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| Official Warnings by the Commission |
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| OG404 |
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# OG 404 Official Warnings by the Commission

**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.**

Section 75A of the Charities Act 2011 allows us to issue an official warning to charity trustees, trustees for a charity or charities. This means that warnings can be issued to those individuals as well as to a charitable organisation. We can use this power where we consider there has been a breach of trust or duty, or other misconduct and/ or mismanagement.

We do not have to open an inquiry to use this power. We must give advance notice of our intention to use it.

A warning is not an order or direction, but failure to remedy any breach specified in a warning can be used as evidence of misconduct and/ or mismanagement including when considering whether to exercise other specified powers, in particular those under section 76 of the Charities Act 2011.

The purpose of issuing an official warning is to ensure that the charity or trustee(s) concerned know:

* that a breach, misconduct and/ or mismanagement has taken place
* that this is a serious matter
* what action (if any) they should take or the Commission intends to take to stop the misconduct and/ or mismanagement or to prevent a recurrence of it

We have discretion as to whether and how we publish an official warning. Publishing can promote accountability and transparency within the sector by alerting charities, members of the public and potential donors to actions within the charity which have been a cause for regulatory concern sufficient for us to issue a warning. It may also to help promote public trust and confidence in the sector. We need to weigh up the benefits and risks of publication in each case, however.

We have issued guidance in the form of [Q and A](https://www.gov.uk/government/publications/official-warnings-to-charities-and-trustees-q-and-a) on official warnings to help charities, trustees and their advisors understand what they are and when we might use these.

# Summary of the guidance

This guidance is intended to help caseworkers to:

* Understand where official warnings sit within the range of our regulatory powers
* Understand how an official warning may help to progress a case and achieve a regulatory outcome
* Decide if it is appropriate to issue an official warning to a charity or its trustee(s) in a particular case
* Decide if it is appropriate to publish an official warning
* Decide if it is appropriate to vary or withdraw an official warning
* Ensure compliance with the legal framework for official warnings
* Take account of risk, proportionality and principles of best regulatory practice (see [s.16(4) of the 2011 Act](http://www.legislation.gov.uk/ukpga/2011/25/section/16)) in making decisions about issuing official warnings

# B Casework Guidance

## B1 Introduction

**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.

Section 1 of the Charities (Protection and Social Investment) Act 2016 inserts a new power as section 75A of the Charities Act 2011, to issue official warnings. We can issue official warnings to trustees or charities if we consider there has been a breach of trust or duty, or other misconduct and/ or mismanagement.

The power supplements our existing powers to deal with wrongdoing in charities, such as:

* giving regulatory advice and guidance (including by issuing action plans)
* taking action to hold trustees to account to repay or recover funds or
* using temporary and protective powers, whether in an inquiry or outside it

This power will help us to tackle misconduct and/ or mismanagement in charities where, in line with the priorities and principles set out in our [Regulatory and Risk Framework](https://www.gov.uk/government/publications/risk-framework-charity-commission), 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 and/ 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

## B2 Using this power

Our [Regulatory and Risk Framework](https://www.gov.uk/government/publications/risk-framework-charity-commission) explains that when something goes wrong in a charity we will take into account, amongst other factors, the trustees’ conduct and response in deciding what regulatory action is appropriate. Following these principles, we are 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 and/ or mismanagement
* have failed to take appropriate steps to rectify a breach of trust, misconduct and/ 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 and/ 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

We recognise that most trustees are volunteers who sometimes make honest mistakes. We are unlikely to issue an official warning where:

* the breach, misconduct and/ 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; and
* the trustees have acted honestly and reasonably and are taking appropriate steps to put matters right and prevent a recurrence; and
* the loss or risk to the charity or to public trust and confidence in the charity is minimal

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

The purpose of issuing a warning is to secure a regulatory outcome in line with the Commission’s statutory objectives and this should be the focus of our action. By using a warning we will aim to:

