

**Chairperson and Committee Members**  
AUDIT AND RISK COMMITTEE

10 AUGUST 2017

Meeting Status: **Public**

Purpose of Report: For Information

## **RISK MANAGEMENT FRAMEWORK UPDATE**

### **PURPOSE OF REPORT**

- 1 This report primarily updates the Audit and Risk Committee on the on-going implementation of the Enterprise Risk Management (ERM) framework.
- 2 At the request of the Committee, this report also details those corrective measures that have since been implemented by the Council in response to the damage caused to the vinyl pool liner at the Coastlands Aquatic Centre and the Oriwa Crescent prosecutions.

### **DELEGATION**

- 3 The Audit and Risk Committee has delegated authority to consider this report under the following delegation in the Governance Structure, Section B.3.

*Ensuring that Council has in place a current and comprehensive risk management framework and making recommendations to the Council on risk mitigation.*

### **BACKGROUND**

- 4 At its meeting on 16 February 2017, the Audit and Risk Committee endorsed the proposed approach to accelerate the implementation of Council's Enterprise Risk Management Framework. An independent consultant was engaged to complete the following work streams in a facilitative and collaborative manner:
  - review and agree with management the areas of the business where risk management implementation will provide the greatest value;
  - develop a targeted programme of risk workshops at Council; Committee; Senior Leadership and Group levels; and encourage the right conversations;
  - work with the Council's business groups to socialise and incentivise the day-to-day management of risks in the more routine activities;
  - develop a risk communication/reporting process at, and between, the following levels;
    - Council/ Committees
    - Senior Leadership
    - Business Units / Groups
    - Projects, Asset Management

- 5 As previously reported, the intended outcomes from achieving this implementation will include:
- stakeholders, external auditors, Council and management achieve high levels of assurance that the real risks are being identified and managed effectively;
  - better decision making throughout the business through greater awareness of the real risks (threats and opportunities);
  - clarification and socialisation of the notion of Council's risk appetite and tolerance.

## **RISK MANAGEMENT FRAMEWORK PROGRESS UPDATE**

Since February 2017, risk management work effort has focussed primarily on tangible outputs, as discussed separately below.

### Corporate Business Continuity Management Plans

- 6 Immediately following the November 2016 Kaikoura earthquake, the Chief Executive required the immediate refresh of the Council's Corporate Business Continuity Plans (BCPs). The same independent risk management consultant was re-directed to assist Council's Business Improvement Team and other Officers to fully review and where necessary, further develop Council's corporate BCPs.
- 7 Since November 2016, work effort includes the establishment of a Continuity Management Team in December 2016, the introduction of a BCP policy and the following corporate BCPs have been refreshed and/or further developed: Loss of Access to Buildings; Loss of Customer Call Centre; Loss of Payroll (Processing and Payment) and Payment to key Council Suppliers.
- 8 A back-up call centre was also established at the Council's Emergency Operations Centre (EOC). This can provide the full range of call centre functions (dependent on systems availability) and has capacity to more than double in size for emergency situations that would generate a significant increase in call volumes. As well as improved resilience for business continuity, the back up call centre also enables Council to operate its call centre alongside an emergency response when the EOC is activated which will improve communication and co-ordination.
- 9 Work continues on fully assessing and testing the ICT requirements necessary to fully enable and support the corporate BCPs, provided that an event has not resulted in wide scale ICT outages. Further development of the Continuity Management Team structure, terms of reference and staff training also needs to be completed.

### Corporate Risk Register

- 10 The Chief Executive and Group Managers were interviewed separately to determine their perceived highest risks and these were then collated as practically as possible, into a simple corporate risk register.
- 11 Deliberate focus was given only to those risks (in consideration of the current controls in place) that could potentially cause the highest impact and immediacy. A simple high/medium/low scale approach was used in determining a 'current risk level'.

- 12 Consideration was also made as to whether a risk could be accepted or not, noting that a risk may be accepted even if that risk is considered high/significant. This would normally only happen when the risk is out of the Council's control or is too costly to mitigate but is within the Council's risk appetite.
- 13 Work is continuing with the Senior Leadership Team to determine a 'target risk level' for each risk on the corporate risk register. Once completed, these will be reported using a radar chart which depicts, for each risk, the current risk level, and target risk level landscape.
- 14 It is intended that the corporate risk register and radar chart will be reported to the Senior Leadership Team on a quarterly basis and by exception, to the Audit and Risk Committee going forward.
- 15 The corporate risk register is attached as Appendix 1.

#### Procurement Function Review

- 16 In late June 2017, a procurement specialist was engaged to complete an assessment of Council's current procurement function. This included a detailed review of the Council's procurement policy, procurement templates, interviews with Council officers and a supplier survey.
- 17 Subject to the findings of this initial assessment, a procurement improvement programme will be developed and reported back to the Operations & Finance Committee.

#### Internal Audit Programme

- 18 The Council does not currently have dedicated internal audit resources. At present, this is resourced externally, similar to the model employed by Greater Wellington Regional Council.
- 19 For the 2017/18 year, an external auditor has been engaged to develop an internal audit programme that will include at least four separate internal audit assignments. The programme, including terms of reference and costings for each assignment will be agreed separately and the findings will be reported to the Audit and Risk Committee.

### **CORRECTIVE MEASURES/ SAFEGUARDS IMPLEMENTED**

- 20 At its meeting on the 16 February 2017, the Committee requested a report back on those corrective measures and/or safeguards implemented by the Council in direct response to the lessons learned from the damage caused to the vinyl liner at the Coastlands Aquatic Centre and the Oriwa Crescent prosecutions.

Damage to the Coastlands Aquatic Centre vinyl liner

- 21 A hole was discovered in the vinyl pool liner, exposing the underlying concrete slab to chlorinated water. Whilst the pool was not leaking, the liner makes the pool watertight and protects the underlying concrete slab. The damage was caused by a moveable floor roller wheel seizing and tearing a hole in the liner.
- 22 Both the liner and the moveable floor roller wheels were replaced and a heavy plastic strip was installed under each set of moveable floor roller wheels, to provide extra protection in the event that a moveable floor roller seizes in the future. Council incurred installation costs only which were approximately \$15,000 in total.
- 23 Annual inspections of the moveable floor will continue to include a full inspection of the roller wheels as this is how the liner damage was first identified.

Oriwa Crescent prosecutions

- 24 In August 2013, the owners of a property located on Oriwa Crescent, Otaki, engaged a contractor to cut some native trees on their property. Initially, the council charged the owners for modifying naturally occurring indigenous vegetation but later withdrew these charges.
- 25 Consequently, the Chief Executive established a new Prosecution Procedure, effective from 1 July 2014, that (a) details the duties of staff with prosecution decision making, (b) ensures no prosecution action is able to proceed without the Chief Executive's written approval and (c) ensures the Chief Executive consults with the Mayor, Deputy Mayor and Chair of the Operations and Finance Committee (formerly the Regulatory Management Committee) before approving or rejecting any proposal to prosecute. Refer to New Prosecution Procedure (Report CS-14-1241) for further details (Appendix 2).
- 26 Furthermore, in September 2014, the Chief Executive established a draft enforcement policy, which came into effect on 16 October 2014 and is now embedded into Council processes and quality assurance systems. Refer to Draft Enforcement Policy (Report RS-14-1302) for further details (Appendix 3).

## **CONSIDERATIONS**

### **Policy Implications**

- 27 There are no further policy implications arising from this report.

### **Legal Considerations**

- 28 There are no further legal considerations arising from this report.

### **Financial Considerations**

- 29 The cost of the independent consultants and external internal auditor will be absorbed within existing budgets, by way of re-prioritisation. No new budgets are required.

## Tāngata Whenua Considerations

30 There are no tāngata whenua considerations.

## Publicity Considerations

31 There are no publicity considerations at this stage.

## **SIGNIFICANCE AND ENGAGEMENT**

32 This matter has a low level of significance under the Council Policy.

## **RECOMMENDATIONS**

33 That the Audit and Risk Committee notes the progress update regards the Council's Enterprise Risk Management Framework.

34 That the Audit and Risk Committee notes the corrective measures and/or safeguards implemented by the Council in direct response to the two identified events.

**Report prepared by:**

**Approved for submission by:**

**Mark de Haast**  
**Chief Financial Officer**

**Wayne Maxwell**  
**Group Manager Corporate Services**

**Approved for submission by:**

**Sarah Stevenson**  
**Group Manager Strategy and Planning**

## **Attachment:**

Appendix 1: Corporate Risk Register.

Appendix 2: New Prosecution Procedure (Report CS-14-1241).

Appendix 3: Draft Enforcement Policy (Report RS-14-1302).

## Corporate Risk Register

Description		Cause	Impacts	Current Risk Level	Accept Risk ?	Target Risk Level	Controls	New Treatments (by date)	Owner
-	Health and safety (Permanent item on register)	<ul style="list-style-type: none"> <li>• Extreme events (eg natural hazard)</li> <li>• Hazardous environments</li> <li>• Poor hazard identification</li> </ul>	<ul style="list-style-type: none"> <li>• Injuries to people</li> <li>• Penalties, fines</li> <li>• Loss of reputation</li> </ul>	Low	N	Zero	<ul style="list-style-type: none"> <li>• Health and safety management systems</li> <li>• Continual improvement</li> </ul>	<ul style="list-style-type: none"> <li>• Enterprise Risk Management 6/18</li> </ul>	Senior Leadership Team
1	Sub optimal asset investment decisions-poor district outcomes	<ul style="list-style-type: none"> <li>• Weak strategic vision/plan</li> <li>• Funding limitations, poor prioritisation</li> <li>• Expert advice not accepted</li> <li>• Poor or no business case justification</li> </ul>	<ul style="list-style-type: none"> <li>• Financial losses</li> <li>• Strategy not achieved</li> <li>• Reputational damage</li> <li>• Higher priority issues unresolved</li> <li>• Deliverables / KPIs not met</li> </ul>	High	N	Med	<ul style="list-style-type: none"> <li>• Activity management plans</li> <li>• Asset renewal programme</li> <li>• SLT and Council reviews and approvals</li> <li>• Business cases required</li> </ul>	<ul style="list-style-type: none"> <li>• Revisit strategic vision and plan 4/18</li> <li>• Prioritise and advocate investments in accord with strategy 6/18</li> <li>• Refresh asset condition assessments 12/17</li> <li>• Upskill, enhance quality of business case templates and requirements 12/17</li> <li>• Enterprise Risk Management 6/18</li> </ul>	GM Infrastructure Services and GM Community Services
2	Uncertainty in economic development and district growth	Lack of capability to accurately predict / forecast Expressway reshaping Kapiti	<ul style="list-style-type: none"> <li>• Ad-hoc development and business growth unpredictable</li> <li>• Higher rates due lower than predicted growth</li> </ul>	High	N	Med	<ul style="list-style-type: none"> <li>• Current forecasts</li> <li>• Constant review</li> <li>• Stimulate Economic Development Leadership Group to deliver optimal outcomes</li> </ul>	<ul style="list-style-type: none"> <li>• Constantly review projections, forecasting On-going</li> <li>• Implement adequate resources 4/18</li> </ul>	GM Strategy & Planning
3	Rising debt levels	Trying to meet community expectations but lack of willingness to pay	<ul style="list-style-type: none"> <li>• Reputational damage</li> <li>• High debt levels and interest rate risk</li> <li>• Debt cap breached faster</li> <li>• Inability to increase debt</li> </ul>	High	N	Low	<ul style="list-style-type: none"> <li>• Manage community expectations via elected members</li> <li>• Financial strategy (closing depreciation / funding gap)</li> <li>• Long term planning</li> <li>• Review rates</li> </ul>	Capital works programme review / reprioritization (18/19 and beyond) 6/18	Chief Executive

