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| Investigations Work-Using Temporary Protective Powers to Protect Charity Assets |
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| OG117-8 |
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# OG117-8 Investigations Work - Using Temporary Protective Powers to Protect Charity Assets

# Policy Statement/Overview

It remains the case officer's responsibility to explain how the grounds for using this power have been met and why it is an appropriate action in the context of the case and the principles of best regulatory practice (eg the reasons for wanting particular information from particular people, or reasons for discounting particular information or people and why this power is appropriate). This explanation will provide evidential analysis, setting out facts that are relied upon and those that have been discounted in reaching the decision to use the power.

# Summary of the guidance

## Casework Guidance

**24 April 2019**

# Using Temporary Protective Powers to Protect Charity Assets

## 1.  Introduction

The powers detailed by this guidance relate to the assets and general administration of those assets for charitable purposes. We can prevent assets being disposed of without our authority and refocus charitable activity within a charity's objects by the restriction of transactions or payments.

These powers are used only as temporary measures in proportion to the level of risk that exists to charity assets. These powers are more likely to be self-standing rather than being combined with powers that restrict the powers of individuals.

The statutory test for the use of any of these powers is either that there has been misconduct or mismanagement in the administration of the charity or that it is necessary or desirable to act to protect the charity's property. However, the mere fact that there has been misconduct and/ or mismanagement is not itself sufficient - the Order must be an appropriate response to the particular misconduct and/ or mismanagement in question.

Alternatively, we might consider circumstances that fall short of misconduct and/ or mismanagement (but where we need to act to protect the charity's property) where use of these powers is, again, an appropriate response to the circumstances in question.

**KEYPOINT**: Although the Act states 'misconduct or mismanagement', when setting out the Commission's findings, we should normally use the phrase 'misconduct and/ or mismanagement' so as not to tie us to one or both.

### 1.1 Section 2.2 Charities (Protection and Social Investment) Act 2016

Prior to the Charities (Protection and Social Investment) Act 2016, to use a protective power under s.76(3) of the Charities Act 2011, the Commission had to be satisfied that there had been misconduct or mismanagement in the administration of the charity, **or** that it was necessary/ desirable to act to protect the charity's property/ secure a proper application of the property.

This remains the case, but now, as a result of [s.2.2 of the Charities (Protection and Social Investment) Act 2016](http://www.legislation.gov.uk/ukpga/2016/4/section/2), failure to comply with a Commission Order or Direction, or failure to remedy any breach specified in a warning under s.75A is itself regarded as misconduct and/ or mismanagement under section 76(1), and so allows the Commission to use these s.76(3) powers. In effect, this means that the gateway to s.76(3) is now clarified and enlarged.

### 1.2 Using wider conduct to decide on appropriate powers

Where misconduct and/ or mismanagement has been established by a particular person in a charity we can (under s.76A(2) of the 2011 Act), also take into account the wider conduct of an individual:

* who was responsible for;
* who knew of or failed to take reasonable steps to oppose; or
* whose conduct contributed to

the misconduct and/ or mismanagement when deciding whether or how to exercise any of the temporary powers under s.76 of the 2011 Act.

**The wider conduct that we can take into account of any such individual is:**

* that person's conduct in relation to any other charity; or
* their conduct more generally if it appears to be damaging, or likely to be damaging to public trust and confidence in charities. This could be damaging to charities generally, particular charities or classes of charity.

## 2. Charities Act 2011 s.76(3)(c) - Vesting or transferring property into the name of the Official Custodian for Charities

### 2.1 Using this power

**What this power allows us to do**

Orders under this section of the Act allow for any property held by or in trust for the charity to be vested in or transferred into the name of the Official Custodian for Charities.

**Initial considerations**

An Order cannot be made under this section unless:

* A Statutory Inquiry is open under section 46 of the Charities Act; and
* One of the limbs of the statutory grounds in section 76(1) is met.

Where misconduct and/ or mismanagement by a particular person in relation to a charity has been established, we can [consider that persons conduct](http://ogs.charitycommission.gov.uk/g117a008.aspx#tab3#heading_toc_cc_9) more widely when deciding whether to use the power to vest or transfer property to the Official Custodian for Charities.

Some sorts of property can be vested by our Order in the OC (eg land and property such as cash and equipment). In other cases we cannot vest legal title directly (eg money in bank accounts, shares, investments or mortgages where the charity is the lender) in these cases we must order the person(s) holding the property to transfer it to the Official Custodian.

The vesting provision may be contained in an Order as part of a "package" of provisions for instance an Order appointing a receiver and manager or additional trustees Where there are constitutional problems or the holders of the property are not cooperating with the Commission there are two options:

* To make the Order as above and enforce that Order under section 336 of the Charities Act. Any such Order would need to be served personally and contain a penal notice; or
* To make an Order appointing a person to transfer the property to the Official Custodian.

**IMPORTANT NOTE**:The impact of human rights issues and the use of our powers are considered at section 3 of OG117-1. Where caseworkers have uncertainties or concerns about engagement of human rights or the proportionality of our action legal advice must be taken.

