



WAIKATO REGIONAL COUNCIL ENFORCEMENT POLICY

TE KAUPAPA HERE
ŪRUHITANGA A TE
KAUNIHERA Ā-ROHE
O WAIKATO



Waikato
REGIONAL COUNCIL
Te Kaunihera ā Rohe o Waikato

CONTENTS

NGĀ IHIRANGI

INTRODUCTION	2
1. GATHERING THE INFORMATION (INVESTIGATION)	7
2. ENFORCEMENT DECISION MAKING	8
2.1 Who can make the decision?	9
2.2 Independent legal review	10
3. ENFORCEMENT OPTIONS	11
APPENDIX A	



INTRODUCTION

HE KUPU WHAKATAKI

Local government in New Zealand is responsible for ensuring compliance with a variety of laws and regulations that are aimed at achieving positive community and environmental outcomes.

For Waikato Regional Council there are a number of obligations relating to implementation of the Resource Management Act (RMA). The purpose¹ of the RMA is to 'promote sustainable management of our natural and physical resources'.

Waikato Regional Council needs to meet their obligations to the RMA and community while working within the corporate values, and towards the vision and mission of the wider organisation.

These obligations are met by a dedicated regulatory team known as the Resource Use Directorate (RUD) who are bound by principles and guidelines particular to that role.

Much of the regulatory 'business' for RUD revolves around the receipt and processing of resource consent applications by those in the community seeking to use, or impact on, natural and physical resources. When consents are issued there are then obligations for the council in respect of monitoring compliance with the respective consent conditions.

Many activities in the Waikato are 'permitted' by the Waikato Regional Plan or Regional Coastal Plan. As with consented activities there are also obligations to monitor compliance with permitted activity rules. RUD also manages an incident response service whereby members of the public can contact the council if they believe there has been a breach of environmental regulations.

On occasion when a breach has been confirmed there is a requirement to take enforcement action against liable parties using tools available under the RMA. This role can be highly contentious and the subject of much public and judicial scrutiny. In short, it has to be done 'right'.²

The purpose of this policy is to provide clear guidance to the Waikato Regional Council as to how our RMA enforcement obligations are carried out.

1 - Section 5 Resource Management Act 1991

2 - In 2015 an independent review of how Waikato Regional Council deals with Resource Management Act non-compliance was conducted. As a result of that review the practices of council were found to be best practice with a total of eleven recommendations made to further improve this area of work. The content of this enforcement policy reflects the information that was the subject of review by that independent review panel and in keeping with its findings and recommendations.

DEFINING THE SCOPE OF THIS POLICY

Waikato Regional Council has a 'spectrum' approach to encouraging positive behaviour change and ensuring the highest levels of compliance possible.

