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# Formal Warning Policy

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**Date:** February 2024  
**Next Review:** February 2026  
**Number:** 1.10  
**Owner:** General Counsel

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## Document History

DATE	VERSION	CHANGE	APPROVED BY
14/02/24	V1.0	New Policy.	REA Board 21 February 2024

## Policy Statement

1. The Real Estate Authority (**REA**) is required by section 12(1)(j) of the Real Estate Agents Act 2008 (**the Act**) to investigate and prosecute suspected criminal offences related to the real estate industry.
2. In some instances, the REA may consider issuing a formal warning instead of bringing criminal charges.
3. When doing so, the REA will follow the processes contained in this policy and the guidance contained in the *Solicitor-General's Guidelines for the Use of Warnings*.
4. This policy will be published on the REA's website.

## Purpose of warnings

5. When deciding whether or not to prosecute, the REA is required to consider the public interest. Not all behaviour that may involve an offence requires a prosecution response. In some circumstances, a warning may achieve the REA's enforcement objectives. All decisions must be made on a case-by-case basis.
6. The REA may issue warnings for a range of different purposes. These include to:
  - a. show that it takes a matter seriously;
  - b. impress upon the person being warned that, in the REA's view, their behaviour may amount to criminal conduct that could have been prosecuted by the REA;
  - c. denounce the behaviour to the industry as a whole;
  - d. reduce the risk of the behaviour recurring in the future, either generally or specifically by the warned person; and
  - e. give the person an opportunity to amend or address the behaviour to avoid the risk of prosecution in the future.

## Process for issuing warnings

7. The investigation process leading up to a person being warned will follow the same path as the decision to prosecute. As an overview:
  - a. The conduct will be investigated by REA.
  - b. Once the investigation is complete, the file will undergo a legal review.
  - c. The investigation report and legal review will be considered by the Head of Regulatory Services and the General Counsel of the REA who will provide a recommendation, taking into account the details of the case and REA's regulatory objectives.
8. Decisions on whether or not to issue a warning are made by the REA General Counsel or the Chief Executive. Any matters considered non-routine or unusual, involving sensitive public relations issues, or the reputation of REA, or which relate to particularly serious conduct must be decided by the Chief Executive and/or the Board.

9. As part of this process, the REA will observe the principles of natural justice. The REA recognises its natural justice obligations will vary depending on the circumstances, but will at a minimum include:
- a. The REA discussing the relevant conduct with the person being investigated a reasonable time after the conduct has come to the REA's attention; and
  - b. Putting potential adverse findings to the investigated person for comment before a final decision is reached.
  - c. The REA will actively turn its mind to what natural justice requires on a case-by-case basis.
10. Warnings will only be issued by the REA where:
- a. There is evidence of behaviour that would be an offence under the Real Estate Agents Act 2008 or other relevant legislation (for example, evidence that a person has carried out unlicensed trading).
  - b. Enough evidence is available to provide a reasonable prospect of success if a prosecution was brought. By way of guidance:
    - i. This does not require the REA to be sure that a prosecution would succeed.
    - ii. However, there should be credible evidence that, if a court accepted it, would be enough to prove beyond reasonable doubt that an offence has been committed.
  - c. Issuing a warning is in the public interest. In most cases, a warning will be the appropriate outcome where:
    - i. The conduct is serious enough to warrant a regulatory response; but
    - ii. The public interest does not require a prosecution because:
      1. the person has changed their behaviour or has indicated that they will change their behaviour;
      2. the behaviour was accidental or based on a genuine misunderstanding of the law;
      3. there was little or no actual consumer harm, or the person has remedied any harm that they caused;
      4. a warning would be sufficient to deter similar conduct by others and set standards in the industry;
      5. it would not be a good use of the REA's limited regulatory resources;
      6. there are special reasons why prosecuting the person would be a disproportionate response (for example, they are seriously unwell or are a company that has been put into liquidation); and/or
      7. the REA can achieve its regulatory objectives without a prosecution.

(Note: the above factors will each need to be assessed and balanced on a case-by-case basis).

11. Warnings will be issued by the REA as soon as practicable, but in any case, within a timeframe that would otherwise be acceptable if charges were being filed for the conduct.

### **Publishing a warning**

12. Publishing the fact that a warning has been issued will often be an important part of achieving the REA's regulatory objectives. In each case where a warning is issued, the REA will consider three options:
  - a. No publication.
  - b. Publication of an anonymised summary of the circumstances of the warning, and/or a general press release setting out the REA's expectations around the type of conduct that is the subject of the warning.
  - c. Publication of the circumstances of the warning in a way that identifies the warned person.
13. The REA's default option will be anonymised publication on its website and/or through media release. When anonymising the summary, the REA will remove any identifying particulars so far as possible. At a minimum, this would include any names, sensitive personal information, and (if practicable) locations.
14. The REA will also turn its mind to whether there are special circumstances that justify one of the other options. For example, no publication may be appropriate where the summary of the warning cannot be adequately anonymised, and the REA considers it would be disproportionate or unfair to publish a non-anonymised summary.
15. The REA's intentions regarding publication will be made clear in the warning letter provided, and the warned person will be given the opportunity to raise any reason why the REA's proposed course is not appropriate.
16. All publications will make clear that no finding of unlawful conduct has been made. If named publication is going to take place, the publication will also acknowledge the recipient's position, including if they have denied the conduct or denied that it is an offence.

