



Guidance

Official warnings to charities and trustees: Q and A

The Charities (Protection and Social Investment) Act 2016 gave the Charity Commission ('the commission') a new power to issue official warnings. The commission can issue an official warning when it considers there has been a breach of trust or duty or other misconduct or mismanagement in a charity. The power supplements the commission's existing ability and powers to deal with wrongdoing in charities, including by giving regulatory advice and guidance or using temporary and protective powers.

This guidance explains more about the power and when the commission can use it. It explains the process for issuing an official warning, and what it means for charities or trustees that receive an official warning.

Q1. What is this power?

This is the statutory power to issue an official (ie formal) warning to:

- a charity trustee or trustee for a charity who the commission considers has committed a breach of trust or duty, or other misconduct or mismanagement, or
- a charity in connection with which the commission considers a breach of trust or duty, or other misconduct or mismanagement has been committed

Q2. What is its purpose, and why does the commission need it?

The purpose of issuing an official warning is to ensure that the charity or trustee(s) concerned knows that a breach, misconduct or mismanagement has taken place and that it needs to be rectified, and to ensure they know what action they should take to stop the misconduct or mismanagement or to prevent a recurrence of it.

This power will help us to tackle misconduct or mismanagement in charities where, in line with the priorities and principles set out in our **risk framework**, we consider that:

- the harm, or risk of harm, to a charity, its assets (including reputation) or beneficiaries is sufficient to require the commission to take action
- regulatory advice and guidance alone is not sufficient to deal with the misconduct or mismanagement
- it would not be proportionate in the circumstances to use other temporary or permanent protective powers (such as removing or disqualifying trustees, whether in an inquiry or not) or require trustees to account for a loss or benefit, for example through restitution or recovery of funds

Where appropriate, the commission may also use publication of official warnings to promote transparency. Publication can alert charities and members of the public or potential donors to actions within a charity which have been a cause for regulatory concern. It will assist in promoting public trust and confidence in the sector.

Q3. Will an investigation or inquiry be opened?

The commission does not need to open a statutory inquiry before it can issue a warning. Usually the commission would consider issuing an official warning in a case where it would not be proportionate to use other powers, such as those that it can only use where an inquiry is open. But the commission may decide at the conclusion of an inquiry that issuing a warning is more appropriate and proportionate as an outcome than use of other powers.

The commission may consider opening an inquiry and using its other powers if trustees subsequently fail to rectify a breach specified in an official warning. Failure to remedy misconduct or mismanagement specified in an official warning enables the commission to use of other protective and remedial powers, such as suspension and ultimate removal of trustees upon opening an inquiry. It may also constitute mismanagement or misconduct.

Q4. What is breach of trust or duty, misconduct or mismanagement?

Breach of trust or breach of duty includes acting in breach of:

- the trustees' legal duties
- the charity's governing document
- specific statutory requirements for trustees as set out in the Charities Act 2011 - such as filing annual returns, reports and accounts
- any other legal duty that applies to the charity or its trustees

(Trustees' key legal duties are explained in **The essential trustee**.)

Misconduct includes any act (or failure to act) that the person committing it knew (or ought to have known) was criminal, unlawful or improper.

Mismanagement includes any act (or failure to act) that may cause charitable resources to be misused or the people who benefit from the charity to be put at risk.

In addition the Charities Act makes clear that failure to comply with an order or direction of the commission and failure to remedy misconduct or mismanagement specified in an official warning are misconduct and/or mismanagement.

Q5. In what kinds of circumstances is the commission likely to issue an official warning?