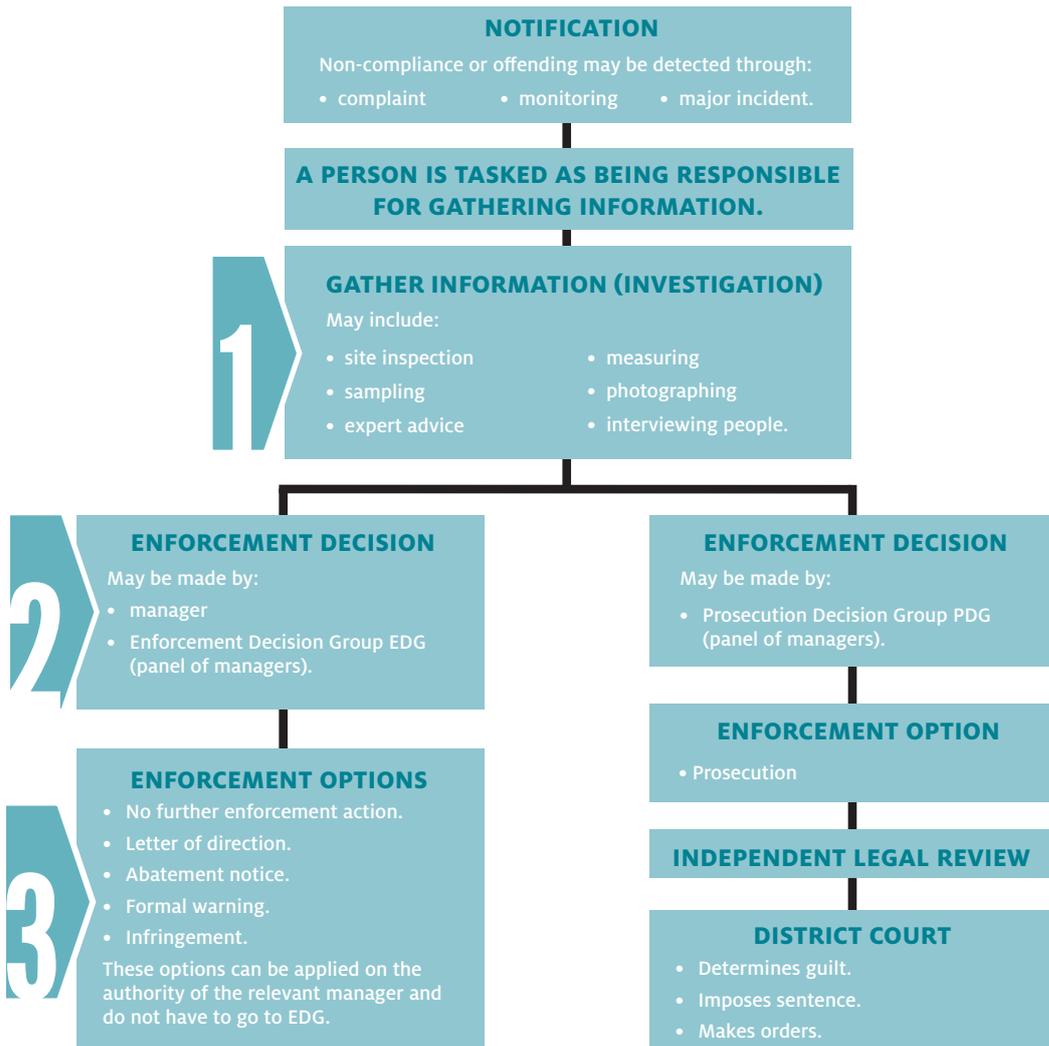
Waikato Regional Council's approach to ensuring compliance with the RMA includes the following:

- **Recognition and reward** for those who lead best practice and are seen as exemplar, going above and beyond mere regulation.
- **Education** for those people who are unaware of rules or need reminding of their obligations, and the reasons for those obligations.
- **Supporting industries** to develop best practise and be engaged to encourage compliance, or better, within their peers and own industry.
- **Enforcement** for those people who breach regulation. The RMA provides a number of enforcement tools that can be applied to people who have committed breaches. One of those enforcement tools is prosecution.

THIS POLICY COVERS THE COUNCIL'S ENFORCEMENT ACTIVITIES.



THE INVESTIGATION AND ENFORCEMENT PROCESS AT A GLANCE



As shown in this diagram 'enforcement' can be broken down into three components.

- 1 How we **gather information** once a breach is identified.
- 2 How we **decide** what we are going to do about that breach.
- 3 What subsequent **action**, if any, we should take.

These three components form the basis of this enforcement policy.

PRINCIPLES AND GUIDELINES

The regulatory enforcement role in New Zealand has clearly established guidelines and principles. Waikato Regional Council will apply and adhere to these principles³ when carrying out enforcement activities.

TRANSPARENCY

We will provide clear information and explanation to the community, and those being regulated, about the standards and requirements for compliance. We will ensure that the community has access to information about the change to environmental impacts of industry as well as actions taken by us to address environmental issues and non-compliance.

CONSISTENCY OF PROCESS

Our actions will be consistent with the legislation and within our powers. Compliance and enforcement outcomes will be consistent and predictable for similar circumstances. We will ensure that our staff have the necessary skills and are appropriately trained, and that there are effective systems and policies in place to support them.

FAIR, REASONABLE AND PROPORTIONAL APPROACH

We will apply regulatory interventions and actions appropriate for the situation. We will use our discretion justifiably and ensure our decisions are appropriate to the circumstances, and that our interventions and actions will be proportionate to the seriousness of the non-compliance and the risks posed to people and the environment.

