

COMPLIANCE AND ENFORCEMENT POLICY

September 2022

SUTHERLAND SHIRE
COUNCIL

Sutherland Shire Council
4-20 Eton Street,
Sutherland NSW 2232
T 02 9710 0333
sutherlandshire.nsw.gov.au



COMPLIANCE AND ENFORCEMENT POLICY



1. PURPOSE

The purpose of this Policy is to support Council's regulatory functions to enable Council:

- to act promptly, effectively and consistently in response to the allegations of unlawful activity or when undertaking proactive investigation of unlawful activity;
- to ensure those functions are exercised proportionally, without bias, and in accordance with legislation; and
- to improve compliance management and reduce the impact of unlawful activity on the community and the environment.

This Policy will not limit Council's authorised officers in their use of discretion and exercise of official functions. The full circumstances and facts of each case will need to be considered and a decision made on the merits.

2. APPLICATION

This Policy applies to the management and investigation of unlawful activity, as defined in this Policy, and any enforcement action required in relation to unlawful activity within Council's local government area for which Council is the appropriate regulatory authority. The unlawful activity may relate to development and building control, fire safety, trees, pollution, food safety, public health and safety, parking, abandoned articles, companion animals, swimming pools and any other matters within Council's regulatory functions.

This Policy details the matters to be considered at the various stages of the enforcement process from the receipt of reports alleging unlawful activity and their investigation, through to choosing appropriate enforcement actions – including where applicable, representations in response to decisions made by Council during the enforcement process. It also explains the role and/or responsibilities of internal and external stakeholders.

3. PRINCIPLES

3.1. Application of Principles

No one principle should be applied to the detriment of another. Principles should be collectively considered and applied to the extent that is reasonable and practicable in the circumstances. There may be cases where the particular circumstances justify departure from these principles.

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3.2. General Principles

The following are the principles that underpin Council's actions relating to compliance and enforcement:

Principle	Actions
Council will always consider the overall public interest when exercising its regulatory functions	<ul style="list-style-type: none">• Giving priority to the matters where there is an imminent threat to health, life or property• Having regard to Council's priorities and any resource limitations
Council will be accountable for its decisions and transparent during its decision making process	<ul style="list-style-type: none">• Acting in the best interests of public health and safety and in the best interests of the environment• Ensuring accountability for decisions to take or not take action• Acting fairly and impartially and without bias or unlawful discrimination in line with Council's Code of Conduct for Council Staff• Providing information about compliance and enforcement priorities and reasons for decisions to improve understanding and certainty and promote trust by the regulated community• Ensuring meaningful reasons for decisions are given to all relevant parties, particularly when there is a departure from this Policy• Ensuring compliance and enforcement action is implemented consistently• Encouraging customer reports about possible unlawful activity by acting reasonably in response to the circumstances and facts of each matter• Managing conflicts of interest in line with Council's Code of Conduct for Council Staff
Council will be consistent in its approach and will exercise its functions proportionally	<ul style="list-style-type: none">• Ensuring the level of enforcement action is proportionate to the level of risk and seriousness of the breach• Making cost effective decisions about enforcement action• Taking action to address harm and deter future unlawful activity
Council will endeavour to influence behaviour change for the common good and on behalf of the community	<ul style="list-style-type: none">• Taking a proactive approach to preventing breaches of the law by providing information to the public through a range of corporate channels to maximise reach, including Council's website, social media, resident newsletter and advertising• Providing information and educational campaigns covering a range of matters Council regulates as a cost effective way to ensure compliance• Where an offence was committed as a result of an accident or genuine mistake, providing education and guidance or a formal warning, which may be more suitable in achieving desired outcomes
Council will exercise its functions in a timely manner	<ul style="list-style-type: none">• Ensuring responses to reports alleging unlawful activity and decision making in relation to those is timely.



