

Penrith City Council  
**COMPLIANCE AND ENFORCEMENT GUIDELINES**

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# PART 1

## Compliance and Enforcement Options

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### 1. Introduction

Penrith City Council is an enforcement authority and its Officers are required to make decisions and use discretion about appropriate enforcement action when non-compliant issues are identified.

Council also has a responsibility under Section 8 of the Local Government Act 1993 to ensure that its regulatory activities are carried out in a consistent manner and without bias.

Council's regulatory and enforcement actions should be exercised to ensure the health, safety and environmental protection of all stakeholders including residents, visitors, workers and business operators. All stakeholders should have confidence in the decision making and internal review processes.

These guidelines are based on NSW Ombudsman Enforcement Guidelines December 20-15 and have been adapted for use by Penrith City Council as a supporting document to its Compliance and Enforcement Policy.

The information in this document provides additional guidance on:

- responding to allegations of unlawful activity
- choosing options after an investigation
- using discretion
- taking enforcement action
- deciding on prosecution action
- preventing unlawful activity, and
- conducting enforcement investigations.

### 2. Responding to allegations of unlawful activity

#### **2.1 What is 'unlawful activity'?**

For the purposes of these guidelines, 'unlawful activity' is any activity or work that has been or is being carried out:

- contrary to the terms or conditions of a development consent, approval, permission or licence
- contrary to an environmental planning instrument that regulates the activities or work that can be carried out on particular land
- contrary to a legislative provision regulating a particular activity or work
- without a required development consent, approval, permission or licence.

In summary, unlawful activity is any activity or work that is:

- contrary to the terms and conditions of consents, construction certificates, approvals, licences, planning instruments or applicable legislation
- illegal, whether prohibited or merely unauthorised.

These guidelines are primarily directed at the regulation of development activity. However, they are applicable to other regulatory activities such as pollution control, public health and control over keeping animals.

## **2.2 Recording and acting on allegations of unlawful activity**

The public are an important source of information on possible unlawful activity. When councils receive a report or a complaint about unlawful activity, they must make a full and proper record of the complaint.

The key elements of an effective complaint handling system are:

- accessibility: to both members of the public and people subject to regulation
- simplicity: this is particularly important with complaint handling in the enforcement area because many councils use a single system for complaints and work requests
- responsiveness: ideally reflected in standards of service
- fairness
- objectivity
- commitment: to taking complaints seriously
- visibility
- record-keeping: making and keeping full and accurate records.

Council has established systems for recording and acting on complaints. Important features of these systems include:

- Recording a complainant's details on a central register. This record should include the complainant's name, address and telephone number, and the details and location of the activity or work.
- Allocating the complaint to a particular staff member for appropriate action to be completed within specified turnaround times.
- Informing complainants about the council's rights and obligations regarding confidentiality and checking whether they would be willing to be a witness.
- Examining the zoning of the site and deciding if the activity or work is prohibited, permissible with consent or permissible without consent.
- Examining the consent history for the site and determining prima facie if the activity or work is permissible and, if so, whether council records show that any works or activities have been or are being carried out in accordance with all conditions of consent. Inspecting the site and trying to interview the owner/operator if there is prima facie evidence of unlawful activity or works.

- Assessing the matter and recommending appropriate enforcement action if there is evidence of unlawful activity or works.
- Initiating informal enforcement action, usually starting with letters directing that the activity cease or the work be rectified.
- Reviewing the effectiveness of the initial enforcement action and proceeding, if appropriate, with formal enforcement action by issuing a relevant notice.
- If the unlawful activity ceases or the work has been rectified.
- Informing the complainant of the outcome of the investigation or other action taken.

### **2.3 Determining when an investigation is warranted and the nature of that investigation**

Correctly identifying or categorising the nature of the complaint will help you to decide how you should deal with it.

Not every complaint will require an investigation. Many complaints can be resolved informally by providing prompt and accurate advice. This could be, for example, by confirming that a consent is in place for an activity or work or that it is permissible without consent.

Any decision not to investigate an allegation of unlawful activity needs to be recorded and the reasons for that decision clearly stated.

When deciding whether a complaint requires investigation, you need to consider a range of factors.

- Is the matter within the jurisdiction of the council?
- Is the matter premature e.g. does the complaint relate to some unfinished aspect of works that are still in progress?
- Is the activity or work permissible with or without consent?
- If the work is permissible with consent, is there a 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 conditions of consent 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?
- Is there another body that is a more appropriate agency to investigate or deal with the matter?
- Is the activity having a significant detrimental effect on the environment or does it constitute a risk to public safety?
- Does the complaint indicate the existence of a systemic problem e.g. if a 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?
- Does the complaint have special significance in terms of the council's existing priorities?
- Are there significant resource implications in relation to an investigation and any subsequent enforcement action?
- How is the public interest affected?

It is not open to councils to decide not to conduct an investigation on the basis that they can rely on the results of an investigation conducted by some other body. Councils must satisfy themselves about the facts of the case and independently assess the need for action. There may be procedural fairness implications if decisions are based only on the findings of an inquiry by another tribunal or investigative agency.

For more information about procedural fairness, see the NSW Ombudsman's publication *Investigating Complaints: A Manual for Investigators* ([www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)).

Complaints that seem to involve ill will, vengeance or vindictiveness should not be immediately dismissed. Although a complainant's motive may cloud their judgment and flavour the complaint, the complaint may still be well founded.

If the council receives an anonymous complaint, or the complainant subsequently withdraws the complaint, the allegations should still be investigated if the subject matter of the complaint is sufficiently serious and there are other avenues of inquiry reasonably available. However, you need to remember that evidence will not be available from the complainant.

#### **2.4 Risk categorisation in initial assessments**

Answering the set of initial assessment questions will also assist council staff to assign appropriate risk categories to individual matters. A triage or rating system for common non-compliance incidents, such as, critical, high, medium and low will help with prioritising action. This will assist with managing people's expectations and allocating resources.

The following table of risk categories and examples is reproduced from HCCREMS' *Guideline Managing Reports of Non-compliance* (2012).

**Table 1. Example Risk Categories**

RISK CATEGORY		
HIGH	MEDIUM	LOW
<b>FEATURES OF CATEGORY</b>		
Matters likely to cause significant risk or harm to the environment and/or public safety (i.e. likely to cause serious and irreversible impacts).	Matters likely to cause moderate risk of harm to the environment and/or public health and safety (i.e. impacts of concern that need to be controlled or mitigated).	Matters likely to cause minimal risk of harm to the environment and/or public health and safety (i.e. low impact, reversible and easily mitigated).
<b>INDICATIVE TIMEFRAME OF INITIAL RESPONSE</b>		
Immediately or within 48 hours	Response within 15 working days	Response within 20 working days
<b>EXAMPLE REPORT TYPES/ISSUES</b>		
<p>Large scale/major pollution incidents</p> <p>Serious public health issues such as food poisoning outbreaks and Legionnaires cases</p> <p>Dangerous Dog attacks, straying stock</p> <p>Clearing or removal of significant trees and vegetation</p> <p>Abandoned vehicles in unsafe locations</p> <p>Collapsed or unsafe building works adjacent to public areas</p> <p>Poor sediment control on building sites</p> <p>Swimming pool with no fence or barrier</p> <p>Significant fire safety issues</p> <p>Urgent asbestos removal</p> <p>Demolition or damage to a heritage item</p> <p>Sewer leaks and overflows</p> <p>Large scale unauthorised landfilling and waste disposal</p>	<p>Roaming dogs, animal registration and general companion animal enquiries</p> <p>Abandoned motor vehicles</p> <p>Minor pollution incidents air, noise, odour and water quality</p> <p>Breaches of Vegetation Permits</p> <p>Swimming pool with non-compliant fence or barrier</p> <p>Commercial or industrial air and noise complaints</p> <p>Food premises complaints e.g. health and hygiene, condition of premises, suspected food poisoning</p> <p>Public Health complaints e.g. condition of swimming pools and spas, skin penetration premises, cooling towers</p> <p>Significant unauthorised / non complying building and land use matters</p> <p>Unauthorised building works where a Private Certifier is appointed</p> <p>Minor landfilling, or rubbish dumping</p> <p>Footpath obstructions</p> <p>On-site Sewage Management Systems failures</p> <p>Reserve encroachments</p> <p>Boarding houses</p> <p>Overland stormwater flow caused by non-complaint works</p>	<p>Barking dogs</p> <p>All other animal related enquiries</p> <p>Domestic noise complaints (power tools, air conditioners, pool pumps, amplified music)</p> <p>Overgrown land</p> <p>Accumulation of rubbish or material on land</p> <p>Home business/home occupation</p> <p>Minor unauthorised /non complying building works (criteria)</p> <p>Smoke nuisance from domestic wood heaters, outdoor BBQ's, burning prohibited items</p> <p>Illegal Parking</p>