EVIDENCE-BASED, INFORMED

We will use an evidence-based approach to our decision making. Our decisions will be informed by a range of sources, including sound science, the regulated parties, information received from other regulators, members of the community, industry and interest groups.

COLLABORATIVE

We will work with and, where possible, share information with other regulators and stakeholders to ensure the best compliance outcomes for our region. We will engage with the community, those we regulate and government to explain and promote environmental requirements, and achieve better community and environmental outcomes.

LAWFUL, ETHICAL AND ACCOUNTABLE

We will conduct ourselves lawfully and impartially and in accordance with these principles and relevant policies and guidance. We will document and take responsibility for our regulatory decisions and actions. We will measure and report on our regulatory performance.

TARGETED

We will focus on the most important issues and problems to achieve the best environmental outcomes. We will target our regulatory intervention at poor performers and illegal activities that pose the greatest risk to the environment. We will apply the right tool for the right problem at the right time.

RESPONSIVE AND EFFECTIVE

We will consider all alleged non-compliances to determine the necessary interventions and action to minimise impacts on the environment and the community and maximise deterrence. We will respond in an effective and timely manner in accordance with legislative and organisational obligations.

³ - Principles taken directly from the Strategic Compliance Framework authored by the Regional Council Compliance and Enforcement Special Interest Group (CESIG)



Milk discharged into a river

CONFLICTS OF INTEREST

Waikato Regional Council will carry out all of its enforcement functions in accordance with the conflict of interest (COI) policy.⁴

The purpose of this policy is to:

- create a framework for decision making that avoids actual or perceived conflict of interest
- minimise the risks where a conflict of interest exists
- ensure staff are free from any personal, commercial, financial, political or other pressures that might affect their actual or perceived ability to make independent decisions.

This policy provides guidance for staff as to where a COI may arise (and therefore how to avoid a COI) and a mechanism for ensuring that any actual or potential COI is disclosed and managed appropriately.

4 - ID4094809 Draft RUD conflict of interest policy (3482102)

1 GATHERING THE INFORMATION (INVESTIGATION)

TE KOHINGA O TE WHAKAARO (HE WHAKATEWHATEWHA)

If a breach, or potential breach, of the RMA occurs then information must be gathered about how and why the breach occurred. This information gathering, or investigation, should be welcomed by all parties as its purpose is to establish the truth of what has occurred and enable informed decisions to be made.

The depth and scope of the investigation will be dependent on the seriousness of the incident.

Investigation activities may include:

- Visiting private property to collect information or potential evidence like samples, photographs, measurements, or ecological assessments.
- Talking to people about what they know about the incident. People interviewed may be witnesses to an incident or potentially liable parties. These conversations will be recorded in writing or by electronic means.
- For serious matters interviews of potentially liable parties are conducted under caution to ensure their rights are understood. Council has resolved that before any such interview takes place the offer of video recording of the interview must be made.

When visiting private property it is vital to respect the rights of the lawful owner or occupier. Council staff must ensure that all entry to private property is done so lawfully.

The Chief Executive Officer of Waikato Regional Council has the authority to issue staff with warrants of authority.⁵ A warranted enforcement officer has the ability to enter private property for the purpose of assessing compliance with environmental regulation.

However, if the officer has reasonable grounds to believe that a breach of the RMA has been carried out on the property then that warrant is no longer a valid legal access. The High Court⁶ has given very clear direction as to when an officer can rely upon their warrant of authority.

Staff must attend specific training⁷ and be familiar with all of their statutory obligations before carrying out any enforcement functions.

5 - Section 38 RMA

6 - Venning Judgement – Auckland HC – CIV 2003-404-000018 AP18-SW03

7 - Waikato Regional Council warranted staff will gather information in keeping with best practice detailed in Basic Investigative Skills for Local Government ISBN 978-0-9922583-0-6 and attend the Basic Investigative Skills for Local Government course



ENFORCEMENT DECISION MAKING

NGĀ ARA WHAKATAU

Enforcement of the Resource Management Act can be complex. The Act provides potentially large penalties for those who breach however does not offer any guidance as to determining what is serious and what is less so.

For example, a single section of the Act can prohibit activities as diverse as emitting objectionable odour, discharging contaminants to a stream or burying toxic waste in land. Clearly these have vastly different environmental and community effects.

