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# Enforcement Guidelines

## Biosecurity Queensland

Version 3.0 – October 2010

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## Version Control

Version	Date	Comment
1	July 2010	Draft for discussion
2	September 2010	Draft for discussion
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## Introduction & Scope

These Guidelines are designed to assist decision-makers determine the most appropriate outcome for an investigation by Biosecurity Queensland. When an individual or entity fails to comply with legislation, Biosecurity Queensland will consider a range of enforcement options (the “enforcement response”) including:

- Issuing a Warning
- Issuing a Statutory Notice or Direction
- Penalty Infringement Notice
- Seeking a Court Order
- Prosecution
- Taking No Further Action (including an ‘Advisory Letter’)
- Cancellation or Suspension of Licences, Permits or Other Approvals

The decision to undertake enforcement action is not taken lightly and will involve a multi-tiered decision-making framework with input from experienced staff. The decision maker must, before making the decision, ensure that:

- They have received all available relevant information relating to the incident and investigation, and
- All necessary enquiries and investigation has been completed to support any decision.

These Guidelines are to be applied to all legislation administered by Biosecurity Queensland.

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# General Approach

## Overview

In deciding the appropriate enforcement response to an incident, Biosecurity Queensland staff will act lawfully, ethically, and adopt the Guiding Principles outlined in the Regulatory Policy. Decisions will be on an impartial basis and evidence based without the influence of personal feelings, political advantage or any element of discrimination. All decisions relating to enforcement recommendations and responses will be recorded in the 'Auditing and Investigations Management System' (AIMS).

## Use of Discretion

Whilst the need for flexibility in decision-making is recognised, the use of any discretion must be appropriately managed to ensure all decisions are defensible, transparent, and consistent as well as ensuring that the decision-maker is accountable. These Guidelines recognise this and incorporate the ability for the decision-maker to exercise discretion to ensure the enforcement outcome is appropriate to the circumstances of the specific incident.

Within the exercise of this discretion, the decision-maker must consider:

- These Guidelines and the factors to be considered in determining an appropriate outcome in their entirety,
- The DEEDI Code of Conduct and *Public Sector Ethics Act 1994*,
- The Biosecurity Queensland Investigation Procedures Manual and Queensland Government recordkeeping standards (including [Information Standard 40](#) and the *Public Records Act 2002*),
- Statutory requirements in relation to the legislation being administered or enforced, and
- The circumstance of any incident and facts supporting the use of discretion.

In the event of a decision-maker being uncertain on the application of these Guidelines, they should seek the advice of the Manager (Investigations).

Any deviation from the application of these Guidelines, including the grounds for the deviation, must be clearly and comprehensively recorded in AIMS.

## Leniency

The enforcement action is ultimately determined on a case-by-case basis and leniency may be considered for a POI who:

- Voluntarily provides the investigation with valuable information relevant to the offence that was unlikely to have been discovered without their assistance, and
- Demonstrated that they took prompt and effective mitigating action to prevent the offence or minimise its potential impact, and
- Cooperated fully with the investigation, and
- Has not previously been subject to enforcement action for similar offences.

Leniency is less likely to be considered for a POI who is identified as having directed or coerced other parties to commit the offence or is identified as the 'controller' or 'originator' of the activity that lead to the offence.

## **Consideration of Biosecurity and Animal Welfare Risks**

It is important for the decision-maker to identify what action is required to manage any relevant biosecurity and animal welfare risks and issues separate to identifying the appropriate enforcement response. The use of a statutory notice or direction may be appropriate for both decisions but the decision-maker should also consider whether additional enforcement responses (e.g. prosecution, warning) may also be appropriate to ensure the alleged offence is adequately dealt with and the POI appreciates the seriousness of the offence and consequences of any future offences.

## **Selecting the Appropriate POI**

### **Level of Culpability**

The decision-maker should consider the range of enforcement responses available in relation to all parties to the offence. This includes identifying the 'principal offender' as well as those who assisted or aided the commission of the offence or benefited from the offence including any 'corporate entities'. More serious enforcement responses should be directed towards those POI who are directly responsible for the offence and those who were in a position of authority that enabled them to control or prevent the offence.

### **Corporate Entities & Employees**

Legislation often contains provisions making corporate entities and their Executive Officers liable for offences committed on their behalf by their agents and employees. Biosecurity Queensland will consider the culpability of any Executive Officers or employees of the company and take appropriate enforcement action in relation to their involvement. Key factors to be considered in this decision are:

- The level of involvement of the individual in relation to decision-making, or directions provided, that resulted in the offence by the corporate entity,
- The level of authority and influence the individual possesses in the corporate entity,
- The opportunity for the individual to prevent the offence including whether the individual negligently or wilfully ignored activities that lead or contributed to the offence and exercised 'due diligence' in their role

Generally, Biosecurity Queensland will use less severe enforcement responses (e.g. warnings) for employees of offenders where evidence exists that the employee was acting under some level of compulsion. More serious action (e.g. prosecution) will be considered if the circumstances indicate it to be appropriate. Circumstances to be considered in this instance can include:

