



**CITY OF VINCENT**

# **PROSECUTION AND ENFORCEMENT**

## **POLICY NO. 4.1.22**

**(Adopted at the Ordinary Meeting of Council held on 22 February 2005)**

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**PROSECUTION AND ENFORCEMENT**

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**PROSECUTION AND ENFORCEMENT**

**OBJECTIVE**

To ensure that the laws administered by the City of Vincent are applied impartially, in a fair and consistent manner.

**POLICY STATEMENT**

**1. Enforcement of Legislation**

- (i) All provisions of the Acts, Regulations and Local Laws enforced by the City are important in regard to requirements for compliance, and will be appropriately enforced.
- (ii) The enforcement action which is pursued will depend on the circumstances of the case, in particular the seriousness of the breach as reflected by the penalty provided in the legislation.

**2. Prosecutions**

This Policy aims to ensure decisions in relation to prosecutions and enforcement of legislation are based on appropriate criteria which are accountable, transparent, open, fair and capable of being applied consistently across the broad range of circumstances to which the laws apply. The policy recognises the role of the "*public interest*" in determining whether or not a prosecution, or subsequent appeal, will be initiated or continued.

A prosecution has an impact on the rights of the alleged offender, the interests of the victim and the community generally.

Through application of this Policy and Guidelines and Procedures, the City of Vincent (referred to as "the City") will avoid arbitrary decisions, and will ensure prosecutions are not conducted for improper purposes, capriciously or oppressively.

This Policy embraces the principles contained in the *Statement of Prosecution Policy and Guidelines 2005* issued by the Director of Public Prosecutions and published in the *Western Australian Government Gazette*.

This Policy applies to all prosecutions for offences under the Acts, Regulations and Local Laws administered by the City, (referred to as "the Act" or "the Regulations" or "the Local Laws") and as the circumstances allow, to all appeals arising out of proceedings in respect of any such prosecutions.

<b>Date Adopted:</b>	<b>22 February 2005</b>
<b>Date Amended:</b>	<b>1 February 2010, 11 June 2013</b>
<b>Date Reviewed:</b>	<b>1 February 2010</b>
<b>Date of Next Review:</b>	<b>February 2015</b>

**GUIDELINES AND POLICY PROCEDURES FOR  
PROSECUTION AND ENFORCEMENT POLICY –  
POLICY NO. 4.1.22**

**1. APPLICATION**

1.1 This policy is to be applied:

- (i) prior to any authority to prosecute being signed and at any subsequent time should additional information be provided that might influence the decision to prosecute prior to the matter being heard in court;
- (ii) when a decision is taken not to proceed with the recommendation of an “*Authorised Person*” to prosecute; and
- (iii) in all cases involving a serious endangerment to a person or the health and safety to a person is at risk.

“*Authorised Person*” means a person authorised by the local government under Section 9.10 of the *Local Government Act 1995* to perform any of the functions of an authorised person.

**2. ENFORCEMENT OF LEGISLATION**

**2.1.1 General Procedures**

The enforcement action which is warranted will depend upon the circumstances of each individual case, in particular the seriousness of the breach, as reflected by the penalty that Parliament has provided in the legislation and includes the following:

- (i) verbal direction;
- (ii) warning letter;
- (iii) issue of an infringement notice;
- (iv) notices/orders/directives;
- (v) prosecution action; or
- (vi) any combination thereof.

Verbal direction in the context of the enforcement policy will normally relate to situations where a minor breach can be immediately rectified and inspected prior to the Authorised Person leaving the premises or within a short time.

Action taken by the Authorised Person, including verbal directions, will be conveyed to the owner, occupier or proprietor or any other relevant person/party while the City’s Authorised Person is present at the premises.

Where an Authorised Person has issued a verbal warning, details of the warning shall be recorded. Such a record should include when the direction was issued, to whom it was issued and details of the direction. Any verbal warning should be recorded on the appropriate file/document so that repeated breaches can be recognised.

If the breach constitutes an immediate threat to health or safety, the Authorised Person should make every endeavour to promptly contact the owner and/or occupier by telephone or in person.