* promote compliance by warning trustees that they must stop ongoing misconduct and/ or mismanagement
* promote compliance by warning trustees not to repeat a specific instance of misconduct and/ or mismanagement; or
* where, following the warning, the trustees do not rectify the misconduct and/ or mismanagement:
	+ if it is proportionate to do so, promote compliance by using other protective powers (including the powers we can use under a statutory inquiry) on the basis of this further evidence of misconduct and/ or mismanagement
	+ otherwise, promote accountability and public confidence by highlighting to the public that the Commission has taken regulatory action in warning the trustees but it would not be proportionate in the circumstances to take stronger regulatory action

In some cases, the effectiveness of a warning in securing these outcomes may be linked to whether we publish the warning after it has been issued to the person(s) or the charity (either immediately or by a deadline that we set). This may be something that we need to communicate to the trustees.

## B3 Initial considerations – deciding whether to use the power

### B3.1 What has gone wrong, and is it misconduct and/ or mismanagement?

We can only consider issuing an official warning if we consider that a breach of trust or duty, or other misconduct and/ or mismanagement has been committed.

More guidance on misconduct and/ or mismanagement can be found in [OG 117-2](https://ogs.charitycommission.gov.uk/g117a002.aspx)

### B3.2 Who can we warn?

We can only issue an official warning to a:

* charity in connection with which we consider a breach, misconduct and/ or mismanagement has been committed; or
* charity trustee(s), or trustee(s) for a charity (eg a holding or custodian trustee), who we consider has committed a breach, misconduct and/ or mismanagement in that capacity.

### B3.3 Assessing risk and proportionality – is an official warning appropriate?

We use this power only when to do so is a proportionate response to the level of risk to the charity that we identify. We should therefore be satisfied that:

* in line with our [Regulatory and Risk Framework](https://www.gov.uk/government/publications/risk-framework-charity-commission) there are grounds for the Commission to be involved
* regulatory advice and guidance would not be sufficient to deal with the misconduct and/ or mismanagement in view of:
	+ the impact of the misconduct and/ or mismanagement on the charity or the sector, or
	+ the response and actions of the trustees to date

* it would not be proportionate in the circumstances to use other powers (including a statutory direction in an inquiry) because, for example:
	+ the misconduct and/ or mismanagement is not sufficiently serious to merit the use of these powers
	+ the misconduct and/ or mismanagement is serious enough to merit the use of these powers but taking account of all the circumstances it would not be proportionate to the likely outcome
* issuing an official warning (with or without publication) is likely to be an effective way of:
	+ securing compliance by the charity trustees with their legal duties, and/or
	+ promoting accountability or promoting public confidence in charities, by demonstrating that the Commission has taken proportionate regulatory action in the circumstances

### B3.4 Knowing where you want to finish, before you start

It’s important to think about what you want to achieve and how an official warning fits into your overall case strategy and possible regulatory outcomes. For example:

* What has happened up to this point; what engagement have we had with the charity so far about the specific misconduct and/ or mismanagement in question and what was their response?
* What regulatory outcome do you want to achieve; how does this help put the charity on a secure footing or otherwise further the Commission’s functions, duties and objectives (eg compliance, accountability, increasing public trust and confidence)?
* How will issuing a warning help achieve the intended regulatory outcome?
* How might the decision to publish or not to publish the warning affect your strategy?
* At what stage of the case do you propose to issue a warning, and how does this inform your approach? For example:
	+ Does the nature of the misconduct and/ or mismanagement mean that you will need to monitor the charity’s response and ensure they take action to deal with it?
	+ In the circumstances of this particular case is there justification for taking no further action after issuing the warning?

### B3.5 Deciding whether to publish the warning – initial decision

We have discretion to publish official warnings. We should consider in each case whether it is appropriate to publish the warning. We follow the same principles that we apply to publication of [statements on live cases, reports on regulatory cases, and reports of statutory inquiries](https://www.gov.uk/government/collections/charity-commission-reports-decisions-alerts-and-statements).

