

CROWN LAW

SOLICITOR-GENERAL'S GUIDELINES FOR THE USE OF WARNINGS

As at 23 December 2021



**Te Tari Ture
o te Karauna**
Crown Law

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1. APPLICATION

- 1.1. These guidelines have been primarily written for public prosecution and enforcement agencies (**agencies**), but other participants in the justice system may find them useful.
- 1.2. The Solicitor-General recognises that when agencies seek to address conduct that could be criminal (particularly for less serious behaviour), there is a tension between ensuring that any response follows due process and meets all the public interest considerations while at the same time not overburdening the Courts with matters that can be effectively resolved through other routes. In this context, warnings are an increasingly critical tool as they provide a means of resolving the law enforcement concern outside the court process and with a properly calibrated response on behalf of the community.
- 1.3. The purpose of these guidelines is to ensure agencies are using warnings in the appropriate circumstances and are meeting the requirements of natural justice when they administer warnings.
- 1.4. These guidelines should be read together with the *Solicitor-General's Prosecution Guidelines (Prosecution Guidelines)*, along with any other guidelines issued by the Solicitor-General specific to prosecutions. If there is any inconsistency between these guidelines and the *Prosecution Guidelines*, these guidelines should be preferred.

2. COMPLIANCE

- 2.1. It is expected all agencies that conduct public prosecutions, whether conducted by Crown prosecutors, government agencies or (instructed) counsel, should take these guidelines into due consideration in circumstances where a warning is proposed.

3. SCOPE

- 3.1. These guidelines are for agencies that issue warnings where a warning is delivered:
 - 3.1.1 to a person, either natural or legal (including a corporation sole, a body corporate, and an unincorporated body);
 - 3.1.2 relates to behaviour that the agency considers could amount to criminal conduct;
 - 3.1.3 is recorded on the file of the person who has been warned; and
 - 3.1.4 may have ongoing or future disadvantages for the person.
- 3.2. These guidelines set out the principles with which all warnings should be broadly consistent and the process that agencies should follow when administering warnings. They also set out some important matters that should be included in an agency's warning policy and in the warning itself. As the operational and law enforcement context of agencies vary, these guidelines do not prescribe the entirety of every agency's warning process. Agencies will need to develop their

own policies and processes regarding warnings that are consistent with these guidelines.

- 3.3. These guidelines may be indirectly relevant, but are not intended to apply, to:
- 3.3.1. informal verbal warnings where the warning is not recorded on the person's file. Warnings of this type do not have the same potential to have significant or lasting consequences for the person concerned.
 - 3.3.2. warnings given in lieu of issuing of an infringement notice (**notice**) or pursuing an infringement offence (**offence**). Nevertheless, agencies should consider applying these guidelines where, in any particular case, the penalty for that notice or offence (had it been issued or charges filed) is significant.
 - 3.3.3. specific pre-charge resolution schemes for addressing behaviour admitted to by a person.
 - 3.3.4. post-charge diversion schemes for disposing of criminal matters. Specific guidance on diversion is set out in the Solicitor-General's Guidelines for Diversion Schemes dated 6 August 2021 and the *Prosecution Guidelines*.
 - 3.3.5. warnings issued under statutory warning regimes which contain their own tests or requirements.

4 WHEN WARNINGS MAY BE USED

Introduction

- 4.1 As the Public Interest Test of the Test for Prosecution (set out in the *Prosecution Guidelines*) recognises, not all behaviour that an agency considers may amount to criminal conduct requires a prosecution response. Instead, agencies may choose to warn a person, natural or legal, regarding behaviour that may amount to criminal conduct.
- 4.2 Broadly speaking, when deciding whether to issue a warning, an agency should consider:
- 4.2.1 the needs and interests of the person to be warned, their whānau and community (**the person**);
 - 4.2.2 the needs and interests of any person harmed or affected by the person's behaviour, their whānau and community (**the harmed person**); and
 - 4.2.3 the wider public interest.
- 4.3 These considerations may differ depending on the type of offending, and whether the person is a legal entity as opposed to a natural person.
- 4.4 In any given case, an agency needs to carefully consider if it is appropriate to issue a warning, having regard to the circumstances of the situation, including the

behaviour, the purpose of the warning and the evidence available to support the warning.