The courts have provided helpful guidelines⁸ as to what factors are appropriate to consider in RMA cases to determine the seriousness of a breach. It is widely accepted across the regional sector that these are the appropriate factors to consider in enforcement decision making.

Factors to consider when considering enforcement action

- What were, or are, the actual adverse effects on the environment?
- What were, or are, the potential adverse effects on the environment?
- What is the value or sensitivity of the receiving environment or area affected?
- What is the toxicity of discharge?
- Was the breach as a result of deliberate, negligent or careless action?
- What degree of due care was taken and how foreseeable was the incident?
- What efforts have been made to remedy or mitigate the adverse effects?
- What has been the effectiveness of those efforts?
- Was there any profit or benefit gained by alleged offender(s)?
- Is this a repeat non-compliance or has there been previous enforcement action taken against the alleged offender(s)?
- Was there a failure to act on prior instructions, advice or notice?
- Is there a degree of specific deterrence required in relation to the alleged offender(s)?
- Is there a need for a wider general deterrence required in respect of this activity or industry?

As a result of the 2015 review of how Waikato Regional Council deals with non-compliance, three additional factors were suggested that council should consider:

- Was the receiving environment of particular significance to iwi?
- How does the unlawful activity align with the purposes and principles of the RMA?
- If being considered for prosecution, how does the intended prosecution align with Solicitor-General's Prosecution Guidelines? **(these guidelines are attached at Appendix A.)**

Not every factor will be relevant every time. On occasion one single factor may be sufficiently aggravating, or mitigating, that it may influence the ultimate decision. It is inappropriate to take a matrix or numerical approach to weighing and balancing these factors. Each case is unique and the individual circumstances need to be considered on each occasion to achieve a fair and reasonable outcome. The discretion to take enforcement action, or not, sits solely with those delegated to make decisions in the regulatory agency.⁹

8 - Machinery Movers Limited -v Auckland [1994] 1 NZLR 492 & Selwyn Mews Ltd -v- Auckland City Council HC Auckland CRI-2003-404-159
9 - New Zealand Law Commission http://www.nzlii.org/nz/other/nzlc/report/R66/R66-5_.html

2.1 WHO CAN MAKE THE DECISION?

Taking any kind of enforcement action can have a profound impact on the subject of the action and cannot be taken lightly. Decisions on enforcement action must be based on reliable and correctly obtained information.

For low level breaches designated supervisors within RUD can authorise the issuing of formal warnings, infringement notices and abatement notices¹⁰.

A warranted officer cannot make an enforcement decision in isolation.

If a matter is either complex, has a high public profile, requires specific guidance or simply there is no precedent, then an Enforcement Decision Group (EDG) can be formed to consider the matter and authorise an action. The EDG is comprised of delegated supervisors within RUD.

However, if the matter is being considered for prosecution then it must be authorised by a Prosecution Decision Group (PDG). This panel of three managers must also include the Resource Use Director. Even then the authority is conditional on the matter being subjected to independent legal review.

Taking into account the very unique circumstances that can be present in individual cases, and regardless of who makes the decision, it is vital to strive for consistency in decision making.

Independence of the decision maker(s) is paramount.

“In practice in New Zealand the independence of the prosecutor refers to freedom from undue or improper pressure from any source, political or otherwise.”¹¹

10 - RUD Enforcement Decision making delegations ID4089712

11 - Solicitor General's Prosecution Guidelines, 1 July 2013, Article 4.2





2.2 INDEPENDENT LEGAL REVIEW

The independent legal review considers the matter in its entirety. The review applies two tests: the evidential test and public interest test. These tests are separately considered and must both be satisfied before a prosecution is initiated.

THE EVIDENTIAL TEST

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

- The evidence relates to an identifiable person (whether natural or legal).
- The evidence is credible.
- The council can produce the evidence before the court and it is likely it will be admitted by the court.
- The evidence can reasonably be expected to satisfy an impartial jury (or Judge), beyond a reasonable doubt, that the individual has committed a criminal offence; the individual has given any explanations and, if so, whether the court is likely to find the explanations credible in the light of the evidence as a whole.
- There is any other evidence the council should seek out which may support or detract from the case.

