

**BRISBANE CITY COUNCIL**

**AP219 - PROSECUTION POLICY 2019**

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## 1.0 INTRODUCTION

- 1.1. Scope.** This policy is about the exercise of Council's discretion to prosecute for alleged offences under Council's local laws, and any state legislation for which Council has responsibility to administer and enforce including, but not limited to, the *Planning Act 2016*, the *Environmental Protection Act 1994*, and *Food Act 2006*.
- 1.2. Approach.** Council's approach to its significant regulatory responsibilities is based on promoting voluntary compliance and deterring non-compliance. Council is committed to discharging its regulatory responsibilities in a manner that is lawful, ethical, fair, efficient, consistent and customer focused. In discharging its responsibilities, Council uses a suite of regulatory tools, including education, incentives, licensing, auditing and enforcement in an integrated manner. Council actively pursues partnerships with industry and the community which facilitate beneficial outcomes for the city and residents. Where enforcement action is required, Council's response will be proportionate to the severity of the non-compliance.
- 1.3. Cooperation.** Council encourages voluntary disclosure and cooperation in the interests of minimising harm to the environment, health, safety and amenity of Brisbane
- 1.4. Purpose.** The purpose of this policy is to provide an understanding of how Council ordinarily exercises the discretion to prosecute. Whilst this policy is not legally binding on Council and does not confine or limit Council's discretion to take any action, it will only depart from this policy where such departure is warranted in the public interest.
- 1.5. Independent Advice.** This policy is not a substitute for obtaining independent legal advice.

## 2.0 GENERAL PRINCIPLES

- 2.1. Principles.** Set out below are the general principles Council adopts in relation to the institution and conduct of prosecutions for alleged offences of specified legislation. Regard is had for:
- (a) **Internal Guidelines.** Relevant internal guidelines about the discharge of Council's regulatory roles and responsibilities including:
    - (i) The setting and monitoring of standards;
    - (ii) The conduct of investigations into alleged offences;
    - (iii) Options to redress the effects of alleged offences; and
    - (iv) The taking of enforcement action other than prosecution.
  - (b) **Commensurate Response.** Whether the proposed prosecution is a commensurate response to the alleged offence, the damage caused as a result of the unlawful act (or failure to act) and any adverse impact on members the community.
  - (c) **Consistency.** The need for consistency of approach where possible in relation to similar types of alleged offences.

- (d) **Transparency and Fairness.** The need to ensure the case is presented properly and with fairness to the alleged offender. Council is entitled to act firmly when serious breaches are detected, but this authority is tempered by the need to provide information to enable the alleged offender to understand:
  - (i) Council's expectations;
  - (ii) The actions required to remedy an alleged offence;
  - (iii) The circumstances where prosecutions will be taken;
  - (iv) The rights of the alleged offender to defend a prosecution.
- (e) **Responsibility.** Prosecutions are taken against those who are legally responsible for the alleged offence and those who are best placed to control it.
- (f) **Achieving Outcomes.** Commencing prosecutions that are likely to be most relevant to achieving the outcomes envisaged by the specified legislation.

### 3.0 THE DECISION TO PROSECUTE

- 3.1 **Purpose.** Prosecution is an important part of the enforcement process. It aims to punish wrongdoing, to avoid a recurrence by the offender and to act as a deterrent to others.
- 3.2 **Other Enforcement Tools.** Prosecution may be appropriate to consider instead of or in conjunction with other enforcement tools. These may include warning notices, infringement notices, statutory notices and remediation orders. Voluntary actions taken or covenants made by the offender to mitigate damage and prevent recurrence will also be considered in determining appropriate enforcement action.
- 3.3 **No Warning.** Where circumstances warrant it, prosecution without prior warning or recourse to alternative actions will be undertaken. Circumstances may include for example:
  - (a) A previous conviction for a similar offence;
  - (b) The public interest requires a prosecution be undertaken.
- 3.4 **Proper Consideration.** Council recognises that the institution of a prosecution is a serious matter that should be undertaken only after proper consideration of the implications and consequences.
- 3.5 **Sufficiency of Evidence to Prosecute.** Council will not commence or continue a prosecution unless it is satisfied that there is sufficient admissible and reliable evidence that the alleged offence has been committed. There also needs to be a realistic prospect of a conviction against the person or corporation nominated in the complaint and summons.
- 3.6 **Discretion to prosecute.** Where the evidence meets the sufficiency test outlined in paragraph numbered 3.5 above, Council still retains the discretion as to whether it will proceed to prosecution.