## Corporate Risk Register

Description		Cause	Impacts	Current Risk Level	Accept Risk ?	Target Risk Level	Controls	New Treatments (by date)	Owner
5	Not "Open for Business"	<ul style="list-style-type: none"> <li>• Systems and processes not fully fit for purpose</li> <li>• Staff capacity / capability</li> <li>• Poor customer service culture</li> <li>• Expert advice ignored</li> </ul>	<ul style="list-style-type: none"> <li>• Reputational damage – council perceived as not helpful</li> <li>• Financial losses</li> <li>• Legal challenges</li> <li>• H&amp;S compromised</li> <li>• Loss claims</li> <li>• Sued</li> <li>• Dissuades new developers</li> </ul>	High	N	Low	<ul style="list-style-type: none"> <li>• "Open for Business" initiative</li> <li>• Pre-application meetings</li> <li>• Case/project management</li> </ul>	Build on "Open for Business" initiative 6/18 <ul style="list-style-type: none"> <li>• Enhance systems and processes</li> <li>• Improve customer service culture</li> <li>• Ensure timely delivery</li> <li>• Integrated services</li> </ul>	GM Regulatory Services
6	Inability to recruit and retain capability	<ul style="list-style-type: none"> <li>• Competing, more interesting work elsewhere</li> <li>• Better salaries elsewhere</li> <li>• Less desirable working location for some people</li> <li>• Fluctuations in some industries               <ul style="list-style-type: none"> <li>-consenting</li> <li>-building inspection</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Additional costs eg consultants</li> <li>• Corporate loss of institutional knowledge</li> <li>• Less than optimal decision making</li> <li>• Poor staff morale</li> <li>• Loss of IANZ accreditation- Shortage of building control staff</li> <li>• Delays in critical work programmes, eg economic development strategy</li> <li>• Staff welfare</li> </ul>	High	N	Med	<ul style="list-style-type: none"> <li>• Employ contractors/consultants</li> <li>• (Limited) succession planning</li> <li>• (Limited) graduate programme</li> <li>• (Limited) workforce planning</li> <li>• Talent management</li> <li>• Short term workload management</li> </ul>	<ul style="list-style-type: none"> <li>• Change pay structure 4/18</li> <li>• Adjust forward work programmes to align with available capability (Infrastructure) 12/17</li> <li>• Governance transition arrangements</li> <li>• Further explore; 12/17               <ul style="list-style-type: none"> <li>-Arrangements with other councils</li> <li>-Succession planning</li> <li>-Graduate programme</li> <li>-Workforce planning</li> </ul> </li> </ul>	Organisational Development Manager

## Corporate Risk Register

Description		Cause	Impacts	Current Risk Level	Accept Risk ?	Target Risk Level	Controls	New Treatments (by date)	Owner
8	Non-renewal of wastewater consent - Paraparaumu	<ul style="list-style-type: none"> <li>Iwi/community concern regarding current arrangements</li> <li>Bar raised on consent conditions</li> </ul>	<ul style="list-style-type: none"> <li>Substantial costs to further treat and/or dispose</li> <li>More onerous discharge conditions</li> </ul>	High	N	Low	Maintain / strengthen Iwi relationship and general community relationship	New consenting strategy 12/17	GM Infrastructure Services
9	Engagement fatigue	<ul style="list-style-type: none"> <li>Need to extensively consult</li> <li>Legislative requirements</li> <li>Community desire transparency and participation</li> <li>Poor work planning – programming</li> <li>Working in ‘silos’</li> </ul>	<ul style="list-style-type: none"> <li>Delays to critical works</li> <li>Raising community expectations but disconnect with current resources</li> <li>Reputational damage through lack of progress</li> <li>Lack of progress</li> <li>People opt out</li> </ul>	High	N	Low	<ul style="list-style-type: none"> <li>Consultation processes</li> <li>Significance and engagement policies</li> <li>Communication &amp; engagement strategy</li> <li>LG Act requirements</li> </ul>	<ul style="list-style-type: none"> <li>More effective communication strategies 12/17</li> <li>Continue connecting the dots blend / extend consultation topics 12/17</li> <li>Adhere communication &amp; engagement policies 8/17</li> <li>Work programming 12/17</li> </ul>	Senior Leadership Team
11	Fraudulent activity	<ul style="list-style-type: none"> <li>Inadequate monitoring of processes and transactions</li> <li>Unauthorised misappropriation of council assets</li> <li>Lack of strong physical and process controls</li> </ul>	<ul style="list-style-type: none"> <li>Financial loss</li> <li>Reputational damage</li> <li>Business interruption</li> </ul>	High	N	Low	<ul style="list-style-type: none"> <li>Maintain awareness</li> <li>Internal controls</li> <li>Statutory year end audits</li> <li>Employee screening</li> <li>Protected disclosures</li> </ul>	<ul style="list-style-type: none"> <li>Fraud awareness training 12/17</li> <li>Internal audit programme in place (to be agreed) 9/17</li> <li>Enterprise risk management 6/18</li> </ul>	GM Corporate Services



## Corporate Risk Register

	Description	Cause	Impacts	Current Risk Level	Accept Risk ?	Target Risk Level	Controls	New Treatments (by date)	Owner
4	Escalating costs, programme budgets exceeded	<ul style="list-style-type: none"> <li>Global economic situation deteriorates GFC2</li> <li>Govt withdraw subsidies eg 60/40 insurance programme</li> <li>Poor project management, procurement etc</li> </ul>	<ul style="list-style-type: none"> <li>Projects slowed or halted</li> <li>Rates not paid</li> <li>Debt can't be serviced</li> </ul>	High	N	Med	<ul style="list-style-type: none"> <li>Economic situation monitoring</li> <li>Project management systems</li> <li>Risk management</li> </ul>	<ul style="list-style-type: none"> <li>More conservative/resilient forward programme 6/18</li> <li>Review self-insurance, investigate investment fund 6/18</li> <li>PMO 12/17               <ul style="list-style-type: none"> <li>-continue roll out of techniques</li> <li>-educate new staff</li> </ul> </li> </ul>	Senior Leadership Team
12	Financial mismanagement	<ul style="list-style-type: none"> <li>Lack of controls in project management, procurement, contract management</li> <li>"Use it or lose it" attitude of some budget managers</li> <li>Operational inconsistencies across groups</li> </ul>	<ul style="list-style-type: none"> <li>Actual costs exceed budget</li> <li>Unnecessary and/or poorly planned expenditure (hockey stick expenditure profile)</li> <li>Lack of VfM expenditure</li> <li>Legal challenges and costs</li> </ul>	High	N	Low	<ul style="list-style-type: none"> <li>Monthly management reports provided to budget managers</li> <li>SLT provided with monthly management report identifying financial risks</li> <li>Quarterly financial and non-financial performance reporting to council</li> </ul>	<ul style="list-style-type: none"> <li>Extensive review of Council's procurement function and budget management system - implement change where needed 6/18</li> <li>Simplified council-wide contract registers (part of procurement review) 12/17</li> </ul>	GM Corporate Services
13	(New) Sea level rise and more frequent and significant storm events cause extreme and difficult to predict effects	<ul style="list-style-type: none"> <li>Climate change,</li> <li>Inability to budget for effects</li> </ul>	<ul style="list-style-type: none"> <li>Erosion, property abandonment</li> <li>Property floods</li> <li>Greater costs</li> <li>Early stormwater asset replacements</li> <li>Higher capital costs for more resilient assets</li> </ul>	High	N	Med	<ul style="list-style-type: none"> <li>Asset management plans</li> <li>Risk and event targeted asset upgrades</li> <li>Seawall and other protective measures</li> </ul>	<ul style="list-style-type: none"> <li>Continually revise and enhance forecasts 12/17</li> <li>Prioritise interventions to preclude house flooding 6/18</li> </ul>	GM Infrastructure Services and GM Strategy & Planning

## Corporate Risk Register

Description		Cause	Impacts	Current Risk Level	Accept Risk ?	Target Risk Level	Controls	New Treatments (by date)	Owner
10	Widespread, sustained Infrastructure service disruption	<ul style="list-style-type: none"> <li>• Extreme natural event e.g earthquake, tsunami, flood</li> <li>• Lack of resilience</li> <li>• Inadequate insurance arrangements</li> </ul>	<ul style="list-style-type: none"> <li>• Loss of core infrastructure and services to the community</li> <li>• Injuries, fatalities</li> </ul>	High	N	Med (long term)	<ul style="list-style-type: none"> <li>• Asset replacement programme &amp; condition assessments</li> <li>• Resilience programme</li> <li>• Insurance programme</li> </ul>	<ul style="list-style-type: none"> <li>• Self-insurance 12/17</li> <li>• Enterprise risk management 6/18</li> </ul>	GM Infrastructure Services
14	(New) Ineffective emergency response	<ul style="list-style-type: none"> <li>• Lack of preparedness and unified response approach</li> <li>• Loss of limited key staff</li> </ul>	<ul style="list-style-type: none"> <li>• Reputational damage</li> <li>• Financial loss</li> <li>• Injuries, fatalities</li> </ul>	High	N	Med	<ul style="list-style-type: none"> <li>• CD and emergency management systems</li> <li>• CD training and exercises</li> </ul>	<ul style="list-style-type: none"> <li>• Review 4/18</li> <li>-EOC structure and internal relationships</li> <li>-Emergency management plans</li> <li>-Capability/resources</li> <li>• Enterprise risk management 6/18</li> </ul>	GM Community Services
7	Impacts from loss of critical business activity	<ul style="list-style-type: none"> <li>• Lack of BCP's in some areas</li> <li>• Insufficient resources</li> <li>• Lack of staff awareness</li> <li>• Lack of staff</li> <li>• Loss of key system</li> <li>• ICT Cyber attack</li> <li>• Reliance on key staff</li> </ul>	<ul style="list-style-type: none"> <li>• Financial losses</li> <li>• Reputational damage</li> <li>• Non-delivery of core services</li> <li>• H&amp;S compromised</li> </ul>	High	N	Med	<ul style="list-style-type: none"> <li>• Current business continuity processes (Corporate BCPs)</li> </ul>	<ul style="list-style-type: none"> <li>• Identify critical activities, ensure appropriate BCP's and critical resources in place 4/18</li> <li>• CMT training 12/17</li> <li>• BCP tests 12/17</li> <li>• ICT alignment with BCPs 12/17</li> <li>• Assess cyber risks and mitigate 4/18</li> <li>• Governance/SLT succession planning 4/18</li> <li>• Enterprise risk management 6/18</li> </ul>	Senior Leadership Team

**Mayor and Councillors  
COUNCIL**

26 JUNE 2014

Meeting Status: **Public**

Purpose of Report: For Decision

## **NEW PROSECUTION PROCEDURE**

### **PURPOSE OF REPORT**

- 1 This report provides the Council with details of a new Prosecution Procedure that outlines the duties of staff with prosecution decision making.

### **SIGNIFICANCE OF DECISION**

- 2 This report does not trigger the Council's Significance Policy.

### **BACKGROUND**

- 3 Council, as a regulator, is responsible for a wide-ranging list of statutes. At times the Council is required to take prosecutions 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 Staff, in particular those in the Regulatory Services Group, investigate breaches of the law and prepare, where appropriate, the case for enforcement action. The way this enforcement function is performed has come under recent scrutiny.
- 5 Both the Council and the Chief Executive are in agreement that they wish to see a higher level of authority applied to making any decision to prosecute.
- 6 The Chief Executive issued a verbal direction on 26 May 2014 to the Regulatory Services Management Team that, as of that date, there was an immediate change to prosecutions and none could be taken without his approval. In addition, the Chief Executive ordered a review of the enforcement processes and decision-making tools available to staff with a view to establishing an increased emphasis on risk. The Council will be updated on that work in August 2014.

