



Otago
Regional
Council

Otago Regional Council

Formal Warning Policy

May 2022



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1. PURPOSE

The policy is aimed at ensuring:

- a consistent approach by ORC to the use of warnings in appropriate circumstances;
- when addressing conduct that may be 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.

This policy applies in circumstances where a formal warning is considered as an appropriate compliance response, being a formal warning that:

- is delivered to a person, either natural or legal (this includes a corporation sole, a body corporate, and an incorporated body);
- is related to behaviour that ORC 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.

This policy 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.

This policy is implemented together with ORC's RMA Compliance and Enforcement Policy 2020 and should be read in conjunction with the Solicitor-General's Prosecution Guidelines and the Solicitor-General's Guidelines for the Use of Formal Warnings¹.

For RMA matters, ORC's RMA Compliance and Enforcement Policy 2020 describes how ORC approaches compliance and enforcement to achieve outcomes for the environment. Formal warnings are one of several compliance interventions available to ORC.

2. SCOPE

This policy applies to all employees of the Otago Regional Council that carry out an enforcement role under any statute.

3. POLICY CONTENT

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

¹ The Solicitor-General's guidelines are available online:
<https://www.crownlaw.govt.nz/publications/prosecution-guidelines>.

Formal warning letters, where appropriate, are issued by enforcement officers (or authorised persons), with approval from a Team Leader.

Formal warnings are one of several tools that ORC has available to address offending against the RMA and can be used in conjunction with other enforcement tools and/or directed at differently liable persons/organisations.

Formal warnings are not a mechanism to suggest or imply an offence has been committed or proven, however, it may set out ORC's view that the conduct or behaviour may amount to a specific offence and that if repeated, a prosecution may be considered.

Formal warnings may be issued for a range of behaviour it will depend on the circumstances of the case. A formal warning is inappropriate for serious and/or repeated incidents. A serious incident may involve significant environmental impact or harm. Formal warning can be an effective response in relation to matters involving:

- administrative, minor, or technical breaches;
- minor or trivial actual or potential effects;
- where the subject has no prior history of non-compliance, and the incident is unlikely to be repeated in the future;
- a matter that can be put right simply, and there were immediate and/or significant steps to repair or remediate.

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

- show that ORC takes the matter seriously;
- impress on the person that the behaviour the person has engaged in may amount to criminal conduct that could otherwise be prosecuted but that ORC 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;
- send a signal to the person and others in similar situations, including the general public, to reduce the risk of environmental impacts.

ORC will consider a formal warning held on a person's file when investigating future conduct that may amount to an offence. This includes as a matter of compliance history when determining whether a prosecution is warranted. ORC will also consider any mitigating factors recorded on the formal warning including expressions of remorse and steps taken to rectify the impact of their conduct on the environment.

3.2. Process of issuing warning

Formal warnings are issued in writing and may only be issued by enforcement officers or authorised persons with the approval of a Team Leader in the Regulatory, Engineering or Environmental Implementation teams.

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.

When issuing formal warnings, ORC needs to consider:

- The needs and interests of any person harmed or affected by the breach. 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;
- The wider public interest;
- The content of this policy.

ORC considers ORC's enforcement priorities, in determining whether a formal warning is appropriate, and whether it may achieve the relevant objectives.

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, ORC's RMA Compliance and Enforcement Policy, the RMA statutory objectives, and the Regional Plan.

Those issuing the warning on behalf of the ORC need to ensure it is appropriate, considering all the circumstances of the incident, the environmental impact, evidence available and the purpose of the warning. The decision to formally warn should only be made when there is sufficient evidence and the ORC's position is not to prosecute or take other enforcement options. A formal warning should not indicate prosecution as the otherwise appropriate response if that is not in fact the case.

The decision to start the process of issuing a formal warning rather than using a different CME tool sits with the relevant Team Leader (or Manager if the Team Leader is unavailable).

Once the decision to start the process has been made, there must be an opportunity given to the potential recipient to engage with ORC in the process, to give effect to natural justice by informing them of the potential they will be formally warned, and to allow them to comment before a final decision is reached.