In situations where the breach is of a minor nature, does not constitute an immediate threat to health or safety, the owner or occupier is not readily contactable and the person has not previously received a letter concerning the breach, the Authorised Person may send a letter to the owner and/or occupier requesting that the breach be rectified within a reasonable period of time. Such a letter will quote the relevant Act, Regulation or Local Law and will indicate the actions open to the City if the breach is not rectified, including penalties that may apply.

Where the Authorised Person believes that the breach will not be rectified within the time frame stipulated in the letter, a notice/order/directive should be issued in accordance with the Act, Regulation and Local Law.

Where the breach has not been rectified after the City has issued the necessary notices/orders/directives, consideration will be given to instituting prosecution action. Such action will be in accordance with the City's Prosecution and Enforcement Policy.

Anonymous complaints are to be dealt with in accordance with the Policy No. 4.1.3 – Customer Service Complaints Management.

### **City of Vincent Local Government Property Local Law 2008 Clause 3.13 concerning the prohibiting camping and/or occupying a vehicle overnight in a public place**

At the Ordinary Meeting of Council held on 11 June 2013 the Council considered a Notice of Motion (Item 10.2) from Mayor Hon. Alannah MacTiernan and resolved as follows:

“The enforcement of the City of Vincent Local Government Property Local Law 2008, Clause 3.13 concerning prohibiting the camping and/or occupying a vehicle overnight in a public place, shall only follow a complaint or a decision by the Manager Ranger and Community Safety Services, from a local resident, ratepayer or a Police Officer

#### **2.1.2 Infringement Notices - General**

- (i) As an alternative to commencing prosecution proceedings, an offender may be issued with an Infringement Notice, under a specified Statute. Infringement Notices shall only be issued by authorised persons (or designated officers) as approved by the Chief Executive Officer and prescribed in the City's Delegation Register.
- (ii) Infringement Notices will only be issued where the offence committed is a minor contravention of the Act.
- (iii) Payment of the modified penalty for an Infringement Notice may not prevent further formal enforcement proceedings being taken should the alleged breach not be remedied.

#### **2.2 Enforcement and Legal Proceedings relating to Development, Subdivision or Land Use**

##### **2.2.1 Definitions**

“*Unauthorised Development*” means development that does not have a valid Planning Approval and/or a valid Building Permit, where required, from the City of Vincent.

“*Compliance Matter*” means an alleged unauthorised development; or a development operating contrary to approved plans/and or conditions of approval, raised by a written enquiry/complaint or inspection by an Authorised Person.

“*Planning Written Direction*” means a notice given under the provisions of the *Planning and Development Act 2005*, to an owner or any other person undertaking a development in contravention of a planning scheme, interim development order or planning control area requirements, to stop, and not recommence, the development or that part of the development that is undertaken in contravention and/or to remove, pull down, take up, or alter the development; and to restore the land as nearly as practicable to its condition immediately before the development started, to the satisfaction of the responsible authority.

“*Building Notice*” means a notice given under the provisions of the *Building Act 2011*, to an owner or builder in contravention of this Act, requiring him to pull down or so alter the building as to remove the cause of the objection.

### **2.2.2 Raising a Compliance Matter**

- (i) In the interest of fairness and accountability, all enquiries/complaints are to be made in writing (letter, facsimile or e-mail) to the City, including the person's name, address, phone/email contact and details of the matter.

This information will enable the City to contact the complainant should further information be required and/or notify them of the outcome of the investigation. Should the City be unsuccessful in achieving compliance, complainants may be required to appear as a witness at legal proceedings.

- (ii) All compliance matters will be treated confidentially, where practicable.

### **2.2.3 Discretionary Criteria**

The following matters may not be dealt with by the City:

- (i) matters falling outside of the jurisdiction of the City, such as civil matters;
- (ii) where in the opinion of the Manager Planning and Building Services, the matter of concern is of a vexatious nature or is not made in good faith;
- (iii) where after reasonable investigation, enforcement proceedings are unlikely to be achieved due to:
  - (a) a lack of documentary evidence; (e.g. such as plans/documents);
  - (b) the time which has elapsed since the development was undertaken; and/or
  - (c) the development/building(s) is deemed NOT to be a potential danger, hazard, health or safety risk to any person or property.