## **2.5 Deciding if you need more information**

Before deciding how a complaint should be dealt with, you may need to question the complainant more closely about their allegations and any evidence they have or can point to which supports their allegations.

It is important to remember that a complainant may be under considerable strain. They may react badly to a line of questioning that gives the impression that you are sceptical about their initial complaint.

Some complainants may prefer you to contact them on a home or other telephone number. This will depend on the nature of the matters alleged and the preference of the individual complainant.

## **2.6 The role of the investigating officer**

The investigator is responsible for finding out all the relevant facts about a complaint. This task must be done in an impartial, independent and objective manner. The role and functions of an investigator are quite distinct from those of a mediator, conciliator or adviser. However, a good investigator will be able to adopt these roles when appropriate to satisfactorily respond to certain complaints.

In certain circumstances, matters should be referred to an appropriate external agency or other third party for investigation or action. For example, you should refer a complaint if:

- it concerns possible criminal conduct or serious corruption and the council is unlikely to have adequate powers or expertise to investigate
- it is particularly complex or sensitive and there is an appropriate alternative agency (such as the Environment Protection Authority) with jurisdiction to investigate the matter
- the subject of the complaint is the council itself or a senior manager of the council and the investigation therefore needs to be impartial.

For more detailed information about conducting enforcement investigations, please see Part 2 of these guidelines.

## **3. Choosing options after an investigation**

There are a range of possible outcomes at the end of an investigation.

Most commonly, Council itself will decide whether or not to pursue formal legal action. Another possible outcome may be for the complaint to be referred to an external agency for further investigation or prosecution. There are also a number of alternative approaches that should be considered. For example, you could decide to:

- take no action on the basis of a lack of evidence or some other appropriate reason
- counsel the person investigated to educate them on the relevant council requirements

- negotiate with the subject of the investigation and obtain some undertakings to address the issues of concern arising from the investigation e.g. lodgement of a development application or an application for modification of development consent
- issue a letter requiring work to be done or activity to cease in lieu of more formal action
- issue a notice of intention to serve an order or notice under relevant legislation, and then serve an appropriate order or notice (*Local Government Act* (LG Act) ss.124-128, *Environmental Planning and Assessment Act* (EPA Act) s.121B)
- issue a notice requiring work to be done under various legislation
- take proceedings in the Land and Environment Court for an order to remedy or restrain a breach of the relevant Act or Regulation (s.673 LG Act, s.123 EPA Act)
- seek injunctions from the Land and Environment Court or the Supreme Court
- issue a summons in the local court
- take proceedings for an offence against the relevant Act or Regulation (s.691 LG Act, s.125 EPA Act, Ch 5 PoEO Act)
- carry out the works specified in an order under the LG Act at the cost of the person served with the order (s.678 LG Act)
- issue a penalty notice (s. 679 LG Act, s127A EPA Act, Ch 8 PoEO Act).

## 4. Using discretion

Councils have discretion in deciding whether to take enforcement action in response to evidence of unlawful activity. Councils exercise this discretion in the context of their broad regulatory responsibilities for the administration of justice and the enforcement of the law.

The use of discretion was covered in the judgement of the NSW Court of Appeal in *Ryde City Council v Echt and Anor* [2000] NSWCA 108. The following is a summary of some of the key issues:

- While the council in question had a responsibility to enforce the law, this does not mean that there is a legal obligation to act or a statutory power which is enforceable at the insistence of a third party.
- Statutory bodies, and those exercising the prerogatives of the Crown, which have responsibility for the administration of justice and the enforcement of the law may choose not to enforce the law in particular circumstances or at all.
- A repository of a statutory power may commit a relevant legal error by failing to turn his or her mind to the exercise of that power.

The issue was also considered by McHugh J in the judgement of the High Court in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* [1998] HCA 49. McHugh J noted that:

There are sometimes very good reasons why the public interest of a society is best served by not attempting to enforce a particular law. (para 83)

Attorneys-General have long taken the view that the institution of legal proceedings is not justified simply because there is prima facie evidence of a breach of the law. (para 85)

The decision when and in what circumstances to enforce public law frequently calls for a fine judgement as to what the public interest truly requires. (para 86)

The NSW Director of Public Prosecutions (DPP) states in its *Prosecution Guidelines (section 4 The Decision to Prosecute)* that the question of whether or not the public interest requires that a matter be prosecuted is resolved by determining:

- whether or not the admissible evidence available is capable of establishing each element of the offence
- whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed, and if not
- whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

#### **4.1 Requirements for discretionary decisions**

Like any discretionary decision, there are several important requirements that councils must observe for the decision to be lawful.

- The power must be used for a proper purpose i.e. within the scope and purpose for which the power was given.
- The decision-maker must give proper, genuine and realistic consideration to the merits of the particular case.
- The decision-maker must consider only relevant considerations and must not consider irrelevant considerations in reaching a decision i.e. the decision must not be manifestly unreasonable.
- The decision-maker must give adequate weight to a matter of great importance but not give excessive weight to a relevant factor of no great importance.
- The decision-maker must not exercise a discretion in a way that is so unreasonable that no reasonable person could have exercised the power.
- The decision-maker must not make a decision that is arbitrary, vague or fanciful.
- The decision-maker must exercise a discretion independently and not act under the dictation or at the behest of any third person or body.
- The decision-maker must not fetter its discretion by, for example, adopting a policy that prescribes its decision-making in certain circumstances.
- The decision-maker must observe the basic rules of procedural fairness i.e. natural justice.
- The decision-maker must not act in a way that is biased or conveys a reasonable perception of bias.

## 5. Taking Enforcement Action

There are a range of considerations that councils need to take into account when deciding whether or not to take enforcement action.

### **5.1 Is there an estoppel?**

Estoppel is a legal rule which prevents a person from later denying conduct or words which have been relied, and acted, upon by another person to their detriment.

The issue is whether the conduct of the council could lead to an expectation that it will not take action in a particular circumstance or that it is not concerned about the conduct in question. For example:

- Has the owner/occupier previously been notified that the council would not be taking action?
- Has the matter previously been brought to the attention of the council yet no action taken?
- Has the council contributed to the owner/occupier acting upon a reasonable expectation that no action would be taken?

### **5.2 Is the breach a technical breach only?**

A breach of a technical condition or inconsequential changes to approved plans during construction, in the absence of any other aggravating factor, will generally not warrant a decision to take action to remedy or restrain the breach.