- 4.5 Where regulatory matters are involved, as noted at [5.10] of the *Prosecution Guidelines*, relevant considerations for assessing the public interest will include an agency's statutory objectives and enforcement priorities. This may include having regard to any enforcement criteria published by agencies in their warnings policy (as discussed below at [5.3]).

Range of behaviour

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

Purpose of warning

- 4.7 Agencies may issue warnings for a range of different purposes, for example, to:
- 4.7.1 show that the agency takes the matter seriously;
 - 4.7.2 impress on the person that, in the agency's view, the behaviour the person has engaged in amounts to criminal conduct that could otherwise be prosecuted but the agency has chosen not to prosecute;
 - 4.7.3 mitigate the risk of the behaviour recurring in the future;
 - 4.7.4 give the person an opportunity to amend or address the behaviour to avoid the risk of prosecution in the future; and/or
 - 4.7.5 send a signal to the person, but also to others in similar situations, including the general public.
- 4.8 An agency should consider whether, in the circumstances of the case, a warning would be likely to achieve the intended purpose. The wording of any warning also needs to be appropriate to reflect the particular purpose for which the warning is issued.

Sufficiency of evidence when issuing warnings

- 4.9 Most agencies will only issue warnings where the alternative is to prosecute and where the agency is satisfied that there is credible evidence that meets the Evidential Test of the Test for Prosecution as set out in the *Prosecution Guidelines*.
- 4.10 However, some agencies may operate within a context where it is appropriate to issue warnings on the basis of a more limited body of evidence, such as at an earlier stage of an investigation. If an agency intends to issue a warning in this situation, it needs to consider carefully whether it is appropriate to resolve the matter early, having regard to the matters in [4.2]-[4.4], and having regard to the primary purpose for issuing a warning in the particular case. This assessment should recognise that issuing an early warning could work both for and against the interests of the person, the person harmed and the public.

Reconsidering decision not to prosecute and to instead warn

- 4.11 As noted at [7.1] of the *Prosecution Guidelines*, people should be able to rely on decisions taken by an agency. Therefore, an agency should only issue a warning if it is firm in its decision not to prosecute.
- 4.12 However, as set out at [5.13], [7.2] and [7.3] of the *Prosecution Guidelines*, in rare cases an agency may reconsider its decision not to prosecute a person for their behaviour and to instead warn them (a **reconsideration**). The special reasons where prosecution may be restarted are set out at [7.3] of the *Prosecution Guidelines*, which includes new and additional evidence becoming available. Any reconsideration should be reviewed by the agency's legal team, or by a Crown Solicitor.

5 POLICIES AND PROCESSES FOR ADMINISTERING WARNINGS

Policy and process to comply with natural justice and Privacy Act principles

- 5.1 While warnings are an alternative to prosecution or other enforcement action, they can still adversely affect the people to whom they are issued. For this reason, it is important that each agency complies with the requirements of natural justice and has a clear and documented policy which sets out a number of matters, including the process to follow when warnings are issued.
- 5.2 An agency's policy and process should be consistent with these guidelines, the requirements of natural justice and the principles of the Privacy Act 2020.

Matters to be included in warning policy and process

- 5.3 It is expected that an agency's warning policy will:
- 5.3.1 be publicly available.
 - 5.3.2 set out the situations in which the agency may consider issuing warnings (its enforcement criteria). This might include reference to the types or seriousness of conduct eligible for warnings, and whether warnings may be issued repeatedly or only as a one-off response.
 - 5.3.3 set out the matters that are to form part of the warning, including, in general terms, those matters listed in [6.1] and, as relevant [6.2].
 - 5.3.4 describe the process for issuing warnings, which should include a process for engaging with the person under investigation in order to give effect to natural justice. Giving effect to natural justice will vary depending on the behaviour and the consequences for the person concerned but may mean putting potential adverse findings to the investigated person for comment before a final decision to issue a warning is reached. It may also include:
 - 5.3.4.1 the person consenting to receiving the warning and having the matter resolved in that way.