Another consideration is equality and diversity. When communicating with charities caseworkers should offer to translate documents into another language, another format, e.g. Braille or Audio or to meet any other requirements needed.

**Using section 76(3)(c) in the course of a statutory inquiry**

We may wish to vest in the Official Custodian where we believe charity property may be at risk. It will effectively prevent the disposal of the property, other than land, by the charity without approval of the Commission. If, however, land is to be "frozen" we will need to exercise further protective powers for example provisions to restrict transactions under sections 76(3)(d) or (f).

**NOTE:** By virtue of the Charities Act 1992 and since 1992 the Official Custodian had not had the general power to hold and manage investments for charity as a general function.

### 2.2 Decision points and Authorised Officer powers

The Order must be signed by a PB4 or above (having taken legal advice unless agreed by a PB5 Deputy Head) and authorised by a PB5 or above. Whoever signs the Order must ensure that its content properly represents what has been authorised.

The Official Custodian will need to be consulted in advance about any transfer of money or stock into his/her name.

### 2.3 Key issues

* We need to be satisfied that the property to be vested is held by or in trust for the charity.
* We must ensure when vesting land in the Official Custodian, that there are no covenants contained in the deed that the Official Custodian would be expected to fulfil.
* We must send a copy of all Orders made to the Official Custodian, irrespective of whether it vests land or requires or authorises any person to transfer money, shares or other investments or personal property into the name of the OCC.
* Under section 86 a copy of the Order and a Statement of Reasons (SoR) for making the Order must be sent to the charity (if a corporate body) or to each of the charity trustees as soon as practical after making the Order.
* In most cases "as soon as practical means" means at the time the Order is made. However, section 86(5) allows that where the sending of the Order and SoR would prejudice the statutory inquiry or not be in the interests of the charity we can delay this process. The Order and the SoR must be sent once these factors cease to apply. Legal advice must be taken where we have doubts as to whether the Order or SoR should be sent at the same time as making the Order.
* Inform Land Registry that the Commission has, by Order under s76(6) of the Charities Act 2011, vested the land in the Official Custodian and enclose a copy of the Order. Also refer the Land Registry to section 9 of [CC13](https://www.gov.uk/government/publications/the-official-custodian-for-charities-land-holding-service-cc13) regarding the disposal of land vested in the Official Custodian. This explains that the Official Custodian must put his/her seal on any deed which concerns the disposal of land vested in him/her under s76 of the Act.
* Section 76(6) provides the requirement to review the above Orders at such interval as the Commission sees fit. Most Orders are reviewed on a six monthly basis by the Commission as part of good case working practice. The decision to discharge the Order as a result of a review under section 76(6) is itself a reviewable decision and can be appealed at the Tribunal, as can the decision not to discharge the Order. The trustees will be notified of the review and be told of their rights to appeal. The time limits are the same as those when we notify the making of the Order.
* A request for a review of the original decision to make the Order should be made within 3 months of being notified about the Order and provided it is within the time limit, the request will take precedence over our first six monthly review. Our six monthly reviews of these Orders mean that even where the 3 month limit has passed there remains an option for a decision review or appeal against these subsequent 76(6) reviews.
* Where, on review of the original decision, we decide that the Order should stand then the Order will fall back into the pattern for regular review under section 76(6) unless an appeal to the First-tier Tribunal (Charity) is then received.
* An appeal can be made against the Order to the Tribunal. The appeal can be brought by the any charity trustee, the charity itself where it is a corporate body or any other person affected by the Order. They have 42 days from the date on which we sent notice of the decision. The 42 days includes weekends and bank holidays.
* At the end of a Statutory Inquiry the trustees may decide they want to keep their land vested with the OC. In this instance the order under s.76(3)(c) is no longer appropriate. The Commission should therefore ask the trustees to apply for an order that vests the land under s.90. The original order under s.76(3)(c) should then be discharged and replaced with the new order under s.90.

### 2.4 Notice requirements

The attached [table](http://ogs.charitycommission.gov.uk/Library/Word_docs/g117table.doc) gives notice requirements for all section 76 Orders before and after publication.

The criteria for decisions to give notice and publicity for Schemes and Orders made under section 76 of the Charities Act can be found in section B8 of OG 500 Schemes and section B6 of OG 501 Orders.

## 3. Charities Act 2011 s.76(3)(d) - Order not to part with property

### 3.1 Using this power

**What this power allows us to do**

Orders under this section of the Act prevent any person who holds any property on behalf of the charity, or any trustees of the charity, from parting with any of the charity’s property, without the approval of the Commission. The charity’s bank account can be frozen under this power.  It is also possible to use this power where individuals have mixed charity property with their own property in an account. The Order will only freeze the charity property although the practical effect of this may be to prevent access to any money in the account without our consent.

**Initial considerations**

This power may only be used if:

* A statutory inquiry is open under section 46 of the Charities Act; and
* One of the limbs of the statutory grounds in section 76(1) is met.