### **2.2.4 Enforcement Procedures**

- (i) Compliance matters will be dealt with in accordance with the following priorities:
  - (a) any matter relating to a development/building that is considered to be a potential danger, hazard, health or safety risk to any person and property; and
  - (b) any matter involving irreversible and permanent damage to a building or place on the State Register of Heritage Places or the City's Municipal Heritage Inventory Database, or to the natural environment.

All other compliance matters will be processed in the order in which they arise.

- (ii) The following outlines the general enforcement procedure to be followed, however the manner in which the City takes enforcement action will ultimately depend on the nature of the matter, and the seriousness of the contravention:
  - (a) write to the owner and/or responsible person requesting them to either:
    - (1) remove and/or cease the unauthorised development/building(s) within twenty eight (28) days of notification by the City; OR
    - (2) if in the opinion of the Manager Planning and Building Services, a reasonable prospect of retrospective approval exists, the City will concurrently provide an opportunity for the submission of an application for retrospective Planning and Building Approval (if required) within 28 days of notification; OR
    - (3) issue the respective Planning Written Direction and/or Building Notice to the property owner and/or responsible person, if the development/building(s), in the opinion of the City, is deemed to be a potential danger, hazard, health or safety risk to any person and property.
  - (b) where compliance is not achieved in accordance with the above relevant timeframe, and a request for an extension of time has not been requested and approved by the City, and no attempt has been made to rectify the matter, the City may:
    - (1) issue an Infringement Notice under the Division 3 of Part 13 of the *Planning and Development Act 2005*. Refer to Clause 2.2.5 of this Policy relating to Infringement Notices;
    - (2) write to the owner and/or responsible person requesting them to advise the City, in writing, of their intentions within seven (7) days; or
    - (3) commence legal proceedings in accordance with the City's Policy No. 4.1.22 relating to Prosecution and Enforcement (Clause 6).
- (iii) In addition to Clause (ii) above of this policy, where unauthorised development/building(s) have been carried out, which blatantly disregards the City's requirements, the City may:
  - (a) issue an Infringement Notice under the Division 3 of Part 13 of the *Planning and Development Act 2005*. (Refer to Clause 2.2.5 of this Policy relating to Infringement Notices); and
  - (b) commence legal proceedings in accordance with the City's Policy No. 4.1.22 relating to Prosecution and Enforcement (Clause 6).

*NOTE: The lodgement of an application for retrospective Planning Approval does not prevent action being taken by the City in respect to the offence.*

### 2.2.5 Infringement Notices

- (i) As an alternative to commencing prosecution proceedings, an offender may be issued with an Infringement Notice, as per Division 3 of Part 13 of the *Planning and Development Act 2005*.
- (ii) Infringement Notices will only be issued where the offence committed is a minor contravention of the Act or Scheme and where the physical elements of the offence are clearly recognised.
- (iii) Payment of the modified penalty for an Infringement Notice may not prevent further formal enforcement proceedings being taken should the alleged breach not be remedied.
- (iv) For the purposes of section 234 of the *Planning and Development Act 2005*, the Chief Executive Officer has appointed the following classes of persons to be designated persons for the purposes of **giving an infringement notice** pursuant to sections 228 of the Act:
  - (a) Manager Planning and Building Services.
- (v) For the purposes of the section 234 of the *Planning and Development Act 2005* the Chief Executive Officer has appointed the following classes of persons to be designated persons for the purposes of **withdrawing an Infringement or granting an extension of time for payment** pursuant to sections 230 and 231 of the Act:
  - (a) Director Planning Services.

NOTE: As per the section 234(2) of the *Planning and Development Act 2005* a person who is authorised to give infringement notices under section 228 is not eligible to be a designated person for the purposes of any of the other sections (i.e. sections 230 and 231).

### 2.2.6 Reviews

Where an application for review is lodged with the State Administrative Tribunal in respect to a notice served by the City, no further action shall be taken in relation to that matter until such time as the review application has been determined (unless there are immediate health or safety concerns to be addressed).

## 3. THE DECISION TO PROSECUTE

In applying the law impartially, in a fair and consistent manner, it is necessary to consider:

- (i) the rights of the alleged offender; and
- (ii) the interests of the community and particularly those most adversely affected.

Ordinarily discretion on whether to prosecute will be exercised so as to recognise the courts' central role in the criminal justice system in determining guilt and imposing appropriate sanctions for criminal conduct.