**3.7 Public Interest.** Council recognises that where a discretion to prosecute exists, the dominant factor in exercising that discretion is the public interest.<sup>1</sup>

**3.8 Determining the Public Interest.** So far as they are relevant to the alleged offence and so far as they are reasonably ascertainable at the time of exercising the discretion to prosecute, Council will consider a range of factors in determining public interest, including the following:

- (a) The seriousness of the alleged offence and its likely impact on the environment and the community;
- (b) The foresee-ability of the alleged offence and the circumstances leading to it;
- (c) The intent of the alleged offender, individually and/or corporately;
- (d) The attitude of the alleged offender and cooperation during the investigation phase;
- (e) Measures taken by the alleged offender to prevent the alleged offence from occurring;
- (f) Measures taken by the alleged offender to minimise the impact of the alleged offence;
- (g) History of previous compliance;
- (h) History of offending;
- (i) The effectiveness and deterrent effect of enforcement action other than prosecution;
- (j) Disregard for relevant standards and guidelines;
- (k) Failure to supply information without reasonable excuse;
- (l) Knowingly supplying false information;
- (m) Obstruction of Council staff;
- (n) The deterrent effect of a prosecution on the alleged offender and others;
- (o) The personal circumstances of the alleged offender;
- (p) Mitigating or aggravating circumstances;
- (q) The potential for remedial action, restitution or compensation;
- (r) Trivial or technical nature of the alleged offence;
- (s) The extent to which the alleged offender or its executive officers was able to control and/or influence the employees or contractors who may have

<sup>1</sup> This is a well-established principle of law and has been enunciated in the Director's Guidelines of the Queensland Office of the Director of Public Prosecutions.

perpetrated the alleged offence;

- (t) Any entitlement or liability of a victim or other person to criminal compensation, reparation or forfeiture if prosecution action is taken;
- (u) The prevalence of the particular offence;
- (v) The need to maintain public confidence in the administration of justice by Council;
- (w) The resource implications and costs of undertaking the prosecution.

Council will consider options other than prosecution if they will be more effective in achieving the objectives of the legislation being administered and are in the public interest.

- 3.9 Not Exhaustive.** The factors set out in paragraph 3.8 above are not intended to be exhaustive and those factors that are deemed relevant will necessarily depend on the particular circumstances of each case.
- 3.10 Overall Assessment.** Deciding on the public interest is not simply a matter of adding up the factors on each side. Council officers will decide how important each factor is in the circumstances of each case and go on to make an overall assessment.
- 3.11 Defence.** Council will also have regard to any lines of defence which are plainly open to or have been indicated by the alleged offender and any other factors which would in Council's view affect the likelihood or otherwise of securing a conviction.
- 3.12 Impartiality and the Purpose of Prosecution.** Council adopts the overriding principle that a prosecution must not be instituted (or not instituted) for improper purposes. A decision whether or not to prosecute will not be influenced by:
- (a) Any elements of discrimination against the person such as ethnicity, nationality, political associations, religion, sex or beliefs;
  - (b) Personal feelings towards the alleged offender;
  - (c) Possible political advantage or disadvantage to a government, or any political group or party, or individual;
  - (d) The possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision;
  - (e) The possible effect of the decision on the personal or professional circumstances of those the subject of the prosecution (unless as part of the consideration of the public interest test).
- 3.13 Presentation of Facts.** Once a decision has been made to prosecute, Council must present facts fairly and impartially to the Court.
- 3.14 Council's interest in Prosecution.** Council should have no interest in securing a conviction, other than to ensure that the right person is convicted, that the truth is known and that justice is done (Rule 29.1 Australian Solicitors Conduct Rules, and *R v Hay and Lindsay* (1968) QdR 459 at 476 and the Queensland Barristers Rules).

**3.15 Sentencing.** In making sentencing submissions, Council must ensure that it provides complete and accurate information on likely penalties including material both favourable and unfavourable.

#### 4.0 SELECTING THE APPROPRIATE DEFENDANT

**4.1 Selection.** Prosecution will be considered against all persons responsible for the alleged offence. In making the decision as to who will be prosecuted, the following general considerations apply:

- (a) Who was primarily responsible for the alleged offence - that is who committed the act, who formed the intention and who created or allowed the material circumstances leading to the breach;
- (b) Who benefits from carrying out the activity that gave rise to the alleged offence;
- (c) Who had the control of the premises or the site and was able to develop and implement management systems to ensure compliance;
- (d) Where a person is liable because the law creates strict liability, what was the role of the potential defendant;
- (e) The likely effectiveness of court orders against the potential defendant;
- (f) The objects of the governing legislation.

