

Prosecutions Policy

Local Government Act 2009

1. POLICY STATEMENT

The Council's enforcement of a range of State and Local laws requires that some offenders be prosecuted through the Courts. The Council will commence prosecutions when that is in the community interest, and will conduct prosecutions impartially, fairly and in a manner that demonstrates the Council's commitment to acting as a model litigant.

2. PRINCIPLES

The commencement and conduct of prosecutions will be guided by the principles of:

- **community interest** – the conduct of prosecutions must be in the community interest;
- **commensurate response** – the Council will assess whether the proposed prosecution is a commensurate response to the alleged offence;
- **outcome focused** – the Council will give preference to prosecutions that are likely to be most relevant to achieving the Council's objectives, and will conduct prosecutions in a way that achieves value for the time and money invested;
- **responsibility** - the Council will take enforcement action against those who are legally responsible for the alleged offence and best placed to control or prevent the offending;
- **impartiality** – the Council will conduct its prosecutions without fear or favour;
- **consistency** – while each matter must be treated on its particular merits, where relevant circumstances are broadly the same, the Council will act in a consistent way; and
- **fairness and transparency** – the Council will at all times conduct itself as a model litigant.

3. SCOPE

This policy applies to all prosecutions conducted as part of the Council's regulatory role.

4. RESPONSIBILITY

The Chief Legal Officer is responsible for ensuring this policy is understood and adhered to by all relevant workers.

5. DEFINITIONS

Workers – includes employees, contractors, volunteers and all others who perform work on behalf of council.

6. POLICY

The Council will commence prosecutions when that is in the community interest, and will conduct prosecutions impartially, fairly and in a manner that demonstrates the Council's commitment to acting as a model litigant.

6.1 THE DECISION TO PROSECUTE

OTHER ENFORCEMENT

Prosecution is resource-intensive and expensive. Before a decision to prosecute is taken consideration must be given to the use of other means of enforcement such as warning notices, infringement notices, statutory notices and compliance or remediation orders. However if circumstances warrant prosecution may be undertaken without warning or recourse to alternative actions.

SUFFICIENCY OF EVIDENCE TO PROSECUTE

Council will not commence or continue a prosecution unless it is satisfied that there is sufficient admissible and reliable evidence to create a realistic prospect of success.

COMMUNITY INTEREST

Council regards the community interest as the dominant factor in exercising the discretion to prosecute. When determining the community interest in each case, the Council will consider at least the following factors:

- (a) The seriousness of the offence and its actual or likely impact on others and the environment;
- (b) The need to maintain public confidence in the administration of justice by Council, including whether a prosecution is likely to promote a belief that the Council's enforcement effort is unreasonable and harsh;
- (c) The prevalence of the particular offence;
- (d) The effectiveness and deterrent effect of other available enforcement action;
- (e) Whether prosecution action will disentitle a victim (including the Council) or other person in a claim for compensation or reparation;
- (f) The intent of the offender;
- (g) Whether the offender has disregarded established standards and guidelines;
- (h) Measures taken by the alleged offender to prevent the offence or minimise its impact;
- (i) The offender's history of compliance and offending;
- (j) Voluntary actions taken by the offender to mitigate damage and prevent recurrence;
- (k) The offender's level of cooperation with the Council, including any obstruction of workers, the supply of false information or a refusal to supply information;
- (l) The personal circumstances of the alleged offender;
- (m) The deterrent effect of a prosecution on the alleged offender and others;
- (n) Mitigating or aggravating circumstances;
- (o) Any history of dealings between the council and the offender, and in particular whether the Council has acted appropriately at all times; and
- (p) The resource implications and costs of undertaking the prosecution.

DEFENCE

Council will have regard to any defence and any other factors which are likely to affect the prospects of securing a conviction.

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IMPARTIALITY

A decision to prosecute or not prosecute an alleged offender must not be made for an improper reason. Any decision about a prosecution will not be influenced by:

- (a) Any elements of discrimination against the person such as ethnicity, nationality, political associations, religion, sex or beliefs;
- (b) Personal feelings towards the alleged offender;
- (c) Possible political advantage or disadvantage to a government or any political group or party;
- (d) Any potential effect upon the personal or professional circumstances of those responsible for the prosecution decision; or
- (e) Any potential effect on the personal or professional circumstances of the alleged offender (except as part of the consideration of the community interest).

6.2 CONDUCTING A PROSECUTION

PRESENTATION OF FACTS

The Council will present facts fairly and impartially to the Court.

MODEL LITIGANT

All persons involved in prosecuting a matter on the council's behalf must act at all times in a way that evidences the Council's commitment to act as a model litigant.

INFORMATION TO DEFENDANT

Council will provide a timely response to requests for information about a prosecution within the rules which apply to the proceeding and in accordance with the requirements of applicable legislation.

The Council will not usually prepare a brief of evidence in advance of a trial for most prosecutions, and so is unable to comply with the procedure followed by State prosecutors of making the brief of evidence available to a defendant. The council will advise a defendant of the council's case and the nature and general content of the evidence that the council will rely upon.

CONFIDENTIALITY

Council officers will not disclose confidential information other than in accordance with and as permitted by legislation.

Council release information about the identity of defendants after a prosecution is commenced.

SENTENCING

In making sentencing submissions the Council will provide full, frank, accurate and balanced information on likely penalties.