We will normally publish a warning where we consider that 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

We would 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

Publication of an official warning is aimed at promoting transparency and accountability in the sector, compliance with trustee duties, and public trust and confidence. It may also assist in learning lessons for the sector.

Publication may not be appropriate in all instances. Consider the circumstances of the case to determine the most appropriate course of action. You should consider what evidence is available from either the trustees or the charity, or any other party asserting that they will be impacted by publication, before making a decision.

Consider the potential impact of publication and any risk of unintended consequences:

* where the warning relates to the actions of one or some of the trustees, on the other trustees who were not privy to those actions or the charity as an entity
* where the warning relates to the charity, on the trustees personally
* on any other charity where there are overlapping trusteeships

The Charities Act does not specify how we should publish warnings. If we decide to publish a warning, our usual practice will be to publish it on our website. In particular cases there may be reasons to publish it in other ways, for example on noticeboards at a charity’s premises. Record your reasons for deciding whether and (if applicable) how to publish the warning.

### B3.6 Giving notice of our intention to issue an official warning

s.75A(4) of the 2011 Act says that we must give the charity and each of the trustees (except any who cannot be found or who have no known address in the United Kingdom) prior notice of our intention to issue an official warning, and give them the opportunity to make representations. The Act is prescriptive about what the notice of the warning must set out. It must state the following five points:

* that we intend 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 and/ or mismanagement that the Commission has identified
* any action the Commission is considering taking, or considers the charity or its trustees should take, to rectify the misconduct and/ or mismanagement; (if we don’t identify any action to be taken we should state this for the avoidance of doubt)
* whether and, if so, how the Commission intends to publish the warning
* the time period within which the recipients can make representations to the Commission about the content of the proposed warning

If we consider that there are actions the charity or its trustees should take to rectify a breach, misconduct or mismanagement (or that we should take ourselves), the Act requires us to state these in the notice.

Where you recommend action the trustees could take, you should set a time frame for the action to be taken. You must be clear that this is regulatory advice and guidance, not a direction to take specified action. But you should be clear that failure to remedy the breach also constitutes misconduct or mismanagement. Specifying the outcome(s) they need to achieve rather than the method(s) for achieving them may help to avoid giving the impression of a direction. In some cases, however, for example where the required action is to comply with requirements to submit accounts or annual returns, our recommendations may inevitably appear directive.

You must always send a copy of the notice of our intention to issue a warning to the **charity** (whether it is incorporated or not) and to each **charity trustee** and **trustee for the charity** for whom the Commission has contact details.

The Act says we *may* give notice by post, to the recipient’s last known UK address. To ensure that the notice is properly served it should be sent by post or in high risk cases, hand delivered if it is an address in the UK. In addition to sending by post it can also be sent by email if we have email addresses in our corporate records. The case officer should check that the address they are using for a trustee is the most up-to-date one.

If you are in any doubt about whether someone is still a trustee you should err on the side of caution and give notice to all those you believe to be a trustee unless they cannot be found. If there are doubts about who the trustees are, you should take legal advice.

There is no requirement to serve these notices in person, but there may be circumstances where we decide that this is desirable and proportionate. For example, where correspondence with the person has previously been difficult or delayed and/or where there are any time-related risks involved.

In the interests of fairness and proportionality we should allow trustees a reasonable time to make representations to us about the proposed warning.

Our starting point is that we will give 28 days’ notice unless there are good reasons not to. If there are good reasons to give longer or shorter notice, in considering what length of notice we will give, you should take account of the relevant circumstances, including for example:

* whether there is any specific and time-related risk to charity assets or beneficiaries or any other impact of the breach, misconduct or mismanagement continuing that means we should give less than 28 days’ notice
* the extent to which we have already corresponded with the trustees about the misconduct or mismanagement
* the size of the charity and its capacity to respond, including whether it employs staff or is purely run by volunteers
* whether the trustees may be delayed in responding for any justifiable reason

This is not an opportunity for trustees to delay action in rectifying misconduct or mismanagement. Any change of notice period should be reasonable in all the circumstances. Use your judgement. If you are in receipt of evidence which would justify an extended timescale for response to representations, you should ensure this is recorded.

