

Enforcement Policy

Purpose

The City of Burnside has legislative responsibilities protecting individuals and the community. This includes responsibilities for the safety and amenity of the community's environment under the *Planning, Development and Infrastructure Act 2016 - Local Government Act 1999, Australian Road Rules, Dog and Cat Management Act 1995, Expiation of Offences Act 1996, Road Traffic Act 1961, Fire and Emergency Services Act 2005, Local Nuisance and Litter Control Act 2016 and the City of Burnside By Laws 1-7.*

Policy Statement

1. Introduction

- 1.1 The City of Burnside has legislative responsibilities protecting individuals and the community. This includes responsibilities for the safety and amenity of the community's environment under the *Planning, Development and Infrastructure Act 2016 - Local Government Act 1999 ('the LG Act'), Australian Road Rules, Dog and Cat Management Act 1995, Expiation of Offences Act 1996, Road Traffic Act 1961, Fire and Emergency Services Act 2005, Local Nuisance and Litter Control Act 2016 and the City of Burnside By Laws 1-7.*
 - 1.2 Potential unlawful activity and/or breaches of the above listed legislation may come to the attention of Council through public enquiries or complaints or Council officer patrols and inspections. Council has discretion on taking action concerning any unlawful activity and will do so in accordance with the principles of good governance and administrative practice.
 - 1.3 In adopting this Policy, Council has recognised that when the Parliament makes laws, it may be difficult to determine all the circumstances that should give rise to enforcement. Each situation needs consideration regarding its impact on economic, social, environmental and public safety issues. It is therefore recognised that it is appropriate for Council to apply discretion or common sense in determining when and when not to take enforcement action.
 - 1.4 In addition to enforcement, Council carries out a range of activities to ensure compliance, such as community education programs to encourage conformance. Detailed policies and procedures about these specific activities may also apply.
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- 1.5 This Policy is an “umbrella” policy that outlines Council’s approach to enforcement matters and provides staff with direction about how enforcement activities should be undertaken. The Policy assists Council officers in promptly, consistently and effectively responding to matters of non-compliance or unlawful activity. It provides workable guidelines on:
- How to assess whether allegations of unlawful activity or matters of non-compliance require investigation;
 - Options for dealing with unlawful activity or matters of non-compliance; and
 - How to decide whether enforcement action is warranted.
- 1.6 The Policy ensures transparency, procedural fairness and natural justice principles are applied and that enforcement action is proportionate to the alleged offence in each case.

2. Our approach

- 2.1 Council adopts a broad definition of “enforcement”, which combines providing advice and assisting compliance with formal action where necessary. This is intended to encourage higher levels of voluntary compliance with legal requirements by individuals, businesses and other bodies.
- 2.2 Notwithstanding the above, Council will take immediate action when required (for example, to ensure public health and safety or to protect the environment) against those who act unlawfully when circumstances warrant.

3. Policy Objectives/Scope/Actions

Principles of good enforcement

Enforcement actions are taken within the context of both a legal and Policy framework. Council officers will carry out their enforcement-related work with due regard to the following principles:

- 3.1 Proportionality
- A proportionate response means that Council’s actions will be scaled to the seriousness of the breach.
 - Council recognises that most individuals want to comply with the law and will assist compliance by being open and helpful, offering informal advice and providing the chance to discuss compliance problems.

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- Attention will be focused on those whose activities give rise to the most serious risks, where potential hazards are least well controlled, where offending is continued, or in flagrant disregard for the legislation. Depending on the seriousness and persistence of the infringement, Council will enforce the minimum action necessary to secure future compliance.
 - Prosecution will generally be used for serious offences that pose a severe risk hazard to the community or where a person has elected to be prosecuted.

3.2 Consistency

- Council will take a similar approach in similar cases to achieve similar outcomes.
- While enforcement decisions require the use of professional judgement and discretion to assess varying circumstances, officers will:
 - Follow Standard Operating Procedures ('SOPs') wherever applicable;
 - Ensure fair, equitable and non-discriminatory treatment; and
 - Record any deviation from the SOPs along with reasons for the deviation.