You need to consider whether there are any material implications to the interests of any party or any detrimental affect on the amenity of the area or the environment generally.

### **5.3 When was the unlawful activity carried out and for how long?**

Time limits frequently apply and sometimes prosecution will be statute barred despite good evidence that unlawful activity has taken place.

Courts generally look unkindly on delays in taking action to prevent or prohibit unlawful activity, so evidence of a council's failure to take action in the required time may be an obstacle to successful prosecution.

Whether the offending activity is ongoing or has ceased will also be a relevant consideration.

### **5.4 How has the unlawful activity affected the natural or built environment and the health, safety and amenity of the area?**

If there is actual or potential detriment to the natural or built environment, to the health or safety of residents or the amenity of an area, this would normally warrant a decision to take action to remedy or restrain the breach.

Examples of situations where there is a significant risk of detriment include serious noise, air or water pollution, unsafe building work (especially occupied buildings), dangerous dogs, seriously unhealthy food premises and detriment existing in or threatening any public place. Other

examples will be matters which are specifically negotiated by a council at DA stage to address neighbourhood amenity issues and community concerns. The issue you need to consider is the degree of detriment or risk to the environment.

There may also be cases where the unlawful activity will have a positive or beneficial impact on the environment or amenity of the locality.

### **5.5 Would consent have been given if it had been sought?**

In the absence of aggravating circumstances, a council should be less inclined to proceed with legal action if the unlawful activity could be carried out lawfully if consent had been sought. In these circumstances, you might consider deferring action to allow the owner time to lodge an application for assessment.

Similarly, if an unauthorised use comes to the council's attention only because the owner has sought approval, it is reasonable to defer action until the application is determined. If an owner actively and positively attempts to regularise an unauthorised use by lodging an application, you should take this conduct into account in determining whether to take action against them.

However, if there has been a blatant attempt to flout the law or the person is just using the application process as a delaying action, deferral would not be appropriate.

The following cases support the proposition that carrying out unauthorised work generally does not prevent a council from considering a subsequent application for a building certificate on its merits. The cases are *Kouflidis & Ors v City of Salisbury* (1982) 29 SASR 321; 49 LGRA 17; *Longa v Blacktown City Council* (1985) 54 LGRA 422; *Ireland v Cessnock City Council* (1999) 103 LGERA 285.

Also in *Windy Dropdown Pty Ltd v Warringah Council* (2000) 111 LGERA 299, the court held that it was open to a council to modify an existing development consent to grant consent to works that had already been carried out. This case, however, remains untested on appeal.

Section 96(2) of the EPA Act restricts modification to circumstances where the development is essentially the same development as the development for which consent was originally granted.

### **5.6 Can any unauthorised works or failure to comply with conditions be easily remedied?**

If there is evidence of a significant issue of non-compliance and that matter can be easily remedied by some action on the part of the person the subject of the complaint, there is a less compelling case for enforcement action.

An example would be if, because of a measurement error, the parking spaces available in a development are insufficient to comply with the approval. Strict compliance might involve further excavation or be impossible due to site constraints and subsequent works. In such a case, other options might be considered to remedy the breach such as a monetary contribution or the provision of off-site spaces to make up the shortfall. These options would achieve the council's objective in imposing the condition while still permitting the development to proceed without prejudicial expense and delay.

There is a need to balance the public interest in enforcing the law with whether it is possible to remedy a breach and, if so, how expensive and inconvenient this would be. Discretion may be more readily used in the case of a static development (such as when a building has already been erected) rather than when there is a continuing, easily remedied breach. However there are no hard and fast rules and it is important that discretion is exercised on a case by case basis.

### **5.7 Does the person the subject of the complaint show due contrition?**

In some cases, the person the subject of the complaint will have acted appropriately by acknowledging their wrongdoing and submitting to the rule of law. In such cases, it may be that the public interest would not be best served by prosecuting the offender, especially if the offending conduct or work has been remedied.

### **5.8 Are there any particular circumstances of hardship affecting the complainant or the person the subject of the complaint?**

If the offending activity is minor and primarily offends a private interest rather than the general amenity of the area, a council should not take action where an appropriate alternative remedy, such as civil action, is available to the complainant. However, if the matter falls within the council's jurisdiction and there are particular hardship factors that make it unreasonable to expect the complainant to pursue alternative redress, it may be appropriate for the council to intervene.

Similarly, if enforcement action would cause particular hardship to a person the subject of the complaint and the impact of the unlawful activity is not otherwise severe, the council may consider taking informal action or taking no action. For example, if action in relation to a particular breach would impede progress of a major development and seriously prejudice the rights of the developer in terms of delays and costs, you should consider whether there are acceptable alternatives to enforcement action.

### **5.9 Are there existing use rights?**

Hardship may also be caused to the person the subject of the complaint if the onus of proof is difficult or impossible to discharge. For example, the onus at law to prove existing use rights falls upon the person asserting that right. If an existing use is long established, say over 20 years, it may not be reasonable to require the owner to produce documentary evidence of the use at a particular date if, for example, the business has changed hands several times or fire/flood has destroyed documents.

A heavier responsibility may fall upon the person asserting an existing use right to prove the existence of that right in relation to larger scale developments and those with significant environmental impacts such as sand mining.

### **5.10 Has the person the subject of the complaint received a previous warning or other non-coercive approach or been previously the subject of formal legal action?**

It is essential that councils continue to monitor situations where they decide not to take formal enforcement action despite evidence of unlawful activity. If monitoring reveals that the unlawful activity is not resolved or you receive fresh complaints, then a more formal and coercive approach would appear more appropriate.

### **5.11 Would an educative approach be more appropriate than a coercive approach?**

When deciding to take an educative rather than a coercive approach, you need to consider issues such as the level of contrition shown by the subject of the complaint, whether they have previously been warned or dealt with as a result of this or similar behaviour, and the level of intent shown.

### **5.12 What are the chances of success if challenged?**

A council can validly take into consideration the likelihood that a court challenge to the contemplated action would be successful. In such situations, you would need to identify the causes of that likelihood and address them in the particular case or as a general issue.

### **5.13 What are the relative costs and benefits of taking formal enforcement action as opposed to taking no action or taking informal action?**

Legal proceedings can be expensive and cost prohibitive. When doing a cost/benefit analysis, you should assess costs and benefits broadly and remember to consider indirect costs and benefits. For example, the indirect cost of taking no action is that broader levels of compliance may fall and there may be a general increase in the demands on the council to intervene. Conversely, the indirect benefit of formal proceedings is the educative and deterrent effect of a successful prosecution.

### **5.14 Would a draft local environmental plan make an unauthorised use legal?**

If there is a draft local environment plan (LEP) on exhibition that would make the unauthorised use legal, you could consider deferring any enforcement action until after the LEP is made and the owner given time to apply for approval.

### **5.15 What about reasonableness and proportionality?**

You should always act in ways that are reasonable in the particular circumstances that apply. This includes a reasonable proportionality between the ends to be achieved and the means used to achieve them.

Where decisions are based on technical advice (e.g. engineering or legal advice), you should also make sure that non-technical issues, such as the reasonableness of the conduct and the effect of possible decisions, are not ignored.

The obligation to comply with the law does not relieve you of the moral obligation to take lawful steps to mitigate the effects of rigid adherence to the letter of the law if that results in, or is likely to result in, manifestly inequitable or unreasonable treatment of an individual or organisation.

For example, sometimes the result of enforcing one aspect of a large development may be disproportionate to the harm or damage arising from the breach. In these circumstances, you should weigh up the costs and benefits of taking enforcement action.