- The nature of the offence indicates that the individual should have understood or known that the activity was illegal,
- The seriousness of the offence,
- The role and responsibilities of the individual in the organisation including their level of authority and influence,

- The degree to which they were provided with and followed relevant information, training, supervision and instruction, and
- Any preventative or other mitigating action by the individual to prevent the offence or minimise its potential impact

### **Juvenile POI**

The *Juvenile Justice Act 1992* governs the basis under which juveniles are handled by the justice system. Under that Act special considerations apply to the prosecution of a juvenile POI<sup>i</sup>. The juvenile justice provides alternative restorative justice outcomes including community conferencing and statutory-based cautioning processes that may be a more appropriate enforcement response than a prosecution. Refer to the Biosecurity Queensland Investigation Manual or the Investigations Unit for advice for dealing with Juvenile POI.

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<sup>i</sup> A 'juvenile' is defined as a person who has not yet turned 17 years of age

# Selecting the Appropriate Enforcement Response

## Overview

The enforcement action employed in response to an incident will be decided at the conclusion of the investigation when all evidence is available for the decision-maker.

A 'decision-making tree' is provided in Appendix A to assist staff through the decision to identify an appropriate enforcement response. Two key tests must be applied by the decision-maker in selecting an appropriate enforcement response – the 'Sufficiency of Evidence' and the 'Public Interest' tests. The factors to be considered in these tests are outlined below.

More than one option (e.g. Prosecution and Statutory Notice) may be used with a single POI. Different options may be used for separate POI's involved in the same incident based on the specific circumstances of each POI and the level of their culpability.

## Sufficiency of Evidence Test

An assessment of the 'Sufficiency of Evidence' test should satisfy the decision-maker on whether they possess a **reasonable belief** that an offence has been committed in that:

- A *prima facie* case exists to demonstrate that all elements of the offence can be proven with available and reliable evidence, and
- All possible exemptions, exceptions and defences have been negated or discounted.

## Public Interest Test

The 'Public Interest' test involves the assessment of the following factors:

- the seriousness of the alleged offence;
- any mitigating or aggravating circumstances;
- the age, intelligence, physical health, mental health or special infirmity of the alleged offender/witness;
- the alleged offender's antecedents and background (for example in relation to relevant compliance activity) and the degree of culpability of the alleged offender in connection with the offence;
- the length of time elapsed since the alleged offence;
- the obsolescence or obscurity of the law;
- whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- the availability and efficacy of any alternatives to prosecution;
- the prevalence of the alleged offence and the need for deterrence (including the likely deterrent value of the prosecution);
- whether the consequences of any resulting conviction would be unduly harsh and oppressive;

- whether the alleged offence is of considerable public/environmental concern;
- any entitlement of the department or other person/body to compensation, reparation or forfeiture if prosecution action is taken;
- whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- the necessity to maintain public confidence in Biosecurity Queensland;
- the potential financial benefit the alleged offender stands to make from the illegal activity.

## Prosecution

The decision to commence a prosecution will be in accordance with the QPIF Prosecution Policy. The [QPIF Prosecution Policy](#) provides Principles that is consistent with these guidelines and must be complied with.

**Approval level:** *Principal Legal Officer, Legal (on endorsement of the Manager Investigations or delegate)*

## Warnings

A 'Caution' or 'Warning Letter' is not a sanction in itself. The purpose of a 'warning' is to ensure the POI is aware of the non-compliance and potential ramifications and allow them to voluntarily rectify any issues to prevent a reoccurrence.

'Warnings' must be issued in writing to ensure an accurate record of the action exists. Verbal warnings have no basis to support future enforcement action and will not be regarded as a previous warning for the purpose of justifying escalated future action.

A warning will be issued where:

- The 'Sufficiency of Evidence' Test has been satisfied, and
- The subject offence is relatively minor<sup>ii</sup>, and
- The POI has
  - not previously been subject to enforcement action for a similar offence, or
  - previously been warned for a similar offence but cooperated fully with this investigation

A warning may be issued for a more serious offence where the offence has been detected or proven but statutory limitations prevent the commencement of proceedings.

**Approval level:** *Manager, Investigations or delegate*

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<sup>ii</sup> A relatively minor offence is any act or omission that is considered to be an 'administrative' or 'technical' breach of legislation with no or an inconsequential impact or risk to industry, the community, the environment or animal welfare. The 'Public Interest' test should support this assessment.

## Statutory Notices or Directions

A number of the Acts administered by Biosecurity Queensland allow for a variety of Notices, Directions or other Orders to be served<sup>iii</sup>. A Statutory Notice or Direction may be issued where:

- The relevant legislation presents this as an option and all statutory conditions have been satisfied, and
- It is reasonable to use the Statutory Notice or Direction in order to ensure the POI achieves compliance or rectifies an issue related to the offence within a specified time period.

Statutory Notices or Directions aim to rectify or prevent the impact of the incident and are likely to be used in conjunction with other enforcement responses such as prosecution or warnings.