### B3.7 Considering representations

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

* the factual accuracy of what the breach, misconduct and/ or mismanagement being warned of is and our 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 and/ or mismanagement

The response may also include information relevant to whether it is proportionate to exercise the power which you should consider as part of the review, for example:

* actions taken by the trustees to put things right, and their impact
* mitigating or aggravating factors either already known or brought to light as part of the representations provided
* the significance or impact of the breach, misconduct and/ or mismanagement on the charity, its assets including its reputation, its beneficiaries or on trust and confidence in charities more widely
* any known or reasonably foreseeable impact of the proposal to publish and how, including any risk to the charity or its beneficiaries that may result from the Commission publishing the warning

We are likely to give more weight to representations that are supported by evidence, rather than opinion.

Particularly because an official warning is not appealable to the Tribunal after it has been issued, we have built in the extra safeguard of applying the Decision Review process to the consideration of any representations we receive.

### B3.8 Deciding to issue the warning, issue a modified warning, or not proceed with the warning

At the end of the notice period, once we have properly considered any representations received, we may decide (under s.75A(6)(b) of the Act):

* to issue the official warning as originally notified
* to modify the warning in light of information provided by the trustees, or
* not to proceed with the warning

We do not have to give further notice to the trustees before taking this action.

If we have received representations, we should explain to the trustees the basis for our decision and where appropriate, how we have taken their representations into account.

### B3.8.1 No change as a result of representations

We should issue the warning as originally drafted. We should consider whether explaining why we have maintained a particular position may be necessary as part of handling considerations.

### B3.8.2 Some changes following representations

Where we are satisfied that representations have raised a valid point, the draft warning should be modified accordingly and the changes communicated to the charity. If changes are minor then these can simply be explained to the charity in the letter enclosing the modified warning. If they are more substantial you may need to consider the degree of explanation that is appropriate in the circumstances and whether to communicate this to the charity before issuing the modified warning.

### B3.8.3 Where trustees have taken some action as outlined in the notice

If the trustees can demonstrate that they have taken prompt steps within the notice period to fully or partly remedy the misconduct and/ or mismanagement, we should carefully consider how we take account of this in our decision. It may be appropriate, for example, to

* decide not to issue the warning
* issue a modified warning that reflects the steps the charity has already taken, or
* take account of the steps the trustees have taken when deciding whether to publish the warning

Even if the charity has dealt with the misconduct and/ or mismanagement we may still have grounds to issue a warning. We need to consider all of the circumstances, including the impact of the misconduct and/ or mismanagement, and the intended regulatory outcome(s) to be achieved in this case.

The reasons for our decision for any of the issues under section 8 should be recorded in the decision log for the representation stage of the case.

### B3.8.4 Deciding not to issue the warning for other reasons

If the trustees provide evidence to show that our grounds for proposing to issue the warning are mistaken, then (depending on the circumstances) it is likely that we should not proceed with the warning. We should re-evaluate what our concerns are (if any).

### B3.8.5 In all cases where a warning is issued

The warning (and the covering letter) should include details of any action that we consider the charity or trustee(s) should take, or that we propose to take, to remedy the breach, misconduct and/ or mismanagement. Where applicable, this must originally have been communicated in the notice of the proposed warning. It should be modified appropriately in response to any representations we have received. You should make it clear that the warning is not a legal direction. It should include a time frame within which we expect the trustee(s) to have remedied the misconduct and/ or mismanagement, and to notify us that they have done so.

