



Analysis of consultation responses

Consultation on official warnings to charities and trustees: draft guidance

Introduction

Thank you to everyone who took part in this consultation. All of the consultation feedback has been helpful in developing the Charity Commission's policy and guidance on using this power.

The Charities (Protection and Social Investment) Act 2016 gives the commission a new power to issue official warnings. The commission can issue a warning to charities or their trustees if there has been a breach of trust or duty, or other misconduct or mismanagement. The power came into force on 1 November 2016. On 1 July the commission published a consultation seeking views on draft guidance on its approach to using the new power.

The consultation ran for 12 weeks. Forty-four organisations and individuals responded. Organisations who responded are listed in Annex 1. These include charity sector umbrella bodies, charities, professional bodies and advisers, and other regulators.

Summary

A number of common themes emerged from the consultation, and the commission has focussed on these in its response:

1. The guidance needs to give greater clarity about:

- the commission's regulatory approach and the context for the warnings power
- the purpose and intended outcome of issuing a warning
- the circumstances in which the commission would consider issuing a warning

In response, the commission is replacing the draft guidance on which it consulted with:

- Q and A which address many of the practical issues of how warnings will work
- more detailed operational (staff) guidance, which sets warnings in the context of the commission's **risk framework**, emphasising that warnings will be aimed at remedying misconduct or mismanagement

2. The issuing of official warnings needs to be fair:

- the notice period needs to take account of charities' ability to respond
- the guidance needs to explain the process for representations and what the commission will consider
- the commission should affirm that it will take into account any steps charities have taken (or subsequently take) to mitigate or prevent recurrence of misconduct or mismanagement
- charities have concerns about the lack of recourse after the notice period except via judicial review

In response:

- the commission will give 28 days' notice of its intention to issue a warning, unless there are good reasons for a longer or shorter notice period in a particular case
- the commission is willing to consider representations on a range of issues including any actions taken by the trustees to put matters right, and in relation to publication proposals, as well as on the 'content of the proposed warning' which it must consider by law
- it will follow and apply the principles of its **decision review procedure** when considering representations to ensure that consideration of representations is objective and timely
- the operational guidance highlights the need to consider modifying or withdrawing a warning in cases where the charity has taken steps to remedy the misconduct or mismanagement

3. Charities and their advisers have concerns about publication of warnings:

- the potential reputational impact of publishing a warning
- a default assumption in favour of publication
- the length of publication

In response:

- the commission will consider in each case whether publication is appropriate
- the operational guidance sets out criteria to help commission staff in making this judgement
- the commission will consider in each case what is an appropriate length of time for the warning to be published, the starting point being 12 months
- where trustees show that they have remedied the misconduct or mismanagement, the commission will consider whether the warning should be modified or withdrawn in response to this

Most respondents supported the suggestion that, where the commission publishes a warning in connection with a registered charity, it should be flagged on the charity's register entry. The commission is considering introducing this in future subject to the necessary technical changes being made.

Detailed analysis of responses

1. Reframing and clarifying the guidance

Many respondents asked for more detail of how warnings would work in practice, and felt that the draft guidance was too 'high level' in its explanation. Responses to the consultation have significantly informed the development of the policy. The commission has now produced guidance in the form of **questions and answers** which address many of the practical issues of how warnings will work, together with the more detailed **operational (staff) guidance**. These documents replace the draft guidance published for the consultation.

2. Clarifying the context and purpose of official warnings

The consultation questionnaire asked:

- having read the draft guidance, do you have any views or comments on how the commission proposes to use official warnings?
- do you have any comments on the factors that the commission will take account of and examples of when it might issue an official warning, as explained in the draft guidance?
- are there particular circumstances in which you think the commission should issue an official warning?
- should charities that repeatedly or persistently default on statutory accounting and reporting requirements automatically be issued with official warnings?

The responses to these questions highlighted several key issues.

Some respondents were concerned that the commission might use warnings:

- as a quick way of responding to complaints
- to 'gag' campaigning by charities
- in response to political or media pressure to take action

The commission will not use warnings in these ways. These do not reflect its approach to **regulatory and compliance casework**. The commission verifies facts, engages with charities, weighs up evidence, and assesses risk and proportionality before deciding what regulatory action to take. Warnings are not a type of case or an alternative to casework.

The commission will use the warning power in the context of its **risk framework**. The operational guidance explains how it will assess whether an official warning is appropriate. It may consider issuing an official warning where:

- the harm, or risk of harm, to charity assets (including reputation) or beneficiaries is sufficient to require the commission to take targeted action
- regulatory advice and guidance alone would not be sufficient to deal with the misconduct or mismanagement, or has not been acted upon

- it would not be proportionate in the circumstances to use other temporary or permanent protective powers (such as removing trustees) or to open a statutory inquiry to take further action, or to seek recovery through litigation

The consultation responses highlighted the difficulty of using examples to explain when it would be appropriate to use official warnings. Examples that are too prescriptive may unintentionally fetter the commission's discretion to take appropriate action. But those that are too vague may imply that the commission might use warnings for very minor or technical breaches. Respondents suggested further examples of situations when the commission should use warnings. Some were outside the commission's remit. Some related to lawful decisions within the trustees' discretion, and others to criminal activity. The new guidance sets out a more principle-based approach. This should clarify when it will be appropriate to use warnings; for example when 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

It's important to recognise that most trustees are volunteers who sometimes make honest mistakes. The commission is unlikely to issue an official warning where:

- the trustees have acted honestly and reasonably and are taking appropriate steps to put matters right themselves
- the breach, misconduct or mismanagement is minor or technical in nature
- 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.