4. RESPONSIBILITIES OF AUTHORISED OFFICERS

4.1. General responsibilities

Authorised officers are responsible for implementing this Policy and will:

- act in a fair and impartial manner without bias or unlawful discrimination and be able to recognise, manage and avoid conflicts of interest in line with [Council's Code of Conduct for Council Staff](#);
- treat those who report alleged unlawful activity, as well as individuals or businesses that are subject to investigation and any enforcement action with courtesy and respect and advise them, in plain English, of the outcome of the allegation reported, including a full explanation of the reasons why that outcome was considered to be reasonable in the circumstances;
- assess if they have necessary powers to inspect premises, to obtain or view documents and to obtain information from other sources;
- comply with privacy laws and confidentiality and not disclose any personal information about another person unless the disclosure is required by law and/or in connection with the lawful exercise of official functions;
- provide procedural fairness (sometimes called 'natural justice') which includes:
 - informing people whose rights or interests may be adversely affected by the substance of any allegations against them or grounds for adverse comment about them (unless required by law, this need not be done until an appropriate stage in an investigation has been reached);
 - informing people of the substance of any adverse finding 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 relevant legislation or legal proceedings are to be taken);
 - considering any submissions put forward to the investigator by a party to a matter;
 - making reasonable inquiries or investigations before making decisions; and
 - acting fairly and without bias conduct investigations in a timely manner;
- gather reliable evidence to prove each element of the offence;
- understand the basic rules of evidence such as relevance, hearsay, opinion evidence, giving caution and standard of proof;
- conduct site inspections, which is the key investigative step in reactive as well as proactive investigation; and
- keep good clear records within Council's record keeping system.

4.2. Considering whether to investigate

All reports to Council regarding unlawful activity will be reviewed to determine whether the matter requires investigation.

Council may also undertake proactive investigation of unlawful activity.

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Decisions about whether the matter will be investigated or not are made at Council's sole discretion and in view of this Policy's principles and any relevant considerations.

Council is not required to take action in every case. This means that reports alleging unlawful activity will be resolved to the satisfaction of Council, not necessarily the person raising the matter.

Council will not investigate matters if:

- the matter has already been investigated and resolved or it has been determined that no further action will be taken in the absence of new information;
- Council has no power in relation to the matter or is otherwise not the appropriate regulatory authority to investigate the matter. This may include matters which need to be dealt with by the nominated private certifying authority or other appropriate regulatory authority;
- the matter can be classified as a neighbour dispute which does not require Council's involvement and are personal to the parties;
- the report is not supported with evidence or appears to have no substance;
- the activity is identified as being lawful without the need for an investigation; or
- the relevant supervisor/manager determines that investigation or other action would have an unreasonable impact on resources and/or is unlikely to achieve an outcome sufficient to justify the expenditure of resources.

Where a private certifier is appointed, it is not the Council's responsibility, in the first instance, to ensure building and construction compliance. However, a private certifier may issue a notice of intention to issue an order to the owner or builder to comply with the conditions of consent or rectify any breaches. Once the notice is provided to Council, Council will assess whether it is appropriate to enforce the notice by issuing an order.

If Council decides to investigate a matter, the objectives of the investigation will be to:

- determine the cause of the incident;
- determine if there has been a contravention of law, policy or standards;
- determine how much time has elapsed since the events which are the subject of the report;
- gather evidence to the required standard to support any required enforcement action;
- determine any necessary action/s to mitigate the possibility of reoccurrence of similar incidents; and
- if required, liaise with the relevant authorities (e.g. the Environment Protection Authority, the NSW Police Force, the Office of Liquor, Gaming and Racing, NSW Fair Trading, SafeWork NSW, NSW Food Authority and Crown Lands) to establish in view of the shared regulatory responsibility:
 - which authority will take the leading role on any joint investigation;
 - which activities each authority will carry out;
 - responsibilities for updating an individual where relevant; and
 - protocols for exchanging confidential information between the relevant authorities.

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Any decision will be recorded in Council's records system and the reasons for that decision clearly stated and communicated to the complainant.

Notwithstanding any decision made by Council to investigate or not investigate a matter, any person reporting unlawful activity may exercise their own rights and bring proceedings to remedy or restrain a breach of an Act, where available under the applicable legislation. The person should seek independent legal advice in that respect.