The commission will follow the principles in its **risk framework** in deciding what regulatory action is appropriate when something goes wrong in a charity. The commission will take account, amongst other factors, of the trustees' conduct and response in deciding what regulatory action is appropriate. Following these principles, the commission is likely to consider using the warning power where, for example, one or more trustees:

- have acted recklessly or without due care, resulting in a breach of trust, misconduct or mismanagement
- have failed to take appropriate steps to rectify a breach of trust, misconduct or mismanagement despite engagement with the commission (for example by complying with default notices for failing to submit accounts and returns or implementing an action plan agreed with us)

- have failed to discharge legal duties in the administration of the charity or a charity has failed to discharge its legal duties in connection with charity activities
- (or the charity) have displayed a pattern of repeated misconduct or mismanagement
- have committed deliberate or wilful wrongdoing resulting in a breach but it would not be proportionate in the circumstances for the commission to use other powers

The commission recognises that most trustees are volunteers who sometimes make honest mistakes. The commission is unlikely to issue an official warning where:

- the breach, misconduct or mismanagement is minor or technical in nature (such as a breach of administrative provisions in the governing document)
- it does not demonstrate a repeated course of conduct
- the trustees have acted honestly and reasonably and are taking appropriate steps to put matters right and prevent a recurrence
- the loss or risk to the charity or to public trust and confidence in the charity is minimal

The commission may, however, consider issuing an official warning if the impact of the misconduct or mismanagement on the charity or the sector is sufficiently serious to warrant regulatory action.

Q6. How will I know if the commission intends to issue an official warning to me or my charity?

The commission can only issue a warning if it considers, based on information available to it that you have committed a breach of duty or misconduct or mismanagement in a charity.

It is likely that in most cases the commission will already have formally engaged with your charity about the breach or mismanagement it is concerned about. This might include correspondence about failure to submit annual accounts, reports and returns, an operational compliance case, a monitoring case, an inspection visit or an inquiry. In all cases where the commission has concluded that there has been a breach or mismanagement and as a result intends to issue a warning, it must give statutory notice of its intention and give each of the trustees (in the UK) and the charity the opportunity to make representations first. So you will be aware of the commission's concerns and will have the opportunity to respond before the commission decides to proceed with issuing or publishing the official warning.

Q7. What will the notice of the commission's intention to issue a warning explain?

The notice of the proposed warning must explain:

- that the commission intends to issue an official warning under s.75A of the Charities Act and if it is being made against the trustees and/or the charity
- the grounds for the warning - the breach, misconduct or mismanagement that the commission has identified
- any action the commission intends to take, or considers the charity or its trustees should take, to rectify the misconduct or mismanagement

- whether and, if so, how the commission intends to publish the warning
- the time period within which you can make representations to the commission about the content of the proposed warning

Q8. How will I have the chance to make my views known before the commission issue a warning?

The notice of the proposed warning will explain how to contact the commission, and the deadline for representations about the contents of the proposed warning.

Q9. How long will I have to respond?

The commission will normally give you 28 days to respond unless there are reasons why a shorter notice period is appropriate.

Q10. What will the commission consider representations on?

The commission must consider representations about ‘the content of the proposed warning’. This includes:

- the factual accuracy of what the breach, misconduct or mismanagement being warned of is and the commission’s understanding of the circumstances - what happened, who was involved
- who the warning is being made against
- any action the commission considers needs to be taken to rectify the breach, misconduct or mismanagement

However, in the interests of ensuring that its regulatory action is proportionate, the commission is also willing to consider representations about:

- actions taken by the trustees to put things right, and their impact
- any mitigating or aggravating factors
- the significance or impact of the breach, misconduct or mismanagement on the charity, its assets including its reputation, its beneficiaries or on trust and confidence in charities more widely
- proposals to publish the warning and how, including any risk to the charity or its beneficiaries that may result from the commission publishing the warning

Representations should, where possible, be supported by evidence.

Q11. How can I be sure that any representations I make will be properly considered?

The commission must consider any representations about the content of the proposed warning that it receives within the notice period. The commission will apply the principles in its **decision review procedure**, to ensure that representations are considered in an objective and timely manner.

Q12. What will happen at the end of the notice period?

Having considered any representations, the commission will decide whether to:

- proceed to issue the warning
- issue a warning, but modified to take account of additional information that has been provided
- not issue the warning

There is no requirement to give further notice at this stage, but the commission will inform the trustees of its decision.

Q13. Can I challenge/appeal the commission's decision?