Considerations such as the impact of the breach on other people, whether there are other acceptable options available to address the breach, and the attitude of the developer should be assessed. If the breach is not a structural breach likely to result in an unsafe development, you might consider negotiating a settlement with the developer and resolving variations through, for example, the use of building certificates.

### **5.16 What would be in the public interest?**

While decisions to take enforcement action are discretionary and councils are generally under no legal obligation to act in any particular case, councils do have obligations to uphold the planning laws and to act in the public interest.

If planning laws are not upheld, equal justice may not be secured. Particular individuals may gain private advantages that others cannot enjoy and the environment may be damaged.

In *Parramatta City Council v Lutz* (1988) 12 NSWLR 293, Kirby P (as he then was) found that a duty of care was owed by the council to a complainant who had reported the dangerous state of a neighbouring building and relied upon the council to exercise its powers to remedy the situation.

Section 8 of the LG Act sets out guiding principles in a council's charter. These principles include:

- to properly manage, develop, protect, restore, enhance and conserve the environment of the area for which it is responsible, in a manner that is consistent with and promotes the principles of ecologically sustainable development.
- to ensure that, in the exercise of its regulatory functions, it acts consistently and without bias, particularly where an activity of the council is affected.

While there is no concise definition of the 'public interest', some of the issues you should consider are:

- Are the circumstances outlined in the complaint of unlawful activity likely to affect a significant number of people?
- Will the circumstances impact on certain population groups, particularly disadvantaged or marginalised groups e.g. elderly residents?
- Is the activity indicative of a systemic flaw — possibly the result of a deficiency in policy or procedures?
- Does the activity raise an issue that is individual in nature but occurs unreasonably often?
- Has the activity attracted sustained public controversy and no alternative resolution has been proposed or is likely?

## **6. Deciding on prosecution action**

Regardless of any other enforcement action contemplated by the council, there will be matters where you will need to consider prosecuting an offender.

You need to ask the following key questions:

### **6.1 Is there admissible evidence that establishes each element of the offence beyond reasonable doubt?**

This is the *prima facie case* test.

Is there a reasonable prospect of conviction?

This decision will be based on an evaluation of the weight of the available evidence and the persuasive strength of the Crown case, including the circumstances in which the case will be heard. It is a test appropriate for both indictable and summary charges.

### **6.2 Are there discretionary factors to be considered?**

These factors may include:

- How serious or trivial is the alleged offence?
- Is the applicable law obsolete or obscure?
- Would the prosecution be perceived as counter-productive, for example by bringing the law into disrepute?
- Is the alleged offence of considerable public concern?
- How 'stale' is the alleged offence?
- How prevalent is the alleged offence and is there any need for deterrence, both personal and general?
- Are there any effective alternatives to prosecution?
- How long and expensive would a trial be?
- What are the sentencing options available to the court if there is a guilty finding?
- Would the proceedings or the consequences of any resulting conviction be unduly harsh or oppressive?
- What is the alleged offender's degree of culpability in connection with the offence?
- Are there any mitigating or aggravating circumstances?
- Does the youth, age, maturity, intelligence, physical health, mental health or special disability or infirmity of the alleged offender, a witness or a victim need to be considered?
- Is the alleged offender willing to cooperate in the investigation and prosecution of others?
- What is the attitude of the victim and possibly the material witnesses to a prosecution?

The applicability of these factors and the weight you give them will vary widely depending on the particular circumstances of each case.

There are also several factors that should not influence a decision about prosecution action. These include:

- the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved

- the personal feelings of the prosecutor concerning the alleged offence, the alleged offender or a victim
- any possible political advantage or disadvantage to the government or any political party, group or individual
- the possible effect of the decision on the personal or professional circumstances of those involved.

Councils should always seek legal advice to help them decide whether or not to prosecute a matter. However ultimately the decision is one for the Council to make and will involve the consideration of both legal and non-legal factors. A record must always be made of the decision reached and the reasons for that decision.

## 7. Preventing unlawful activity

There are several strategies that councils can use to help prevent unlawful activity or deal with it in a more positive and cost effective way.

### **7.1 Imposing sensible and enforceable conditions**

Unlawful activity can often be traced back to the imposition of unenforceable or ineffective conditions, consents, approvals, permits or licences.

Councils can avoid or prevent the creation of all sorts of problems if they ensure that proper care and consideration is given to the development and imposition of conditions. All too often problems are caused by conditions being drafted with some overall objective in mind with little thought being given to whether the conditions are enforceable or effective. Councils need to avoid exposing themselves to the suggestion that poorly conceived conditions have been attached to a consent in an attempt to appease opposition to controversial development. This approach rarely works as it is these conditions that prove unworkable in practice and are most likely to be the subject of ongoing complaints.

To properly regulate work or activity, you must be clear about what sorts of objectives the council is trying to achieve, what aspects of the work or activity must be subject to conditions to meet those objectives, and how the attainment of those objectives can be measured. Also, applicants are more likely to comply with conditions that are sensible and workable.

When drafting conditions of consent, you should always assume that at some stage the council or an accredited certifier will be called on to enforce the conditions. This could be as part of a program of inspections or compliance audits or after complaints from members of the public.

The conditions imposed on a consent, approval, permit or licence should be enforceable, effective and timely.

#### Enforceable

- legal: in accordance with the provisions of the relevant Act or Regulation
- for the proper purpose: the purpose for which the power to impose the condition was conferred

- certain: free from ambiguity or other uncertainty
- clear: simple, understandable and free from confusion
- measurable: possible, and preferably easy, to find out whether the requirements of the condition have or are being met or breached

#### Effective

- necessary: the condition serves a good and proper purpose to achieve a reasonable objective
- applicable: the condition has been drafted to apply to the particular circumstances of the activity or work in question
- workable: the requirements of the condition are practical and can be readily implemented
- reasonable: compliance with the condition should not impose unreasonable burdens on the applicant
- clear and simple: easily understandable by members of the public.

#### Timely

- the conditions should set time limits for compliance, where appropriate.

### **7.2 Avoiding delays**

Delays in responding to complaints about unauthorised activity can result in difficulties for the council. For example, the passage of time may result in unauthorised works being further advanced and therefore more difficult to remedy or rectify.

Councils should encourage their staff (from all areas of the council's administration) to report suspicions or concerns. This will help the council respond to unauthorised activity at the earliest opportunity and therefore reduce the magnitude of the problem.

### **7.3 Keeping records of existing use rights**

Existing use rights that have been ongoing for significant periods of time may pose problems for the person asserting the existing use in satisfying the onus of proof.

Council could consider establishing and maintaining a register of existing uses to centrally record the information held by council.

### **7.4 Educating the community**

A proactive approach to preventing unauthorised uses and works should include providing information to the public about planning and building obligations, the restrictions which apply to the development of land, and when consent is required.

Think about ways to make this information more accessible to the community. For example, you could provide downloadable information on the internet such as maps, instruments and brochures, set up an advisory service or publish advice on common issues. A number of councils use recorded voice messages to give information on a range of issues to callers on hold.

It is also important to avoid unnecessary complexity in council plans and policies.

### **7.5 Taking a reasonable approach**

The rational and reasonable exercise of discretion by council will encourage people to try to resolve problems as they arise or come to notice. The blanket application of policy or law, without regard to individual circumstances, discourages the community from approaching council as they may feel the council will not act reasonably and try to resolve the matter.

### **7.6 Doing regular inspections**

Where possible schedule regular inspections of premises with a high potential for pollution, noise etc. as a means of early detection and prevention of potential problems.

### **7.7 Monitoring compliance**

Council routinely inspects premises such as food outlets, public pools, private swimming pools, skin penetration premises and regulated systems (e.g. cooling towers) to check for Legionella. Target auditing of commercial and industrial premises is also conducted from time to time.