### **CONSIDERATIONS**

- 7 The Council is provided by statute with a range of enforcement powers that include prosecutions, infringements and abatements.
- 8 In light of recent events, the Chief Executive intends to establish the following new Prosecution Procedure, effective 1 July 2014, to ensure that he has input into decisions to initiate prosecutions. It should be noted that for the purposes of this procedure, prosecution has been defined as when someone is alleged to have committed an offence under an enactment, and the Council seeks that person's conviction by the Court.

### Prosecution Procedure

- 8.1 Effective 1 July 2014 and until further notice, all staff will be instructed that no prosecution is to be initiated on behalf of the Council unless the Chief Executive has first given written approval to the prosecution.

Note: The Chief Executive will consult with the Mayor, Deputy Mayor and Chair of the Regulatory Management Committee before approving or rejecting any proposal to proceed with a prosecution.

- 8.2 This procedure will apply to any proposal to prosecute.
- 8.3 In order to enable the Chief Executive to consider prospective decisions to prosecute, staff will be required to provide him with sufficient information about the alleged offence, the strength of the intended prosecution which will include advice from an appropriate legal service provider, and any potential risks they have identified and mitigation options.
- 8.4 Staff will receive a copy of the Prosecution Procedure and will be required to return to the Chief Executive a signed acknowledgement to confirm their understanding of, and intent to comply with, the Prosecution Procedure that reads: *"I acknowledge and agree to comply with the Prosecution Procedure set out above. In particular, I will not commence any prosecution without first obtaining the written approval of the Chief Executive"*

Note: Each staff member has a copy of their Warrant of Appointment and Authorisation held on their Personal File. Their signed acknowledgement of the Prosecution Procedure will also be held on their Personal File.

- 9 From an organisational perspective this new Prosecution Procedure provides for an open and transparent process. It ensures the Chief Executive is fully informed of the staff judgment behind proposed prosecutions and in particular the consideration of risk. In turn, the Chief Executive's stated intention to consult with the Mayor, Deputy Mayor and Chair of the Regulatory Management Committee before approving or rejecting any proposal to prosecute will also inform Elected Members.

### Consideration of Risk in relation to the Enforcement

- 10 Staff in the Regulatory Services Group have a project underway to review enforcement processes and decision-making tools available to them. Council have been briefed on a risk assessment matrix that the Animal Control Team is currently trialling as a decision-making tool. The subject of risk is being researched as part of the project with a view to determining how risk, and the range of associated considerations, will be embedded into the enforcement work.
- 11 The intended project outcome is a draft Enforcement Policy that incorporates risk considerations and associated decision-making tools and processes that staff will follow. This Policy will apply to any enforcement action, i.e. will be organisation wide. Elected Members will be updated on this project in August 2014.

## Financial Considerations

- 12 There are no financial considerations associated with this new Prosecution Procedure.

## Legal Considerations

- 13 The new Prosecution Procedure has been reviewed by both Council's Senior Legal Counsel and Simpson Grierson.

## Delegation

- 14 The Council has authority to consider this matter.

## Consultation

- 15 There is no consultation required with what is essentially a corporate administrative procedure.

## Policy Implications

- 16 This changed approach to prosecutions sits across the entire organisation. As such the procedure will be published to all staff by the Chief Executive as a Corporate Policy, effective 1 July 2014. In addition, as part of the Regulatory Services Group best practice, reference to the Prosecution Procedure will be included in all relevant Quality Assurance Systems.

## Publicity Considerations

- 17 There is likely to be media interest in this new procedure. A media release will be prepared.

## RECOMMENDATIONS

- 18 That Council endorses the intention of the Chief Executive to establish, effective 1 July 2014, a new Prosecution Procedure that (a) details the duties of staff with prosecution decision making, (b) ensures no prosecution action will proceed without the Chief Executive's written approval, and (c) ensures the Chief Executive consults with the Mayor, Deputy Mayor and Chair of the Regulatory Management Committee before approving or rejecting any proposal to prosecute.
- 19 That Council notes that the Chief Executive has ordered a review of the enforcement processes and decision-making tools available to staff with a view to establishing a draft Enforcement Policy that incorporates risk considerations.

### Report prepared by:

Sharon Foss

**Acting Group Manager  
Regulatory Services**

MINUTES	MEETING	TIME
KAPITI COAST DISTRICT COUNCIL	THURSDAY 26 JUNE 2014	1.00 PM

former owner or their successor, or whether exemptions from offer back applies.

- (d) Delegate to the Chief Executive the power to either offer the road land back to its former owner(s) or their successor(s), or to approve the exercise of exemptions from offer back under section 40(2), 40(3) or 40(4) PWA (if appropriate).
- (e) Authorise Council officers to initiate the road stopping process for the road land in accordance with Section 342 and the Tenth Schedule of the Local Government Act 1974.
- (f) Delegate to the Chief Executive the power to formally approve the road-stopping, and issue the public notice to declare the road land stopped as road, subject to all statutory requirements being met with no objections being received.
- (g) Delegate to the Chief Executive the power to negotiate the terms of sale, impose any reasonable covenants, and enter into a sale and purchase agreement in respect of the road land, either with the former owner, or their successor, or the owner of 201 Rangiora Road, Reikorangi, provided any such agreement is conditional upon the road being stopped.

**CARRIED**

*Cr Bell left the meeting at 2.25 pm and returned at 2.28 pm*

KCDC 14/06/119

#### **NEW PROSECUTION PROCEDURE (CS-14-1241)**

Ms Sharon Foss spoke to the report which sought Council approval of a new prosecution procedure. It was important to note that this approach was somewhat unusual and went beyond what other Councils do. However, in light of the recent Standen case, and with the establishment of the new Regulatory Services Group, and a focus on improving procedures, it was deemed sensible to take this measure. Discussion included the following points:

- There was some debate around whether if the decision-maker (Council officer) was required to seek clearance from the Chief Executive regarding proposed prosecution, whether that power still rested with the decision-maker. There were concerns that this mechanism could end up voiding prosecution over a technicality.
- The new procedure helped fulfill an undertaking by the Chief Executive that Council would review its processes, and ensure that prosecution action progressed on a 'no surprises' basis.
- The review by Richard Fowler, QC, of the Standen case, was expected to be received in two weeks.

MINUTES	MEETING	TIME
KĀPITI COAST DISTRICT COUNCIL	THURSDAY 26 JUNE 2014	1.00 PM

- Mr Dougherty stated that after the Standen case there was a loss of confidence from Council. The intention of the report was to provide the Council with some temporary measure to give assurance until the enforcement policy would be in place.

**MOVED ( Scott / Gaylor )**

**That Council agrees to let Report CS-14-1241 lie on the table pending consideration of the Richard Fowler QC report and further discussion.**

**CARRIED**

*Cr Elliott left the meeting at 3.00 pm and did not return.*

KCDC 14/06/120

**ELECTED MEMBER EXPENSES RULES POLICY 2014-2015 (Corp-14-1224)**

Ms Starbuck-Maffey spoke to her report which sought to update current expense rules to reflect arrangements with agenda management, and proposed that Council provide some support for Community Board members in terms of IT. Currently Community Board members did not get any support at all. It was suggested that \$190 per annum be paid to each Community Board member to cover the use of a personal computer and printer. This was within the provisions of the Remuneration Authority.

- Discussion centred on the benefits of using iPads to access meeting agendas versus hard copies. Although some Councillors still preferred to receive hard copies of agendas, others preferred iPads and it was acknowledged that using tablet technology helped achieve savings.
- There was some discussion on, in the longer term, providing all Board members with iPads, but for the interim, Councillors agreed with the staff recommendation.

**MOVED ( Welsh / Holborow )**

**That Council approves the Expenses and Reimbursements Rules as detailed at Appendix 2 of report Corp-14-1224.**

**CARRIED**

Prior to going into Public Excluded, the Mayor read out a letter from Betty van Gaalen complimenting Council on its Annual Plan rate increase.

*The meeting adjourned at 3.16 pm.*

**Mayor and Councillors**  
**COUNCIL**

4 SEPTEMBER 2014

Meeting Status: **Public**

Purpose of Report: For Decision

## **DRAFT ENFORCEMENT POLICY**

### **PURPOSE OF REPORT**

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

### **SIGNIFICANCE OF DECISION**

- 2 This report does not trigger the Council's Significance Policy.

### **BACKGROUND**

- 3 Council, as a regulator, is responsible for a wide ranging list of statutes. At times the Council is required to take prosecutions 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 Staff, in particular those in the Regulatory Services Group, investigate breaches of the law and prepare, where appropriate, the case for enforcement action. Both the Council and the Chief Executive are in agreement that they wish to see a higher level of authority applied to making any decision to prosecute.
- 5 Council has received the independent review that Richard Fowler, QC was commissioned to provide of its investigation and enforcement action regarding a breach of the Council's operative District Plan arising from damage to naturally occurring native vegetation at 45 and 47 Oriwa Crescent, Ōtaki.

### **CONSIDERATIONS**

#### **Issues**

- 6 This paper presents a draft Enforcement Policy (attached as Appendix 1, Report: RS-14-1302) that integrates recommendations from Mr Fowler's investigation (attached as Appendix 2, Report: RS-14-1302.)
- 7 From an organisational perspective this new draft Enforcement Policy provides for an open and transparent process with regards to the Council approach to compliance. It captures the lessons learnt from the Oriwa Crescent event and reflects the necessary changes and improvements recommended by Mr Fowler, QC. It also provides the platform for a range of associated business process improvements and will be supported by a delegation framework that will allow staff to administer the policy.

#### **Financial Considerations**

- 8 There are no financial considerations associated with this new Enforcement Policy.



## Legal Considerations

- 9 Richard Fowler, QC has endorsed the new Enforcement Policy. The policy was developed in consultation with Mr Fowler to ensure that it accurately reflected his recommended improvements arising from his independent review.

## Delegation

- 10 The Council has authority to consider this matter

## Policy Implications

- 11 This changed approach to prosecutions sits across the entire organisation. As such the policy will be published to all staff by the Chief Executive as a Corporate Policy, effective following the 16 October 2014 Council meeting at which the relevant supporting delegations will be considered.
- 12 In addition, as part of the Regulatory Services Group best practice, a suite of supporting reference material, forms etc. will be developed to embed the Enforcement Policy into all relevant Quality Assurance Manuals, any relevant Council policies, processes etc.

## Publicity Considerations

- 13 There is likely to be interest in this new policy. A media release will be prepared.

## RECOMMENDATIONS

- 14 That Council endorses the draft Enforcement Policy and notes that:
- 14.1 it will come into effect once Council approves the relevant delegations for staff and that this approval will be sought at the 16 October 2014 Council meeting,
- 14.2 it will be embedded into Council processes and quality assurance systems.

### Report prepared by:

Sharon Foss  
**Acting Group Manager**  
**Regulatory Services**

Tim Power  
**Senior Legal Counsel**

### Approved for submission by:

Tamsin Evans  
**Group Manager, Community Services**

### Approved for submission by:

Stephen McArthur  
**Group Manager, Strategy**  
**and Partnerships**

## ATTACHMENTS:

- Appendix 1 Draft Enforcement Policy
- Appendix 2 Independent review by Richard Fowler, QC of Oriwa Crescent prosecutions



# Enforcement Policy

PREVIOUS REPORT

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Date Approved:	4 September 2014
Approved by:	Council
Review Date:	September 2017
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.)