It is important that the exchange is recorded accurately, and that the potential recipient is given an opportunity to review and correct the information. This opportunity for engagement by the potential warning recipient may be achieved through a variety of means, including in-person discussion, by telephone, or by email. The potential recipient should be told what a formal warning is, and that they may be issued with a formal warning.

The potential recipient should have the opportunity to address the key facts that led to consideration of a potential formal warning, to advise if they accept those facts or dispute them, and to share information that might be relevant or mitigating.

Information provided by the potential recipient will be considered in the decision whether to issue a formal warning, including:

- if the response provided shows that there was an absence of fault and/or the person put forward relevant mitigating factors, this will be assessed by the in the decision as to whether or not a formal warning should be issued;
- if the response provided acknowledges fault and/or provides consent to the formal warning to be issued, the formal warning may be issued, and the acknowledgement/consent must be recorded to show that the person has shown remorse and accepted responsibility;
- if the person did not respond or did not consent to the warning being issued, this must also be recorded in the finalised formal warning and must be considered as against the strength of the evidence on the file.
- if the person did not respond or did not consent to the warning, then a formal warning can still be issued provided the evidence on the file is strong and there was no viable defence. That evidence must be set out clearly in the formal warning letter.

Before a formal warning can be given, the enforcement officer (or authorised person) provides their recommendation to a Team Leader (or Manager) for approval/refusal, and the outcome of that decision must be recorded.

If a Team Leader intends to issue a formal warning, then approval is to be sought from the Manager or another Team Leader within the relevant Directorate Group.

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 warning, recording the evidence that relates to the elements of the offence;

2. **The reasons** for issuing the warning;

NOTE: The formal 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 ORC'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 warning;

4. **The person's responses** to the alleged conduct and adverse findings, including whether they have consented to the formal warning, whether they have acknowledged fault. If no response was provided or the person has refused to engage with the process

5. **That the formal warning will be held in ORC records and retained.** A formal warning is recorded in ORC's internal database and will be held long-term. Once a period of seven years has passed, the warning will be disregarded in any decision making if there have been no relevant subsequent enforcement actions. The formal warning may be disclosed to other agencies or persons in accordance with the provisions of the Privacy Act 2020, and ORC'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 ORC functions

6. **Publishing.** If there is an intention to make formal warning public, or that it will be communicated to relevant parties (iwi, witnesses, victims, suspects), this should be advised to the recipient. In some circumstances the recipient may have already consented to this. (The Council should usually wait until the 14 days period has elapsed before publishing a warning).

7. **The right to have the formal warning reviewed** within 14 days from the date the formal warning was issued and the process for this.

Communication with the proposed recipient of a formal warning is important so that formal 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.

ORC will only consider issuing a warning when it has been firm in its decision not to prosecute. In most circumstances ORC 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 Prosecution Guidelines.

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 the Council at the email address or the postal address included in the formal warning letter, within 14 days of receipt of the warning. This email/letter must be marked as attention to the relevant Team Leader.

The recipient of the formal warning must include reference to the formal 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 formal warning recipient.

3.5. Summary of process

Stage	Description
1	The ORC enforcement officer (or authorised person) investigates an incident and gathers evidence. Assessment of evidential sufficiency to charge an offence. Is the matter potentially appropriate (having regard to the matters in this policy) for a formal warning?
2	The potential recipient given an opportunity to comment on the alleged facts, their role and culpability and the potential for a warning to be issued. This may be done in person, over the telephone, or in writing. Any information provided is to be recorded.
3	The full information available including comment by the potential recipient is taken into account together and considered in accordance with this policy as to whether a formal warning is recommended.
4	A recommendation to formally warn communicated to a Team Leader (or Manager) for their approval/refusal, and the outcome recorded. If a Team Leader intends to issue a formal warning, then approval is to be sought from the Manager or another Team Leader within the relevant Directorate Group.

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| 5 | A written formal warning is issued to the recipient, containing the information referred to above. |
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4. RELEVANT DOCUMENTS

Resource Management Act 1991
Regional Plans
Biosecurity Act 1993
Building Act 2004
Local Government Act 2002
Maritime Transport Act 1994
Otago Regional Council Bylaws