

28 June 2021

**IR-01-21-13438**

Andrew Geddis  
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Kia ora Andrew,

Thank you for your Official Information Act 1982 (OIA) request dated 25 April 2021. You have requested the following information:

*"On April 25, stuff.co.nz published an article ""A judge has ruled that police 'formal warnings' are illegal and akin to a conviction without trial"" (<https://www.stuff.co.nz/national/crime/124930038/a-judge-has-ruled-that-police-formal-warnings-are-illegal-and-akin-to-a-conviction-without-trial>). That article includes a quote attributed to the NZ Police: "In the interim, staff have been provided with information concerning the proper approach to formal written warnings."*

*I request a copy of the information referred to in this article, being all information and advice provided to police staff regarding the issuing of formal written warnings following the decision in S v Commissioner of Police [2021] NZHC 743."*

I have considered your request and provide the following response.

### **Background and information**

The Formal Warning and its predecessor, Pre-Charge Warning (PCW) are alternatives to prosecution for offenders who have committed offences with a maximum penalty of not more than six months' imprisonment. It involves the use of Police discretion not to prosecute even though there is sufficient evidence to do so.

Formal Warnings are one of a number of tools Police can draw upon to resolve the incidents Police respond to. Police replaced the Pre-Charge Warning (PCW) with the Formal Warning on 1 May 2020.

The purpose of the Formal Warning is to resolve offences where Police intervention is required but prosecuting an individual through the Court process is not in the public interest. The 'public interest test' is set out in the Solicitor General's Prosecution Guidelines. It is based on the premise that there will be circumstances in which, although the evidence is sufficient to provide a

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reasonable prospect of conviction prosecution is not required in the public interest due to a range of factors which may include (amongst other factors) offence seriousness, context of offence, prospect of reoffending, victim considerations, and the cost of prosecution to the public.

Formal Warnings are intended to be an effective mechanism for holding an individual to account and deterring them, by showing them that the offence is being treated seriously and recording the warning as part of their criminal history.

Police Instructions chapter 'Formal Warnings' was published on 1 May 2020 and is provided as Appendix 1. This policy is for Formal Warnings to be applied in appropriate situations with offences with a maximum penalty of not more than six months' imprisonment. There have been no changes since the Police Instructions were published on 1 May 2020.

***All information and advice provided to police staff regarding the issuing of formal written warnings following the decision in S v Commissioner of Police [2021] NZHC 743***

Following the decision, police staff were notified that an admission of the offending by the offender must be recorded before a Formal Warning can be issued. Staff were also advised, in the same communication, that Police were currently considering whether to appeal the recent High Court ruling on the case - S v Commissioner of Police [2021] NZHC 743. This communication occurred as an internal bulletin board message and is attached as Appendix 2.

Police has initiated work to ensure the policy remains appropriate and its operational staff are consistently delivering Formal Warnings according to the policy. Police's Reframe strategy, initiated in early 2020 will also provide an opportunity to reflect on the formal warnings policy, and to set this in the context of a wider programme to establish an end-to-end resolutions framework.

You have the right, under section 28(3) of the OIA, to ask the Ombudsman to review my decision if you are not satisfied with the way I have responded to your request.

Ngā mihi,



Michael McLean  
Director  
Māori, Pacific, and Ethnic Service