3.3 Transparency

- Council will be open and transparent about how it undertakes enforcement activities and the laws it enforces. It will consult on and provide ready access to published standards and levels of service and performance that can be expected, as well as be transparent and open about what is expected from those on whom the law places a duty (duty holders).
 - In educating the community and dealing with duty holders, Council will clearly distinguish between what is legally required and what is desirable but not compulsory.
 - Staff will be open to discussing potential and actual compliance failures before, during and after formal action has been taken.
 - Complainants may be advised in general terms what action has been taken and why that action has been taken, subject to
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respecting the parties' privacy and not compromising the integrity of any ongoing investigations.

- Generally, the details of a complaint or the identity of a complainant will not be disclosed by the investigating officers during an investigation. (Subject to Freedom of Information considerations).
- When remedial action is needed, Council will explain clearly and in plain language why the action is necessary. Where practicable, it will give notice of its intent to commence formal action. It will point out what action is required to achieve compliance and the timeframe for undertaking that action. Advice will be provided on how to seek a review of or how to appeal against that decision.
- Where it is not practical to give notice, where legislation requires immediate action, or where there is a high risk or hazard from the offence, the reasons why will be recorded in accordance with Council's Records Management protocols.
- 5Complainants will be advised of what action has been taken and why that action has been taken.

Authorisation of Officers

- 3.4 Only officers competent by training, qualification and/or experience will be authorised to take enforcement action.
- 3.5 Officers will also act in accordance with any delegated authority and other relevant Council policies and procedures to ensure a consistent approach to their duties. Any decision to act other than in accordance with Council policies must have approval from the relevant Manager, and the reasons for action must be recorded following Council's Records Management protocols unless urgent or emergency action is required by the officer(s). In these circumstances, the relevant manager is to be informed immediately after the action and records made as to the reasons for the urgent action.
- 3.6 Officers must identify themselves and show their authorisations on request (or as required by the specific Act they are administering).

Decision Making

- 3.7 Is an investigation required?

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- Not all allegations of non-compliance with the Act will warrant investigation. Council will consider a range of factors when deciding whether to investigate. These include:
 - Is the matter within the jurisdiction of Council and the various Acts it enforces?
 - Is the complaint premature? For example, does it relate to some unfinished aspect of work that is still in progress?
 - Is the activity or work permissible with or without consent?
 - If the activity is permissible with consent, is consent in place?
 - Is it possible to determine from the information available to Council whether the activity or work is permissible without consent and/or whether all consent conditions are being complied with?
 - Is the complaint trivial, frivolous or vexatious?
 - Has too much time elapsed since the events the subject of the complaint took place? (Limitation of time expired within the relevant legislation).
 - Is there another body that is a more appropriate agency to investigate and deal with the matter under an Act not administered by Council?
 - Is the activity significantly detrimental to the environment, or is it a risk to public safety?
 - Does the complaint indicate the existence of a systemic problem e.g. if the complaint is one of a series, could there be a pattern of conduct or a more widespread problem?
 - Has the person or organisation complained of been the subject of previous complaints? (i.e. is there a history of non-compliance).
 - Has the person or organisation making the complaint made complaints or multiple complaints about the same or similar issues in the past? (i.e. is there a history of vexatious, frivolous or trivial past complaints).
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- Does the complaint have special significance regarding the Council's priorities?
 - Are there significant resource implications in relation to an investigation and any subsequent enforcement action?
 - Is it in the public interest to investigate the complaint? (i.e. is it trifling?)
 - Where a decision is made not to investigate a complaint in observance of this Policy or relevant SOP, the decision and reasons will be recorded in accordance with Council's Records Management protocols, and the complainant will be advised in writing.

