

Enforcement

The obligation

Agencies with a regulatory role are obliged to properly deal with allegations about unlawful activities, which include activities that are prohibited or unauthorised, or contrary to the terms of a consent, licence, approval, or other instrument of permission issued pursuant to lawful authority. Failure to properly deal with such allegations, quite apart from being poor administrative practice, could expose an agency to liability for compensation and the expense of litigation.

Responding to complaints about unlawful activity

When a complaint about an unlawful activity is received, it should be assessed and a decision made and documented as to whether investigation is required. Not every complaint will need to be investigated, however, where a decision is made not to investigate, the reasons for that decision should be clear and recorded.

It is also important that agencies take adequate steps to properly respond to complainants, for example to:

- manage expectations to ensure the complainant is realistic about what can and cannot be achieved
- provide regular feedback to the complainant on progress
- advise the complainant of the outcome of the investigation and what, if any, action the agency intends to take.

Determining whether an investigation is warranted

Not every complaint will need to be investigated. Many complaints can be resolved informally by providing prompt and accurate advice. This could be, for example, by advising that an activity or work is lawful.

When deciding whether a complaint requires investigation, a range of matters could be considered including:

- is the matter within the jurisdiction of the agency?
- is the matter premature, eg, does the complaint relate to some unfinished aspect of work still in progress?
- does the activity or work require permission, and if so is an approval in place?
- is the complaint trivial, frivolous or vexatious?
- has too much time elapsed since the events the subject of the complaint took place?
- is another agency more appropriate to investigate or otherwise deal with the matter?

- is the activity having a significant detrimental effect on the environment or does it constitute a risk to public safety?
- does the complaint suggest a systemic problem, eg, if a complaint is one of a series, could there be a pattern of conduct or a more widespread problem?

Determining whether enforcement action is required

Agencies have a discretion in deciding whether to take enforcement action on the basis of evidence of unlawful or unauthorised activity. However, agencies are obliged to uphold the law (including compliance with relevant administrative law principles¹) and to act in the 'public interest'.

In determining whether to take enforcement action some of the issues to be considered include:

- is the unlawful activity likely to affect a significant number of people?
- is it likely to have a serious negative impact on any person?
- has the activity attracted sustained public controversy and no alternative resolution has been proposed or is likely?
- will the circumstances of the activity unreasonably impact on certain population groups, particularly disadvantaged or marginalised groups?
- does the activity raise an issue that is individual in nature but occurs unreasonably often?
- is the activity indicative of a systemic flaw – possibly the result of a deficiency in policy or procedures?
- does the activity raise an issue that is individual in nature but occurs unreasonably often?
- has there been a blatant attempt to flout the law or inappropriately delay action?
- are the identified breaches of a technical or inconsequential nature, with no aggravating circumstances?
- could the unlawful activity be carried out lawfully if consent had been sought?
- could the non-compliance be easily remedied by some action on the part of the person responsible?
- will there be reasonable proportionality between the ends to be achieved by enforcement action and the means that will have to be used to achieve them?

A further consideration is that any obligation to comply with the law does not relieve agencies of the moral obligation to take lawful steps to mitigate the effects of rigid adherence to the letter of the law if that results in, or is likely to result in, manifestly inequitable or unreasonable treatment of an individual or organisation.

¹ see Public Sector Agencies Fact Sheet No. 4, *Discretionary Powers*

Options for action

There are a range of possible outcomes to address unlawful activity, including:

- referring the matter to a relevant agency for further action
- counselling the person investigated to educate them on the relevant requirements
- negotiating a resolution of the complaint between the parties or to obtain undertakings to address the issues of concern
- issuing a warning or caution to the offender, requiring work to be done or activity to cease in lieu of more formal action
- issuing a notice of intention to serve an order or notice or a notice requiring work to be done under relevant legislation
- taking proceedings in a relevant court for an order to remedy or restrain a breach of the relevant Act or Regulation or for an injunction,
- issuing a penalty notice or starting proceedings for an offence against a relevant Act or Regulation.

Prevention strategies

Prevention strategies can be a positive and cost effective way of dealing with unlawful activity, and may include such things as avoiding delays in responding to complaints, imposing sensible and enforceable conditions, keeping proper records, educating the community, exercising powers reasonably and undertaking regular inspections and checks on compliance.

Further information

For further information on this and related topics, see: *Good Conduct and Administrative Practice – Guidelines for state and local government*, NSW Ombudsman, August 2003; and

Public Sector Agencies Fact Sheet No 4, *Discretionary Powers*, NSW Ombudsman.

Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.