Where misconduct and/ or mismanagement by a particular person in relation to a charity has been established, we can [consider that persons conduct](http://ogs.charitycommission.gov.uk/g117a008.aspx#tab3#heading_toc_cc_9) more widely when deciding whether to use the power to protect charity property.

**IMPORTANT NOTE**: We will need to justify the need to safeguard the property in this way and this action should be proportionate to the risk involved to charity property. The impact of human rights issues and the use of our powers are considered at section 3 of OG117-1. Where caseworkers have uncertainties or concerns about engagement of human rights or the proportionality of our action legal advice must be taken.

Issuing of such an Order may create a significant administrative burden on us and the charity especially where there are many and regular transactions to be authorised.

Another consideration is equality and diversity. When communicating with charities caseworkers should offer to translate documents into another language, another format, e.g. Braille or Audio or to meet any other requirements needed.

**Using section 76(3)(d) in the course of a statutory inquiry**

Such Orders will be used where charity funds or property may be at risk but we are confident that by issuing the Order they will remain protected, for instance where funds are in a bank, we are assured that after service of the Order the bank will not release them without our permission.  Where we cannot be assured of such safety we would consider what other protective measures we might take.

### 3.2 Decision points and Authorised Officer powers

The Order must be signed by a PB4 or above (having taken legal advice unless agreed by a PB5 Deputy Head) and authorised by a PB5 or above. Whoever signs the Order must ensure that its content properly represents what has been authorised.

### 3.3 Key issues

* Justification for this action must be noted on file.
* Trustees should be made aware that, although the bank account is effectively frozen, outgoing payments may be made with prior approval and how such payments should be authorised. Also, the Order does not prevent payments being made into the bank account.
* In the case of bank accounts we need to be clear whether we are freezing only a specific account or whether the Order will also attach to other accounts held with the bank the details (account number etc.) of which may not be specifically set out in the Order. If we are aware of a specific account, we should mention it the letter accompanying the Order, but at the same time make it clear if the Order will also apply to other accounts that exist. The case officer should consider the circumstances and situation with regard to the account(s) and should satisfy themselves that the Order will have the intended effect.
* When notifying the trustees of the Order, the case officer should always ask them to provide:
* a written statement as to whether the charity has any funds or property [eg, cash, stocks, shares, redeemable investments or assets etc] held outside the bank account[s] to which the Order applies and if so, to provide details by return.
* written confirmation that if the charity does hold any cash, that they have now paid this into the charity's bank account[s] named in the Order. If the trustees are unwilling or unable [*ADD once 1st commencement Order has taken effect*] to do so, the case officer should consider making an immediate Order under s85 to direct the application of charity property.
* To ensure that the Commission protects all the charity's property [including that for which we have no details], the case officer should routinely consider making a concurrent restricting Order on the trustees, also under Section 76(3)(d), relating to any property not held in the bank account. The case officer may also consider serving an Order under Section 76(3)(f) to restrict the transactions which may be entered into, for example, entering into any new binding agreements, leases, hire purchase agreements etc.
* Also, in the case of an Order being sent to a bank, caseworkers should consider whether they require an account balance at the time of freezing the account. This request should be made under section 52 (see OG117 D2 section 3) as a separate Order or combined with the Order under section 76(3)(d).
* The Order does not need to be personally served, but if it is being sent to an individual, an accompanying letter should make it clear that it is an offence under s.77(1) to contravene it. The Order should carry the appropriate penal notice - see OG 117 D6 section 3).
* Under section 86 a copy of the Order and the SoR must be sent to the charity (if a corporate body) or to each of the charity trustees as soon as practical after making the Order.
* In most cases "as soon as practical means" means at the time the Order is made. However, section 86(5) allows that where the sending of the Order and SoR would prejudice the statutory inquiry or not be in the interests of the charity we can delay this process. The Order and the SoR must be sent once these factors cease to apply.
* Legal advice must be taken where we have doubts as to whether the Order or SoR should be sent at the same time as making the Order.
* Section 76(6) provides the requirement to review the above Order at such interval as the Commission sees fit. Most Orders are reviewed on a six monthly basis by the Commission as part of good case working practice. The decision to discharge the Order as a result of a review under section 76(6) is itself a reviewable decision and can be appealed at the Charity Tribunal, as can the decision not to discharge the Order. The person concerned, the trustees or the charity (if a corporate body) will be notified of the review and be told of their rights to appeal. The time limits are the same as those when we notify the making of the Order.
* A request for a review of the original decision to make the Order should be made within 3 months of being notified about the Order and provided it is within the time limit, the request will usually take precedence over review. Our six monthly reviews of these Orders mean that even where the 3 month time limit has passed there remains an option for a decision review or appeal against these subsequent section 76(6) reviews.
* Where, on the review of the original decision, we decide that the Order should stand then the Order will fall back into the pattern for regular review under section 76(6).
* An appeal can be made against the Order to the Tribunal. The appeal can be brought by the any charity trustee, the charity itself where it is a corporate body or any other person affected by the Order. They have 42 days from the date on which we sent the notice of the decision. The 42 days includes weekends and bank holidays.