Biosecurity Act 1993	Land Transport Act 1998
Building Act 2004	Litter Act 1979
Dog Control Act 1996	Local Government Act 1974
Fencing of Swimming Pools Act 1987	Local Government Act 2002
Food Act 1981	Prostitution Law Reform Act 2003
Forest and Rural Fire Act 1977	Reserves Act 1977
Freedom Camping Act 2011	Resource Management Act 1991
Gambling Act 2003	The Sale and Supply of Alcohol Act 2012
Hazardous Substances & New Organisms Act 1996	Transport Act 1962
Health Act 1956	Various Regulations, Council policies, plans and bylaws
Impounding Act 1955	Any other relevant regulatory requirements including amendments or substitutes

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.

PREVIOUS REPORT

# 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.

*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.

*Food* – We want to support local food businesses that meet the food safety standards and ensure local people can enjoy food prepared and sold 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.

## 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.

### Attitude of person

### Approach to compliance

We believe you do not want to comply

We will use the full force of the law

We believe you do not want to comply but will if you think there is a risk you will be caught

We will deter you through the use of regular monitoring and inspections

We believe you want to comply but are not always successful

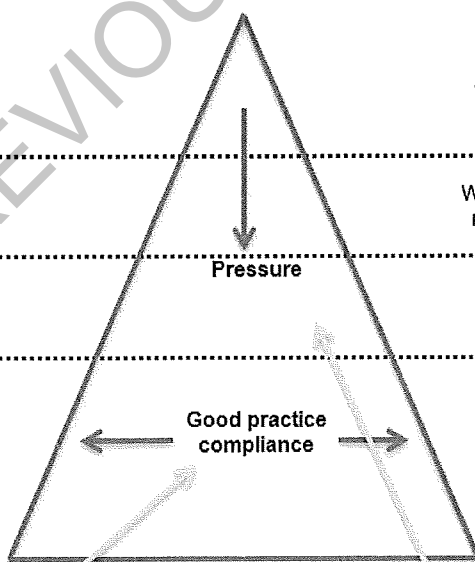
We will assist you to comply

We believe you are willing to comply

We will make compliance as easy as possible and provide information, guidance and advice to assist you

We encourage, support and promote good practice in compliance that exceeds the minimum regulatory requirements

We use regulatory tools to create downward pressure and increase compliance and deter non-compliance



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.

Suspected 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.

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:

- **Excessive noise direction**  
An Investigating Officer may issue an excessive noise direction, either orally or in writing, 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 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 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.

- **Enforcement 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 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;
- 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**

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 it 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.

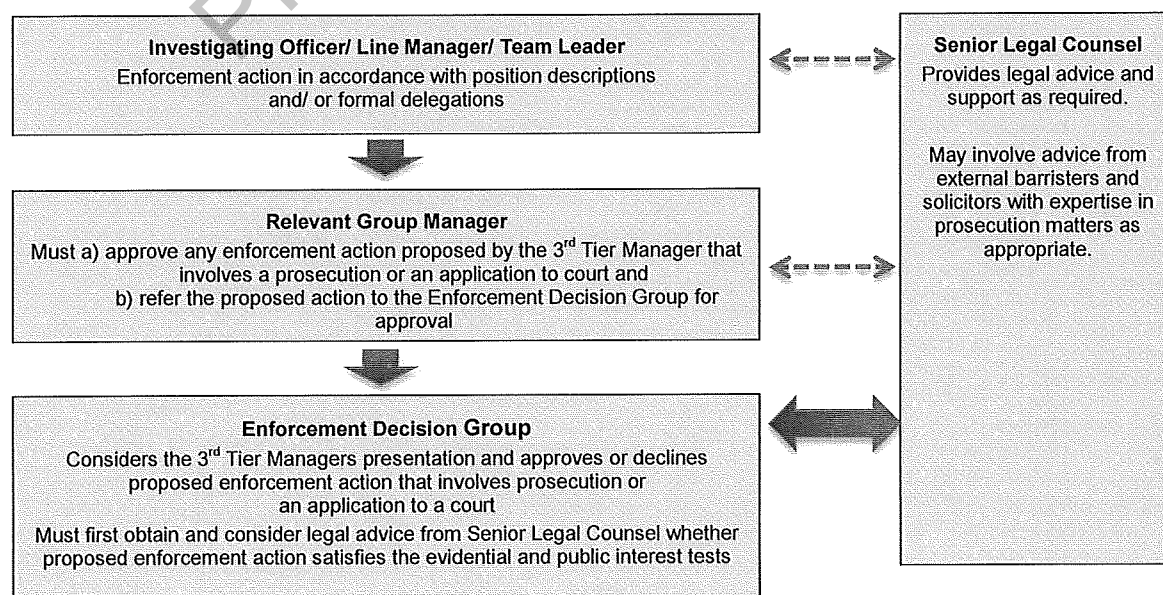
For more serious enforcement options an Investigating Officer must obtain the approval of the relevant line manager or team leader and, where appropriate, may need to seek legal advice from the Senior Legal Counsel in respect of any legal or enforcement questions that arise. Neither the Investigating 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.

### 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 or application to court for an enforcement order or injunction, after 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 quarterly 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.

PREVIOUS REPORT

# 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.

**RICHARD FOWLER**  
— QUEEN'S COUNSEL —

20 August 2014

Mr Pat Dougherty  
Chief Executive  
Kapiti Coast District Council  
Private Bag 60601  
**PARAPARUMU 5254**

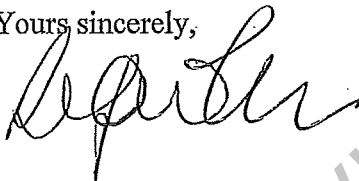
Dear Mr Dougherty,

**Review of Oriwa Crescent prosecutions**

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I enclose my completed review.

Yours sincerely,



**Richard Fowler QC**

## REVIEW OF ORIWA CRESCENT PROSECUTIONS

1. When Mr and Mrs Standen of Oriwa Crescent, Otaki, decided in early August 2013 to get a contractor to cut some native trees on their property that they thought were rotting so that their grandchildren could play safely, they could hardly have imagined that it would lead to being featured on *Campbell Live*, the subject of nationwide media interest including comments to the media by a Cabinet Minister and the subject of discussion at the Council table.
2. This review emanates from the aftermath of all that.
3. The terms of reference of the review are stated below, first in general terms, and then I have set out eight specific questions that I am also directed to answer. The general terms of reference are as follows:

*"The review should consider: the Council's own investigation, administration and decision making processes; the advice sought from external parties; and which external influences affected the Council's decision making.*

*In particular, the Council is interested in identifying the lessons to be learned from these events and wishes to understand the changes and improvements that should be captured and integrated into business processes.*

*The review should be thorough, involving an examination of relevant documentation and interviews with staff, elected representatives and advisers who provided legal and ecological advice as appropriate, and needs to be completed as quickly as can be achieved without adversely affecting the quality of the outcome. The review should also comment on the effect of the media coverage and the appropriateness of the media strategy adopted by Council."*

4. The particular questions that have been asked in the terms of reference are as follows:

- "1. How robust was the case for prosecution in each case? (McLeavey, Standen, Monkeyman) How well were the cases presented?*
- 2. Was the decision to prosecute correct? Did the Council adequately consider all the enforcement options available?*
- 3. Provide comment on the role of elected representatives versus officers in enforcement decisions in general/for this incident.*



4. *In particular, provide comment on how decisions relating to public interest should be made.*
5. *How did the Council come to believe the landowners as well as the contractor should be prosecuted? How did this become 'fact' rather than an interpretation of where liability was perceived to lie?*
6. *Should corroboration of the Standen's defence have been sought earlier?*
7. *Why did advice about the strength of the Council's case change after charges were laid: ie what happened that the original 'clear breach of the District Plan' was no longer an 'open and shut case' and the likelihood of a successful prosecution was considered to have reduced?*
8. *Was the best legal advice provided?"*

#### **How this review is organised**

5. Appendix 1 sets out all of the persons interviewed, plus an indication of the fairly extensive documentary evidence that was reviewed. Cognisant of the legal employment relationships peculiar to local government, I have anonymised all references to Council officers below the level of Chief Executive both here and in Appendix 2.
6. Appendix 2 sets out a chronology of the events. By way of explanation of the function of that, there are not many disputed facts as to what happened in the course of this prosecution. There are some, but not many. Therefore, rather than set out a long narrative of events before moving to any analysis, I intend Appendix 2 to effectively be that narrative.
7. On that basis my review exercise can move directly to analysis, assessment and recommendation. Appendix 3 sets out my specific recommendations.
8. I will therefore undertake the review exercise under the following headings:
  - 8.1 What went right, what went wrong, and why;
  - 8.2 How that can be fixed through best practice;
  - 8.3 My answers to the specific questions.

### **What went right, and what went wrong, and why**

9. The Council officer who was on duty responded to the complaints appropriately. I do not find that there was anything remarkable about his initial investigation or the way in which he documented that. I have not undertaken a site visit and with the passage of time, I am not sure that it would be useful. While there is plainly a difference of view as to how one might regard the extent of the work, this much is clear: it was certainly more than minor tree trimming but less than wholesale clear felling. To put the matter another way, it is plain that the areas of bush at the back of the two properties concerned remain viable and obvious enclaves of native bush, but within those enclaves it is equally plain that more than trivial cutting has occurred<sup>1</sup>.
10. Thus the initial officer response to regard the cutting as more than trivial was appropriate, at least at that stage.
11. I have one reservation about that initial officer response concerning the desirability of seeking an explanation for the apparent non-compliance or transgression. That is something that could be sought at any time from the very beginning of the officer response through to a later stage, such as after the initial investigation. I will deal with it more fully at that later stage, but my point for now is that this is the first moment when it could have been explicitly sought.
12. The next step was similarly unremarkable. The officers identified that they needed the appropriate expert ecologist advice and they sought it. Of course that needed a return to the property with the ecologist. That in turn triggered the issue of informed consent and/or obtaining a search warrant. Although they had already had some general discussions, it was also at this stage that officers sought particular specialist prosecution advice from external solicitors, Luke Cunningham and Clere (LCC). Despite the fact that the Council regularly prosecutes in respect of matters like dogs and parking, it is some considerable time since this Council brought a prosecution under the Resource Management Act 1991 (RMA). In that sense it was something of new ground.

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<sup>1</sup> There are in excess of 100 photographs on the files

13. With regard to preparing a search warrant application, LCC suggested the officer seek guidance from an officer in another local authority who was very experienced in obtaining search warrants. That was sought and obtained.
14. I find nothing remarkable about the informed consent/search warrant procedure that was adopted and followed. I note that much was made in the eventual media coverage of the fact that a policeman was present when the officers went back to the Oriwa Crescent properties with the search warrants. That is a statutory requirement whenever search warrants are executed under the RMA. It is a very sensible precaution and is done for the protection of both the parties the subject of the search, as well as the local authority officers. This is because the power to enter and search is an intrusion into a fundamental civil liberty.
15. Assisted by the officer the ecologist completed her task and thereafter she provided a draft and then a final report. That was duly forwarded to LCC who then provided a full assessment of the prospects of bringing charges against three possible defendants: the Standens, the McLeaveys and the contractor (Monkeyman). Obviously that report is a significant step in the prosecution process. In my view it is a very comprehensive assessment of the position as matters stood at that point. It concluded that charges could be brought. Importantly, however, it contained a section that referred to what is sometimes called the prosecutorial discretion or, sometimes simply described as the public interest factor in deciding whether a prosecution should be brought, even if all the elements of the offence at issue are present. In this review I will call it the “public interest discretion”. To put this in layman’s terms that might be more plainly understood, it is the equivalent of the village constable of another era letting the offender off with a warning or less, because the criminality was minimal even though an offence had clearly been committed.
16. In a modern context and in respect of this type of offending, that can be more than just a discretion as to whether or not to prosecute at all. As long as it is within the time for this option<sup>2</sup>, it might also extend to the decision as to whether the

<sup>2</sup> Although it is not a prescribed time limit, in practical terms decisions to issue infringement notices really need to be made within about four months of the infringing conduct in order to meet the next regulatory requirements.

infringement notice procedure should be preferred. In other words, on a continuum of increasing seriousness, that discretion here would extend thus:

16.1 No action at all;

16.2 No action but a warning given;

16.3 Infringement Notice;

16.4 Prosecution.

17. In the RMA context, there are also some tangential options as well, such as abatement notices and enforcement orders, although I am not suggesting those options were warranted here.

