



**MARLBOROUGH
DISTRICT COUNCIL**



Only Marlborough

ENFORCEMENT POLICY



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INTRODUCTION

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

Marlborough District Council needs to meet its obligations under the RMA and to its community while working within its corporate values, and towards the vision and mission of the wider organisation.

These obligations are met by a dedicated compliance team. The compliance team monitor a range of activities regulated by the Resource Management Act, including monitoring compliance with National Environmental Standards, Plan rules, and the conditions of resource consents. On occasion when a breach has been confirmed there is a requirement to take enforcement action against liable parties using enforcement tools available under the Resource Management Act.

PURPOSE

With increasing pressure on resource use, Marlborough District Council's regulatory functions are subject to greater interest from resource users and the wider community. This policy is intended to provide a clear understanding of Marlborough District Council's management of compliance and enforcement of the Resource Management Act.

The policy sets out the purpose and principles by which we promote and enforce compliance with the Resource Management Act.

This policy is intended to ensure a consistent and integrated approach to compliance and enforcement by Marlborough District Council.

The Marlborough District Council compliance team also apply the 4 Es approach (Engage, Educate, Enable and Enforce) and 3 contact concept (Prior, Present and Post) in their programmes.

It is intended that the policy will encourage a regional culture of proactive compliance, accountability, consultation and cooperation in governing resource use in Marlborough.

DEFINING THE SCOPE OF THIS POLICY

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

Marlborough District 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 exemplars, 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 businesses** to develop best practice to encourage compliance, or better, by their peers and within their industry.

- **Enforcement** for those people who breach regulations. 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.

A proportionate, risk-based compliance strategy

"A successful and cost effective compliance strategy will draw on a range of options for responding to non-compliance. Responses can range from encouraging and assisting an individual or business to comply where the risk presented is minor, to revoking an operating licence and bringing criminal or civil court action in cases of serious risk and deliberate non-compliance."

CCCP – Achieving Compliance; A Guide for Compliance Agencies in New Zealand June 2011; page 172



THE INVESTIGATION AND ENFORCEMENT PROCESS AT A GLANCE

NOTIFICATION

Non-compliance or offending may be detected through:

- Complaint
- Monitoring
- Major incident

A PERSON IS TASKED AS BEING RESPONSIBLE FOR GATHERING INFORMATION

1

GATHER INFORMATION (INVESTIGATION)

May include:

- Site inspection
- Measuring
- Sampling
- Photographing
- Expert advice
- Interviewing people

2

ENFORCEMENT DECISION

May be made by:

- Manager
- Enforcement Officer with QA Enforcement Decision Panel Approval

3

ENFORCEMENT OPTIONS

- No further enforcement action
- Letter of direction
- Abatement notice
- Formal warning
- Infringement

These options can be applied on the authority of the relevant manager or officer with QA panel approval and do not have to go to EPC.

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.

ENFORCEMENT DECISION

May be made by:

- Enforcement and Prosecution Committee (EPC)

ENFORCEMENT OPTION

- Enforcement Order
- Prosecution

INDEPENDENT LEGAL ADVICE

DISTRICT COURT

- Determines guilt
- Imposes sentence
- Makes orders

LEGAL STATUS

This policy:

- Is not legally binding on Marlborough District Council, any other organisations, or any individual;
- Is general in nature and does not exhaustively address all statutory limitations and considerations that may be relevant under the RMA;
- Does not confine, restrain or limit the discretion of Marlborough District Council to take any action; and
- Is not a substitute for legal advice or legal processes.

It is not the intention of this policy that any act or omission of any officer of Marlborough District Council shall be called into question or held to be invalid on the grounds of a failure to comply with this policy.

DISCRETION

Marlborough District Council has discretion in considering appropriate compliance advocacy and/or enforcement action² with respect to:

- The appropriate defendant to pursue;
- The appropriate enforcement tools to use in the circumstances; and
- Withdrawal of an enforcement action that has been commenced.

Marlborough District Council is required to exercise this discretion in a way that is reasonable and consistent with the principles of the RMA and the requirements of natural justice.

DESIRED OUTCOME

- To monitor, promote and enforce compliance with the Resource Management Act 1991 (RMA) to:
- Modify the behaviour of actual and potential offenders by:
 - Educating resource users.
 - Promoting compliance with the RMA, consents and plans.
 - Using enforcement tools to obtain necessary action, and
 - Providing deterrence through appropriate penalties.

PRINCIPLES AND GUIDELINES

The regulatory enforcement role in New Zealand has clearly established guidelines and principles. Marlborough District 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.

CONFLICTS OF INTEREST

Marlborough District Council will carry out all of its enforcement functions in accordance with the conflict of interest 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 conflict of interest may arise (and therefore how to avoid a conflict of interest) and a mechanism for ensuring that any actual or potential conflict of interest is disclosed and managed appropriately.



THE 4 E'S MODEL

The 4Es model is outlined in the Regional Sector Strategic Compliance Framework and provides a comprehensive strategy for working with customers. The 4Es: Engage, Educate, Enable and Enforce are not exclusive of each other. It is recognised that different components of the model may be carried out by different parts of an organisation and that many components of the model may be used with one incident.