Depending on resourcing it can be a challenge to monitor compliance with, for example, conditions of development consents. A risk assessment approach is typically used to identify which premises should be included in a program of compliance inspections. This should include a careful assessment of the key risk factors arising from the nature of activities and works carried out in the council area.

## PART 2

# Conducting Enforcement Investigations

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This section covers the key issues you need to consider when conducting an enforcement investigation.

## 8. Recognising and avoiding conflicts of interest and bias

### **8.1 Introduction**

All investigations must be conducted in an impartial and objective manner. The investigator must not have, and must not be perceived to have, any conflicts of interest in relation to the complaint, the complainant, or the people or conduct being investigated.

There can be no confidence in the outcome of an investigation or the decision on enforcement action if the process is tainted by bias or an actual or perceived conflict of interest.

### **8.2 Conflicts of interest**

It is no answer to an allegation of conflict of interest to say that the investigator is not the ultimate decision-maker. The allegation may be that, because of a conflict of interest, the investigator did not collect all the relevant facts or ask the necessary questions. They therefore did not carry out a proper investigation on which the ultimate decision was based.

It is not always easy to identify a conflict of interest. Although the investigation must be conducted impartially, it is sometimes unrealistic to expect that the investigator will be someone having no previous connection with the person or issues being investigated. Complaints of alleged unlawful conduct often have significant histories that involve the same complainants, the same people being investigated and the same council staff.

Simply knowing the complainant or the person being investigated, or previously having investigated that person, is not enough in itself to form a conflict of interest allegation. An allegation must be based on something more or something particular to the current investigation.

### **8.3 Bias**

There are several factors that should not influence the conduct of an investigation or any subsequent decision on enforcement action. These include:

- the race, religion, sex, national origins or political associations of the complainant or person being investigated
- the personal feelings of the investigator towards the subject matter of the investigation or the person being investigated
- any possible political advantage or disadvantage to any individual or group on or off the council

- the possible effect of the outcome of the investigation on the personal or professional circumstances of those involved in the investigation.

## 9. Determining powers of investigation

### **9.1 Do I have the powers to investigate effectively?**

The four chief sources of information in nearly all investigations are:

- witnesses, including complainants and independent witnesses
- experts or other people with relevant knowledge or information
- documents
- physical evidence.

At the outset you need to ask yourself what powers you have to investigate. In particular, do you have the necessary power to get any witnesses to talk to you about relevant events, to inspect premises, to obtain or view documents and to obtain information from other sources?

The powers council staff have to enter and inspect premises are detailed in the delegations and certificates of authority relevant to their position.

### **9.2 What if I encounter resistance from witnesses?**

When deciding whether you have the authority to get access to relevant documents and to question witnesses, it is important to distinguish between the right to ask and the power to demand.

You may have the right to ask people to answer questions and to provide you with relevant documents. However if witnesses refuse to be interviewed or refuse you access to documents, you may not have the legal power to compel non-council witnesses to be interviewed or to provide information or records.

If the relevant records are all available within the council, then the investigation should be untroubled. However, records may be held by other people or organisations that may be reluctant to produce them. If so, the investigation may stall.

If you believe lack of powers may prevent you from properly conducting an effective investigation into a complaint, you may need to seek legal advice or ask the general manager about possible alternative strategies.

## 10. Establish a framework for the investigation

### **10.1 What authorisation do I need to begin an investigation?**

The level of authorisation required will depend on the nature of the investigation. In most circumstances where there are adequate and appropriate delegations of authority, all you should

need is a decision from the relevant member of staff. If the matter is more complex or sensitive, or not covered by a delegation or council policy, you may need to obtain authorisation from a relevant manager.

If you have any doubts, you should refer the matter to the Legal and Governance Department for advice.

## **10.2 Preparing an investigation plan**

Before beginning a major investigation, you should prepare an investigation plan. The plan should be completed before conducting any inquiries because the 'planning process' will help you clarify the approach you should take. The plan will become the road map of your investigation. It allows you to stay focused on the job and alerts you to potential problems before you encounter them.

The first step in preparing an investigation plan is to clarify exactly what is being alleged in the complaint. A single complaint may contain a number of separate allegations. Write each allegation down so it can be individually dealt with.

The investigation plan or matrix should deal with each allegation under the following headings – Allegation, Possible offence/order, Proofs/facts in issue, and Avenues of inquiry (primary tasks).

### Possible offence/order

Under 'Possible offence/order' you should list the practical implications of the allegation, if proved. For example, is the conduct complained of grounds for issuing an order or grounds for a prosecution? Try to be specific about this to save wasting resources on investigating a matter where the council has no power to act or is unlikely to take further action.

### Proofs/facts in issue

Under 'Proofs/facts in issue' you should list the facts that need to be established to determine whether the allegations are true or false. If the complaint is about the conduct of an individual, the facts in issue will usually involve you finding out:

- the identity of the person alleged to have engaged in or carried out the unlawful activity
- the place and the date that the alleged unlawful activity occurred
- whether the conduct itself is an unlawful activity
- whether the person the subject of the allegation did the thing alleged
- whether the person concerned had authority to engage in or carry out the unlawful activity or had some other lawful basis for avoiding liability.

The relevant legislation, regulation, instrument or consent alleged to have been breached may also contain specific elements or requirements which must all be proven in order for a breach to be made out. The standard of proof to be met will depend on whether the allegation concerns a breach of the law or a criminal offence. In proceedings to remedy a breach of the law, the relevant standard is the 'balance of probabilities'. In criminal proceedings, the relevant standard is 'beyond reasonable doubt'.

### Avenues of inquiry

Under 'Avenues of inquiry' you should identify the methodology to be used, the procedures to be followed and the primary tasks to be undertaken to gather the necessary evidence.

This may include site inspections, expert reports, physical evidence such as soil samples, interviews with specific witnesses and examining documents.

The right to take legal action against unlawful activity is subject to a time limit. For example, action taken in the local court for an offence is subject to a six month time limit from the point at which the matter arose. Make sure your investigation plan identifies and accommodates these limitations. The investigation must be completed within the actionable deadline so that there is time to assess evidence and make a final decision on what, if any, enforcement action is required.

It is important to start with a plan, but investigations rarely proceed as originally predicted. You should therefore be ready to revise your plan as new situations emerge during the course of the investigation. Make sure you follow the facts - never try to make the facts fit into your plan.

## 11. Complying with confidentiality and privacy requirements

There are various statutory and contractual confidentiality requirements that may apply to the conduct of investigations in local government.

The *Privacy and Personal Information Protection Act 1998 (the PPIP Act)* makes it an offence for a public official to intentionally disclose any personal information about another person to which the official has or had access in the exercise of his or her official functions, otherwise than in connection with the lawful exercise of his or her official functions (s.62). Unauthorised disclosure of confidential information will also generally be covered by a council's code of conduct. The PPIP Act also contains various information protection principles that are relevant to the actions that may be taken by a council in response to allegations of unlawful activity.

Confidentiality serves a number of important functions. Preserving the confidentiality of the identity of the person making the complaint and the person the subject of the complaint minimises the risk of harm to these parties.

Confidentiality also helps to ensure the integrity of the investigation. If a potential witness feels that they are unable to trust the discretion of the investigator, they will be more reluctant to come forward with relevant information. If material uncovered in an investigation is kept confidential, there is less risk of contamination of evidence. Any witnesses interviewed in the course of an investigation should be advised not to discuss the matter with other witnesses or other third parties. Before interviewing a witness, you should ask them whether they have discussed the matter with anyone else.