18. It is at this point that, in my view, the first obvious errors were made. Although the Council in rather an ad hoc sense went through a form of overall assessment and approval of the decision to prosecute, I think it fell short of what was needed. I am not saying that the process was completely deficient because the decision to prosecute was certainly elevated, and also had some lateral input at that stage as well. However, prosecutions are serious steps to take – the maximum penalties under the RMA are quite significant and the stigma of conviction can have all sorts of serious consequences. That is why many local authorities mark this step out distinctly, ensuring that at least one “fresh pair of eyes” is involved, sometimes more than that. Many require an actual meeting involving at least three people so that views can be tested, rather than just memoranda countersigned or emails exchanged.

19. In my view it is at this point where there was a significant opportunity for things to have taken a different course. I consider that the assessment of the public interest discretion factor was not robust enough. Had there been a robust assessment, the following matters would have been brought into consideration:

19.1 While deterrence is often an important factor in any prosecution, there was no particular district wide problem or issue regarding unauthorised destruction of native bush.

- 19.2 The work had stopped immediately – there was no suggestion or risk of further non-compliance on the part of the landowners.
- 19.3 The landowners were two elderly couples and of course the bush concerned was literally in their backyards. I would nonetheless suggest some care here – simply because a “would be” defendant is elderly or retired is not a reason of itself not to prosecute. Something like 25% of the Kapiti District’s population is retired.
- 19.4 It was known that both couples had used a contractor.
- 19.5 But perhaps most importantly with regard to the Standens, the apparent reliance on a Council brochure was known. (The role the brochure had played in the instructions given by the Standens to Monkeyman was not yet known, but the fact that the brochure had been involved was.)
20. I would mention one additional factor, although I am not sure that it would be of more than marginal relevance. The ecologist’s report identifies the fact that a cycle of rotting and regeneration is a feature of New Zealand indigenous growth. In other words, indigenous flora that might appear at first glance to be rotten may in fact be well capable of regeneration. It is possible that a non-expert might therefore treat some flora as rotten or diseased (and beyond any prospect of survival) which an expert would not.
21. The role of the brochure is significant. It does not of itself exculpate any of the would-be defendants. One could say that it does enough to make it clear that there are limitations on what can be done by way of trimming in native bush where that is protected. But it is confusing, and it could be read to permit trimming and tidying of rotten indigenous flora as not requiring a resource consent. It was also apparently quite old, and pre-dated the proposed district plan and therefore was blind to the effect of s.86B(3) of the RMA and the rules of that plan that would take immediate legal effect. I understand that the brochure was nonetheless still available at some Council outlets.
22. Whatever the accuracy or inaccuracy of the brochure, the more important point is the significance of that and the other factors mentioned above in assessing the overall criminality of the landowners. I consider even its mention ought to have

- raised at least a question mark over the assessment of the overall criminality as to the appropriate enforcement step. And this is where the link to the absence of a statement or explanation from the would-be defendants becomes significant.
23. In other words, if not obtained already, this is the point where a robust assessment would have looked closely at the would-be defendants' explanation, if there was one.
24. In this case, the explanations that had been given from the landowners were exiguous. In the case of Monkeyman, there was nothing at all. I accept, of course, that no person the subject of this sort of investigation is obliged to give an explanation or a statement. However, it is highly likely that if such a step had been taken here, two further factors would have quickly emerged:
- 24.1 Most importantly, the role of the brochure in the instructions given to Monkeyman – at least by the Standens.
- 24.2 The circumstances of the landowning couples, and their role in local conservation – particularly the Standens.
25. It was also at this point that the suggestion appears to have been conveyed to the Chief Executive after an officers' briefing that it was necessary to prosecute the landowners in order to prosecute the contractor. That of itself would disincentivise a robust consideration of non-prosecution options as against the landowners.
26. One of the exercises I conducted was to test the views of the various officers knowing now what they know, as against the decision to prosecute made at that time. I do not intend to traverse the individual results, and there was some variation. But what is interesting is that none of them would have reached exactly the same position as they took at that time. When asked about relative culpability, all placed the Standens at the lowest end of the scale and Monkeyman at the highest. All regret that the possibility of an infringement notice was not brought into the mix for consideration somewhere.
27. In reviewing the decision to prosecute, I am very mindful of the fact that we are talking about the exercise of a discretion in this instance, not whether some

evidential element was missing or whether there was some other technical deficiency in the prosecution. The very nature of the discretion would permit a range of views in the sense that in a marginal case two competent officers armed with all the facts might reach a different conclusion. And we are doing all this with the benefit of hindsight. Nonetheless, looking at all the factors here, I do not consider that the options were adequately considered in respect of the Standens, and possibly the McLeaveys as well, and if they had been, prosecutions may well not have resulted.

28. I have a different view of the position regarding Monkeyman. I would have thought a skilled contractor, or someone who held himself out to be that, would be familiar with the applicable rules in the localities in which he is working. In that sense, this is no different to the householder who contracts a plumber to make kitchen alterations. Whilst obviously the property owner is ultimately answerable at law too, one would have thought that in the first instance the plumber would know the requirements of the local rules and bylaws. And if there was any doubt, he would go and find out.
29. The last point I would make under the exercise of the public interest discretion is that it does not end at this point. It is a continuing discretion in the sense that even after charges are laid it is open to a prosecuting authority to reconsider its position in the light of further information coming to hand.
30. The next aspect of what happened which warrants comment is the degree of political involvement. As will be seen shortly, I am critical of that. But before I do so, a preliminary point is worthy of mention.
31. Given my findings above concerning what happened over the deficiencies in the decision to lay charges and the (failed) exercise of the public interest discretion, the politicians who did get involved in this case might well say:
 

*"Surely, even if political interference in the case of "ordinary" prosecutions is inappropriate, the situation where there has been a deficient decision to prosecute would be a circumstance where comment at the political level is appropriate?"*
32. My response to that is an unequivocal "no". In the circumstance of a deficient decision to prosecute, the charges will come before the court, and the court will

assess the criminality and deal with the charges accordingly. Indeed, in this particular instance that is exactly what happened with the McLeaveys, who after all had pleaded guilty and indicated a willingness to make a charitable payment on a discharge without conviction. Notwithstanding that indication, the court refused to require that payment. In other words, the appropriate outcome can and should be left to the Courts, and no one has suggested that the result in the McLeaveys' case came about because the Judge was affected by the publicity.

33. Although the Minister's comments in the media were not the first "political" public statement, my consideration of the political involvement here begins with those comments. The Minister for the Environment chose to make comments that were highly critical of the decision to prosecute. In my opinion, this was inappropriate. The danger of such comment is that it can be perceived to be an attempt to influence a matter before a court – particularly a prosecution. The fact I happen to agree with her that the decision to prosecute was deficient, makes not one jot of difference. Comment by a Minister of the Crown like this throws up all sorts of awkward issues. What if there were other facts unknown to the Minister? Does the Council then get into a debate or exchange with the Minister over why the charges were laid – all ahead of any hearing itself? Do the comments mean that a different approach would be taken to would-be defendants who are elderly? What if next time the decision at issue is one not to prosecute, is it then appropriate for the Minister to state publicly that a prosecution ought to have been brought?
34. I do not confine my observations to the Minister's media comments. As I have said above, there were earlier public statements that ought not to have been made. I was sufficiently puzzled by the fact that they had been made to enquire whether the incoming Councillors in October/November 2013 had been given a proper induction briefing on these sorts of issues. The briefing PowerPoints do not explicitly touch on this. However, I would have thought that the principle that elected politicians should not publicly comment on decisions to prosecute was generally well understood. Or at least I thought it was. Perhaps the topic needs to be explicitly addressed at induction briefings.
35. There is another dimension to this discrete to the RMA. Under s.84 of that Act every local authority has a statutory obligation to enforce its own district plan. That places an additional burden on Council officers who have the carriage of that



unrewarding task. It is not particularly clear to me where any consideration of that aspect is apparent in either the Minister's comments or in the conduct of the local authority politicians that either previously or subsequently entered into the debate.

36. If the people of Kapiti want to have district plan rules that guarantee a pleasant and harmonious environment in which to live and work, the last thing they need is Council officers who carry the heavy onus of ensuring compliance but who are now gun shy on account of the possibility of public statements by politicians.
37. Unsurprisingly, these various public comments excited the Councillors and Otaki Community Board members to be seen to react. I say "unsurprisingly" because it is an entirely natural reaction on their part to be concerned that the actions of the local authority of which they were members were being ridiculed on a national scale. Much of the councillor comment and conduct that followed is attributable to that.
38. However, that still does not justify it. There should never have been any exploration by the councillors of the merits or otherwise of these prosecutions. I was frankly surprised to see the degree to which public comment had been made about the individual cases, and I was even more surprised to learn that these matters had been debated at the Council table.
39. Having now had the benefit of interviews with a number of the political personnel involved, I am quite sure that those that made such comments did so feeling that they were doing the right thing and unaware that it was inappropriate. I would characterise the conduct as more naïve than anything else. But it should never have happened, and in the vast bulk of local authorities that I have dealt with that is a boundary line that is well understood.
40. It should also be clearly understood that my above observations relate to those who did choose to make public comment. There were in fact many elected members who did not, who respected the fact that this was an enforcement decision for staff and a matter before the Courts, and who chose to remain silent under what must have been significant mounting pressure.
41. The last dimension on which some general comment can be made is the communications and media management of this matter.

42. In a sense, what happened here was a manifestation of the earlier mistakes. The Council's communication management was completely compromised and placed in an impossible situation. With public comments by the Minister and some sitting Councillors excoriating the Council's decision to prosecute and venturing into factual aspects, the natural instinct of any similar entity's communications management will be to try to defend the decision and explain or justify it. That is a perfectly acceptable dynamic around most public decision making. But the position with prosecutions (and probably any matter before a court) is different. The urge to go on the front foot can lead to further problems, and that is exactly what happened here. The difficulties that ensued are self-evident from the chronology.
43. With virtually all such prosecutions there is really only one effective media strategy. When the local authority is approached, it should simply state an inability to comment because the matter is before the court. That is a sound strategy because:
- (a) Most of the time it is difficult for any local authority to win a media battle over a decision to bring such a prosecution. Local authorities are probably the easiest targets in New Zealand for stories about rampant petty bureaucracy. It is better to leave what is said in the courtroom to be the direct source of any media publicity.
  - (b) By making no further comment officers and Council avoid getting into further trouble by opening themselves to the criticism that they are seeking to influence the outcome (as actually happened here over Monkeyman) or even creating a further unnecessary story.
44. In short, the Council's communications team felt frustrated and wrong footed by the blaze of publicity that occurred, and would have dearly wished to have been briefed from an early point in order to justify and explain the Council's position. While being totally sympathetic to that urge, my view is that no engagement with the media on this matter should have occurred in the first place. All that the ensuing publicity achieved here was to needlessly and unfairly portray the Council as vacillating and incompetent.