**4.2. Prosecuting Companies Generally.** Where a company is involved, it will be usual practice to prosecute the company where the offence resulted from that company's activities.

**4.3 Prosecuting Company Officers.** Council will also consider any part played in the alleged offence by the officers of the company including directors, managers and company secretaries. Factors to be considered in determining whether prosecutions will be instituted against the officer include:

- (a) Whether the alleged offence was committed with the consent (express, implied or ostensible) of the officer or due to the officer's neglect and/or recklessness;
- (b) Whether the officer turned a "blind eye";
- (c) Whether the company has a history of offending.

This principle may be departed from where specific legislation applies a stricter liability than as stated above.

**4.4 Prosecuting Employees.** Council will not ordinarily prosecute employees of companies acting under orders, except where the employee is culpable.

To ascertain culpability, the following factors will be considered:

- (a) Whether the employee knew or should have known that the activity was illegal;
- (b) Whether the employee feared loss of livelihood if they did not continue acting in breach of the legislation;



- (c) The seniority of the employee and the scope of the employee's work duties;
- (d) Whether having regard to the above whether the employee had taken reasonable steps to draw the attention of the employer or an appropriate person to the illegality of the practice;
- (e) The officer was not in a position to influence the conduct of the person to the illegality of the practice;
- (f) Whether the employee has taken reasonable steps to mitigate or prevent any harm.

## 5.0 INFORMATION ABOUT A PROSECUTION

- 5.1 Requests for Information.** Council will provide a timely response to requests for *information* about a prosecution within the rules which apply to the proceeding and in accordance with the requirements of applicable legislation.
- 5.2 Confidentiality.** Council officers will take the utmost care not to disclose confidential information other than in accordance with and as permitted by legislation, and having regard to Brisbane City Council privacy policies.

## 6.0 SPECIFIED LEGISLATION

### 6.1 Companies and Individuals

- (a) The *Environmental Protection Act 1994*, the *Sustainable Planning Act 2009*, the *Food Act 2006* and other legislation impose liability on corporations as well as individuals.<sup>2</sup>
- (b) Where an alleged offence is committed by employees, agents or officers of a corporation in the course of their employment, proceedings will usually be commenced against the corporation.
- (c) Where, however, the alleged offence has occurred because an employee, agent or officer of the corporation has embarked on a venture of their own making or volition, and outside of the scope of their employment, proceedings may be instituted against the individual employee, agent or officer.
- (d) These proceedings may be either in substitution for or in addition to proceedings against the corporation.

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<sup>2</sup> SPA s.624, EP Act s.492

## 6.2 Liability of Directors and Executive Officers for acts of corporations

- (a) The *Environmental Protection Act 1994* and the *Sustainable Planning Act 2009*<sup>3</sup>, the *Food Act 2006* and other legislation recognise that while corporations are legal entities, nevertheless it is the executive officers who represent the directing mind and will of the corporation and control its activities.
- (b) Executive officers have an obligation to ensure that the corporation complies with statutory requirements.
- (c) If a corporation commits an alleged offence against a statutory provision each of the corporation's executive officers commits the alleged offence of failing to ensure that the corporation complies with the provision.
- (d) Council will institute proceedings under the executive officer liability provisions only where evidence links the person with the corporation's illegal activity.

## 6.3 Defences to Executive Officer Liability

- (a) The law provides defences to executive officer/representative liability where:
  - (i) The officer was not in a position to influence the conduct of the corporation in relation to the alleged offence; or
  - (ii) The officer was in a position to influence the corporation's conduct in relation to the alleged offence; and
  - (iii) The officer exercised reasonable diligence to ensure the corporation complied with the relevant legislation.
- (b) Council will have regard to the following considerations in determining whether to prosecute:
  - (i) The corporation has a compliance system in place which identified statutory requirements and approval conditions;
  - (ii) All staff, agents and officers of the corporation were aware of the system;
  - (iii) The system had been effectively implemented throughout the corporation and across all sites under the control of the corporation, so that there is an effective translation of those systems to its various sites subject to the specified legislation;
  - (iv) The system was under regular review and was amended where necessary.
- (c) Council will not ordinarily prosecute Executive Officers for a corporation's first offence unless there is strong evidence that the relevant officers were complicit in that offence.