### **Content of warnings**

17. Each warning will be issued in writing and contain the following information:
  - a. the key facts and reasons that led to the issuing of the warning;
  - b. the consequences related to the warning – for example that an anonymised summary of the warning will be published and may be taken into account by the REA for future decision-making;
  - c. that if the person engages in similar behaviour in the future, they may be subject to prosecution under the relevant enactment;
  - d. that the existence of the warning may be shared with any person harmed by the conduct (on a confidential basis if the warning is not to be published);
  - e. of the person's right under the Privacy Act 2020, including the person's right to request a copy of personal information relating to the warning; and

- f. any relevant response the person has made to the proposed warning when engaged with (e.g. whether they admitted or disputed the facts of the alleged conduct, and whether they consented to the matter being dealt with through a warning).

### Reconsideration of a warning

18. The REA may in rare cases reconsider the decision to issue a formal warning rather than initiating prosecution. Reasons for this may include if further evidence comes to light. Before any reconsideration is actioned, the REA will seek legal advice from either its internal team or from the external counsel.

### Form of warning

19. An example warning letter is attached to this policy at **Appendix One**.
20. The exact wording of a warning letter will vary from case to case, depending on matters such as the nature of the alleged conduct, the extent of the warned person's participation in the investigation, whether there were any admissions, and the recipient's fluency in English.

### Monitoring and Review

21. General Counsel is responsible for maintaining this Policy. Compliance with the Policy will be overseen by the General Counsel. The Policy will be monitored and reviewed every 2 years.

Authorisation



Denese Bates KC  
Board Chair

Dated: 21 February 2024

### Related Policies:

- 1.6 Prosecution and Charging Policy

## Appendix One

### **Example warning letter**

Dear [recipient],

#### **Warning for possible offending under the Real Estate Agents Act 2008**

The Real Estate Authority (**REA**) has been investigating [you] under the Real Estate Agents Act 2008. We have now completed our investigation and are writing to inform you about our conclusions.

The REA considers that [you are] likely to have breached the Act by [summarise relevant conduct]. The REA's view is that this is likely to be an offence under [relevant provision]. Based on the information currently available, the REA has decided to issue [you] with this warning letter instead of bringing legal action. This means there has not been any finding that [you] have broken the law, as only the courts and tribunals can make such a finding. However, this warning may be used by the REA or a court or tribunal in any future enforcement actions.

#### **The investigation**

On [date] the REA [received a complaint alleging that / became concerned that] [you] may be breaching [relevant provisions]. The REA therefore began an investigation. [Brief summary of the investigation, including whether the recipient participated.] After reviewing all of the evidence obtained during the investigation, the REA has formed the view that the following events occurred:

- [Bullet point summary of the REA's reasons.]

#### **Warning**

After assessing the evidence gathered during the investigation against REA's *Prosecution and Charging Policy* and *Formal Warning Policy*, the REA has decided to issue this warning letter rather than by beginning legal proceedings.

This letter explains the REA's opinion that [you] likely broke the law, as set out above. The consequences of this warning are as follows:

- If [you] carry out similar conduct in the future, the REA may take legal action.
- The REA may take this warning into account when making future decisions about [you] and related entities, including when considering future enforcement actions and when determining whether [you] or related entities are a fit and proper person to hold a licence.
- The REA may draw this warning to the attention of any court or tribunal dealing with relevant proceedings involving [you] or related entities.

- The REA intend to publish this warning in an anonymised summary on our website and may issue a media release about the outcome of this investigation. [To be updated if special circumstances exist].
- We may share the outcome of the investigation with [interested party].

In rare cases (for example, where new information becomes available after a warning is issued), the REA may decide to begin legal proceedings despite issuing a warning letter. In that case the warning will be withdrawn.

### **Your rights**

[If the REA intends to publish the warning] If you have concerns about a [n anonymised] summary of the warning being published by the REA, you may write to the REA at the address given below with reasons why the REA should not make this publication.

You have ten working days from the date of this letter to write to the REA. If we do not receive anything from you in this time, the REA will make the publication. If you do write to us within this time, we will consider your reasons before making a final decision on publication. In that case, we will advise you of our decision.

[If recipient is an individual: Under the Privacy Act 2020, you have the right to request all personal information about you that relates to this warning. Please note that there are grounds for withholding information under that Act; these will be considered on a case-by-case basis.]

### **Further information**

We recommend that you seek legal advice and encourage you to regularly review your compliance procedures and policies.

We refer you to the following resources that may be of assistance:

- [Link to relevant REA resources.]

You can also view the Real Estate Agents Act and other legislation at [www.legislation.govt.nz](http://www.legislation.govt.nz).

Please contact [contact person] if you have any questions about this letter.

Yours sincerely