Once it has been established that there is sufficient evidence to provide a reasonable prospect of conviction, the test for prosecution requires a consideration of whether the public interest requires a criminal prosecution.

THE PUBLIC INTEREST TEST

The second part of the test for prosecution is the public interest test, which is important for ensuring that the discretion to prosecute is exercised in accordance with the rule of law and any relevant statutory requirements.

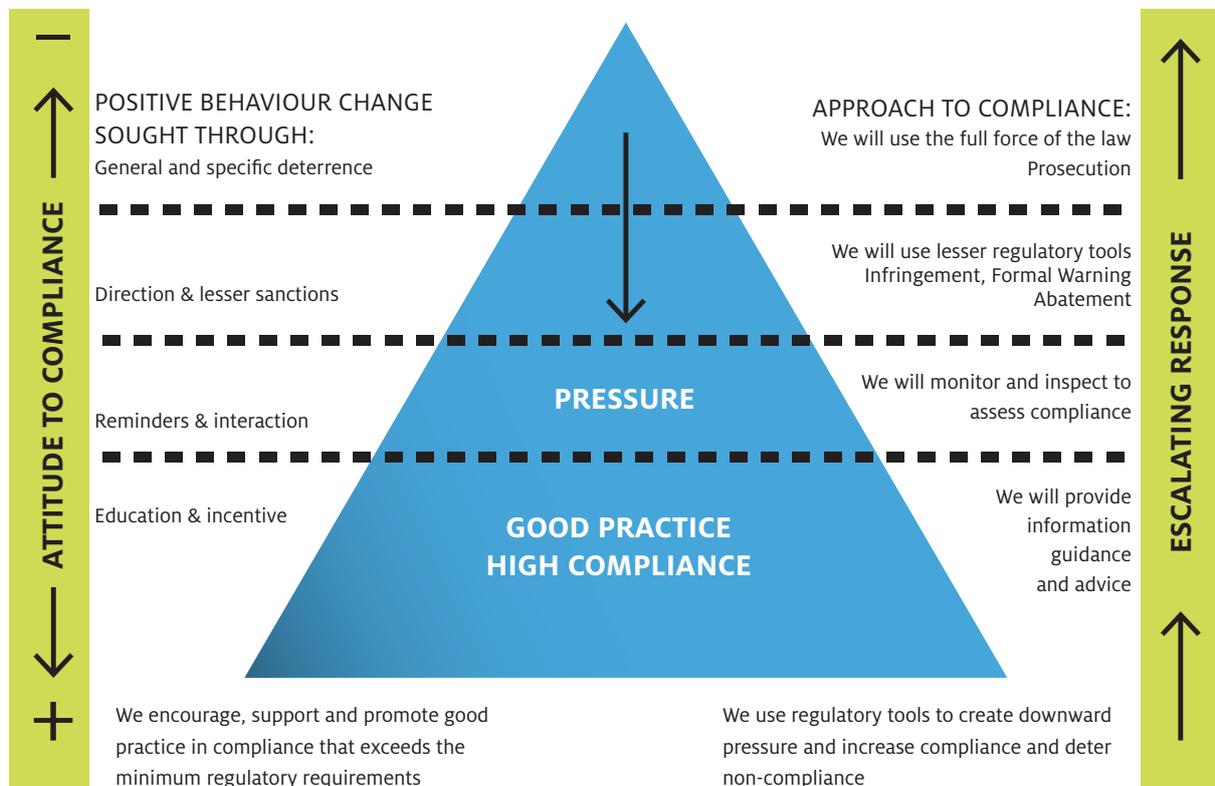
WHO SHOULD CONDUCT THIS REVIEW?

As a local authority Waikato Regional Council is free to choose its legal representatives in enforcement matters. Where possible Waikato Regional Council will consider using law firms in the Crown Solicitor network as they are the recognised experts in this area. In some circumstances the Crown **must** assume responsibility for the prosecution which is another good reason to involve them early in the process.

3 ENFORCEMENT OPTIONS

NGĀ ARA WHAKATIKATIKA

The 'compliance pyramid'¹² is a widely used model for achieving positive behaviour change. At the bottom of the pyramid are those who are willing to comply – at the top are those who resist compliance. The pyramid is designed to create downward pressure – that is, to move non-compliant individuals or organisations down the pyramid to full compliance and to where lower-level and less costly interventions can be utilised.