3.8 Factors in choosing an enforcement strategy

- In deciding on the most appropriate means of enforcement (and whether any enforcement is required at all), the officer shall apply discretion with regard to the following factors:
 - Whether the breach or situation has drawn complaint, and if so, to what extent;
 - Whether the breach or situation has been implicated in any accident;
 - Whether the breach or situation is highly visible due to its size, colour, location, illumination or other factors etc;
 - The size and scope of the breach or situation, particularly as compared with what might be established "as of right" (i.e. without need for approval);
 - The duration (hours) that the breach or situation has occurred, if relevant;
 - Whether the breach or situation is something commonly employed by other like businesses, residences, premises, etc;
 - Whether other nearby businesses, residences, premises, etc and/or competitors employ similar circumstances;

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- How long the breach or situation has occurred before coming to the council's attention, and whether the council is within time to take enforcement action;
 - Whether the breach or situation is being used for a purpose that is not envisaged by the Development Plan (to be replaced Planning and Design Code) or other Council policies for the relevant area or circumstance;
 - Whether the Council has given incorrect information or advice or in some other way encouraged (tacit consent) the breach or situation;
 - Whether the breach or situation would likely gain approval if approval were sought; and
 - The "seriousness" of the breach or situation relative to other breaches or situations of which the Council is aware (Council must prioritise its enforcement resources, targeting the most serious matters first).
- The following factors are to be ignored when choosing an enforcement strategy:
 - Any element of discrimination or bias against the person, such as ethnicity, nationality, political association, religion, gender, sexuality or beliefs; and
 - Possible political advantage or disadvantage to a government, a person holding (or a candidate for) public office, or any political group or party.
 - Where a personal association or relationship with the alleged offender or any other person involved exists:
 - An alternative Authorised Officer or manager will make decisions where possible; and
 - The facts about any conflict/relationship will be recorded in accordance with Council's Records Management protocols.
 - 5.8.4. Written documentation will:
 - Include all the information necessary to make clear what needs to be done to comply with legal requirements, the required time frame and, if
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necessary, the reasons for these actions and potential penalties for failing to comply with the request;

- Detail the section/s of the Act contravened, measures necessary to ensure compliance and the consequences of non-compliance; and
 - Differentiate between legal requirements and recommendations of good practice.
- Where a decision is made not to pursue compliance, having exercised discretion in accordance with this Policy and/or the relevant SOP, the decision and reasons will be recorded in accordance with Council's Records Management protocols, and the complainant will be advised in writing.

3.9 Options for compliance

- Where, after having undertaken an investigation and exercising an appropriate level of discretion under this Policy and the relevant SOP, it is determined that on prima facie evidence, non-compliance has occurred, Council has various options available to it to seek or promote compliance, including:
 - Explaining legal requirements and, where appropriate, the means to achieve compliance;
 - Providing an opportunity to discuss points of issue where appropriate;
 - Allowing reasonable timeframes to achieve compliance and/or waiving or reducing fees;
 - Facilitating communication between affected parties to achieve a resolution;
 - Issuing a verbal or written warning; or
 - Enforcement actions include issuing expiation, issuing an order/direction, and conducting civil enforcement proceedings and/or prosecution (see discussion below).
- Enforcement decisions must be fair, consistent, and balanced and relate to common standards that protect the public.

Enforcement Actions

Officers have a range of enforcement actions available, as outlined below. In considering each option, regard should be given to the factors in the sections below of this Policy and the relevant SOP.

3.10 No Action

- No action will be taken when no breaches of the Act are discovered after investigation and exercising an appropriate level of discretion.
- It may also be appropriate to take no action when:
 - The complaint is frivolous, vexatious or trivial;
 - The alleged offence is outside Council's area of authority;
 - Taking action may prejudice other major investigations;
 - The factors described in the sections below of this Policy and the protocols outlined in the relevant SOP do not warrant action.

