



# Formal warnings

## OPERATIONAL POLICY | KAUPAPAHERE

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## Introduction | Whakatakinga

1. This policy outlines why Customs may issue a formal warning, verbal or written, to a person or entity whose behaviour Customs considers amounts to a criminal offence, and what content is to be included in the formal warning. This policy also covers how the warning is administered.

## Overview | Tirohanga whānui

2. This operational policy requires that formal warnings are issued by Customs with a clear purpose intended, and in accordance with the [Solicitor-General's Guidelines for the Use of Warnings](#), the requirements of natural justice and the principles of the Privacy Act 2020.

## Scope

3. This operational policy applies to formal warnings, either verbal or written, that:
  - are issued by Customs to a person, either natural or legal (for example, a limited liability company)
  - relate to behaviour Customs considers amounts to a criminal offence in breach of a law that is enforced by Customs
  - are recorded on the file of the person who has been warned
  - may have ongoing or future disadvantages for the person who has been warned.
4. This operational policy does **not** apply to:
  - warnings that have their own statutory regime (for example, warnings issued to children or young persons under the Oranga Tamariki Act 1989)
  - explanations given, letters sent, or information sheets issued, to advise or educate a person or entity about Customs matters
  - explanations given or letters sent in response to an enquiry or request
  - offending where Customs intends to either serve an infringement notice or initiate prosecution.

## Why Customs issues warnings

5. In broad terms, warnings may be issued for a range of different purposes, for example, to:
  - show that Customs views the matter seriously
  - mitigate the risk of the behaviour recurring in the future
  - impress on the person that, in Customs' view, the behaviour the person has engaged in amounts to criminal conduct that could otherwise be prosecuted but Customs has chosen not to prosecute

- give the person an opportunity to amend or address the behaviour to avoid the risk of prosecution in the future
- send a signal to the person, but also to others in similar situations, including the general public.

## Examples of behaviour that may merit a formal warning

The table below lists some examples of situations in which Customs may issue a formal warning.

Behaviour	Offence
Incorrectly declaring goods being imported or exported (for example, describing the goods as something other than what they are, or significantly understating their value)	➤ Section 364(1) of the Customs and Excise Act 2018 – making an entry that is erroneous or defective in a material particular
Failing to advise Customs of a change in key personnel in a licensed Customs-controlled area (CCA), when this is a condition of the licence	➤ Section 69 of the Customs and Excise Act 2018 – failing to comply with a term, condition, or restriction imposed under the licence for the CCA
Sailing a yacht into New Zealand and arriving at a place that is not designated as a Customs place, unless directed to by a Customs officer or forced to by circumstance (e.g. weather)	➤ Section 18 of the Customs and Excise Act 2018 – failing to comply with requirement to arrive at a Customs place

## Deciding whether to issue a formal warning

### Key requirements

6. Not all behaviour that Customs considers to be a breach of the law requires a prosecution response. The [Solicitor-General's Prosecution Guidelines](#) explain that prosecutions ought to be initiated or continued only where the prosecutor is satisfied that the Test for Prosecution is met. This occurs if:
  - the evidence which can be presented in Court is sufficient to provide a reasonable prospect of conviction – the Evidential Test
  - prosecution is required in the public interest – the Public Interest Test.
7. The Prosecution Guidelines provide detailed explanation of how to apply both the Evidential Test and the Public Interest Test.
8. Customs initiates prosecutions only where the Test for Prosecution is considered to be met **and** prosecution is consistent with Customs' approach to compliance.

9. If Customs decides not to prosecute, and issues a formal warning:
  - it will be in a situation where it is likely that **the requirements of the Evidential Test could be met**, but a clear decision has been reached that **prosecution will not be initiated** – either because it would not be in the public interest or because it is not consistent with Customs' approach to compliance
  - the **purpose of the formal warning will be clearly defined and understood**, and in line with Customs' statutory objectives and enforcement priorities.

## What to consider

10. A decision as to whether it would be appropriate to issue a formal warning should take into account all the circumstances of the situation, including the:
  - alleged offence (for example, the seriousness, or whether Customs has previously advised the person about a similar offence)
  - purpose of the warning
  - evidence available to support the warning.
11. The Solicitor-General, in the [Solicitor-General's Guidelines for the Use of Warnings](#), has directed that the following should also be taken into consideration:
  - the needs and interests of the person to be warned, their whānau and community (**the person**)
  - the needs and interests of any person harmed or affected by the person's behaviour, their whānau and community (**the harmed person**)
  - the wider public interest.

## What must be included in a formal warning

### Verbal warning

12. A formal warning issued verbally needs to:
  - accurately set out the key facts that led to the warning
  - warn the person
  - explain that this is a formal warning from the New Zealand Customs Service
  - explain the reason(s) for issuing the formal warning.
13. An officer issuing a formal warning verbally will give the person being warned an opportunity to respond to the warning. Any relevant response of the person to the 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) will be noted in the CusMod report in which the formal warning is recorded.

## Written warning

14. The wording of a formal warning letter needs to be:
  - appropriate to reflect the particular purpose for which the formal warning is issued
  - written in a manner and language that is appropriate to the person's level of understanding.
15. A warning letter must include the following:
  - statement that the letter is a formal warning from the New Zealand Customs Service
  - accurate summation of the key facts that led to the issuing of the warning letter
  - the reasons for issuing the warning letter
  - the consequences related to the formal warning, including:
    - where the formal warning will be held and for how long
    - how the formal warning may be used (for instance with whom it may be shared and if it will be published)
    - any likely consequences if, in the future, the person engages in similar behaviour (for example, if the behaviour is repeated, prosecution may be considered)
  - the person's rights in relation to the formal warning, including:
    - rights under the Privacy Act 2020
    - the right to request, within twenty working days, to have the formal warning reviewed
    - how the review process will work
  - any relevant comments provided by the person, 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.

## Process for issuing a formal warning letter

16. In some circumstances, a person or entity will have been advised in advance that a formal warning letter is going to be issued to them because of behaviour Customs considers amounts to a criminal offence. This provides an opportunity for the person or entity to do any or all of the following:
  - provide comment on their actions
  - consent to receiving the formal warning letter and having the matter dealt with in that way
  - admit to the behaviour for which they are being formally warned.
17. As noted in paragraph 15, any of the above responses must be noted in the formal warning letter.
18. A CusMod report will record that a formal written warning has been issued.

## Reviewing a formal warning letter that has been issued

19. A person or entity will generally be allowed 20 working days in which to write to Customs requesting a review of the formal warning letter. This timeframe may be extended if there is good reason to do so (for instance, if the person is waiting for a response to a request for relevant personal information under the Privacy Act 2020).
20. Customs will undertake a review of the original decision to issue a warning letter, taking particular note of any new or additional information supplied.
21. When a review is undertaken:
  - it will be carried out by a work area that is independent of the work area that issued the formal warning letter
  - Customs' Chief Legal Advisor will be consulted.
22. Customs will aim to respond within 20 working days of receiving the request for review, advising the person or entity of the outcome of the review that has been undertaken.
23. The request, the review and its outcome will be noted in a CusMod report referencing the CusMod report in which the formal warning was recorded.