### 3.4 Notice requirements

The attached [table](http://ogs.charitycommission.gov.uk/Library/Word_docs/g117table.doc) gives notice requirements for all section 76 Orders before and after publication.

The criteria for decisions to give notice and publicity for Schemes and Orders made under section 76 of the Charities Act 2011 can be found in section B8 of OG 500 Schemes and section B6 of OG 501 Orders.

**4. Charities Act 2011 s.76(3)(e) - Order debtor not to make payment**

### 4.1 Using this power

**What this power allows us to do**

Orders under this section of the Act prevent any debtor of the charity from making any payment in or towards the discharge of his liability to the charity, without the approval of the Commission.

**Initial considerations**

**This power cannot be used unless:**

* A statutory inquiry is open under section 46 of the Charities Act; and
* One of the limbs of the statutory grounds in section 76(1) is met.

Where misconduct and/ or mismanagement by a particular person in relation to a charity has been established, we can [consider that persons conduct](http://ogs.charitycommission.gov.uk/g117a008.aspx#tab3#heading_toc_cc_9) more widely when deciding whether to use the power to protect the potential loss of charity assets.

We may also want to consider other powers to protect charity property at the same time as using this power.

**IMPORTANT NOTE:** Such Orders will have a direct effect on an individual. Our action in making the Order must be proportionate to the risk involved to the potential loss of charity assets. Our reasons for making the Order should be recorded on file. The impact of human rights issues and the use of our powers are considered at section 3 of OG117-1. Where caseworkers have uncertainties or concerns about engagement of human rights or the proportionality of our action legal advice must be taken.

Another consideration is equality and diversity. When communicating with charities caseworkers should offer to translate documents into another language, another format, e.g. Braille or Audio or to meet any other requirements needed.

**Using section 76(3)(e) in the course of a statutory inquiry**

In these cases we would not wish for people owing money to a charity to make payment to the charity where we consider that those funds may be at risk. Whilst this remains an option there may be more appropriate ways of protecting funds, for instance by suspension of trustees or freezing bank accounts. An example might be where we use this power to prevent temporarily executors paying over a legacy to a charity where there are concerns that if it were received it would be spent on non-charitable purposes.

### 4.2 Decision points and Authorised Officer powers

The Order must be signed by a PB4 or above (having taken legal advice unless agreed by a PB5 Deputy Head) and authorised by a PB5 or above. Whoever signs the Order must ensure that its content properly represents what has been authorised.

### 4.3 Key issues

The Order does not need to be personally served, but if it is being sent to an individual, an accompanying letter should make it clear that it is an offence under s.77(1)&(2) to contravene it. The Order should carry the appropriate penal notice – see OG117-10 section 3.

If the debtor is a company, a sequestration notice (see OG117-10 section 3) rather than a penal notice should be included in the Order.

The Order should specifically identify the particular liability or debt concerned.

Under section 86 a copy of the Order and the SoR must be sent to the charity (if a corporate body) or to each of the charity trustees as soon as practical after making the Order.

In most cases "as soon as practical means" means at the time the Order is made. However, section 86(5) allows that where the sending of the Order and SoR would prejudice the statutory inquiry or not be in the interests of the charity we can delay this process. The Order and the SoR must be sent once these factors cease to apply. Legal advice should be taken where we have doubts as to whether the Order or SoR should be sent at the same time as making the Order.

Section 76(6) provides the requirement to review the above Orders at such interval as the Commission sees fit. Most Orders are reviewed on a six monthly basis by the Commission as part of good case working practice The decision to discharge the Order as a result of a review under section 76(6) is itself a reviewable decision and can be appealed at the Charity Tribunal, as can the decision not to discharge the Order. The person concerned, the trustees or the charity (if a corporate body) will be notified of the review and be told of their rights to appeal. The time limits are the same as those when we notify the making of the Order.

A request for a review of the original decision to make the Order should be made within 3 months of being notified about the Order and, provided it is within the time limit, the request will take precedence over our first six monthly review. Our six monthly reviews of these Orders mean that even where the 3 month limit has passed there remains an option for a decision review or appeal against these subsequent section 76(6) reviews.

Where, on the review of the original decision we decide that the Order should stand then the Order will fall back into the pattern for regular review under section 76(6).

An appeal can be made against the Order to the Tribunal. The appeal can be brought by the any charity trustee, the charity itself where it is a corporate body or any other person affected by the Order. They have 42 days from the date on which we sent notice of the decision. The 42 days includes weekends and bank holidays.

### 4.4 Notice requirements

The attached [table](http://ogs.charitycommission.gov.uk/Library/Word_docs/g117table.doc) gives notice requirements for all section 76 Orders before and after publication.

The criteria for decisions to give notice and publicity for Schemes and Orders made under section 76 of the Charities Act 2011 can be found in section B8 of OG 500 Schemes and section B6 of OG 501 Orders.

## 5. Charities Act 2011 s.76(3)(f) - Order to restrict transactions

### 5.1 Using this power

**What this power allows us to do**

Orders under this section of the Act allow the Commission to restrict the transactions into which the charity trustees may enter, or the nature or amount of the payments which they may make, in the administration of the charity.