**How can that be fixed through best practice?**

45. The following best practice process outline is based on the experience of a large number of local authorities over many years. I have not outlined every step of the process. Many of those steps are self-evident. I have limited the outline to the steps relevant to this review.
46. Starting at the initial alert of a non-compliance issue, at some point after it is apprehended that a compliance issue has arisen, and an investigation of the facts has occurred (even if only partial) some effort should be made to seek an explanation or statement from the would-be defendant. Of course, a would-be defendant is not obliged to give an explanation or statement, but in a sense a failure to provide one fortifies the prosecution's justification to proceed for the time being on the basis that there is no adequate justification or explanation for what has occurred.
47. There are a number of reasons for obtaining a statement from a would-be defendant that have nothing to do with the public interest discretion – e.g. obtaining an admission of certain facts that might be otherwise difficult to prove, or securing evidence of a state of knowledge where that is an element of the offending. However, what is especially relevant to the exercise of the discretion to prosecute, is that sometimes the explanatory statement will throw up facts or matters that would not otherwise have been known to the investigating officers and might well go to diminishing or removing criminality. Before leaving this topic, however, it should be noted that there can be some special skills involved in taking such statements. There can also be admissibility issues, and thus some training of officers may be required.
48. With the investigation complete and all of the facts assembled, including any explanation that might have been given along with the legal advice from the lawyers who would be prosecuting (if charges are to be laid), a watershed consideration must take place as to whether or not to prosecute and the possible exercise of the public interest discretion. Ideally, that should be a face to face discussion after those participating have reviewed all the material. In my view, in the local authorities where this works well there will be two other features:

- 48.1 It will involve at least one officer, if not two, who are able to view the whole exercise with “a fresh pair of eyes”. In other words, they will have had no involvement up to this point.
- 48.2 The meeting should take place at a very senior officer level, but not involve the chief executive. The reason for not involving the chief executive is that it leaves one final option for intervention at a later stage should the circumstances require it.
49. I should mention here that I have seen the draft Enforcement Policy that was used as something of a guide in this case. It is perfectly satisfactory as far as it goes, but it does not specify the features I have set out above vis-à-vis what it calls the “Enforcement Decision Panel”.
50. If a decision is made to prosecute, then the Mayor and Councillors (and Community Board members where relevant) should be advised of:
- (a) The identity of the parties being prosecuted;
  - (b) The nature of the charges;
- and nothing else. That ensures that councillors and community board members are aware of the fact of a prosecution, and should they be contacted they will not be compromised because they will be able to avoid involvement. At no point from here should any local government politician have any involvement in or be making any statement about the prosecution.
51. As recently as 2011 the Auditor General has noted the undesirability of even an appearance of political decision-making in relation to public prosecutions. In her report “Managing Fresh Water Quality: Challenges for Regional Councils” she referred to that principle as well established in central government, and then went on to say:

*“We see no reason for different principles to apply when the enforcement agency is a local authority. In our view, councillors should not be involved either in decisions to prosecute or to investigate or hear grievances about cases.”*

52. If councillors harbour concerns that the discretion to prosecute is being exercised inappropriately, then that will be a matter that they are entitled to raise in the context of the employment of the chief executive – usually in his/her performance review. It should never be a matter of direct criticism or attack by a councillor directed at a council officer junior to the chief executive. The reasons for that are well established and should not require further explanation from me. They will also usually be manifested in some way in the Code of Conduct.
53. As I indicated earlier, a minimalist approach should be taken to media comment on behalf of the Council itself in the course of a prosecution. Even after an outcome, any public statement needs to be handled carefully. Ideally, it would be a matter of liaison between the Council's communications team, but with at least a quick cross-check with prosecuting counsel.

#### **My answers to the specific questions**

*How robust was the case for the prosecution in each case? (McLeavey, Standen, Monkeyman) How well were the cases presented?*

54. I am interpreting this question as directed to whether the elements of the offences were present, and in sufficiently robust form to justify a conclusion that a prima facie case could be made out.
55. In my view, there was a prima facie case that could be made out against all three defendants. There were, however, some differences and it is appropriate that those be discussed.
56. Starting with the Standens, I have found nothing to fault the prosecutor's assessment as to all the elements of the charges. There might have been an issue at trial as to the presence of whether the area of bush squarely met the requirements of the rule, but notwithstanding the learned Judge's queries about that, I tend to the view that on full argument the prosecution position would have prevailed.
57. I am aware that the Standens would have argued at trial:
- (a) That no tree met the girth/threshold requirements of the rule;
  - (b) That there was no proof of date when the trees were cut;

- (c) That there would have been difficulty in proving this was indigenous flora because photographs would show that it probably post-dates 1980.

58. The first two points appear to be answered in the ecologist's evidence. Of course, it is always possible that the Standens might have called their own evidence to displace the prosecution case to its required standard of proof. As to the third, I am dubious that the mere fact that the indigenous growth post-dates 1980 defeats the requirements of the rule.
59. But there is another factor that might well have resulted in an acquittal. This is a positive defence and not part of the *prima facie* case of a prosecution. If the Standens could establish that they had relied on a competent contractor, then had the case gone to trial they might have succeeded in avoiding conviction under s.340 of the RMA. But it must be emphasised that this is a matter of justification or excuse to be established by a defendant. It does not form part of the *prima facie* case. In my view, the *prima facie* case for the prosecution was present and was robust as against the Standens.
60. The "McKenzie Friend" for the Standens states that the reason the Council withdrew the prosecution against them (the Standens) had nothing to do with the media attention. The councillors say it had everything to do with that.
61. Having examined the prosecution file, it is clear to me that neither are correct.
62. The reason for the withdrawal in the Standens' case was a reconsideration of the public interest discretion which, as mentioned earlier, is an ongoing duty, not any identified deficiency in the *prima facie* case, and not media pressure. The reconsideration was based on the overall diminished criminality attributable to the Standens, and most particularly their instructions to the contractor specifically utilising the Council's brochure which, as explained previously, at best amounted to a possible positive defence.
63. Turning to the McLeaveys, the analysis of whether there was sufficient and robust evidence for a *prima facie* case against them is very much the same as against the Standens. The ecological report identifies a greater number of trees affected in their case, but that does not change the elements analysis. Similarly, there is an inference on the files that the McLeaveys used the same contractor as the Standens

and therefore the same positive defence arises as a possibility, but again not as part of the *prima facie* case assessment, and utilisation of the Council brochure did not seem to feature in their case.

64. Finally, with regard to Monkeyman, with the exception of tidying up the appropriate identification of the defendant, all of the elements of a *prima facie* case against the Standens and the McLeaveys would be equally applicable against Monkeyman, and the s.340 positive defence would be unavailable.
65. Having reviewed the entire prosecution files, and subject only to correcting the name of Monkeyman as a defendant, which should not have been a major issue<sup>3</sup>, I can find no aspect of the presentation of any of the cases as deficient. To the contrary, they appear to have been very competently presented, including during the last phase when withdrawals for guilty pleas were being implemented.

***Was the decision to prosecute correct? Did the Council adequately consider all the enforcement options available?***

66. I do not consider the decision to prosecute was correct – at least in the case of the Standens, and possibly also in the case of the McLeaveys. Allowing for the fact that this is a discretion, I am still of the view that the decision to prosecute the Standens was inappropriate in all the circumstances. This has already been discussed in the general part of this review, but specifically in relation to the Standens, the following factors are relevant to that decision:
  - 66.1 They had entrusted the task to an ostensibly skilled contractor with the specific instruction to comply with the rules set out in the Council brochure.
  - 66.2 They had stopped work immediately at the first suggestion of a compliance issue and there was no threat that the work would continue.
  - 66.3 There was no suggestion of a district deterrence issue or broader compliance problem over unauthorised clearing of native growth.

<sup>3</sup> The need to correct the defendant's name in the Monkeyman prosecution was not a fatal flaw. As long as the prosecution could eventually show that the identity originally charged was the same person named in any amendment, on recent authority that would have sufficed and been permitted.

- 66.4 Although it should not be over emphasised, the Standens' personal circumstances were also relevant in that they were a mature couple who had made, and continue to make, significant contributions to environmental protection in the locality.
67. The overall criminality was minimal. Within the ambit of the public interest discretion on the basis of these factors, an appropriate decision would have been to decide not to prosecute. Below that level a mere warning would probably have been the most appropriate outcome or, if within sufficient time, at worst the issue of an infringement notice.
68. In respect of the McLeaveys, a similar approach could have been open, although in their cases there are some differences from the Standens that might be noted:
- 68.1 It would appear that the modifications were greater on the McLeavey property.
- 68.2 The McLeaveys admitted the objective had been to improve their vista (as opposed to being entirely for the purpose of removing dead or rotten trees).
- 68.3 Perhaps the degree of direct involvement in other environmental conservation work might not have been as marked.
- 68.4 The Council brochure does not appear to have been utilised, or if it was it does not seem to have been a matter of specific direction or reliance.
69. However, all other factors were similar to the Standens and even allowing for a range within the discretion, I would have thought that this also was a situation where it would have been perfectly appropriate to select an outcome short of prosecution. The prospect of an infringement notice was probably more apt in the case of the McLeaveys than the Standens, but even with the McLeaveys something less than that might have been open.
70. With regard to Monkeyman, I think the position is rather different. In my view, a commercial contractor should be expected to know the rules, or at least be willing to ascertain them – particularly in a situation where the landowner has particularly instructed the contractor to carry out the work in compliance with the Council's rules.



71. Having said that, I would not entirely have ruled out a decision not to prosecute and simply proceed with an infringement notice at the bottom end for Monkeyman. That option might have been open. All I am saying is that, at the top end, a decision to prosecute was certainly well within the appropriate exercise of the public interest discretion and entirely justifiable.

***Provide comment on the role of elected representatives versus officers in enforcement decisions in general/or this incident.***

72. In the general section of this review I have already made comment on this topic. In short, elected representatives should take no role at all in enforcement decisions. There is nothing unique or special about this incident that would justify a different approach. Any involvement of elected representatives in enforcement decisions opens the door to the conclusion that the enforcement decisions (whichever way they go) have been subjected to political interference or influence.
73. Certainly, elected representatives should be advised of the fact of enforcement decisions, but no more than that. Even that is intended to enable elected representatives to quarantine themselves from any accusation of political interference. If elected representatives consider that these sorts of incidents should not result in prosecution, their appropriate response is to change the district plan rules – not to try to second-guess or unstitch particular enforcement decisions.

***In particular, provide comment on how decisions relating to public interest should be made***

74. As to the process aspect of this, I have already provided some observations in the general part of this review. In short, there needs to be a high level officer meeting that includes officers capable of bringing a fresh pair of eyes to the consideration, but that group of officers ideally would not include the chief executive. Preferably there should be a face to face meeting once all the materials have been assembled and the critical delegated decision as to whether or not to prosecute should be made by this high level group.
75. As to the actual factors involved in that decision, that is necessarily rather variable depending on the type of prosecution involved. But at the core of the exercise is an overall assessment of criminality. Factors that can be identified in respect of this type of RMA prosecution would be:

- 75.1 Any explanation given;
- 75.2 Reliance on professional advice, or even Council communications;
- 75.3 Whether there was any ongoing risk;
- 75.4 Whether deterrence features heavily as a factor;
- 75.5 The personal circumstances of the would-be defendants;
- 75.6 Whether other enforcement options better fit the circumstances and meet enforcement objectives.