Where an Authorised Person obtains sufficient evidence to establish a *prima facie* case for serious matters, and there is a reasonable prospect of a conviction, consideration will be given to taking prosecution action, instead of, or in addition to applying alternative enforcement actions, in circumstances including:

- (i) where the issue of notices/orders/directives is considered insufficient for ensuring compliance with the Act or Regulations;
- (ii) where, in the opinion of an Authorised Person, an alleged breach of the Act, Regulations or Local Laws either has resulted, or could have resulted in serious injury, serious risk/damage or a serious health hazard;
- (iii) alleged failure to comply with a notice within a reasonable period of time;
- (iv) where a person flagrantly and/or deliberately breaches legislation;
- (v) where an Authorised Person alleges a person has repeated the same serious offence; and
- (vi) wilful obstruction of an Authorised Person.

In cases falling under one or more of the above circumstances, a prosecution only will be initiated where:

- (i) an Authorised Person obtains sufficient evidence to establish a *prima facie* case; and
- (ii) it is judged to be in the "public interest", including there being a reasonable prospect of success.

The above considerations are detailed under sections 3, 4, 5, and 6 below.

The decision to continue a prosecution is at least as important as the decision to charge and takes into account factors beyond those which influence an Authorised Person. Those factors are set out in this document.

#### **4. A PRIMA FACIE CASE**

Consideration should be given, as early as possible in the prosecution process, as to whether the evidence discloses a *prima facie* case.

The question whether there is a *prima facie* case is one of law. This involves consideration of whether the evidence could lead to the conclusion, beyond reasonable doubt, that all the elements of the offence can be proved.

Where, in the opinion of the City's Chief Executive Officer, giving due consideration to appropriate advice, the available material does not support a *prima facie* case, the prosecution should not be instituted or proceed under any circumstances. A report shall be prepared by the Chief Executive Officer specifying the reasons for such action.

## **5. THE PUBLIC INTEREST**

If a *prima facie* case exists, the prosecution of an offence must also be in the public interest.

This requires the balancing of a broad range of factors, as they relate to the particular case. The presence of a particular factor does not necessarily mean it would be against, or in, the public interest to proceed with a prosecution, and the same factor could equally weigh in favour of prosecution in one particular case, yet weigh against it in another. Ultimately it is all the relevant factors taken together which will determine, on balance, whether it is in the public interest to proceed.

As mentioned earlier in this policy, it is the role of the courts to determine guilt or innocence. While all prosecutions must be in the public interest, the test of public interest must be applied in a manner which does not remove the central role of the courts in the prosecution process. As is the case with other issues relating to the public interest, it is a matter of balance and exercise of appropriate judgement.

It is in the public interest that prosecutions be treated fairly and impartially.

A prosecution which is instituted for improper purposes, capriciously or oppressively is not in the public interest.

## **6. EVALUATION OF THE PUBLIC INTEREST**

### **6.1. Reasonable Prospects of Conviction**

It is not in the public interest to proceed with a prosecution which has no reasonable prospect of resulting in a conviction.

A prosecution should be discontinued if, based on the available material and appropriate advice, the City's Chief Executive Officer considers that there is no reasonable prospect of conviction, unless further prompt investigation will remedy any deficiency in the prosecution case.

The evaluation of prospects of conviction requires dispassionate and impartial judgement, based on the advice and experience of the Council's solicitors.

Such decisions may on occasions be difficult. However, this does not mean that only cases perceived as 'strong' should be prosecuted. Generally, the resolution of disputed questions of fact is for the court and not the Council. A case considered 'weak' by some may not seem so to others. Nevertheless, the Council has a responsibility, in the public interest, to exercise appropriate discretion and judgement in the assessment of the prospects of conviction when deciding to bring a matter to court. The assessment of the prospects of conviction is not to be understood as an usurpation of the role of the court but rather as an exercise of discretion in the public interest.