**Initial considerations**

An Order cannot be made under this section unless:

* A statutory inquiry has been opened under section 46 of the Charities Act; and
* One of the limbs of the statutory grounds in section 76(1) is met.

Where misconduct or mismanagement by a particular person in relation to a charity has been established, we can [consider that persons conduct](http://ogs.charitycommission.gov.uk/g117a008.aspx#tab3#heading_toc_cc_9) more widely when deciding whether to use the power to restrict transactions.

We will need to be clear and specific about what transactions and payments we wish to allow or not allow and the effect the restrictions will achieve. Accountancy and legal advice may be helpful in determining the effect of our action. The impact of human rights issues and the use of our powers are considered at section 3 of OG117-1. Legal advice must be taken on the impact of our action on human rights issues.

Another consideration is equality and diversity. When communicating with charities caseworkers should offer to translate documents into another language, another format, e.g. Braille or Audio or to meet any other requirements needed.

**Using section 76(3)(f) in the course of a statutory inquiry**

This power will be used to ensure that charitable funds are used for their appropriate purpose within clearly defined limits. It allows a charity to function for its proper purposes as the alternatives of freezing bank accounts or vesting property with the Official Custodian can render the charity inoperable. This may be the preferred option where there are vulnerable beneficiaries who are dependant upon the charity and the risk of misuse of funds is low once this Order is in place. Such Orders may also be used to restrict fundraising by a charity or prevent a charity using the services of a particular volunteer where there are concerns about this.

### 5.2 Decision points and Authorised Officer powers

The Order must be signed by a PB4 or above (having taken legal advice unless agreed by a PB5 Deputy Head) and authorised by a PB5 Senior Investigator or above. Whoever signs the Order must ensure that its content properly represents what has been authorised.

### 5.3 Key issues

* The Order does not need to be personally served, but an accompanying letter should make it clear that it is an offence under s.77(1)&(2) to contravene it. The Order should carry the appropriate penal notice (see OG117-10 section 3) with it.
* The Order needs clearly to provide details of the nature of the transactions to be restricted.
* Under section 86 a copy of the Order and a Statement of Reasons (SoR) for making the Order must be sent to the charity (if a corporate body) or to each of the charity trustees as soon as practical after making the Order.
* In most cases "as soon as practical means" means at the time the Order is made. However, section 86(5) allows that where the sending of the Order and SoR would prejudice the statutory inquiry or not be in the interests of the charity we can delay this process. The Order and the SoR must be sent once these factors cease to apply. Legal advice must be taken where we have doubts as to whether the Order or SoR should be sent at the same time as making the Order.
* Section 76(6) provides the requirement to review the above Orders at such interval as the Commission sees fit. Most Orders are reviewed on a six monthly basis by the Commission as part of good case working practice. The decision to discharge the Order as a result of a review under section 76(6) is itself a reviewable decision and can be appealed at the Charity Tribunal, as can the decision not to discharge the Order. The person concerned, the trustees or the charity (if a corporate body) will be notified of the review and be told of their rights to appeal. The time limits are the same as those when we notify the making of the Order.
* A request for a review of the original decision to make the Order should be made within 3 months of being notified about the Order and, provided it is within the time limit, the request will take precedence over our first six monthly review. Our six monthly reviews of these Orders mean that even where the 3 month limit has passed there remains an option for a decision review or appeal against these subsequent section 76(6) reviews.
* Where, on review of the original decision, we decide that the Order should stand it will fall back into the pattern for regular review under section 76(6).
* An appeal can be made against the Order to the Tribunal. The appeal can be brought by the any charity trustee, the charity itself where it is a corporate body or any other person affected by the Order. They have 42 days from the date on which we sent notice of the decision. The 42 days includes weekends and bank holidays.

### 5.4 Notice requirements

The attached [table](http://ogs.charitycommission.gov.uk/Library/Word_docs/g117table.doc) gives notice requirements for all section 76 Orders before and after publication.

The criteria for decisions to give notice and publicity for Schemes and Orders made under section 76 of the Charities Act 2011 can be found in section B8 of OG 500 Schemes and section B6 of OG 501 Orders.

## 6.Charities Act 2011 s.84A - Power to direct specified action not to be taken

### 6.1 Using this power

**What this power allows us to do**

This power allows the Commission to direct a charity (if it’s a body corporate), or a charity trustee (or trustee for a charity), officer or employee of a charity:

* not to **take** an action that we consider would constitute misconduct and/ or mismanagement in the administration of the charity if taken, or
* not to **continue** an action that we consider would constitute misconduct and/ or mismanagement in the administration of the charity if continued.

The power was inserted as s84A of the 2011 Act by s.6 of the Charities (Protection and Social Investment) Act 2016. The grounds for using this power are different from other powers we can use when a statutory inquiry is open. (These include the powers to direct specific action to be taken, in s.84, and to restrict transactions, in s.76). We do not have to be satisfied that (i) there has already been misconduct and/ or mismanagement committed or (ii) we need to act to protect, or secure the application of, charity property. Instead, we must consider that an action would constitute misconduct and/ or mismanagement, if taken or continued. (Clearly, if **continuing** an action would constitute misconduct and/ or mismanagement, we will have considered that the action already being taken constitutes misconduct and/ or mismanagement.)