Council staff investigating alleged unlawful activity do not have absolute privilege against defamation. Failing to maintain confidentiality - by improperly or unnecessarily 'publishing' details of the complaint or any material uncovered in the course of an investigation - might expose you to defamation proceedings. However, you should be able to claim the defence of qualified privilege in any such proceedings provided the publication was for a proper purpose and made in good faith.

Effectively the requirements of the information protection principles set out in the PPIP Act do not prevent or hinder a council from investigating allegations of unlawful activity.

## 12. Providing procedural fairness

### 12.1 What does procedural fairness mean?

Depending on the circumstances, procedural fairness may mean you need to:

- inform people against whose rights or interests a decision may be made of the substance of any allegations against them or grounds for adverse comment about them - this need not be done until an appropriate stage in an investigation has been reached
- inform people of the substance of any adverse comment proposed to be made about them and provide them with a reasonable opportunity to put their case - this may not be necessary if a formal order is to be made under the Local Government Act or criminal or other court proceedings are to be taken
- consider any submissions put forward by the parties to a matter
- make reasonable inquiries or investigations before making a decision
- ensure that no person decides a case in which they have a direct interest
- act fairly and without bias
- conduct the investigation without undue delay.

The obligation to inform people of the substance of the allegations made against them does not apply if you are not directly involved in proceedings that will affect a person's rights or interests. However if you are responsible for conducting an investigation that will lead to recommendations about the matter, you should provide procedural fairness to the person against whom allegations have been made.

In most cases it will be sufficient to offer the person an opportunity to put their case in writing. However there may be occasions where natural justice requires that the person be able to make oral representations.

In some other cases there may be an overriding public interest in short-circuiting certain procedural fairness requirements. This will normally be in situations that involve serious risks to personal safety or where substantial amounts of public funds may be at risk. You should always seek and document expert external advice if you believe you have such a case on your hands.

Always record your reasons for any decision involving procedural fairness considerations in case your investigation later becomes the subject of a complaint to an accountability agency or an appeal to a tribunal or court.

For further information on procedural fairness requirements, please refer to the Ombudsman's *Investigating Complaints - A Manual for Investigators* (published June 2004).

## 13. Gathering evidence

### **13.1 The principal forms of evidence**

The three main types of evidence are:

- oral evidence (recollections)
- documentary evidence (records)
- expert evidence (technical advice).

In most investigations into unlawful activity the main type of evidence is the physical evidence of the activity or work supported, if necessary, by oral evidence of witnesses and documentary evidence. In many cases, however, you may need to obtain expert evidence.

When you are conducting an investigation you will often obtain a substantial amount of extraneous information. Make sure you refer constantly to your investigation plan so that you focus your efforts on obtaining the relevant information to establish the proofs or resolve the facts in issue.

As an investigator, you must always conduct yourself with probity. You must never resort to trickery, deception or unlawful means to obtain evidence. However withholding information from witnesses or people being investigated does not necessarily amount to trickery or deception.

### **13.2 Forensic evidence**

The word forensic means 'used in, or connected with, a court of law'. The implications for an investigator of evidence being or becoming forensic are significant. If investigations of unlawful activity or work are likely to end up being the subject of legal proceedings, the task of preparing evidence will be much more onerous and you will have to take considerably more care in the way it is obtained and recorded.

If the possible legal proceedings are criminal, the general rule should be that you do not conduct the investigation at all unless:

- you are an experienced or trained investigator
- you are obtaining information at the request or suggestion of, and being guided by, suitably experienced lawyers.

Perhaps the most important consequence of evidence being forensic is the application of the rules of evidence. If these rules apply, you may need to get professional advice. A good investigator will always ask for this help.

## 14. Understanding the rules of evidence

It is useful for investigators to have a basic understanding of the rules of evidence. Even if allegations made in a complaint are unlikely to or do not become the subject of legal proceedings, the rules of evidence are based on solid and sound principles that can help your investigation by directing you to the best evidence.

The most fundamental consideration applying to any evidence is relevance. There must be a minimal logical connection between the evidence and the facts in issue.

However, if the rules of evidence apply, even evidence that is relevant may be inadmissible in proceedings.

### **14.1 Hearsay**

Hearsay evidence is evidence based on what has been reported to a witness by others, rather than what the witness has heard or witnessed themselves. Hearsay is not admissible in a court as evidence as to the truth of what the witness has heard.

When investigating allegations of unlawful activity, hearsay can be a useful source of leads to other relevant evidence or witnesses. However whenever the primary source is available, they should be used in preference to relying on hearsay evidence.

An important exception to the rule against hearsay is any statement made by an alleged wrongdoer where they admit their wrongdoing. Damaging confessions are treated as inherently likely to be true.

### **14.2 Opinion evidence**

As a general rule, a witness statement should not contain expressions of opinion about something or someone unless the witness is an expert who is asked to provide an expert opinion.

Opinion evidence from a witness other than an expert may be admissible if it is based on what a person saw, heard or perceived about a matter, and the opinion is necessary to obtain an adequate understanding of the witness' perception of the matter. Similarly if the witness has acquired considerable practical experience about a matter through life experience, they may be able to express an opinion about something even if they are not an expert.

### **14.3 Cautioning**

If, during the course of an investigation, you obtain evidence which establishes a prima facie case against the person being interviewed of a criminal offence, then a caution should be administered. This means advising the person that they do not have to say or do anything, but anything that they say or do may be used in evidence.

Evidence obtained in the absence of a caution is taken to be evidence that has been improperly obtained. Such evidence will, as a general rule, be excluded from proceedings in a court of law.

If you are proceeding with an investigation where the issue of cautioning a witness comes up, you should stop and think whether you should be continuing your investigation. Is it really appropriate that you conduct what is potentially a criminal investigation? The Ombudsman guidelines suggest not unless it is cleared with the police beforehand.

## 15. Doing site inspections

### **15.1 Good preparation**

The site inspection is the key investigative step for most council investigations of unlawful conduct complaints. It is the physical evidence of what is or is not occurring or has or has not been built that will prove crucial in deciding what enforcement action is required.

Good preparation is very important. Consider carefully what you need to know before you visit the site. For example, you should be familiar with any relevant conditions of consent or licence conditions, the relevant legislation that may have been breached and the legislation under which any formal enforcement action may be taken.

On many occasions, the site will be able to be inspected from a public place or from the complainant's property. Otherwise, you will need to approach the owner or occupier of the premises and ask for permission to inspect the site.

If permission is refused, you will need to decide whether to use the formal inspection provisions of the legislation.

Other issues that should be considered include the need for photographic equipment, tape recorders and other measurement devices. You will need to make notes to support judgements on key issues like impact on amenity.

Matters that should be covered during site inspections to investigate complaints of unlawful activity include:

- the need to identify yourself and carry proof of identity and authority
- key questions about the work or activity
- key questions to identify the subject of the complaint and the state of knowledge of that person about the unlawful activity
- key questions to identify who was responsible for the unlawful activity.

### **15.2 Good record keeping**

It is extremely important to keep good clear records of site inspections. Your notes should include:

- the time and date of the inspection
- precise details of where you went, what you saw and who you spoke to
- what other information you obtained, including a record of any photographs taken, documents or other physical evidence obtained.

Do not take too long to make this record. Accuracy is very important and the longer you leave it, the more scope there is for inaccuracy.

### **15.3 Some common problems with site inspections**

There are several situations where special considerations apply to site inspections.

#### Serious persistent complaints

Serious and persistent complaints may require alternative evidence gathering strategies. One example is persistent complaints about noise from barking dogs. Evidence can be gathered by surveying surrounding premises or encouraging complainants to maintain a diary of incidents.