4.3. Taking enforcement action

After conducting an investigation and determining that there is sufficient evidence to prove that an offence has occurred, authorised officers will consider the full circumstances and facts of the individual matter and the public interest to determine:

- whether to take or not take enforcement action; and
- the level of enforcement action that is appropriate, if applicable.

Decisions about whether to take or not take enforcement action are made at Council's sole discretion and in view of this Policy's principles and any relevant considerations.

The following common considerations will assist Council staff in determining the most appropriate response in the public interest:

Alleged offence and impact	<ul style="list-style-type: none">• the nature, extent and severity of the unlawful activity including whether the activity is continuing• the seriousness of the breach, including whether the breach is merely technical• the harm or potential harm to the environment or public health, safety or amenity caused by the unlawful activity• is the activity inconsequential or minor in nature• the time that has lapsed since the date of the unlawful activity
Alleged offender	<ul style="list-style-type: none">• whether the offence was committed with intent• whether the person or organisation reported has been proactive in the resolution of the matter and assisted Council with its requirements and investigation• any mitigating or aggravating circumstances demonstrated by the alleged offender• whether the offender shows or has shown contrition• any particular circumstances of hardship affecting any prior warnings, instructions, advice that was issued to the person or organisation reported or previous enforcement action taken against them• the person or organisation reported• prior history of the offender
Impact of any enforcement action	<ul style="list-style-type: none">• what action would be proportionate and reasonable in response to the unlawful activity• whether an educative approach may be more appropriate• the costs and benefits of taking formal enforcement action as opposed to giving a warning or taking no action• whether the action will result in people becoming homeless;

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	<ul style="list-style-type: none">the prospect of success if the proposed enforcement action was challenged in courtthe need to deter any future unlawful activitythe likely outcome in the event of a conviction having regard to the sentencing options available to the courtif the matter is currently before the courtwhether Council is prevented from taking action based on earlier advice given by Council or any prior Ordersany precedent which may be set by not taking enforcement action
Potential for remedy	<ul style="list-style-type: none">whether the breach can be easily remediedwhether it is likely consent would have been given for the activity if it had been soughtwhether there is a draft planning instrument on exhibition that would make the unauthorised use legal

Authorised officers will use discretion to determine the most appropriate response to confirmed cases of unlawful activity and may take more than one approach.

Enforcement action (including prosecution) will not be undertaken for an improper purpose and will not be influenced by:

- any matter that would constitute unlawful discrimination against a person;
- personal empathy or antipathy towards a person; and
- political affiliations or any other association.

Notwithstanding any decision made by Council to take or not take enforcement action, any person reporting unlawful activity may exercise their own rights and bring proceedings to remedy or restrain a breach of an Act, where available under the applicable legislation. The person should seek independent legal advice in that respect.

4.4. Review and appeal rights

Decisions of authorised officers to investigate or not investigate and/or to take or not take enforcement action may be subject of:

- an internal review following submissions put forward by a party to a matter, which may relate to the following:
 - directions, declarations, notices and orders
 - penalty notices
 - other matters, including decisions not to investigate or take enforcement action or the general conduct of Council during the enforcement process; and/or
- any applicable appeal rights to a court of competent jurisdiction.

Once a matter has been subject to an internal review the outcome of that review is final and will not be subject of a further review by Council.

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4.4.1. Directions, declarations, notices and orders

All representations in relation to directions, declarations, notices and orders should be made to the issuing authorised officer quoting the Council reference number displayed on the direction, declaration, notice or order. Representations that are addressed to any other person within Council, including Council's Chief Executive Officer, Mayor or Councillors will be referred back to the issuing authorised officer.

Representations will be considered in accordance with Council's internal review processes and a peer review by an equal and/or senior officer will be required.

The decision making process in respect of the representations will be recorded on Council's record system and the reasons for that decision clearly stated and communicated to the person making the representations.