There is no requirement to give prior notice of our intention to use it, although we would normally expect to have engagement with the charity over the proposed conduct, actions or issues, save in exceptional cases.

We can only use this power if a statutory inquiry is open under section 46, to which our normal considerations will apply. We can only direct charity trustees, any trustee for a charity, any officer or employee of a charity or the charity itself. This means we can only direct persons with a continuing relationship with the charity, and not direct former trustees.

The decision to use this power is subject to appeal to the Tribunal.

### 6.2 Our general approach to using section 84A

This power can only be used within a statutory inquiry. We may use it where we have identified potential or actual concerns and need to take targeted and robust action. It enables us to protect the charity from future or continuing actions that we consider will be taken and would constitute misconduct and/ or mismanagement. We have to consider whether it is the most appropriate of our powers to use in the circumstances.

This is a power that we must only use to prevent an action (or continuation of an action) that we consider would constitute misconduct and/ or mismanagement. You must be careful to avoid interfering with the lawful exercise of trustee discretion beyond the scope of this power. Equally when using it you must consider the scope of the direction proposed and ensure it is in line with the principles of best regulatory practice and whether the restriction unlawfully interferes with human rights.

Normally we are prohibited in acting in the administration of a charity, save in exceptional circumstances. This is one of those circumstances (other examples are taking action to restrict transactions, appointing an Interim manager to run a charity and directing action to be taken). This interference in trustee decision making, the fact that no advance notice is required (like other temporary and protective powers), and that the power is subject to a requirement for the commission to review it at intervals of not more than 6 months, means it is a protective power, intended to last for a period until we are satisfied the actions will not take place or the risks have subsided, whereby it is likely that the order will need to be revoked at some point in the future. It should therefore be regarded as a temporary and protective power. You should exercise caution about treating this power as a permanent solution for an action or activity that may continue indefinitely.

See the guidance on duration of the Order at section 6.11 of this OG.

### 6.3 Key conditions for using this power

The key legal conditions in s84A that must be satisfied before using this power are:

* it can only be used after a statutory inquiry is open
* we must consider that an action, if taken or continued, would constitute misconduct and/ or mismanagement
* the action in question must be one that would be taken or continued by a charity (if a body corporate), charity trustee, trustee for a charity, officer or employee – one of the persons we are authorised to direct
* there is a person or body capable of being directed to prevent the specific action under concern

In considering whether or not to use this power, the case officer needs to be satisfied that:

* the use of this power will directly aim to prevent action(s) that we consider to be misconduct and/ or mismanagement
* the use of the power is proportionate in the circumstances of the case, for example how long it is anticipated the order will need to be in place to effectively prevent misconduct and/ or mismanagement in a charity
* they have considered any human rights and equality issues
* they have considered whether or not it is appropriate to use any of our other protective powers in conjunction with or instead of this power (for example s.76 power to restrict transactions)

Having made the Order, we must:

* give appropriate notice in accordance with s.86 of the Charities Act (see 6.8, below)
* review the Order at least once in every 6 months whilst it remains in force

### 6.4 Appropriate and proportionate

You should consider the case in line with our [Regulatory and Risk Framework](https://www.gov.uk/government/publications/risk-framework-charity-commission) which sets out elements of best regulatory practice, including the proportionality of our action. In particular you should consider:

* What are the grounds which demonstrate that the trustees, or a trustee, officer or employee of the charity intends to take (or continue) an action that would constitute misconduct and/ or mismanagement in the administration of the charity? [How strong is the information or evidence presented](http://ogs.charitycommission.gov.uk/g117a003.aspx)?
* Do we have particular concerns in this case which may not be adequately addressed by the use of other powers, such as by restricting transactions which may be entered into, or directing positive action to be taken?
* Those concerns may arise because:
* the action is clearly misconduct and/ or mismanagement but the trustees have not stopped it or taken steps they could have taken to avoid it
* the trustees were warned previously that the action or omission was misconduct and/ or mismanagement and have not responded to previous advice or action by us to correct it or prevent recurrence
* the impact of the actions, if taken, are likely to have such serious consequences for, or indicate a high risk of damage to, the charity’s assets, its beneficiaries or its viability that it requires swift and/or clear action by the regulator to ensure the misconduct and/ or mismanagement does not take place; for example, it may result in public donations being misused, or criminal action taking place
* the type of misconduct and/ or mismanagement that has either occurred or would occur can be more directly or appropriately addressed by using this power
* Of the options available to us, what are the reasons for using this power and is this an effective way of achieving the desired outcome (for example, might regulatory advice and an action plan be sufficient or is there too great a risk that it would not be followed)?
* How quickly do we need to act to stop the misconduct and/ or mismanagement?
* Are there financial or other implications for the charity if it is directed not to take the action in question? Will the action interfere with the livelihood of others? Equally are there financial implications the Commission does not make the order?
* What steps can or might be taken, if any, to assess compliance with the Order?
* Is the action to be prevented a one off event or action, or will the order need to be effective for a period of time to ensure we prevent the misconduct and/ or mismanagement? If it is more than a one off event, for what period of time is it likely the Order will need to be effective for? How does this sit with the current planned duration of the case?
* How does this fit in with our overall strategy for the case?