Surveys give councils a basis to judge whether there is evidence that the problem is sufficiently serious to warrant action. Diaries can highlight patterns of behaviour that help you judge the seriousness of the problem and enable you to identify the best time and place to gather further evidence.

Another option may be the use of a digital recorder which can record the level, persistence and duration of noise at any time of the day or night.

#### After hours operations

Unlawful activity can occur at any time of the day or night, on weekdays or at weekends. Nights and weekends are particularly relevant for complaints about offensive noise and failure to comply with limitations on hours of operation which are detrimentally impacting on neighbours.

Council may need to respond to after-hours complaints and make after hours inspections of compliance e.g. with terms and conditions of consent, or with notice and orders if this is an issue.

#### Using surveillance

Councils have the ability, at common law, to investigate alleged breaches of the law or the terms and conditions of consents, approvals and licences. However, this common law right does not give councils any power to use compulsion or infringe a person's legal rights.

Councils do have certain powers of compulsion which are particularly relevant for conducting investigations. The main ones relate to powers of entry and inspection.

When conducting surveillance or any other method of investigation, councils must of course comply with any legal requirements such as the privacy protection principles in the *Privacy and Personal Information Protection Act 1998*.

#### Using private inquiry agents

Councils can carry out investigations using their own staff acting under delegation or direction or use private inquiry agents.

It is preferable for a council to use its own staff when there are technical issues which require the particular expertise of its specialist staff. However, in many cases it may be better to use private inquiry agents if the primary issue is whether or not a particular activity is occurring at a particular place or time.

### Inspecting brothels

Inspecting illegal brothels may be problematic if the operator denies entry or will not provide information to inspectors. Obtaining evidence of an unauthorised use as a brothel may also prove difficult.

The *Restricted Premises Act 1943* contains provisions in relation to establishing that an unauthorised brothel is operating. Section 17A of the Act states the court may rely upon circumstantial evidence to find that particular premises are used as a brothel. Examples of circumstantial evidence include, but is not limited to the following:

- evidence relating to persons entering and leaving the premises (including number, gender and frequency) that is consistent with the use of the premises for prostitution,
- evidence of appointments with persons at the premises for the purposes of prostitution that are made through the use of telephone numbers and other contact details that are publicly advertised,
- evidence of information in books of accounts that is consistent with the use of the premises for prostitution,
- evidence of the arrangement of the premises, or of the furniture, equipment or articles in the premises, that is consistent with the use of the premises for prostitution.

## 16. Obtaining oral evidence

### **16.1 Witness responses**

The oral evidence of witnesses is usually the most difficult evidence to obtain. Memories are imperfect and witnesses often recall events unclearly.

An interview is the way an investigator will usually gather oral evidence. The skills of the interviewer and the manner in which the interview is conducted influence the extent and quality of information obtained. Different witnesses will respond in different ways to particular forms and styles of questioning.

Other variables are the degree of cooperation that you can expect from witnesses and their emotional reaction to the interview. Some witnesses will be forthcoming in their responses, while others will be more reticent. Some will deliberately withhold information. Some witnesses will feel confident giving their evidence, but others may feel intimidated and need support.

Some specific types of responses that you may encounter include:

#### Non-cooperative

These are witnesses who do not remain silent but who do not cooperate e.g. by refusing to answer some or all questions. This may be because they do not wish to incriminate themselves, they may want to avoid the embarrassment that an answer may cause, they may fear becoming personally involved in the matter, or they may distrust authority.

### Partial

These are witnesses who are basically, or at least partly truthful, but will withhold certain items of information for varying reasons. They do not lie, they simply do not tell the whole truth.

### Distorted

Witnesses who alter some or all of the information recounted so that it presents a better version, in their eyes, of events. They may still be truthful about most of their evidence.

### Exaggerated

Witnesses who embellish or exaggerate their account of events either for a definite purpose or just to make the story sound impressive.

### Minimise

Witnesses involved in some wrongdoing or who believe they may be seen as being so involved, may actively minimise their own involvement in the matter and this will be reflected in their account.

### Maximise

These witnesses maximise their part in a situation to boost their own feeling of importance.

### Complete lies

These witnesses are untruthful when questioned and intentionally tell lies. This may be to hide facts, to divert the focus of an investigation, or simply because they enjoy lying.

One of the key concerns for an investigator obtaining oral evidence should be to minimise the possibility of the witness subsequently denying, changing or contradicting their evidence.

You are more likely to obtain evidence from a witness who is at ease. Before the interview, decide if you might need an interpreter and, if necessary, arrange for one to be present.

To help create a comfortable environment for the witness, start by setting the scene.

- introduce yourself
- explain the purpose of the interview
- let the witness know what is going to happen - how you will be conducting the interview
- and, if appropriate, how the interview fits into the investigation process as a whole
- advise the witness how you will be recording their evidence - if you are planning to tape record the interview, inform the witness that this is to occur
- confirm with the witness that they have been given the opportunity to bring a support person or observer with them to the interview
- assure the witness of your impartiality
- consider and deal appropriately with any objections that the witness may raise

- ask the witness whether they have any questions at the beginning, and again at the end, of the interview.

## **16.2 Interview techniques**

You will not always be able to overcome witnesses who are determined to be uncooperative and you may sometimes have to look elsewhere for evidence. If a witness refuses to cooperate with your inquiries, advise them that you will need to reach some decision on the issues under investigation whether they choose to cooperate or not. Witness statements are useful but often not essential.

### Questioning skills

Prepare the questions you are going to ask a witness before the interview. This may involve drafting a set of questions or writing down one or more lines of inquiry. You may need to deviate from your list of questions to ask follow-up questions. Be prepared to follow a useful and relevant line of inquiry that may arise or come to light during an interview. As part of your planning, you should anticipate the possible responses you are likely to be given and think about further questions to test these responses. Remember your objective is to gather information which will be proof or which will resolve the facts in issue identified in your investigation plan.

Questions form part of the listening process. With appropriate questions, the witness will be more confident they are being listened to.

There are several different approaches that you can adopt.

### Open questions

Open questions use language designed to explore the subject, using words like 'who', 'what', 'where', 'when', 'how' and 'why'. These questions do not lead the witness in any particular direction. They are particularly useful for avoiding contamination of answers by facts or other matters that are not known to the witness.

### Closed questions

Closed questions are questions to which the answer can only be 'yes' or 'no'. They are useful to confirm matters once information has been obtained but tend to foreclose the opportunity for witnesses to articulate positions for themselves.

### Strategic questions

Strategic questions are those which take the interview away from information gathering to solution finding. They ask the witness to have some input into how the matter could be resolved. They are particularly useful if the council is anxious to facilitate a negotiated outcome to a complaint. For example, 'How do you think this can be resolved?' or 'What do you want to get out of this at the end of the day?'

### Hypothetical questions

Hypothetical questions allow ideas to be discussed with the witness in a non-threatening manner. They are also useful in facilitating a negotiated outcome. For example, rather than the

closed and challenging 'Don't you think your neighbour will reject that proposal', try 'What would you think/feel/do if your neighbour did not accept that proposal?'

## 17. Recording oral evidence

### **17.1 Ensuring accuracy**

There are three main ways to record oral evidence.

- by tape or digital recording
- by preparing a record of interview
- by creating a witness statement.

The main objective of recording oral evidence is to ensure accuracy. The best way to do this is to tape record the interview. Sometimes, you will not have the necessary equipment or the witness will refuse to allow the interview to be recorded. You will then have to keep meticulous notes of the questions asked and their answers which can be very time consuming. It is a good idea to check your notes and read them back to the witness. If possible, get the witness to sign off on the notes to indicate they are accurate. If resources allow, you should interview witnesses in the presence of a colleague who should take notes.