The most severe response is reserved for the most serious breach

12 - Adapted from Ian Ayres & John Braithwaite (1992), *Responsive Regulation: Transcending the deregulation debate*, Oxford University Press, New York

The RMA and case law provide the formal enforcement tools that are available to deal with breaches of the RMA. It is important to ensure these tools are applied consistently across the myriad of activities and resource use across the region.

Enforcement tools can be categorised into two main functions. **Directive** actions are about looking forward and giving direction to right the wrong. **Punitive** actions are about looking back and holding people accountable for what they have done.

These actions are described in more detail in the following diagrams.

DIRECTIVE ACTIONS

ACTION	DESCRIPTION OF ACTION	POTENTIAL IMPACTS ON THE LIABLE PARTY	WHEN MIGHT THIS ACTION BE APPROPRIATE?
 <p>Letter of direction</p>	<p>To prevent further breaches, or to remedy or mitigate the effects of non-compliance, council can give a written direction for a party to take or cease a particular action.</p>	<p>Such a direction is not legally enforceable.</p>	<p>Letter of directions should be reserved for dealing with co-operative parties, who are motivated to follow the direction, and where the breach is of a minor nature, consistent with a breach that would perhaps also receive a formal warning.</p>
 <p>Abatement notice</p>	<p>An abatement notice is a formal, written directive. It is drafted and served by council instructing an individual or company to cease an activity, prohibit them from commencing an activity or requiring them to do something. The form, content and scope of an abatement notice are prescribed in statute.</p>	<p>A direction given through an abatement notice is legally enforceable.</p> <p>To breach an abatement notice is to commit an offence against the RMA and make liable parties open to punitive actions.</p>	<p>An abatement notice may be appropriate any time that there is a risk of further breaches of environmental regulation or remediation or mitigation is required as a result of non-compliance.</p>
 <p>Enforcement order</p>	<p>Like an abatement notice an enforcement order can direct a party to take particular action. However, an application for an enforcement order must be made to the Environment Court or during the course of a RMA prosecution.</p>	<p>A direction given through an enforcement order is legally enforceable.</p> <p>To breach an enforcement order is to commit an offence against the RMA and make liable parties open to punitive actions.</p>	<p>An application for an enforcement order may be appropriate any time there is a risk of further breaches of environmental regulation, or remediation or mitigation is required as a result of non-compliance.</p>

It is important to note that for every directive action there should be a corresponding punitive action.

PUNITIVE ACTIONS

ACTION	DESCRIPTION OF ACTION	POTENTIAL IMPACTS ON THE LIABLE PARTY	WHEN MIGHT THIS ACTION BE APPROPRIATE?
 <p>Formal warning</p>	<p>A formal warning is documented by way of a letter to a culpable party informing them that an offence against the RMA has been committed, and that they are liable.</p>	<p>No further action will be taken in respect of that breach. However, the warning forms part of a history of non-compliance and will be considered if there are future incidents of non-compliance.</p>	<p>A formal warning may be given when:</p> <ul style="list-style-type: none"> • an administrative, minor or technical breach has occurred; and • the environmental effect, or potential effect, is minor or trivial in nature; and • the subject does not have a history of non-compliance; and • the matter is one which can be quickly and simply put right; or • a written warning would be appropriate in the circumstances.
 <p>Infringement notice</p>	<p>An infringement notice is a written notice which requires the payment of a fine. The amount of the fine is set in law. Depending on the breach the fine will be between \$300 and \$1000.</p>	<p>No further action will be taken in respect of that breach. However, the infringement notice forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance.</p>	<p>An infringement notice may be issued when:</p> <ul style="list-style-type: none"> • there is prima facie (on the face of it) evidence of a legislative breach; and • a one-off or isolated legislative breach has occurred which is of minor impact and which can be remedied easily; and • where an infringement notice is considered to be a sufficient deterrent.
 <p>Prosecution</p>	<p>A prosecution is a process taken through the criminal courts to establish guilt or innocence and, if appropriate, the court will impose sanctions.</p> <p>RMA matters are heard by a District Court Judge who is also an Environment Judge.</p> <p>All criminal evidential rules and standards must be met in a RMA prosecution.</p> <p>Most RMA offences carry a penalty of up to two years imprisonment, or \$300,000 fine for a 'natural person' or fine up to \$600,000 for other than a 'natural person' such as a company.</p>	<p>A successful prosecution will generally result in a conviction and a penalty imposed.</p> <p>A prosecution forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance.</p>	<p>A prosecution may be considered appropriate when the factors listed in this policy indicate that the matter is sufficiently serious to warrant the intervention of the criminal law.</p>