ENGAGE: Consult with monitored parties, stakeholders and the community on matters that may affect them. This will require maintaining relationships and communication until final outcomes have been reached. This will facilitate greater understanding of challenges and constraints, engender support and identify opportunities to work with others.

EDUCATE: Alert monitored parties to what is required to be compliant with consent conditions and where the onus lies to be compliant. Education should also be utilised to inform the community and stakeholders about what regulations are in place around them, so that they will better understand what is compliant and what is not.

ENABLE: Provide opportunities for monitored parties to be exposed to industry best practice and regulatory requirements. Link monitored parties with appropriate industry advisors and promote examples of best practice.

ENFORCE: When breaches of regulation, or non-compliance, are identified then an array of enforcement tools are available to bring about positive behaviour change. Enforcement outcomes should be proportional to individual circumstances of the breach and culpability of the party.

This policy covers the activities of the compliance team in the final 'enforce' part of the model.

THE THREE CONTACTS CONCEPT

Marlborough District Council is committed to keeping all parties as informed as possible. The compliance team has identified the three main areas of contact with the public and consent holders.

PRIOR: Making contact with the public and consent holders before there are issues. Such as industry and community group meetings and workshops are all designed to encourage, educate and enable the public or consent holder to be compliant.

PRESENT: At the time of an incident, compliance officers will give advice on reducing the impact to the environment at the scene.

POST: If someone is being investigated they are made fully aware of the investigation process and possible outcomes that they may face. This enforcement policy highlights the process for people.



1 GATHERING THE INFORMATION (INVESTIGATION)

If a breach, or potential breach, of the RMA occurs then information must be gathered about how and why the breach occurred. The purpose of an investigation 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 such as 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.

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 Marlborough District Council has the authority to issue staff with warrants of authority. A warranted enforcement officer has the ability to enter private property (excluding dwelling houses) for the purpose of assessing compliance with environmental regulation. This can be completed without providing prior notice to the occupier or land owner.

However, there are times when access to property has to be conducted with informed consent or search warrant. The High Court has given very clear direction as to when an officer can rely upon their warrant of authority and when they need to have informed consent or a search warrant.

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



2 ENFORCEMENT DECISION MAKING

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.

The courts have provided helpful guidelines⁵ 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?
- 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.⁶

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 CAN MAKE THE DECISION?



Taking any kind of enforcement action can have a profound impact on the alleged offender and is never taken lightly. Decisions on enforcement action must be based on reliable and correctly obtained information.

A warranted officer cannot make an enforcement decision in isolation. The compliance team has established a Quality assurance enforcement decision panel to ensure consistency of officers' enforcement approach and decision making.

Enforcement officers on establishing a breach complete a QA report for the QA enforcement decision panel to approve enforcement recommendation. A recommendation may range from no further action through to referral to Council's Enforcement and Prosecution committee for prosecution.

If urgency is required the Manager of Compliance can approve enforcement action with the exclusion of prosecution and enforcement orders which can only be approved by the delegated Enforcement and Prosecution committee.

Officers are delegated to issue abatement notices and may do this without QA panel approval where urgent directive action is required.

The decision to take a prosecution or make an application for an enforcement order is delegated to Council's Enforcement and Prosecution committee. The enforcement officer provides the Enforcement and Prosecution committee with an Enforcement and prosecution report. This report sets out a summary of the offence(s), the factors to consider, including the Solicitor-General's Prosecution Guidelines.⁷

If the committee determines to proceed to court action legal counsel is instructed to independently review the file for evidential sufficiency, culpable parties and any available defenses.

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.”⁷

3 ENFORCEMENT OPTIONS

Marlborough District Council enforcement officers have a broad range of enforcement options available to them to address matters of non-compliance.

Enforcement tools can be categorised into three main types. Informal actions are focused on providing education and incentive-based responses to allow the person to become better informed and develop their own means to improved compliance. Directive actions are about looking forward and giving direction and righting 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.

Education and Incentive

Action	Description of Action	Potential impacts on the liable party	When might this action be appropriate?
EDUCATION & ENGAGEMENT	To prevent further breaches, or to remedy or mitigate the effects of non-compliance, Council can provide information or guidance around rules and regulations or provide assistance to enable parties to achieve compliance.	This is a non-formal process and as such has no legal implication.	Education and other incentive based interactions are reserved for dealing with cooperative parties, who are motivated to do the right thing but lack the knowledge or skills necessary to achieve and maintain compliance.



Directive actions

Action	Description of Action	Potential impacts on the liable party	When might this action be appropriate?
LETTER OF DIRECTION	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.	Such a direction is not legally enforceable.	Letters of direction 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.
ABATEMENT NOTICE	<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.</p> <p>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>	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.
ENFORCEMENT ORDER	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 but can also be made during the course of an RMA prosecution.	<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>	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.

It is important to note that for every directive action, where a breach has been established that Council may also elect to take punitive action.