If it is impractical to take contemporaneous notes during an interview, it is important that a written record is made as soon as possible. The longer the delay, the less evidentiary value that record will have.

Witnesses will often ask for a copy of the tape or your notes. You need to consider how important it is to maintain the confidentiality of the investigation. If confidentiality is important, you could make copies of the tape or notes available to witnesses only after you have interviewed any alleged wrongdoer or all other witnesses who are to corroborate the evidence of the first witness.

### **17.2 Tape or digital recording**

If you are going to record an interview, you must inform all the people involved beforehand. You should also fully identify on the recording the time, date and place of the interview, the names of every person who is present in the room and in what capacity, any third parties who are present, and the purpose of the interview.

At the beginning of a recorded interview, you may find it useful to state your name (as the interviewer) and the names of anyone else in the room with you and the time, date and location of the interview.

*You could also ask the witness to confirm that they are aware of the recording of the interview e.g. 'This is Jane Green at 1.00pm on Friday 27 March 1998 in the Blue Hills Council offices. With me is Belinda Smith. Belinda do you understand that I want to record this interview today?'*

### **17.3 Records of interview**

A record of interview is a verbatim record of the interview. It should include information about the date, place and people present at the interview. Records of interview are most commonly used in serious or formal cases or if there is likely to be a dispute about certain elements of the conversation.

You need to carefully consider issuing a caution to the interviewee depending on the circumstances of the interview.

### **17.4 Witness statements**

The third way of recording oral evidence is a witness statement.

The following guidelines for preparing a witness statement are particularly important if the statement may need to be used as evidence in any subsequent legal proceedings.

- Start by giving the name, address and occupation of the witness.
- At the end of the interview, the witness should sign and date the statement (with both time and date) and the investigator should witness this signature.
- If the matter being investigated could end up in court, you may need to seek legal advice and prepare a sworn statement.
- Witness statements should contain only relevant and admissible information.
- This can be quite difficult to judge. If you are unsure of the relevance or admissibility of a piece of information, the safest approach is to include it. Inadmissible material can always be excluded later but it is more difficult to try and introduce what appears to be new evidence at some later stage.
- Witness statements should 'tell it like it is'. Avoid the temptation to improve a witness' grammar, syntax or use of the vernacular. If a witness is recounting a conversation with another person, the statement should quote the exact words used.
- Use the first person 'I' and the third person 'she/he'.
- If a witness is offering an opinion such as 'I believe she was angry', ask the witness the basis for that opinion if it is not otherwise volunteered. The witness statement should set out the basis for that opinion before stating the opinion.
- Ask the witness to read the statement before they sign it. Getting the witness to read the statement aloud is one way to ensure that they actually understand the statement and agree with it.
- Number the pages of the statement and ask the witness to initial all pages and fully sign on the last page.
- If the witness refuses to sign the statement, you should make a clear file note that you went through the statement with them and offered them a copy. Make sure you note the reason given by the witness for refusing to sign.
- If the witness wants to alter their statement or add something else to it after they have signed it, get them to do another statement rather than amend the first one. If in the second statement the witness contradicts something in the first statement, make sure that the reasons for this contradiction are explained in the second statement.

- Carefully preserve all notes connected with the interview.

### **17.5 Third parties**

Witnesses will sometimes ask if they can have another person present during their interview. If you approve such a request, you should make it clear to the third party that their role is simply one of observer and they must not take part in the discussion or interview.

If the third party is a person likely to be called or asked to give evidence, they should not be allowed to be present during the interview of another witness. You also need to address the issue of confidentiality with both the witness and the third party.

### **17.6 Securing documentary evidence**

Some of the most reliable evidence in an investigation is documentary evidence. Documents don't tend to tell lies, except if they are forged, improperly altered or manufactured after the event to mislead. One of the first steps you should take at the start of your investigation is to secure any relevant documentary evidence. Make a record of when, where and how you obtained the documents and how you have stored them.

Where possible you should take original documents rather than accept photocopies. If this is impractical, at least view all originals before or at the time of accepting photocopies. Useful information is often written in pencil in the margins of documents or on yellow 'Post-It' notes. By taking, or at least viewing, the originals you will have access to this additional information. If you take the originals, have them photocopied yourself and use another copy during the course of your investigation. The original documents should be kept securely under lock and key.

Whenever you take possession of any documents, always leave behind a receipt or other record and your contact details in case anyone needs to access the documents or have a copy of them.

### **17.7 Using expert evidence**

Your investigation will often need to include the use of professional experts such as town planners, building surveyors, acoustic experts, engineers, accountants and valuers.

If you are going to get an expert to produce a statement, you must remember to 'qualify' the expert in the statement. The first paragraph of the statement should specify the things that make the expert an expert, such as their qualifications and training.

There is no foolproof formula for selecting an expert. Professional associations, universities and TAFE colleges can be useful sources of relatively affordable and independent expertise.

### **17.8 Recording and storing information obtained during an investigation**

It is essential that you make contemporaneous notes of all discussions, phone calls and interviews that take place during the course of an investigation. All information, including original documents and records of other evidence examined during the investigation, should be promptly placed on a central file.

Investigators often find it useful to keep a 'running sheet' for the investigation on the inside cover of the investigation file. This running sheet is essentially a chronology of events that have taken place in the investigation. It provides a ready record of who did what and when and is particularly useful if:

- an investigation is complicated or involves a range of issues
- there is more than one investigator
- there is a change in staff during the investigation and a new investigator has to take over.

The *State Records Act 2015* reinforces the importance of keeping a full and proper record of information obtained during an investigation. The Act requires that councils:

- make and keep full and accurate records of their activities
- provide for the safe custody and proper preservation of records made and kept, or received and kept, by any person in the course of the exercise of official functions.

As an investigator, it is crucial that you create a paper trail of your actions in an investigation. This will protect you at a later stage if your methodology or conclusions become the subject of a complaint to an outside agency. You should:

- keep an accurate and up to date paper trail of your steps, decisions and conclusions
- take contemporaneous notes of all discussions and interviews (telephone and in person) connected with the investigation
- place all relevant information on a central and secure case file
- obtain, or at least view and copy, all original documents relevant to the investigation
- only use copies of documents during the investigation.

### **17.9 Does the person being investigated have the right to inspect documents related to the investigation?**

Access to documents relating to a complaint or an investigation involves balancing two competing principles. On the one hand, any person under investigation should be informed at an appropriate time of the allegations made against them and the nature of the evidence gathered that both supports and contradicts those allegations. On the other hand, there is the need to preserve the integrity of the investigation. By prematurely revealing critical evidence the investigation might be prejudiced. There may also be circumstances where it may be a breach of statutory obligations, or not in the best of interests of the investigation, for information to be disclosed that may identify or tend to identify the person who made the complaint.

The person who is the subject of the complaint has some statutory rights of access.

- The *Local Government Act 1993* gives every person the right to inspect the 'other documents' of an agency, subject to certain exemptions such as if inspection would be contrary to the public interest.

- The *Government Information (Public Access) Act 2009* (NSW) authorises and encourages the proactive release of information by NSW public sector agencies; gives members of the public a legally enforceable right to access government information; and ensures that access to government information is restricted only when there is an overriding public interest against releasing that information.
- There is a statutory right of access to personal information under the provisions of the *Privacy and Personal Information Protection Act 1998*. Section 14 of the Act provides that: 'a public sector agency that holds personal information must, at the request of the individual to whom the information relates and without excessive delay or expense, provide the individual with access to the information.'

Different considerations apply if documents are subpoenaed by a court. There are only limited grounds for objecting to producing documents that are subpoenaed and you would need to obtain legal advice.