- 5.3.4.2 the person admitting to the behaviour in respect of which they are being warned.
- 5.3.5 set out the process the agency will follow for a reconsideration. The policy should also:
 - 5.3.5.1 confirm that a reconsideration should only occur in rare situations and should be consistent with the reasons set out in [5.13], [7.2] and [7.3] of the *Prosecution Guidelines* (as referred to in [4.11] above).
 - 5.3.5.2 require the agency to seek internal legal advice, or the advice of a Crown Solicitor, as part of any reconsideration process.

Matters agencies may wish to include in their policies and processes

- 5.4 To make warning policies and processes more robust, an agency should consider including the following aspects:
 - 5.4.1 setting out in the policy the purpose or purposes for which the agency uses warnings;
 - 5.4.2 having internal supervision and assurance processes within the agency to ensure that warnings are appropriately issued in the circumstances of the case and that the agency is taking a consistent approach concerning the use of warnings;
 - 5.4.3 having a process to engage with any person harmed by the behaviour of the person it is proposed to warn; and/or
 - 5.4.4 including a process for reviewing warnings, at the request of the warned person, within a set period of time after a warning has been issued. This may be an internal review or complaints process within the agency. Any such process should be suitably independent from the officials who made the decision to warn.

6 THE WARNING

Content of warning

- 6.1 A warning should include the context for issuing a warning including:
 - 6.1.1 *accurately* setting out the key facts that led to the issuing of the warning; and
 - 6.1.2 the reasons for issuing the warning.
- 6.2 A written warning has greater potential than a verbal warning to have future and/or unforeseen consequences. Therefore, where an agency issues a written warning, it should, in addition to the matters in [6.1], set out:
 - 6.2.1 the consequences related to the warning including:

- 6.2.1.1 where the warning will be held and for how long;
 - 6.2.1.2 how the warning may be used (for instance with whom it may be shared and if it will be published); and
 - 6.2.1.3 any likely consequences if, in the future, the person engages in similar behaviour.
- 6.2.2 the person's rights in relation to the warning including:
- 6.2.2.1 how they will be engaged with in the process of issuing the warning; and
 - 6.2.2.2 rights under the Privacy Act or the agency's privacy policy, for instance, the right to have the warning reviewed within a certain period.
- 6.2.3 any relevant response of the person to the proposed warning, for example, whether they admit the facts or conduct alleged or dispute it; or whether they consent to the matter being dealt with by a warning.

Agency not to overreach bounds of its role and warnings to be accurate and clear

- 6.3 The specific terms of a warning should not overreach the bounds of the agency's role as investigator and/or prosecutor.
- 6.4 A warning should focus on setting out accurately and clearly the conduct or behaviour which, in the agency's view, the evidence supports.
- 6.5 The warning should not assert or imply that an offence has been committed or is proven. To do so could be seen as the agency taking on an adjudicative role that it does not possess.¹ The warning may set out that, in the agency's view, such conduct or behaviour may amount to a specific offence and that if repeated, a prosecution may be considered.
- 6.6 A warning should not indicate prosecution as the otherwise appropriate response if that is not in fact the case.

Issuing the warning

- 6.7 When an agency issues any warning, whether written or verbal, it should ensure the matters set out in [6.1] and, if relevant [6.2], are explained to the person in a manner and language that is appropriate to the person's level of understanding.

¹ In *S v Commissioner of Police* [2021] NZHC 743 the High Court was critical of the way Police framed the warning, as it implied the alleged offence had occurred and been proven. The warning then had significant consequences for Mr S when subsequently released by Police vetting.