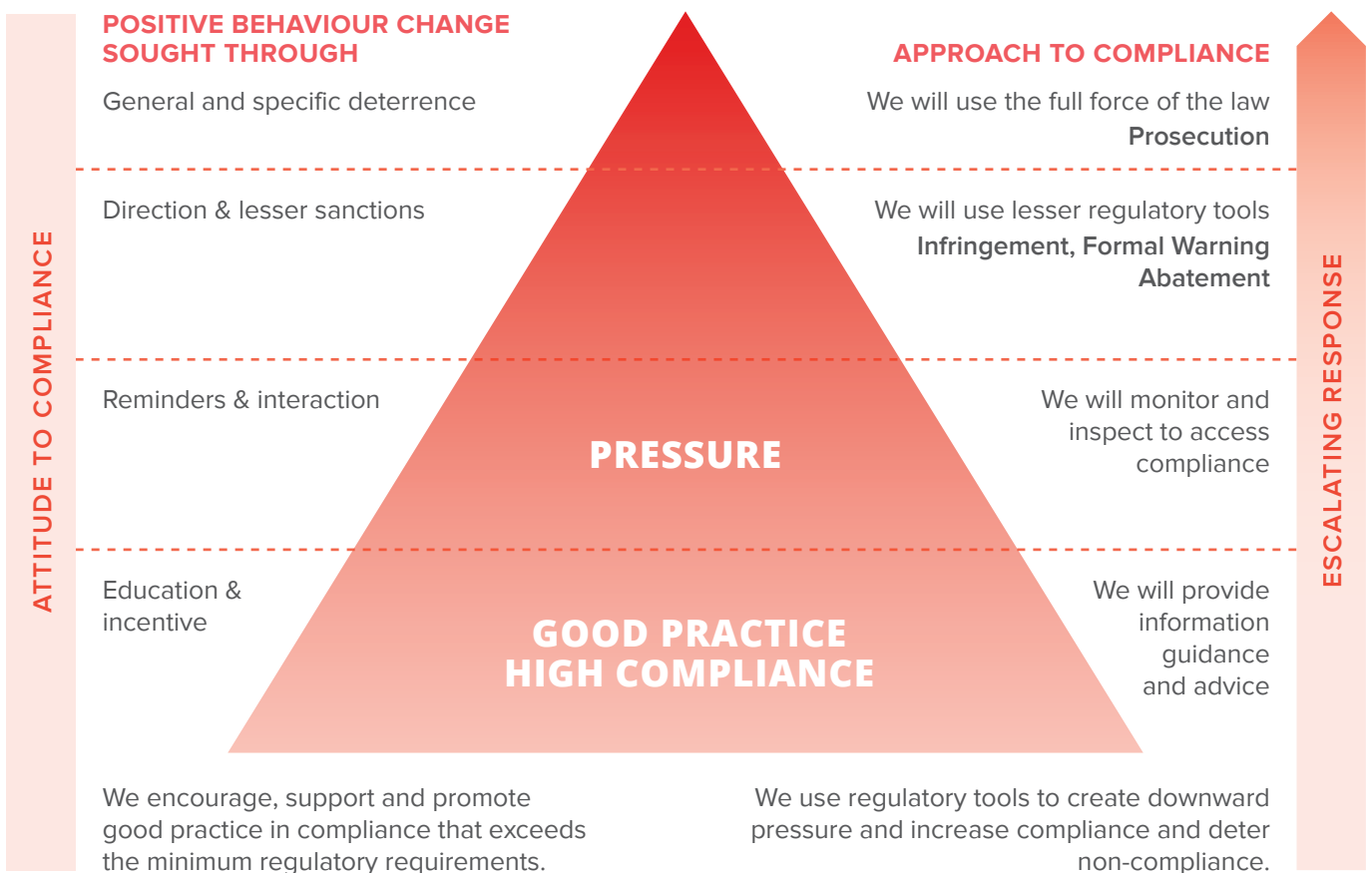
Punitive actions

Action	Description of Action	Potential impacts on the liable party	When might this action be appropriate?
FORMAL WARNING	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.	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.	A formal warning may be given when: 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; and a written warning would be appropriate in the circumstances.
INFRINGEMENT NOTICE	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 .	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.	An infringement notice may be issued when: 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.
PROSECUTION	A prosecution is a process taken through the criminal courts to establish guilt or innocence and, if appropriate, the court will impose sanctions. RMA matters are heard by a District Court Judge with an Environment Court warrant. All criminal evidential rules and standards must be met in a RMA prosecution.	A successful prosecution will generally result in a conviction, a penalty imposed and consideration to costs of the Investigation. A prosecution forms part of the history of non-compliance and will be considered if there are future incidents of non-compliance.	A prosecution may be considered appropriate when the factors listed in section 2 indicate that the matter is sufficiently serious to warrant the intervention of the criminal law.

SELECTING AN ENFORCEMENT RESPONSE

Deciding on the appropriate enforcement response is often complicated by a range of factors. In order to make a sound and justifiable decision, it is essential that all relevant issues surrounding the matter are carefully considered prior to actual enforcement action being taken.

The ‘compliance pyramid’⁸ 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

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

APPENDIX 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.