The evaluation of the prospects of conviction includes consideration of:

- (i) whether any alleged confession was given voluntarily and whether there are grounds for reaching the view that a confession will not meet the various criteria for admission into evidence;
- (ii) the likelihood of the exclusion from the trial of a confession or other important piece of evidence in the exercise of a judicial discretion. In the case of an alleged confession, regard should be given to whether a confession may be unreliable having regard to the intelligence of the accused, or linguistic or cultural factors;
- (iii) the competence, reliability and availability of witnesses;
- (iv) matters known to the prosecution which may significantly lessen the likelihood of acceptance of the testimony of a witness. Regard should be given to the following:
  - (a) Has the witness made prior inconsistent statements relevant to the matter?
  - (b) Is the witness friendly or hostile to the defence?
  - (c) Is the credibility of the witness affected by any physical or mental impairment;
- (v) the existence of an essential conflict in any important particular of the prosecution case among prosecution witnesses;
- (vi) where identity of the alleged offender is in issue, the cogency and reliability of the identification evidence;
- (vii) any lines of defence which have been indicated by or are otherwise plainly open to the defence.

Evaluation of the prospects of conviction will generally not have regard to:

- (i) material not disclosed to the prosecution by the defence;
- (ii) notification of a defence which purports to rest upon unsubstantiated assertions of fact;
- (iii) whether assertions of facts upon which a defence or excuse are based are contentious, or rest on information which would not, in the opinion of the prosecutor, form the basis of credible cogent evidence.

## **6.2 Other Relevant Public Interest Factors**

### **6.2.1 Factors Which May Weigh Against Prosecution**

Despite the existence of a *prima facie* case and reasonable prospects of conviction, it may not be in the public interest to proceed if other factors, singly or in combination, render a prosecution inappropriate.

Presence of one or more of the following factors does not necessarily indicate that the prosecution should not proceed, but rather that the factor(s) should be balanced against other factors relating to the case. Factors which may, singly or in combination, render a prosecution inappropriate in the public interest include:

- (i) the trivial or technical nature of the alleged offence in the circumstance;
- (ii) the youth, age, physical or mental health or special infirmity of the victim, alleged offender or a witness;
- (iii) the alleged offender's antecedents (i.e. previous history);
- (iv) the staleness of the alleged offence, including delay in the prosecution process which may be oppressive;

- (v) the degree of culpability of the alleged offender in connection with the offence;
- (vi) the obsolescence or obscurity of the law;
- (vii) whether a prosecution would be perceived as counter-productive to the interests of justice;
- (viii) the availability or efficacy of any alternatives to prosecution;
- (ix) the lack of prevalence of the alleged offence and need for deterrence, either personal or general;
- (x) whether the alleged offence is of minimal public concern;
- (xi) the attitude of the victim of an alleged offence to prosecution;
- (xii) the likely length and expense of a trial;
- (xiii) whether the alleged offender has co-operated in the investigation and prosecution of others or has indicated an intention so to do;
- (xiv) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
- (xv) the likely effect on public order and morale;
- (xvi) whether a sentence has already been imposed on the offender which adequately reflects the criminality of the episode; and
- (xvii) whether the alleged offender has already been sentenced for a series of other offences and the likelihood of the imposition of an additional penalty, having regard to the totality principle (i.e. where a person has been sentenced to a penalty to a level where "enough is enough"), is remote.

#### 6.2.2 Factors Which May Weigh in Favour of a Prosecution Proceeding

Factors which might require the prosecution to proceed in the public interest, and which should be balanced against any factors weighing against, include:

- (i) the need to maintain the rule of law (i.e. the application of the law without the influence of arbitrary power; the equal accountability of all before the law; and the protection of the rights and freedoms of individuals through the courts);
- (ii) the need to maintain public confidence in basic constitutional institutions, including Parliament and the courts;
- (iii) the entitlement of any person to be awarded compensation if guilt is adjudged;
- (iv) the release from obligation by a person to pay compensation, insurance or other similar payments in relation to the action of the defendant, if the defendant is found guilty of an offence;
- (v) the need for punishment and deterrence; and
- (vi) the circumstances in which the alleged offence was committed.

#### 6.2.3 Irrelevant Factors

The following matters are not to be taken into consideration in evaluating the public interest:

- (i) the race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the alleged offender;
- (ii) the possible political consequences of the exercise or non-exercise of discretion;
- (iii) the prosecutor's personal feelings concerning the alleged offender or victim; and
- (iv) the possible effect of the decision on the personal or professional circumstances of those responsible for the decision.

