

Formal Warning Policy



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1. PURPOSE

The policy:

- Is aimed at ensuring:
 - a consistent approach by Marlborough District Council (MDC) to the use of formal warnings in appropriate circumstances;
 - when addressing conduct that is an offence, any response taken will follow due process and public interest considerations, while at the same time not overburdening the courts with matters that can be effectively resolved through other enforcement routes.
- applies in circumstances where a warning is considered as an appropriate compliance response, being a formal warning that:
 - is delivered to a person, either natural or legal (including a corporation sole, a body corporate, and an incorporated body);
 - is related to behaviour that MDC considers could amount to criminal conduct;
 - is recorded on the file of the person who has been warned; and
 - may have ongoing or future disadvantages for the person.
- sets out the principles with which all formal warnings should be broadly consistent and the process that MDC should follow when administering formal warnings may be indirectly relevant to, but not intended to apply to:
 - informal verbal warnings where the warning is not recorded for future reference; and
 - warnings that are given in lieu of issuing an infringement notice.
- is implemented together with the MDC Enforcement Policy and should be read in conjunction with the Solicitor-General's Prosecution Guidelines and the Solicitor-General's Guidelines for the Use of Warnings.

For RMA matters, MDC's Enforcement Policy describes how MDC approaches compliance and enforcement to achieve outcomes for the environment. Warnings are one of several compliance interventions available to MDC.

2. SCOPE

This policy applies to all employees of the MDC that carry out an enforcement role under the [Resource Management Act 1991 \(RMA\)](#).

3. POLICY CONTENT

3.1 What is a formal warning and when is it used?

The Solicitor General's guidelines are available online at:

<https://www.crownlaw.govt.nz/publications/prosecution-guidelines>.

A formal warning is a lawful alternative to a prosecution where the Public Interest Test for Prosecutions (set out in the Prosecution Guidelines), in taking or continuing a prosecution, is not met. It is a tool intended to hold a person to account, and to deter them from future behaviour.

A formal warning is an official written communication from MDC to a person, natural or legal, informing them that in MDC's view the addressee's conduct may amount to a specified offence and that if the conduct is repeated a prosecution will be considered.

A formal warning must be issued only where there is credible and admissible evidence that meets the test for evidential sufficiency under the Evidential Test for prosecution. A formal warning must not be issued where there is a mere suspicion of offending without sufficient evidence by which to prove the offence. A formal warning must also never be issued where there has been undesirable conduct that nevertheless does not amount to an offence.

Formal warnings may be issued for a range of behaviour, from conduct that might only attract a fine through to more serious conduct. Whether a formal warning is appropriate will depend on the circumstances of the case.

Issuing formal warnings can achieve one or more relevant purposes, including to:

- show that MDC takes the matter seriously;
- impress on the person that the behaviour the person has engaged in amounts to criminal conduct that could otherwise be prosecuted but that MDC has chosen not to prosecute;
- mitigate the risk of the behaviour recurring in the future;
- give the person an opportunity to amend or address their behaviour to reduce their risk of non-compliance and prosecution in the future; and/or
- send a signal to the person and others in similar situations, including the public, to reduce the risk of environmental impacts.

MDC will consider a warning held on a person's file when investigating future conduct that may amount to an offence.

3.2 Process of Issuing a Formal Warning

Formal warnings are issued in writing and may only be issued by enforcement officers or authorised persons within MDC [following an investigation carried out in accordance with MDC's Enforcement Policy].

Formal warnings are an alternative to other enforcement options, such as infringements or prosecution. This then means there needs to be credible evidence that meets the evidential test set out on the Solicitor-General's Prosecution Guidelines.

Prior to issuing the formal warning, MDC will engage with the person under investigation. The level of engagement will vary depending on the circumstances but may include:

- putting potential adverse findings to the investigated person for comment before a final decision is reached;
- the person consenting to receiving the warning and having the matter resolved; or
- the person admitting to the behaviour they are being warned about.

When issuing warnings, MDC needs to consider:

- the needs and interests of any person harmed or affected by the person's behaviour, their whānau and community. In the RMA context, this includes consideration of those impacted as well as harm to the environment; and
- the needs and interests of the person being warned, their whānau and community;
- the wider public interest;
- the content of this policy.

When issuing a formal warning, consideration is given to the Solicitor-General's Prosecution Guidelines (Prosecution Guidelines), the Solicitor General's Guidelines for Use of Warnings, and, for RMA matters,

MDC's Enforcement Policy, the RMA statutory objectives, and the Proposed Marlborough Environment Plan.

3.3 Content of Formal Warning Letter

Formal warnings will be issued using a standard template, but the content will be tailored to the circumstances of the case. The formal warning letter will set out the following:

1. **An accurate summary** of the key facts that led to the issue of the formal warning and **the reasons** for issuing the formal warning.
2. Note: The warning letter should not assert or imply that an offence has been committed or is proven beyond reasonable doubt. However, a warning may set out that, in MDC's view, such conduct or behaviour may amount to a specific offence and that if repeated in the future, a prosecution may be considered.
3. **The consequences** related to the formal warning.
4. **The persons responses** to the alleged conduct and adverse findings, including whether they have consented to the warning, whether they have acknowledged fault. If no response was provided or the person has refused to engage with the process.
5. **That the warning will be held in MDC records and retained.** A formal warning is recorded in MDC's internal database and will be held long-term. The warning may be disclosed to other agencies or persons in accordance with the provisions of the Privacy Act 2020, and MDC's responsibilities in connection with other legislation, including the Local Government Official Information and Meetings Act 1987 and the Public Records Act 2005. The letter will also refer to the person's rights under the Privacy Act 2020 and that the warning is held for internal considerations of RMA regulatory matters and legitimate MDC functions.
6. **The right to have the warning reviewed** within 10 working days from the date the warning was issued and the process for this.

Communication with the proposed recipient of a warning is important so that warnings can be administered appropriately. It is important that these matters are communicated in a manner and language appropriate to the recipient's level of understanding. If it is known that the recipient cannot read, for example, then the document could be read to them.

MDC will only consider issuing a formal warning when it has been firm in its decision not to prosecute. In most circumstances MDC will not reconsider its decision not to prosecute a person for their behaviour, unless there are special reasons (for example, new and additional evidence becoming available). Any reconsideration of its decision to prosecute will be done in accordance with the Solicitor-General's Guidelines for Use of Warnings.

3.4 Disputes Process

The process for raising any matter relating to the issuing of a formal warning (including addressing any matter relating to the circumstances of the incident), is to write to MDC at the email address or the postal address included in the warning letter, within 10 working days of receipt of the warning. This email/letter must be marked as attention to the relevant team leader.

The recipient of the warning must include reference to the warning, their personal details, and the information they wish to have considered in a review.

The review of the decision to issue a formal warning may be conducted by an enforcement officer (or authorised person), but will be referred to the manager, or (if they approved the issue of the warning) may be referred to another manager or team leader for the final decision. A decision will be issued and communicated to the warning recipient.