**Approval level:** *Subject to the relevant Instrument of Appointment or Instrument of Delegation, any officer appointed under the relevant Act with the required authority to issue the Notice may issue the Notice. The decision to limit enforcement action to a Statutory Notice resides with the Manager, Investigations, Principal Investigations Officer, Operations Managers and Zone Leaders*

## Penalty Infringement Notice

A Penalty Infringement Notice (PIN) may be issued where:

- The relevant offence is specified in the *State Penalties Enforcement Regulation 2000*, and
- The Limitations of Proceedings for the offence do not expire within 70 days of the date of issuing the PIN, and
- The ‘Sufficiency of Evidence’ Test has been satisfied, and
- The POI has not been issued with more than three PIN for previous similar offences, and
- The POI has not previously been prosecuted for previous similar offences, and
- The particular circumstances of the offence mean that:
  - The incident did not cause a significant impact on industry, the community, or the environment, and
  - A PIN is a more effective and efficient method to deal with the offence rather than commence court proceedings

Only three PIN can be issued to the same individual or entity in relation to the same incident. If there are more than three PIN are applicable, commencing a prosecution must be considered.

**Approval level:** *Manager, Investigations or delegate*

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<sup>iii</sup> For example, Animal Welfare Directions, Quarantine Notices and Pest Control Notices

## Cancellation or Suspension of Statutory Approvals

Biosecurity Queensland issues and administers a range of statutory licences, permits, accreditations and other approvals. The cancellation or suspension of such approvals<sup>iv</sup> may be appropriate where the offence relates to the breach of a condition of that approval or is otherwise related to the scope of the approval.

An approval may be **suspended** if:

- The relevant legislation presents this as an option, and
- All statutory conditions have been satisfied including providing the approval holder 'natural justice' prior to making the decision, and
- The 'Sufficiency of Evidence' Test for the relevant offence has been satisfied in relation to the approval holder, and
- The subject incident involves a failure by the POI to maintain systems or processes to ensure compliance with the approval, and
- It is reasonable to allow the approval holder a period of time to rectify that issue whilst ensuring no further activity occurs until the issue is rectified

An approval may be **cancelled** if:

- The relevant legislation presents this as an option, and
- All statutory conditions have been satisfied including providing the approval holder 'natural justice' prior to making the decision, and
- The 'Sufficiency of Evidence' Test has been satisfied, and
- The nature of the offence and level of culpability of the POI indicates that the approval holder is unsuitable to retain that approval or unable or unwilling to develop or maintain systems to ensure compliance with the conditions of the approval

**Approval level:** *In accordance with the relevant statutory delegation*

## Court Orders

An application for a Court Order<sup>v</sup> may be made where:

- The relevant legislation presents this as an option, and
- The nature of the offence involves issues that require a resolution that can be achieved via a Court Order

If a statutory notice or direction is available to remedy the offence, that option will normally be utilised as a more efficient enforcement response to achieve a similar outcome. A Court Order will normally be sought in conjunction with prosecution proceedings.

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<sup>iv</sup> Note that such approvals may be suspended or cancelled under statutory provisions and separate to an enforcement response – for example, the non-payment of fees.

<sup>v</sup> E.g. A 'Prohibition Order' under section 183 of the *Animal Care and Protection Act 2001*

**Approval level:** *Principal Legal Officer, Legal (on endorsement of the Manager Investigations or delegate)*

## **Application for Investigation and / or Legal Costs**

Some legislation administered by Biosecurity Queensland allows for an application for costs incurred in relation to an investigation, court proceeding or in relation to damages caused as a result of the offence.

The recovery of such costs will not be used as grounds on which a prosecution is commenced. However, if a prosecution is commenced and an application to the Court for a costs order is permitted by statute, Biosecurity Queensland will consider seeking such costs where appropriate.

Generally, costs will not be sought if the court proceeding is finalised with an 'early plea of guilty' other than the cost of registering a Complaint and Summons with the court.

Investigation costs will generally be sought if the investigation was prolonged due to actions or inactions of the defendant or is otherwise complex or if the court proceeding is contested by the POI.

Legal costs will generally be sought where such costs were incurred as a result of delays caused by the POI or in the event of contested proceedings.

**Approval level:** *Manager, Investigations or delegate in consultation with the General Manager of the relevant Biosecurity Queensland program.*

## **Advisory Letters and No Further Action**

No further action will be taken where:

- Insufficient evidence exists to prove all elements of the suspected offence, or
- The impact and potential risk of the offence is extremely low, or
- The examination of the 'public interest' test indicates no further action should be taken, or
- Another agency has taken action and issues of duplicity arise if Biosecurity Queensland takes further action, or
- Legislation is not applicable in the circumstances or a valid statutory exemption, exception or defence exists.

Confirmation to a POI, in the form of an 'Advisory Letter', that no further action will be taken should be taken as an opportunity, where appropriate, to ensure the POI understands their obligations and responsibilities under the relevant legislation.

**Approval level:** *Manager, Investigations; Principal Investigations Officer, Operations Manager, Zone Leader*