Lodgement of the representations does not affect the legislative timeframes of any appeal rights and the person making the representations must ensure that their appeal rights to a court of competent jurisdiction are exercised within those applicable timeframes. Council will inform the person of their appeal rights and the relevant timeframes in the directions, declarations, notices or orders, if applicable.

4.4.2. Penalty notices

As penalty notices issued by Council are processed and enforced by Revenue NSW, all representations in relation to a review of these penalty notices must be made directly to Revenue NSW to stop the enforcement process to enable completion of the review. If representations are received by Council, the person making them will be advised to make the representations directly to Revenue NSW. Representations that are addressed to any person within Council, including Council's Chief Executive Officer, Mayor or Councillors will be referred back to Revenue NSW.

Where Revenue NSW refers penalty notice representations to Council for recommendation, the representations will be dealt with in accordance with Council's internal review processes and appropriate recommendations will be recorded on Council's record system and provided back to Revenue NSW.

Revenue NSW will inform the person making the representations of the outcome of the review and will inform the person of their appeal rights (i.e. a right to court elect the penalty notice and have the matter heard by a Local Court Magistrate).

4.4.3. Other matters

Any other submissions received by Council in relation to a decision to investigate or not investigate and/or to take or not take any enforcement action should be addressed to the issuing authorised officer and quote Council's reference number where applicable. Submissions that are addressed to any other person within

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Council, including Council's Chief Executive Officer, Mayor or Councillors will be referred to the supervisor of the issuing authorised officer.

Submissions will be considered in accordance with Council's internal review processes and a peer review by a senior officer will be required.

The decision making process in respect of the submissions will be recorded on Council's record system and the reasons for that decision clearly stated and communicated to the person making the submissions.

4.5. Taking legal action

Council and its authorised officers will be guided by legal advice in deciding whether to commence criminal or civil proceedings and will consider the following:

- whether there is sufficient evidence to establish the elements of the offence to the required standard of proof;
- whether there is a reasonable prospect of success before a court;
- whether the public interest warrants legal action being pursued; and
- time within which to commence proceedings.

5. RESPONSIBILITIES OF OTHER STAKEHOLDERS

5.1. Those who report unlawful activities

Council expects that people who report allegations of unlawful activity will cooperate and act in good faith in respect of any investigations conducted by Council. This includes:

- providing a clear description of the problem (and the resolution sought, if relevant) ;
- giving all available and relevant information to Council, including any new information; about the alleged activity that may become known to the person following the making of their report;
- not giving any information that is intentionally misleading or wrong;
- cooperating with Council's inquiries and giving timely responses to questions and requests for information;
- treating Council's staff with courtesy and respect; and
- allowing the investigation to be completed without prematurely taking the matter to other agencies unless referred to them by Council.

If these expectations of the individual are not met, Council may need to set limits or conditions on the continuation of the investigation or may need to restrict any further communications with the individual.

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Anonymous reports will be recorded and assessed. However, because it is not possible to seek clarification or additional information about a matter, it is more difficult to evaluate the allegations and therefore only high risk matters that are reported anonymously are likely to be tasked for investigation.

5.2. Councillors

Councillors play a vital role in meeting the needs of Sutherland Shire local community. They serve their community by listening to their views and representing those views on Council. They can have a major and positive impact on the health and well-being of the whole community. Thus, a good working relationship between Councillors, the Mayor, the Chief Executive Officer and other Council staff is fundamental to an effective Council.

Compliance and enforcement matters are sensitive and easily susceptible to allegations of impropriety, bias or inconsistency. Consistent with Councillors' Code of Conduct, to manage those risks, and to balance their role as both a local advocate for community members as well as ensuring Council maintains fair and impartial decision making processes, Councillors should not attend meetings with Council staff, the complainants, or persons the subject of investigation or enforcement action, or direct staff in relation to particular outcomes relating to investigations or enforcement options or actions.

Decision making relating to the investigation of reports alleging unlawful activity and taking enforcement action is the responsibility of Council authorised officers.