The decision to issue an official warning, once made, is not one of the decisions that you can refer to the First Tier Tribunal (Charity).

In light of this the commission has built additional safeguards into the process of making the decision to issue a warning. As explained in questions 10 and 11:

- the commission is prepared to consider representations on a wider range of grounds than it strictly must by law
- the commission will follow the principles of its decision review process when considering representations

Once the commission has decided to issue a warning, however, you can only ask for the decision to be reviewed if you can show that the warning was issued by mistake or on misrepresentation or otherwise than in conformity with the Charities Act.

The commission will, however, take into account any steps taken by the charity to rectify the breach, misconduct or mismanagement, or prevent it being repeated, when considering whether it may be appropriate to vary or withdraw the warning.

Like most decisions by public bodies, the commission's use of an official warning can also be subject to judicial review.

Q14. What must I do in response to an official warning? Can the commission direct me?

An official warning is not a statutory direction. The commission cannot use an official warning to direct trustees to take specific action. However:

- the commission must specify (in the notice of its intention to issue a warning) any action it is considering taking, or considers that the trustees or the charity should take, to rectify the breach, misconduct or mismanagement
- failure to remedy any breach specified in a warning can be used as evidence of misconduct or mismanagement including when considering whether to exercise other specified powers, in particular those under section 76 of the Charities Act 2011 (as explained in question 15)

You should, therefore, take appropriate steps to rectify the breach, misconduct or mismanagement specified in the warning, and prevent a further recurrence.

Q15. What will happen if we deal with the misconduct or mismanagement, or if we don't?

The commission expects you to take appropriate steps to deal with the misconduct or mismanagement identified in the warning. Once you have done this, it can consider whether it would be appropriate to withdraw or vary the warning to reflect the action that you have taken, depending on the circumstances. The commission will not automatically withdraw the warning; it will consider the circumstances in each case, including the risk that the misconduct or mismanagement might be repeated.

If the commission decides to vary the warning, it must repeat the notice procedure set out in the answer to question 7.

If you fail to rectify any breach specified in a warning under s.75A, this is grounds for the commission to use its powers under s.76 of the Charities Act (or to take other regulatory action).

The commission's powers under s.76 include power to suspend trustees and other officers, to protect the charity's property by restricting the transactions that the charity can enter into, and to appoint an interim manager.

Q16. Will the warning be published?

The commission will decide in each case whether it is appropriate to publish a warning. It will follow the same principles that apply to publication of **statements on live cases, reports on regulatory cases, and reports of statutory inquiries**.

The commission will normally publish a warning where doing so is likely to:

- help secure compliance by the trustees with their duties
- protect public trust and confidence in the charity or charities more widely
- be the most effective way of highlighting a regulatory issue to the wider sector
- promote accountability and transparency
- protect potential donors or funders in circumstances where we consider this necessary
- be in the public interest for any other reason

The commission will not publish a warning where doing so would:

- be detrimental to a particular individual or group of individuals, for example a risk to someone's personal safety
- contravene or prejudice requirements for confidentiality or commercial sensitivity, or risk national security
- in itself cause disproportionate prejudice to the charity and/or its beneficiaries
- contravene the Commission's duty to use its resources in the most efficient, effective and economic way
- not be in the public interest for any other reason

Where the Commission publishes an official warning, this will normally be on GOV.UK. The Commission can consider other forms of publication (such as at a charity's premises) where this is appropriate in the circumstances.

Q17. How can I avoid getting an official warning from the Commission?

The Commission can only use an official warning in cases of breach of duty, misconduct or mismanagement in a charity.

Even if something goes wrong in your charity, in the majority of cases if you:

- contact the Commission about it to keep us informed and if necessary get our help
- work with the Commission and follow its advice to resolve it

then there is unlikely to be any reason for the Commission to issue an official warning, or use any other regulatory powers, in order to resolve the issue.

Q18. Where can I find out more about official warnings?

The Commission has published **operational guidance** for its staff explaining in more detail how the warning power will be used.