***How did the Council come to believe the landowners as well as the contractor should be prosecuted? How did this become 'fact' rather than an interpretation of where liability was perceived to lie?***

- 76. The background to this is that a statement to the media on behalf of the Council suggested that one of the factors in continuing to prosecute the landowners was that that was necessary to sheet home charges against the contractor. This statement had its provenance in a series of events commencing with the briefings following the officers' site visits.
- 77. I have concluded that that statement came to be made as a result of a misunderstanding. The officers to whom it was attributed say that that was not what was meant, but rather the intent was to convey the point that if a conviction were to be obtained against either or both landowners, the prospects of obtaining a conviction against the contractor might well be easier.
- 78. It is certainly not the case that convictions against the landowners would have been necessary to secure a conviction against the contractor.
- 79. It would be a fair observation that if convictions were obtained against the landowners, while it would still be possible that a prosecution against the contractor might well fail as a separate exercise, in the ordinary course of events that might be seen as advantageous to the prospects of successfully prosecuting the contractor. But that could never be a stand-alone reason for deciding to prosecute the landowners.

80. It was unfortunate that this misunderstanding arose, and having arisen, that the correct position was not drawn to the officer's attention. Yet again, it demonstrates the undesirability of offering any comment in the first place – a situation forced on the officer by the public comments of the politicians.

***Should corroboration of the Standens' defence have been sought earlier?***

81. As indicated earlier, in my view an understanding of the Standens' defence, or perhaps more accurately an understanding of their explanation, should have been sought earlier. The critical information was the nature of the instructions to the contractor to comply with the Council's rules, and manifested in handing the brochure to the contractor. It is more a matter of comprehending that that was the explanation the Standens were giving and accepting it as most likely correct, rather than "corroboration" in any legal sense. After all, in this instance the contractor might just as easily have elected not to provide any "corroboration" which would still have left the Council with having to decide whether or not to accept that explanation.
82. The important point is that there was an opportunity to identify the Standens' explanation and to obtain more detail at a much earlier point, and before the decision to prosecute was made.
83. Had the prosecution proceeded, the Standens' explanation would have been raised by them as a possible positive defence. If the details had been obtained earlier it is much more likely a decision would have been made not to prosecute the Standens.

***Why did advice about the strength of the Council's case change after charges were laid, i.e. what happened that the original 'clear breach of the district plan' was no longer an 'open and shut case' and the likelihood of a successful prosecution was considered to have reduced?***

84. This question needs to be unravelled to some extent.
85. Having reviewed the *prima facie* evidence, in my view there was a 'clear breach of the district plan' by all three would-be defendants on the face of the prosecution evidence. That never changed. It is possible that in the case of the Standens they may have been able to call their own evidence to show that the girth provisions of the district plan were not breached, but that would have been a matter of a simple evidential contest at a defended hearing and the Council was going to call

evidence to the contrary. The position remains that there was *prima facie* evidence of a clear breach of the district plan in all three cases.

86. But that does not mean that a successful prosecution will automatically follow. It needs to be remembered that for these offences it is open to a defendant to answer a strong *prima facie* case with a successful s.340 RMA defence.
87. It is true that LCC indicated a likelihood of a successful prosecution, but that written advice was not expressed in terms of being an 'open and shut case' or anywhere near as unqualified as that. Further, that written advice specifically pointed to the public interest discretion over whether or not to prosecute and made the point that that was a decision for Council. However, it does seem that in verbal briefings with the Chief Executive, the expressions "a strong case" and "an open and shut case" were used. The Chief Executive quite understandably drew confidence from the site visits by his officers and their verbal briefings that followed, plus the LCC written advice.
88. But, regardless of that, I am not sure that it could be said that the likelihood of successful outcome was considered to have markedly reduced later on when the media got involved – at least in the case of two out of the three defendants. Certainly in the case of the Standens the possible positive defence had more starkly emerged. A reassessment of the likelihood of a successful outcome in that case was certainly justifiable, although not essential.
89. In the case of the McLeaveys and Monkeyman, no new facts had emerged and no new legal principles or technical issues were identified that changed the assessment.
90. The reality of what changed was that there was a realisation that certainly in the case of the Standens, and probably the McLeaveys, the decision to prosecute them was too heavy handed, and it would have been far more appropriate to have exercised the discretion to deal with their non-compliances in some other way short of prosecution.
91. The further reality was that by the time that that belated realisation overtook the prosecutions, the accompanying media frenzy had effectively rendered the

continuing prosecution of Monkeyman untenable, remembering that Monkeyman had elected trial by jury.

*Was the best legal advice provided?*

92. The legal advice on the prosecution was obtained from LCC. A partner of that firm holds the warrant as Crown Solicitor for the Wellington region and prior to his appointment it has been held by a member of that firm for many years. LCC would be regarded as the pre-eminent firm of prosecuting lawyers in Wellington and has a national reputation as such.
93. The partner in charge of this particular prosecution is an experienced prosecutor in the criminal courts having conducted many criminal trials at a high level. He also has expertise and a special interest in local body prosecutions under the RMA, which is no doubt why this particular matter was directed to him. He prosecutes regularly for the Wellington Regional Council (ie Greater Wellington) under the RMA, as well as for a Crown entity.
94. So I do not consider that the choice of prosecutor, as such, could be faulted.
95. Turning to the legal advice itself, I have closely examined the entire LCC involvement and I am unable to fault it other than in respect of the relatively minor matter of identifying the appropriate defendant for "Monkeyman" – something that could be relatively easily fixed. In particular, I note that they did a comprehensive review of the potential prosecutions in writing in a letter dated 22 November 2013 that covered off all the appropriate topics.
96. I conclude that the best legal advice was provided, both in terms of the firm that was chosen, and the actual advice that was given.

## **APPENDIX 1**

### **List of persons interviewed:**

Officer A – Duty Compliance Officer when complaints received

Officer B – Senior In-house legal counsel – Tim Power

Officer C – Group Manager Community Services – Tamsin Evans

Officer D – Management officer consulted by Officer A

Officer E – Communications Officer

Pat Dougherty, Chief Executive

James Cootes, Chair of Otaki Community Board

Colin Pearce, Member of Otaki Community Board

Ross Church, Mayor

Tom Gilbert, Partner of Luke Cunningham Clere

Emma Light (by telephone only), staff solicitor of Luke Cunningham Clere

Councillor Gurunathan

Councillor Jackie Elliot

Christopher Ruthe (former solicitor and “McKenzie friend” for the Standens)

### **Documentary and other evidence reviewed:**

Internal Council file and email exchanges

Luke Cunningham Clere file

Ecologist’s draft and final reports

Kapiti Coast District Council Operative District Plan

Various newspaper articles and notes of interviews

Draft Enforcement Policy

Video recording of television broadcast “Campbell Live”

Council brochure “Trees for Kapiti”

Briefing PowerPoints for Council members’ induction 2013

## APPENDIX 2 – CHRONOLOGY

01.08.13	Two telephone complaints received by Council
01.08.13	Officer A (Duty Officer) attends at Oriwa Crescent, Otaki and takes notes and photographs
14.08.13	Council letter to Standens, McLeaveys and Monkeyman
15-29.08.13	Officer A consults Officer B (in house legal counsel) and Officer D and then Luke Cunningham Clere (LCC) initially consulted and give preliminary views followed by formal retainer
29.08.13	Letter from Standens to Council including reference to employing professional arborist and use of Council brochure
29.08.13	Letter from McLeaveys acknowledging purpose of the tree topping was to retain their vista
09.09.13	Application for search warrants
23.09.13	Officer A attends at Oriwa Crescent, Otaki with search warrant plus ecologist and Police constable. Standens give informed consent. McLeaveys are out when warrant executed although one returns part way through. Notes and photographs taken
01.10.13	Draft ecologist's report is received
22.10.13 to 06.11.13	Internal discussion and exchanges in order to brief planning evidence
12.11.13	Draft brief of planning evidence is circulated
15.11.13	Council sends its file to LCC for opinion on viability of prosecution
22.11.13	LCC comprehensive advice to Council that it is appropriate to lay charges against the Standens, the McLeaveys and Monkeyman (referring at one point to "Monkeyman Tree Services Limited"). The advice specifically refers to the prosecution guidelines relevant to the discretion and states that it is a matter for the Council to assess, although the advice does indicate LCC's then view that a prosecution would be justifiable in the circumstances.
25.11.13	Officer A prepares memorandum to Officer C attaching evidence and LCC advice and recommending prosecution
26.11.13	Approval given to prosecute
02.12.13	Officer D and a community board member visit the Standens and view the relevant areas. Officer D tells the Standens that given the amount of

	modification the Council could not ignore the situation.
11.12.13	LCC instructed to prepare charges. Some debate as to whether to lay charges under both Operative Plan and Proposed Plan plus confirmation that Monkeyman to be included
19.12.13	Council officers review draft charges, Officer A forwards updated planning evidence to LCC and requests that prosecution is only under the Operative Plan and that Council wished to be sensitive over laying charges close to the holiday period
19.12.13	Officer A forwards completed ecologists report to LCC
23.12.13	Charges laid against the Standens, the McLeaveys and "Monkeyman Tree Services"
09.01.14	Council letter to the Standens advising of decision to prosecute them
20.01.14	Standens write to Council complaining of their treatment (including the search) and referring again to engaging "professionals" along with being "guided" by the Council brochure
21.01.14	Charging documents returned by Court to LCC
29.01.14	Council seeks advice from LCC as to process from here
29.01.14	LCC advise forward process
30.01.14	LCC forward draft summaries of fact to Council
31.01.14	Council signs summonses to defendants
03.02.14	Council officers provide feedback on summaries
10.02.14	LCC provide package to go with service
12.02.14	Charges served on Standens along with summary of facts and summons
13.02.14	Council letter to the Standens acknowledging their letter and referring further contact to Luke Cunningham and Clere
13.02.14	Charges served on McLeaveys along with summary of facts and summons
13.02.14	Charges served on Monkeyman along with summary of facts and summons
17.02.14	Christopher Ruthe (the Standens "McKenzie Friend") advises the Court the Standens will be pleading not guilty at first call and seeking appearance be excused
17.02.14	Dominion Post reporter contacts Officer E to respond to accusations that Council had been heavy handed in dealing with the Standens



17.02.14	Councillor comment on Standen case to <i>Kapiti News</i> and other media
18.02.14	Officer A advises LCC Council has no objection to Standens appearance being excused
20.02.14	Minister for the Environment issues public statement "Minister Blasts Ridiculous Tree Felling Charge"
20.02.14	Campbell Live and RadioNZ make contact. Chief Executive interviewed on Campbell Live which includes councillor advocating withdrawal of charges. Briefing to Council's Corporate Business Committee on prosecution
21.02.14	Officer B checks with LCC as to whether advice given on Solicitor-General's guidelines (i.e. the public interest discretion) and also checks on some earlier advice by Simpson Grierson on the application of the tree rules
21.02.14	Monkeyman (Craig Eddie) makes contact with LCC
21.02.14	Court advises that the Standens and Monkeyman cases are adjourned to a review hearing on 8 April 2014 with not guilty pleas recorded
23.02.14	Christopher Ruthe complains adverse statements by Chief Executive and a councillor are compromising their trial
24.02.14	Tom Gilbert (LCC) advises Council that presence of Police officer on execution of a warrant under the RMA is a statutory requirement
24.02.14	Initial disclosure provided by LCC to Monkeyman
24.02.14	Officer B makes site visit and prepares legal background with Council's Communications team
25.02.14	Christopher Ruthe indicates Standens will elect a jury trial
26.02.14	Officer B indicates to LCC Council interest in discharge without conviction for both the Standens and McLeaveys and asks for consideration of how to raise with their lawyers
26.02.14	Councillor comment in the " <i>Kapiti News</i> "
26.02.14	Emma Light/Tom Gilbert speak to Mrs McLeavey about guilty plea options if the Council's intelligence was correct that they were intending to plead guilty. Mrs McLeavey indicates they were receptive to that option. They then ring Craig Eddie of Monkeyman Tree Services who said he had no lawyer acting but had entered a not guilty plea. There was some discussion around who the conviction would be against plus the amount of a donation if Monkeyman pleaded guilty. Craig Eddie said he would consult a lawyer before deciding what to do. They then ring the Standens and spoke to Mr Standen who was still hoping the charges would be withdrawn and considered that was the best thing for the Council. Tom Gilbert raised the option of making a donation to an environmental cause. Mr Standen explains the extent of their involvement with Keep Otaki Beautiful plus