## **7. JUVENILES**

Further special considerations apply to the prosecution of juveniles and decisions to continue a prosecution of a juvenile should have regard to:

- (i) the seriousness of the alleged offence;
- (ii) the age and apparent maturity of the juvenile;
- (iii) the capacity of the juvenile, if under 14, to know that at the time of doing an act, or making an omission, the juvenile knew that he or she ought not to do the act or make the omission;
- (iv) the juvenile's antecedents; and
- (v) any other special factor.

## **8. PROSECUTION OF THE MENTALLY IMPAIRED**

People with a mental impairment should not be prosecuted for offences which pose no threat to the community or where it is likely that the defence of insanity under section 27 of the *Criminal Code* will be relied upon.

While the appropriate course may usually be to decide not to proceed with the prosecution, in some cases it may nevertheless be appropriate to proceed with the prosecution, for example, where the offence involves violence or there is a danger of the alleged offender re-offending.

Consideration should be given to the willingness of the offender to undergo appropriate treatment (if such treatment is available), and any change in circumstances since the alleged offending.

## **9. PROSECUTION APPEALS**

The purpose of prosecution appeals is to ensure that offence provisions are justly and correctly applied; and in the case of appeals against penalty is to ensure that there are established and adequate, just and proportionate standards of punishment for offences.

Prosecution appeals have been held by the courts to raise considerations not present in an appeal by a defendant seeking a judgment of not guilty or a reduction in penalty. They have been described as cutting across time-honoured concepts of criminal administration and as putting the convicted person in jeopardy a second time.

Prosecution appeals must be considered against the background of many complex circumstances and legal principles. For any offence there is a range of sentencing options and a court must have regard, in choosing which option seems appropriate, to the principles laid down by Parliament and in other cases. For any offence there may be a number of different dispositions none of which are necessarily wrong. Therefore a prosecution appeal will not be initiated simply because the outcome is perceived as inadequate or inappropriate in a particular case.

The following factors are relevant in considering whether or not to lodge an appeal:

- (i) whether a penalty is so disproportionate to the seriousness of the offence as to reflect error in sentencing principle by the courts;
- (ii) whether a penalty is so disproportionate to the seriousness of the crime as to shock the public conscience;
- (iii) whether a penalty is so out of line with other penalties imposed for the same or similar offences without reasonable cause for that disparity;
- (iv) whether the idiosyncratic views of individual magistrates as to particular offences or types of offences require correction;
- (v) whether disputed points of sentencing principle are giving, or are likely to give, rise to disparity of penalties imposed for offences of the same or similar type;
- (vi) whether existing penalties are already subject to wide and inexplicable variations and there is a need to reduce this disparity and variability in order to promote uniform standards of sentencing.

#### **10. CASES WHERE A DECISION IS MADE NOT TO PROSECUTE**

- (i) The Chief Executive Officer is to ensure that where a prosecution is to be instituted or not proceeded with, a report shall be prepared specifying the reasons for such actions, taking cognisance of Section 6.
- (ii) Where a decision has been made not to proceed with prosecution that decision will not be reversed unless:
  - (a) significant fresh evidence has been produced that was not previously available for consideration;
  - (b) the decision was obtained by fraud; or
  - (c) the decision was based on a mistake of fact or law;and in all the circumstances it is in the interests of justice that the decision be reversed.
- (iii) Generally, reasons for discontinuance of a prosecution will be given to an enquirer who has a legitimate interest in the proceedings, including representatives of the media. Reasons will not be given if to do so would prejudice the administration of justice or would cause significant harm to a victim, witness or accused person.

#### **11. RESPONSIBILITIES**

- (i) The primary responsibility for investigating and issuing complaints under the Act, Regulations and Local Laws reside with the Chief Executive Officer.
- (ii) Only a person authorised by the Council may sign a complaint alleging a breach of the Act, Regulations or Local Laws by another person. The Council has delegated this authority to the Chief Executive Officer.
- (iii) The authority to prosecute is, in the first instance, to be subject to legal advice from the Council's solicitors.
- (iv) The Council has the ultimate responsibility and decision to determine and/or direct the Chief Executive Officer with regards to initiating or discontinuing legal action or an Appeal.