**IMPORTANT NOTE**: The response to these and any other relevant questions which may arise depending on the circumstances of the case will ensure that the action we propose is in itself reasonable and proportionate. The case files should clearly record the decision making process. Caseworkers must take legal advice before using this power, including if they have uncertainties or concerns about engagement of human rights, the equality duty or the proportionality of our action. The impact of human rights issues and the use of our powers are considered at section 3 of [OG117-1](http://ogs.charitycommission.gov.uk/g117a001.aspx).

### 6.5 Assessing evidence and information from the inquiry

We will need to assess:

* the level or extent to which misconduct and/ or mismanagement has already occurred, or if not, which may occur (minor or immaterial breaches will not be enough);
* the seriousness, nature and immediacy of our concerns and extent of any adverse impact which may take place if allowed to occur or continue;
* the extent to which the trustees have had a chance to respond to our concerns and the contents of that response;
* the completeness of the information that has been provided to us;
* whether (and to what extent) inaction or an omission on the part of the trustees has resulted in a failure to manage a particular matter;
* any provision (or lack of provision) in the charity’s governing document affecting either the action in question or the trustees’ ability to address it;
* the adequacy or lack of policies and procedures affecting the action in question;
* any information by other parties eg complainants or beneficiaries which may lean towards or against the making of an order in any given case;
* the extent to which trustees have co-operated with us to date or in the past on other issues

### 6.6 The action specified in the Order

We must specify an action or a course of action that the person(s) who we are directing must not take or continue.

Following principles of best regulatory practice, we should ensure that our use of the power (including what we specify in the Order) is:

* proportionate
* accountable
* consistent
* transparent
* targeted only at cases in which action is needed

The action must be clearly defined within the Order to minimise the risk of uncertainty and possible non-compliance. You should also consider whether the person so directed is capable of preventing the action from continuing or occurring.

You should be clear that it is an action rather than a transaction, such as entering into a contract or agreement. Our power in s.76 (3)(f) is more appropriate for restricting specified transactions.

### 6.7 Circumstances in which we might use a section 84A Order

Having assessed that the circumstances of the case merit its use, legal advice should be taken where there is uncertainty or concerns about the effects of the proposals.

### 6.8 Sending the statement of reasons and Order to the person(s) being directed and, if different, trustees

* The Order must be accompanied by a Statement of Reasons (SoR) in accordance with s.86 of the Charities Act, which sets out our reasons for making the Order.
* The Order and SoR should be sent to the person(s) directed not to take or continue the action.
* We must send a copy of the Order and the SoR to each charity trustee, or to the charity if it is a corporate body, as soon as practicable after making the Order. This is a requirement of s.86(4) and care should be taken that all the relevant parties are given the statement of reasons where our direction is to someone other than the charity trustees or the charity. (NB the only other persons we can direct under this power are a trustee for the charity, or an officer or employee of the charity.)
* In most cases "as soon as practicable" means at the time the Order is made, or if needed, as soon as is reasonably possible thereafter. However, section 86(5) of the Act allows that where the sending of the Order and SoR would prejudice the statutory inquiry or not be in the interests of the charity we can delay this process. The Order and SoR must be sent once these factors cease to apply.

Our policy on serving Orders, and when it is appropriate to do so by email or by post, is set out in OG 501, at section B4.3.

We do not routinely serve Orders in person, but there may be circumstances where we decide that this is desirable and proportionate. For example, where correspondence with the individual has previously been difficult or delayed and/or where there are any time-related risks involved, or to be sure, given the reasons why we are making the order, that they have received it.

### 6.9 Notice requirements

There is no public notice requirement for s.84A Orders. We will usually need to act quickly to prevent the misconduct and/ or mismanagement, meaning that it is not appropriate to give notice inviting representations.

The Commission can in some instances give public notice on the making of, or the contents of the order or require a charity to provide such notice under section s.337(3) of the Charities Act, however this is not ordinary practice and legal advice should be taken.

In any case where we may want to give publicity to the use of this power because there is a public interest in the action or where the making of the order may have a significant impact on the charity’s interests or a particular community or beneficiaries we should follow our policy on [making statements on live cases](https://www.gov.uk/government/publications/how-the-charity-commission-reports-on-its-current-regulatory-work). This might apply, for example, where we are preventing a disposal of a property that is used by the community and there is an expectation that the charity will be disposing of it.