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<sup>3</sup> SPA s.611, EP Act s.493

#### 6.4 Vicarious Liability of Persons and Corporations for Acts of Agents and Contractors

- (a) Under the *Sustainable Planning Act 2009*, *Environmental Protection Act 1994* and the *Food Act 2006* a person or corporation is made vicariously liable for the actions of its officers, employees or agents, if those actions are done within the scope of their actual or apparent authority.
- (b) The law provides a defence to vicarious liability where the representative took all reasonable steps to prevent the offending acts or omissions.
- (c) Council will not capriciously or arbitrarily seek to enforce this vicarious liability unless it is satisfied that it has made it clear to the affected persons or corporations what standards of reasonable diligence it would require to decide not to prosecute.
- (d) In determining whether to prosecute for an alleged offence caused by the action of a contractor or agent Council will consider:
  - (i) Specific statutory obligations;
  - (ii) The chapter 2 provisions of the *Criminal Code Act 1899* governing parties to an offence;
  - (iii) Evidence of control of the site or premises where the alleged offence occurred;
  - (v) The person who obtained the relevant approval, accepted its conditions and benefits from carrying out the activity that gave rise to the alleged offence;
  - (vi) Whether the corporation was in the position to influence the contractors or agent's conduct, then the corporation exercised reasonable diligence or took reasonable steps to ensure that the contractors complied with the relevant legal requirement.
- (e) Council will have regard to the following considerations in determining whether to prosecute:
  - (i) Whether the corporation had a compliance system in place which identified statutory requirements and approval conditions;
  - (ii) Whether all staff, agents and officers of the corporation were aware of the compliance system;
  - (iii) Whether the compliance system had been effectively implemented throughout the corporation and across all sites under the control of the corporation, so that there is an effective translation of the system to its various sites;
  - (iv) Whether the compliance system was under regular review and was amended where necessary.
- (f) However Council has a legitimate expectation that any party seeking to invoke a reasonable diligence defence will take positive steps to advise the details of that defence as soon as possible if it wishes to avoid prosecution.

- (g) Council will not ordinarily prosecute persons or corporations (or officers of that corporation) under the vicarious liability provisions, if this is the first alleged offence for the agent or contractor unless there is strong evidence that the relevant persons, corporation or officers were arguably complicit in that offence.

## 7.0 PROSECUTION DELEGATIONS

- 7.1 Independence.** Council exercises its prosecutorial function independently of the investigatory function. This is ensured by prosecution briefs being referred to Brisbane City Legal Practice for advice on whether the evidence supports a charge being initiated or continued.
- 7.2 Initiating Prosecutions.** The Manager Compliance and Regulatory Services, Brisbane Lifestyle is the Officer delegated the power to make decisions to initiate prosecutions under this Policy including the Specified Legislation and will initiate prosecutions after consulting with the Chief Legal Counsel, Brisbane City Legal Practice.
- 7.3 Conducting and Finalising Prosecutions.** Brisbane City Legal Practice will undertake and finalise prosecutions referred under Section 7.1 upon receiving the instructions of the Manager Compliance and Regulatory Services.
- 7.4 Consultation.** In exercising prosecutorial functions under this Policy, the Chief Legal Counsel, Brisbane City Legal Practice and the Manager Compliance and Regulatory Services will:
- (a) Comply with this Policy;
  - (b) Consult with relevant areas of Council that have an interest in the issues the subject of the prosecution;
  - (c) Have regard to relevant legislation, local laws, planning instruments and standards as well as Council Policies and Procedures that govern the issues the subject of the alleged offences;
  - (d) Seek to ensure consistency of approach and strategy with regards to prosecutions.
- 7.5 Charge Negotiation.** In determining whether a plea to a lesser offence, or to part of a complaint only can be accepted, relevant factors may include the following:
- (a) Whether the public interest is better served or satisfied, having regard to the evidence available to support the complaint, the resources required to obtain further evidence and the difficulty of obtaining further evidence;
  - (b) Whether the plea reasonably reflects the offending conduct and serves as an appropriate basis for sentencing;
  - (c) Whether the ordeal associated with giving evidence for special or vulnerable witnesses may reasonably be avoided;
  - (d) Whether the cost savings to the community of finalising the prosecution without the need for the expense of a trial weigh in favour of accepting the plea;

- (e) Whether acceptance of the plea would distort the facts disclosed by the available evidence and result in an artificial basis for sentence; and
- (f) Whether the accused person intimates that he or she is not guilty of any offence.

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**AUTHORITY**

Council - last reviewed, amended, approved by resolution of Council 3 May 2011

**POLICY OWNER**

Manager Compliance and Regulatory Services

**FURTHER ASSISTANCE**

Principal Officer  
City Safety Enforcement and Legislation

**RELATED INFORMATION**

Director's Guidelines: Office of the Director of Public Prosecutions (Queensland)  
<http://www.justice.qld.gov.au/justice-services/justice-agencies/office-of-the-director-of-public-prosecutions>

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