3.11 Informal Action

- Informal action to achieve compliance with legislation may include:
 - Offering verbal or written advice;
 - Verbal warnings and requests for action; or
 - Written warnings.
- Advice from officers will be put clearly and confirmed in writing.
- The circumstances in which informal action may be appropriate include:
 - The act or omission is not serious enough to warrant formal action;
 - The duty holder's history reasonably suggests that informal action will secure compliance;
 - Confidence in the individual/other body is high;

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- The consequences of non-compliance will not pose a significant risk to health and/or safety; or
 - Where informal action may prove more effective than a formal approach.
 - Where the limitation of time has expired to undertake formal action but where a warning is served and recorded with Council to have a future record if non-compliance continues.
 - Where statutory action is not possible, but it would be beneficial in a broader public safety context to urge a particular outcome, a senior officer of Council will take such action and the reasons recorded in accordance with Council's Records Management protocols. The recipient will be informed that the requested actions are not legally enforceable.

3.12 Formal Action

- Service of Orders and Directions and Court action
 - The various Acts provide for a number of enforcement actions.
 - Council officers will use professional judgement and discretion to assess the variables relating to each matter, including the reasonableness of the actions required by an Order/direction and the timeframe to comply.
 - Only in circumstances such as a threat to life or immediate threat to public health or safety will an Order be made without notice of intention. In these circumstances, immediate compliance to resolve a situation is required.
 - In most cases, the person receiving the Order or Direction has a right of appeal if they consider the Order or Direction unreasonable. Depending on the Act under which the offence is alleged, this may be to the Environment, Resources and Development Court, the District Court of South Australia, the Magistrates Court of South Australia, the Chief of the CFS or MFS, or another body as determined by the relevant piece of legislation. If an Order or Direction is served for which an appeal is possible, Council will advise the recipient
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in writing of the right to appeal and the relevant legal provisions when serving the Order or Direction.

- Where there is evidence that an offence has been committed Council may issue an Expiation Notice, commence civil proceedings or launch a prosecution in addition to serving an Order or Direction. This will only be done where it is determined that the recipient's conduct justifies taking both steps.
- Action in Regard to a Default
 - Failure to comply with Orders or Directions may incur further enforcement action, such as the launch of a prosecution or civil enforcement.
 - Where action regarding a default is provided for by the Act and the necessary work or action has not been carried out in the time allowed without good reason, Council may undertake the required work or action. Before doing the work or action Council will consider whether there is a realistic prospect that the person responsible will complete the work or action within a reasonable time. Where work or action in default is undertaken, Council will seek to recover all costs over a fair period, using all available statutory means.
 - The decision to act as default will be made by the Chief Executive Officer or delegate.
 - Where an offence has been committed, Council may issue an Expiation Notice, commence civil enforcement, launch a prosecution, and take action to fulfil an Order or Direction. This will only be done where the recipient's conduct justifies taking such steps. Factors such as giving false information, the obstruction of Council staff and the harm or risk of harm caused by the recipient's delay will be considered in determining additional enforcement actions.
- Service of an Expiation Notice
 - A person receiving an Expiation Notice is entitled to elect to be prosecuted for the alleged offence. Hence, there must be substantial, reliable and admissible evidence that an identifiable person or organisation has committed the alleged offence. In other words,

sufficient evidence must prove an offence beyond reasonable doubt.

- The following circumstances are likely to warrant an Expiation Notice:
 - Expiable breaches of the Acts administered by Council;
 - Failure to correct an identified problem after having been given reasonable opportunity to do so by an Authorised Officer (informal enforcement action);
 - Failure to comply with the requirements of an Order or Direction;
 - Confidence in the individual/other body's likelihood to not re-offend is low; or
 - A written warning has been given for a similar offence.
- Prosecution
 - A prosecution will only proceed where there is a reasonable prospect that an offence can be proved beyond reasonable doubt.
 - The following circumstances are likely to warrant a prosecution:
 - A flagrant breach of the law such that public health, safety and welfare have been put at risk;
 - The alleged breach is too serious or the risks too great to be dealt with by means of an expiation;
 - A failure to correct an identified serious problem after having been given reasonable opportunity to do so;
 - It is not possible to rectify a breach (for example, demolition or tree-damaging activity);
 - A failure to comply with the requirements of an Order or Direction;