APPENDIX A

ĀPITIHANGA A

SOLICITOR-GENERAL'S PROSECUTION GUIDELINES (2013)

The Council will adhere to the standards of good criminal prosecution practice expressed in the *Solicitor-General's Prosecution Guidelines* (2013). The Council's criminal prosecutions are conducted by external lawyers, on the Council's behalf, and the *Solicitor-General's Prosecution Guidelines* and the *Media Protocol for Prosecutors* (Crown Law, 2013) while not binding on local authorities, represent best practice. Also the Solicitor-General's Guidance (CLO311/379) is helpful in guidance to local government as to who offers the best legal service in prosecution matters.

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

- A conviction is likely to result in a significant sentence;
- The offence caused significant harm or created a risk of significant harm;
- The offence was committed against a person serving the public for example, a police officer or Council officer;
- The individual was in a position of authority or trust;
- The evidence shows that the individual was a ringleader or an organiser of the offence;
- There is evidence that the offence was premeditated;
- There is evidence that the offence was carried out by a group;
- The victim of the offence was vulnerable, has been put in considerable fear, or suffered personal attack, damage or disturbance;
- The offence was committed in the presence of, or in close proximity to, a child;
- There is an element of corruption;
- The individual's previous convictions or cautions are relevant to the present offence;
- There are grounds for believing that the offence is likely to be continued or repeated, for example, by a history of recurring conduct;
- The offence, although not serious in itself, is widespread in the area where it was committed;
- A prosecution would have a significant positive impact on maintaining community confidence;
- The individual is alleged to have committed the offence while subject to an order of the court;
- A confiscation or some other order is required and a conviction is a pre-requisite.

Under the *Solicitor-General's Prosecution Guidelines* a prosecution is less likely if:

- The court is likely to impose a nominal penalty;
- The individual has already been made the subject of a sentence and any further conviction would be unlikely to result in the imposition of an additional sentence or order;
- The offence was committed as a result of a genuine mistake or misunderstanding (these factors must be balanced against the seriousness of the offence);
- The loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement;
- There has been a long delay between the offence taking place and the date of the trial, unless: the offence is serious, the delay has been caused in part by the individual, the offence has only recently come to light, or the complexity of the offence has meant that there has been a long investigation;
- A prosecution is likely to have a bad effect on the physical or mental health of a victim or witness, always bearing in mind the seriousness of the offence;
- The individual is elderly or very young or is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence was serious or there is real possibility that it may be repeated;
- The individual has put right the loss or harm that was caused (but individuals must not avoid prosecution or diversion solely because they pay compensation);
- Where other proper alternatives to prosecution are available (including disciplinary or other proceedings).

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



“...where a regulated entity deliberately or persistently fails to comply, it is vital that the agency take swift and firm enforcement action. Failing to do this will:

- Unfairly advantage those who are non-compliant, as against those who comply voluntarily
- Undermine incentives for voluntary compliance
- Damage the agency’s credibility with the regulatory sector and the wider public, who will perceive that the agency allows deliberate offenders to ‘get away with it’
- Undermine the agency’s own internal morale”

CCCP – Achieving Compliance; A Guide for Compliance Agencies in New Zealand June 2011; page 181

HE TAIAO MAURIORA

HEALTHY ENVIRONMENT

HE ŌHANGA PAKARI

STRONG ECONOMY

HE HAPORI HIHIRI

VIBRANT COMMUNITIES

Printed July 2016
JOB 4872

Private Bag 3038
Waikato Mail Centre
Hamilton 3240
New Zealand

0800 800 401
waikatoregion.govt.nz