6.3 SELECTING THE APPROPRIATE DEFENDANT

DEFENDANTS GENERALLY

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

- (a) Who was primarily responsible for the alleged offence - that is who committed the act, who formed the intention and who created or allowed the material circumstances leading to the breach;
- (b) Who benefits from carrying out the activity that gave rise to the alleged offence;
- (c) Who had the control of the premises or the site and was able to develop and implement management systems to ensure compliance;

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- (d) Where a person is liable because the law creates strict liability, what was the role of the potential defendant;
- (e) The likely effectiveness of court orders against the potential defendant;
- (f) The objects of the governing legislation

PROSECUTING CORPORATIONS

The Council will prosecute a corporation when an offence resulted from that corporation's activities.

PROSECUTING EXECUTIVE OFFICERS OF CORPORATIONS

Executive officers of corporations have an obligation to ensure that the corporation complies with statutory requirements, and may be liable if they fail in discharging that obligation.

Council will not ordinarily prosecute Executive Officers for a corporation's first offence unless there is strong evidence that the relevant officers were complicit in that offence.

When determining whether to prosecute executive officers in respect of their corporation's unlawful activity the Council will consider whether:

- (a) The corporation has a compliance system in place which identified statutory requirements and approval conditions;
- (b) The compliance system had been effectively communicated and implemented throughout the corporation;
- (c) The compliance system was regularly reviewed and if necessary updated;
- (d) The officer was in a position to influence the corporation's conduct in relation to the alleged offence; and
- (e) The officer exercised reasonable diligence to ensure the corporation complied with the relevant legislation.

PROSECUTING EMPLOYEES

The Council will not ordinarily prosecute employees of a corporation who were acting under direction however the council will make a decision about whether an employee should be prosecuted after considering:

- a) Whether the employee knew or should have known that the activity was illegal;
- b) Whether the employee feared loss of livelihood if they did not continue acting in breach of the legislation;
- c) The seniority of the employee and the scope of the employee's responsibilities;
- d) Whether the employee had taken reasonable steps to draw the attention of the employer or an appropriate person to the illegality of the practice;
- e) Whether the employee has taken reasonable steps to mitigate or prevent any harm.

PROSECUTING FOR THE ACTIONS OF AGENTS

A person or corporation may be vicariously liable for the actions of agents (including contractors) if those actions are done within the scope of the agent's actual or apparent authority. The law provides a defence to vicarious liability where the principal took all reasonable steps to prevent the offending acts or omissions.

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

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When determining whether to prosecute a person or corporation for an offence caused by the actions of an agent Council will consider:

- (a) Evidence of control of the site or premises where the alleged offence occurred;
- (b) If the principal was in the position to influence the agent's conduct, whether the principal exercised reasonable diligence or took reasonable steps to ensure that the agent complied with the relevant legal requirement; and
- (c) If the principal benefits from the agent carrying out the unlawful activity that gave rise to the alleged offence.

6.4 PROSECUTION DELEGATIONS

INDEPENDENCE

To ensure independence in the bringing of prosecutions the Council has delegated that authority to the Chief Executive Officer.

INITIATING PROSECUTIONS

The Chief Executive Officer has sub-delegated their authority to initiate prosecutions to relevant workers.

To ensure an appropriate balance between the investigatory and prosecutorial functions, a prosecution must not be commenced unless a lawyer in the Council's Legal Services Section has recommended that the prosecution proceed after considering that prosecution against this policy (including specifically the community interest of bringing a prosecution).

CONDUCTING PROSECUTIONS

The Council's Legal Services Section will undertake all prosecutions. On occasions this may include having the prosecution conducted by an external legal services provider, under direction from the Legal Services Section.

The lawyers in Council's Legal Services Section have authority in respect of all matters affecting the conduct of a prosecution, including:

- (a) All correspondence concerning the prosecution and the offence for which the prosecution is brought;
- (b) The charge/s to be brought;
- (c) Which witnesses to call;
- (d) The evidence to be presented;
- (e) Amending a charge;
- (f) Submissions on penalty;
- (g) Whether or not to seek legal costs and the amount of costs to be sought;
- (h) Whether or not to seek the recording of a conviction;
- (i) Whether an issue raised by the defendant reduces the prospects of Council's succeeding so that it is in the Council's interest to discontinue the prosecution; and
- (j) Whether an issue raised by the defendant raises a community interest consideration so that it is in the community interest to discontinue the prosecution.

DISCONTINUING PROSECUTIONS

Workers with authority to commence prosecutions have authority to discontinue proceedings at any time:

- (a) on legal grounds after receiving a recommendation to do so from a lawyer in the Council's Legal Services Section; or
- (b) on community interest grounds (including that the cost of prosecution is not warranted in the circumstances).

The lawyers in Council's Legal Services Section have authority to discontinue proceedings:

- (a) At any time on legal grounds (including for example insufficient evidence, an inappropriate charge, the incorrect defendant or a plausible defence);
- (b) When actually before the court on community interest grounds.

If not actually before the court, when a lawyer proposes that a prosecution be discontinued on community interest grounds the lawyer must seek that instruction from the worker with authority to commence the prosecution.

In all cases, the reasons for discontinuing a prosecution must be documented on the relevant file.

7. LEGAL PARAMETERS

Local Government Act 2009

Local Government Regulations 2012

Townsville City Council Local Laws

8. ASSOCIATED DOCUMENTS

Nil