Councillors can always assist individuals who raise concerns with them by liaising with the relevant senior manager and satisfying themselves that Council's policies and guidelines are being carried out correctly.

6. POLICY COMPLIANCE

Compliance with this Policy will be monitored by the Manager Corporate Governance with assistance from the Manager Environment Health and Building and Manager Public Safety and Lifeguards.

Council will review this Policy every four years or at the request of Council or in response to legislative and statutory requirements.

7. RECORD KEEPING, CONFIDENTIALITY AND PRIVACY

Council adheres to and complies with the NSW State Records Act 1998, the Government Information (Public Access) Act 2009 and the Privacy and Personal Information Protection Act 1998 through its Access to Information Policy and Privacy Management Plan.

People who report allegations of unlawful activity should not expect that their identities will remain confidential from the subject of their report in all circumstances. Council may have to disclose information that identifies them in the following cases:

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- the disclosure is necessary to investigate the matter;
- their identity has already been disclosed to the subject of their report directly or in a publicly available document;
- the individual was consulted following receipt of a GIPA access application and did not object to the disclosure;
- the individual consents in writing to their identity being disclosed;
- the disclosure is required to comply with principles of procedural fairness; or
- the matter proceeds to court.

Council will take seriously any concerns an individual may have about their physical safety being endangered as a result of making a report. However, this may limit council's ability to investigate the matter.

8. BREACHES OF POLICY

Breaches of this Policy will be dealt with in accordance with normal disciplinary procedures and will be advised to the Chief Executive Officer, Director Shire Planning and/or Director Shire Services, via the Manager Environment Health and Building and/or via Manager Public Safety and Lifeguards.

9. RELATED DOCUMENTS

- Sutherland Shire Council Complaints Management Procedures 2013
- Customer Response Policy 2014
- Unreasonable Customer Conduct Policy 2020

10. RELEVANT LEGISLATION, REGULATIONS AND GUIDELINES

- Building Code of Australia / National Construction Code
- Companion Animals Act 1998 and Regulations
- Environmental Planning and Assessment Act 1979 & Regulations
- Impounding Act 1993 and Regulations
- Fines Act 1996 and Regulations
- Food Act 2003 and Regulations
- Government Information (Public Access) Act 2009
- Local Government Act 1993 and Regulations
- Law Enforcement (Powers and Responsibilities) Act 2002
- Privacy and Personal Information Protection Act 1998
- Protection of the Environment Operations Act 1997 and Regulations
- Public Health Act 2010 and Regulations
- Roads Act 1993 and Regulations
- Roads Transport Act 2013 and Regulations
- Swimming Pools Act 1992 and Regulations

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- State Records Act 1998
- Surveillance Devices Act 2007
- NSW Ombudsman Model Compliance and Enforcement Model Policy 2015
- NSW Ombudsman Enforcement Guidelines for Councils 2015
- NSW Department of Planning Prosecution Guidelines 2016
- NSW Department of Planning Compliance Policy 2018
- NSW EPA Compliance Policy 2013
- NSW EPA Prosecution Guidelines 2020
- NSW EPA Powers and Notices, Draft Guidelines for Authorised Officers and Enforcement Officers 2020
- NSW Health Prosecution Policy and Guidelines 2014
- NSW Food Authority Compliance and Enforcement Policy
- **Code of Conduct for Council Staff**

11. DEFINITION OF TERMS

Term	Meaning
Unlawful activity	<p>Any activity or work that has been or is being carried out or a failure to carry out such activity or work:</p> <ul style="list-style-type: none">• contrary to the terms and conditions of a development consent, approval, permit or licence;• contrary to an environmental planning instrument that regulates activities or work that can be carried out on particular land;• activities or works undertaken without a required development consent, approval, permit or license; or• otherwise contrary to legislation (including a legislative provision regulating a particular activity or work).
Authorised officer	Council staff provided with adequate and appropriate delegations to exercise Council's regulatory functions.
Conflict of interest	A conflict of interest is defined in Council's Code of Conduct for Council Staff and could be of pecuniary or non-pecuniary nature.

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