Several respondents asked for clarification of the aim of a warning. Some felt there was a tension between using warnings as a sanction or to mitigate the impact of wrongdoing. The operational guidance links the use of warnings to the commission's statutory objectives. This will usually be to promote compliance with trustees' duties, or to promote accountability or public confidence by highlighting regulatory action that the commission has taken.

A majority of respondents supported issuing official warnings to charities that repeatedly file late (in contrast to those that fail to file at all, which may be subject to statutory inquiry).

The draft guidance explained that official warnings are not statutory directions. Some respondents asked for a more emphatic statement that the commission cannot use a warning to direct trustees. The new guidance states that the commission cannot use an official warning to direct trustees to take specific action. It must be recognised, however, that:

- the act requires the commission to specify (in the notice of its intention to issue a warning) any action it considers that the trustees or the charity should take
- failure to rectify a breach specified in a warning can be treated as misconduct or mismanagement

3. Giving notice and considering representations

The consultation questionnaire asked:

- the commission proposes that 14 days should be the normal minimum notice period for an official warning - do you agree, or do you think notice should normally be shorter or longer than this?
- do you have any comments on the commission's proposed approach to considering representations on official warnings?

Most respondents felt that 14 days was too short for smaller and volunteer-run charities to make sufficient representations. The commission therefore proposes that a 28 day notice period should be the normal starting point. It will, however, take into account all the circumstances, which might mean that in some cases a longer or shorter notice period is appropriate.

Some respondents were concerned that the notice of the intention to issue a warning might be the commission's first contact with a charity about misconduct or mismanagement. In practice it is more likely that the commission will have already contacted the charity. Issuing notice of a warning will often be an escalation where the trustees have failed to respond or show that they are taking action to remedy the misconduct or mismanagement.

4. Publishing official warnings

The consultation questionnaire asked:

- do you agree with the approach [to publication] set out in the guidance?
- do you agree that the commission should usually publish warnings on GOV.UK for 2 years (unless a warning is withdrawn before then)?
- do you agree that the commission should usually highlight published warnings on a charity's page in the central register?

Many respondents expressed concerns about publishing warnings at all, and the potential reputational impact on charities. The commission can't accept that this is a reason not to publish warnings at all in the kinds of circumstances where it will use warnings. The commission agrees, however, to consider each case on its own merits, considering all relevant factors as set out in the guidance. The commission hopes that clarifying the circumstances in which it would consider use of warnings will give further reassurance on this point. The commission is unlikely to issue warnings where trustees have made honest mistakes and take prompt action to put matters right themselves.

5. Actions following an official warning

The consultation questionnaire asked:

- do you have any views or comments on action the commission might take following an official warning?

Most respondents either had no specific comments on this part of the guidance or broadly supported our approach. A few reiterated concerns about fairness and proportionality (if trustees have committed an honest mistake, or rectified the misconduct or mismanagement). A few felt that the commission should be able to take stronger action. The commission is satisfied that the possible outcomes outlined in the consultation and repeated in the operational guidance are appropriate and proportionate.

Find out more:

Official warnings to charities and trustees: Q and A

Operational guidance - official warnings by the Charity Commission

Annex 1: List of organisations who responded to the consultation

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| ACEVO |
| Animal Welfare Solutions |
| Anthony Collins Solicitors LLP - Charities Team |
| Association of Accounting Technicians |
| Association of School and College Leaders |
| Bates Wells Braithwaite |
| Bircham Dyson Bell LLP |
| Charity Finance Group |
| Charity Law Association working party |
| Charity Law and Policy Unit, School of Law & Social Justice, University of Liverpool |
| Deeside House Educational Trust Limited |
| Directory of Social Change |
| Evangelical Alliance |
| Family Action |
| Higher Education Funding Council for England |
| Homes and Communities Agency |
| Hull and East Yorkshire Mind |
| ICSA: The Governance Institute |
| National Federation of Music Societies (Making Music) |
| NCVO and ACF (joint response) |
| Orphans in Need |
| Royal College of Anaesthetists |
| Sense, the National Deafblind & Rubella Association |
| Sheffield Mencap and Gateway |
| Slough Older Peoples' Forum |
| Stone King LLP |
| Sussex Street Christian Centre |
| The Bridge Church St Ives |
| The Mare & Foal Sanctuary |
| The Royal College of Radiologists |
| Thomley Hall Centre |
| University of Leeds |