	voluntary work in a local park. Mr Standen also says they had bought the house just a year ago and that they had used a Council brochure when engaging and instructing a professional arborist, and that the Council should withdraw the charges against them. They then contact Christopher Ruthe who said that at least 35% of the trees on the Standen's property had nothing to do with either the Standens or Monkeyman and had been cut by the neighbours earlier. Later Mrs McLeavey rang back confirming that she and her husband favoured the option LCC had put forward and would enter guilty pleas on that basis
27.02.14	McLeaveys appear, guilty pleas are indicated along with intention to apply for discharge without conviction at sentencing, and they are remanded at large
28.02.14	TV3 apply for "in Court camera" approval
03.03.14	Mrs McLeavey speaks to Tom Gilbert indicating uncertainty about proceeding with guilty plea and possible donation because retrospective consent is not an option
03.03.14	Standens make official information request about tree felling complaints and action thereon
04.03.14	Enima Light telephones Mrs McLeavey to further explore guilty plea plus donation sentencing option
06.03.14	<i>DominionPost</i> applies for leave to take in Court photographs on 8 April 2014
10.03.14	Discussion between Officer B and Mr Standen and then Tom Gilbert regarding disposal of Standen charges
10.03.14	Officer B emails Christopher Ruthe that Council will not oppose a discharge without conviction for the Standens and no need for a donation, but they would need to provide an affidavit setting out the instructions they gave the contractor. Also a joint media statement should be agreed
14.03.14	Christopher Ruthe telephones Tom Gilbert to indicate that while the Standens are interested in the discharge without conviction possibility, that still had to be confirmed and they were reluctant to admit guilt which is a necessary part of that
17.03.14	Officer B visits Oriwa Crescent with Christopher Ruthe
24.03.14	Costas Matsis and Tom Gilbert discuss the possibility of Monkeyman guilty pleas with restorative justice options possibly open ie conviction and discharge of the trading entity plus a donation to a suitable environmental cause
25.03.14	LCC advise Court that Council does not oppose still photographs being taken of the defendants but opposes filming

26.03.14	Christopher Ruthe indicates the Standens will affirm they instructed the contractor to undertake all work in compliance with the Council guidelines as per the brochure, but if not resolved will proceed with a jury trial
27.03.14	LCC advise Council that it is appropriate to review the continuation of the prosecution of the Standens in the light of the further information and its effect on the public interest test. The advice draws a distinction with the McLeaveys over the extent of the work and says the new information is the Standens' commitment to the environment and the detail of the instructions they had given to Monkeyman
31.03.14	Christopher Ruthe calls Tom Gilbert concerned because two councillors have told him the Council's advice is that it was "a 100% slam-dunk case they couldn't lose" which Tom Gilbert states was not the legal advice and is never the LCC approach
31.03.14	Council instructs LCC to seek an adjournment to allow sufficient time to make further inquiries suggested by the Chief Executive
01.04.14	Tom Gilbert seeks Costas Matsis confirmation that the Standens instructed Monkeyman in terms of the Council brochure, and also explores conviction and discharge plus appropriate donation for outcome of Monkeyman prosecution
03.04.14	Costas Matsis (lawyer for Monkeyman) responds by telephone to Tom Gilbert stating preference that no conviction is entered. But Tom Gilbert indicates on his instructions a conviction would be a bottom line. However, it is stated that the Standens did show Monkeyman a brochure and instructed him to proceed in accordance with that. The whole conversation is without prejudice
03.04.14	A councillor telephones Tom Gilbert wanting information which the latter declines to give
03.04.14	Judge rules that still photographs only in Court
03.04.14	Officer B advises Tom Gilbert that the charges against the Standens are to be withdrawn
03.04.14	Tom Gilbert reverts to Costas Matsis that a conviction against Monkeyman is a bottom line but makes suggestions regarding donation
04.04.14	<i>DominionPost</i> front page article that charges against the Standens to be dropped and quoting Council as saying that by talking to Monkeyman it had been able to substantiate the Standen's account in respect of the use of the brochure. Costas Matsis emails Tom Gilbert complaining of adverse publicity
04.04.14	Costas Matsis complains to Tom Gilbert that the newspaper revelation that the Standens had shown the brochure to Monkeyman had to be a reference to the earlier (Gilbert/Matsis) without prejudice conversation

04.04.14	Charlotte Brook (Public Prosecutions Unit at Crown Law Office) contacts Tom Gilbert to check that the prosecution guidelines have been applied
04.04.14	<i>Voxy.co.nz</i> article quoting Officer C stating the decision to prosecute was based on sound legal advice and the decision to withdraw the charges against the Standens was based on new information which was the corroboration by the contractor that the Standens had referred him to a Council brochure. TV3 News website article quoted the Council as saying that it was necessary to prosecute the Standens "in order to take on the arborists Monkeyman Tree Services"
07.04.14	Tom Gilbert advises Costas Matsis the newspaper article misreported the basis of the decision not to proceed against the Standens but that Council has confirmed it intends to proceed against Monkeyman although amenable to a conviction and discharge on terms
07.04.14	Costas Matsis notes no direct response to his previous complaint about the newspaper article and that that is prejudicing a fair trial for Monkeyman. Tom Gilbert asks Council to refrain from mentioning Monkeyman
08.04.14	Monkeyman case remanded to 14 May 2014. Standen charges withdrawn
08.04.14	<i>Stuff</i> article stating the Council said it had confirmation from the arborist that the Standens had referred him to the Council brochure. NewstalkZB website article states that the Council has just found out "the elderly couple gave the contractor a brochure on its rules on native trees before they did the job"
10.04.14	"Please explain" meeting with councillors
10.04.14	<i>Stuff</i> article referring to a Council meeting that day in which Officer C said the new information was the corroboration by Monkeyman that the Standens had referred him to the Council brochure
14.04.14	Officer C contacts Tom Gilbert to get an assessment of the strength of the case against Monkeyman. Tom Gilbert stands by the opinion of 22 November 2013 but emphasises no guarantee can be given
16.04.14	Costas Matsis advises Monkeyman is unwilling to agree to conviction plus discharge on terms, points to the prejudicial media statements by Council about Monkeyman and states Council should withdraw the charges (given that it is to be a jury trial), and if not accepted, Monkeyman will apply for a stay of proceedings
16.04.14	Tom Gilbert relays to Council the Monkeyman position and emphasises the importance of avoiding media comment, although advising that a stay is unlikely to succeed
22.04.14	McLeaveys write to LCC stating they are perplexed that the Council has withdrawn all charges against the Standens, but not against them and query whether that is because they (the McLeaveys) have not sought media attention. They state they will seek a discharge without conviction and will

	now retain a lawyer
24.04.14	LCC send case management memorandum to Costas Matsis on the basis that a jury trial will proceed
28.04.14	Sentencing of McLeaveys adjourned to 14 May 2014
29.04.14	Costas Matsis signals Monkeyman will raise a defence under s.341
05.05.14	Court advise <i>DominionPost</i> have applied for in court still photography of McLeavey sentencing and Monkeyman next call
05.05.14	LCC forward McLeavey letter of 22 April to Council
07.05.14	Emma Light telephones Mrs McLeavey and discusses possible donations if a discharge without conviction occurs. Mrs McLeavey queries whether the Council's position has changed in the light of their letter
07.05.14	LCC file the prosecutor's sentencing submissions indicating no opposition to a discharge without conviction and consideration given of appropriate environment organisation to receive a donation
08.05.14	A draft without prejudice letter from Costas Matsis is received from an unspecified third party (but never received by Council) repeating reference to media comment about Monkeyman by Council, and making a final offer involving a plea of guilty to one representative charge but on an amended summary of facts, a discharge and a donation, no orders for costs plus Council to publicly retract some of the previous public statements. It is clear that this is draft advice for Craig Eddie not intended for the Council
08.05.14	Exchanges between Officer B and Emma Light/Tom Gilbert as to confusion about differing versions of Costas Matsis' letter
08.05.14	Tom Gilbert alerts Costas Matsis of confusion over the receipt of the draft letter
08.05.14	Costas Matsis confirms alternative version is a draft and the correct position is as per 16 April 2014
08.05.14	Briefing of councillors who are told not to comment further
14.05.14	Court sentencing of McLeaveys. After hearing submissions of both sides the Judge, after expressing some doubt that these particular mahoe trees would fall within the relevant Rule, declines to direct any donation or payment of any costs and makes observations that the matter is effectively trivial and a prosecution has been an over-kill. 20 or so people attending in Court clap. Monkeyman is also called and adjourned a trial call-over in Palmerston North but Judge indicates that he hopes some other resolution occurs before then. Charlotte Brook briefed by LCC on outcome
14.05.14	Tom Gilbert provides further advice on the public interest test as to whether the Monkeyman prosecution should continue in the light of Judge Dwyer's comments at the McLeavey sentencing. While stating a view that there was

	still sufficient evidence to prosecute Monkeyman and there had been nothing to change that, given the indication by the Court that the offending was at the very low end it would be open to the Council to take the view that continuing was no longer in the public interest. However, an additional complication was that by reason of the jury trial election the Crown Solicitor at Palmerston North would have to be the person to be satisfied the charges should be withdrawn. Again, a no media comment position is urged
14.05.14	Council advises LCC that it no longer considers the prosecution of Monkeyman in the public interest
14.05.14	Tom Gilbert notes that media comment is likely on behalf of the Council as a result of the attention the matter is getting but nonetheless advises against it
15.05.14	Tom Gilbert alerts Palmerston North Crown Solicitor of position.
20.05.14	LCC forward file to Crown Solicitor
13.06.14	Crown Solicitor, while noting that the evidential test for a viable prosecution was met, files memorandum seeking leave to withdraw charges against Monkeyman on the basis that the prosecution would not be in the public interest

### APPENDIX 3 – RECOMMENDATIONS

1. At an early stage in the investigation, and at least no later than step 2 below, an explanation should be sought from the would-be defendant. It may be that interviewing officers will need some special training for this.
2. There should be a clear and distinct step in the prosecution assessment process within Council when, after all the information is assembled (including the relevant legal advice) where the overall public interest discretion as to whether or not to prosecute is made. That separate and distinct step should:
  - (a) Include whether some lesser step to the laying of charges should be preferred (ie an infringement notice or a mere warning). If an infringement notice is a possibility, this step should be no later than four months after the conduct in issue.
  - (b) More than one person should be involved, including at least one senior Council officer or consultant who is bringing “a fresh pair of eyes” to the decision. But the personnel involved should not include the Chief Executive, nor councillors or community board members.
  - (c) There should be a meeting at which views and recommendations are tested and explored.
3. At some point after a decision to lay charges is made, the following should be advised of the persons against whom charges are being laid and the nature of those charges (and nothing more);
  - 3.1 Council members;
  - 3.2 Members of the relevant Community Board.
4. The Council should adopt a strict policy of minimising any public comment on the merits or otherwise of any non-compliance actions it is taking. Some limited comment confined to information about process would be the exception. Anything beyond that should both state the fact of no comment being made and the premise for it being an inability to do so.

5. The limitations around Council members' involvement in or comment on individual decisions to prosecute should be included in the induction briefing.

PREVIOUS REPORT