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- An established and recorded history of similar offences;
 - An unwillingness on the part of the individual or other body to prevent a recurrence of the problem; or
 - The recovery of the costs of the investigation, remedial work or financial compensation that Council requires or an aggrieved party.
- Where circumstances warrant a prosecution, all relevant evidence and information will be considered to enable a consistent, fair and objective decision.
 - Before a prosecution is recommended, substantial, reliable, and admissible evidence must be obtained that an identifiable person or organisation has committed the offence.
 - Before undertaking a prosecution, the Authorised Officer of Manager should seek written legal advice from one of Councils legal advisors. This advice should be forwarded through senior management for their information and recording on council records management systems.
 - A decision to prosecute must be in the public interest. In considering whether prosecution is in the public interest, the following additional factors will be considered:
 - Whether the offence was premeditated;
 - The need to influence the offender's future behaviour;
 - The effect on the offender's or witness's physical or mental health, balanced against the seriousness of the offence (i.e. would a prosecution be perceived as a disproportionate response given the offender's circumstances);
 - The availability and efficacy of any alternatives to prosecution;
 - The prevalence of the alleged offence and the need for deterrence, both personal and general; and
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- The likely length, expense and outcome of a trial.
 - The Chief Executive Officer [or delegate] will make the final decision to prosecute.

4. Review and Authority

- 4.1 This Policy will be reviewed every four years in accordance with Council's Policy and Protocols Framework.
- 4.2 For operational requirements, whilst still supporting the intent of the Policy, the Chief Executive Officer may approve, waive or vary requirements of this Policy as needed.

5. Availability

- 5.1 The Policy is available to be downloaded, free of charge, from Council's website www.burnside.sa.gov.au.
- 5.2 The Policy will be available for inspection, free of charge, at the Civic Centre during ordinary business hours, and a copy may be purchased at a fee as set annually by Council.
 - City of Burnside Civic Centre; 401 Greenhill Road, Tasmore SA 5065
 - Telephone: 8366 4200
 - Email: burnside@burnside.sa.gov.au
 - Office hours: Monday to Friday, 8.30 am to 5 pm (except public holidays)

Other Useful Documents

Related Documents

- Access to Development Documentation Policy
- Bushfire Hazard Management Policy
- On-Street Parking Policy

Relevant Legislation

- *Australian Road Rules*
- *Dog and Cat Management Act 1995*
- *Expiation of Offences Act 1996*
- *Fire and Emergency Services Act 2005*
- *Local Government Act 1999*
- *Local Nuisance and Litter Control Act 2016*

- *Planning, Development and Infrastructure Act 2016*
- *Road Traffic Act 1961*

Glossary No terms are defined in this policy.

Administrative As part of Council’s commitment to deliver the City of Burnside Strategic Community Plan, services to the community and the provision of transparent information, all policy documents are reviewed as per legislative requirements or when there is no such provision a risk assessment approach is taken to guide the review timeframe.

This Policy document will be reviewed every 4 years unless legislative or operational change occurs beforehand.

Adoption Date: 16 July 2024

Review Date: June 2028

Strategic Plan Reference **Principles:** Governing with Integrity

Theme: Spans all themes

Goals: Spans all goals

Priorities: Spans all priorities

Review History

| ECM Reference: | Authorising Body: | Date/Decision ID | Description of changes |
|----------------|-------------------|-----------------------------|---|
| 2503022 | Council | 11/08/ 2015, C10316 | |
| | | 12/12/2017, C11537 | |
| | | 12/05/2020, C12547 | |
| | | 16/07/2024, C72024/13730 | Updates to: <ul style="list-style-type: none"> • Strategic Community Plan • Legislation • Responsibilities • Minor editorial and format changes • Removal of mediation from policy |

Contact

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