### 6.10 Decision reviews and appeals to Tribunal – the decision to make the Order

* We may be asked to carry out a Decision Review of our decision to make the Order.
* Only the person who is directed not to take or continue the action has a right to appeal to the Tribunal on the making of the Order. They have 42 days from which we sent the notice of the Order being made. The 42 days includes weekends and bank holidays.
* The Order is enforceable through the High Court and therefore should contain the appropriate penal notice, see OG117-10 section 3. Failure to comply with our Order may result in proceedings for contempt of court.

### 6.11 Duration of the Order

An Order under s.84A is not time limited by law but you will need to consider if it is proportionate to keep an Order in place for an indeterminate period of time, particularly where the action specified is not due to end or does not crystallise. We must under the provisions in the Act formally review the order at least every six months, to ensure that it is still required and being complied with (see 6.12, below); we need to take account of this requirement and ensure it is met. The Order will remain in force until it is revoked or where it lapses because it includes a provision giving it a fixed duration.

The model Order contains an optional provision to set an end date.

Case officers should therefore consider whether the Order should be time limited, and if so, what would be an appropriate duration when making it, based on factors such as:

* the nature of the action – whether it relates to a single timeframe or event, or it could be ongoing or repeated;
* whether there are cost implications for the charity in not being able to carry out a specified action which could be otherwise modified rather than prevented;
* the regularity or frequency of the concerned action;
* whether there is a greater adverse impact on other parties or rights such as: beneficiaries where the action is prevented or stopped rather than modified;
* contractual rights where those expose the charity to the risk of further loss;
* the degree of co-operation by the trustees in addressing the concerns surrounding the action either prior to or during its continuity.

We should be satisfied that the duration of the Order is justified and proportionate in the circumstances. The case officer is responsible for ensuring that the Order will be reviewed with the correct frequency.

If the Order will remain in force after the inquiry case is closed, the case officer must open a monitoring case on closure and remains responsible for ensuring that an appropriate monitoring framework is in place and will be adhered to for as long as the Order remains in force.

### 6.12 Reviewing the Order

Case officers should consider and decide when making the order the frequency with which the Order should be reviewed. S.84A Orders must, under the legislation, be reviewed at least every six months but there may be reasons for reviewing more frequently.

In addition, because of the invasive nature of the effect of the Order in the administration of a charity, the case officer should review the case at appropriate periods in between formal temporary order reviews to be satisfied the grounds for making the order against those named in the order are still valid. This does not necessarily mean a formal temporary order review needs to be carried out each time unless in the case review, the officer believes the grounds are no longer valid or the direction needs amending (e.g. the action to be prevented or if one of the trustees has resigned or is no longer a trustee, then that part of the order should be varied), in which case a formal review and decision log should be triggered immediately.

The purpose of reviewing the Order is both to ensure that it is being complied with and to decide whether it needs to remain in force, should be varied, or should be revoked. You should consider any relevant factors, including, for example:

* any change in the circumstances that led to us making the Order
* change of trustees
* any subsequent actions by the trustees (including compliance or non-compliance), and how they affect the need for the Order to remain in force

You must record the review, and your decision.

You should notify the person(s) to whom the Order applies that you have carried out the review and of the outcome of the review. (They will be anticipating this if you have contacted them in the course of conducting the review.)

### 6.13 Ensuring compliance with our Order

Where we make an Order we expect compliance with it. Non-compliance is a serious matter with serious legal consequences which might be enforced.

We must therefore check, as part of the mandatory reviews of the Order (and more frequently if necessary), that the Order is being complied with. It should be part of the ongoing case plan to take action on non-compliance and consider alternative strategies to achieve compliance. These might include:

* personally serving a further section 84A Order to the individual(s) named so that it may be enforced through the court; we might decide that personal service would be appropriate in the first instance if there is a high risk that the Order will not be complied with and this will have a serious impact on the charity;
* where a person fails to carry out some or all of the provisions of the Order to issue a further Order under section 335 of the Act requiring any default to be made good;
* (without the need to undertake the step above) enforcement of the Order through the court.

Failure by the trustees to comply in full and within the deadline with any Order or Direction of the Commission, without good reasons, in itself is likely to be taken as further evidence of misconduct and/ or mismanagement in the administration of the charity. Alternative strategies should be discussed with the relevant investigations manager and legal officer before action is taken.

### 6.14 Revoking or discharging the Order

Once we consider that a s.84A direction is no longer required, and where is has not lapsed because of a time limit on the Order we should revoke it.

* We can vary or revoke the Order by our own motion under s.337(6) of the Charities Act by way of a subsequent order.
* Under s.337(4), we may discharge an Order that was made by mistake or on misrepresentation or otherwise than in accordance with the Act – see OG117-10 section 4. The time limit for such discharge is within 12 months of the making of the Order.

### 6.15 Decision points and authorised officer powers

The decision to issue a direction under s.84A must be authorised at PB6a level (Deputy Head of Investigations and Enforcement) or above.

**IMPORTANT NOTE**: Legal advice must be taken about the grounds for using the power and the content of the draft Statement of Reasons and Order.

Whoever signs the Order must ensure that its content properly represents what has been authorised.

Any decision review must be allocated and undertaken by a PB6a (Deputy Head of Investigations and Enforcement) or above.