You should point out that failure to remedy misconduct and/ 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 misconduct and/ or mismanagement.

### B3.8.6 Issuing the warning

Follow the same procedure as for serving notice of our intention to issue the warning (see section 6 of this OG), ie send copies of the warning by post or by email as appropriate to the charity and each trustee.

### B3.9 Publishing the warning (where applicable)

Review your initial decisions about publication of the warning (whether and where to publish) and your reasons in light of any representations you received. See section 5 again which sets out the principles for publication in more detail and consider whether the weight placed on the factors set out apply in the same manner.

### B3.10 Duration of publication of the warning

*When* warnings are published it will normally be for one year, *unlike* RCR's and SORI's which are normally two years.

We may have reasons in a particular case to decide when publishing the notice that a shorter period of publication is appropriate in the circumstances.

We may need to review publication or update the information we have published in response to further information we receive, for example if we subsequently withdraw or vary a warning. (See section 11, After the warning is issued – monitoring and next steps.)

### B3.11 After the warning is issued – monitoring and next steps

We should always undertake follow up when we have required trustees to take specific actions to deal with regulatory concerns that we have identified, particularly where an indicative timescale has been applied. This applies to any actions specified in a warning.

### B3.11.1 Variation or withdrawal of the warning

After a warning has been issued, if the charity demonstrates that they have taken sufficient steps to partially or fully remedy or prevent the misconduct and/ or mismanagement identified in the original warning, we have a discretion (s.75A(7)) to vary or withdraw the warning to reflect this. You should consider how this may incentivise compliance, and ensure fairness and proportionality in our approach. However simply because a trustee or charity has complied with the steps set out to rectify the breach, we don’t automatically undertake to vary or withdraw the warning.

We have discretion to publish the variation or withdrawal of a warning (s.75A(8)). The same considerations apply to publishing the variation or withdrawal of the warning as to publication of the original warning. We also need to make sure that if we vary the published warning, only the latest version is available on our website. Equally, if we withdraw the warning we must remove the original published warning from anywhere it appears on the website and take reasonable steps to ensure that it is removed from other locations where appropriate if we published in those other places.

If we intend to vary a warning, we must (under s.75A(9)) repeat the process of giving notice and considering representations on the proposed variation of the warning. We must comply with the content requirements for the notice in s.75A(5). See sections 4-5 above for the processes that must be followed, but instead of repeating the action that we considered should be taken, the notice must specify ’any change as a result of the variation in the action previously proposed by the Commission’.

### B3.11.2 If the trustees do not take appropriate action in response to the warning

If the trustees do not take sufficient steps to remedy the misconduct and/ or mismanagement, or prevent further misconduct and/ or mismanagement, within any timetable we have set for them, you must decide what further action, if any, is appropriate. This may include:

* requiring a meeting with the trustees to discuss their non-compliance
* opening a statutory inquiry (or referring for inquiry as appropriate), where we may use one or more of our powers under ss.76-84B of the 2011 Act
* making an order under s.335 of the 2011 Act to enforce compliance with the requirements of the warning
* where applicable, referring the matter to another regulator
* where use of other powers would not be proportionate, leaving the warning published on our website for up to two years to highlight that the Commission has taken proportionate action to secure compliance and the charity remains non-compliant

### B3.12 Decision points and authorised officer powers

* These are the key stages and decisions:
	+ - * deciding to give the notice of intention to warn
			* deciding to publish
			* following the notice period, deciding whether to proceed with the issue of the warning, taking into account any representations that may have been made
			* in cases where we have informed trustees of actions that we consider they need to take to address a breach, misconduct and/ or mismanagement and they do not take these actions, deciding what further action (or none) is appropriate in the circumstances.
* Any referral for decision will normally include a draft warning.
* The decision log will normally explain and set out why the grounds for using this power have been met and why it is a proportionate action in the context of the case. This explanation will provide evidential analysis, setting out facts that are relied upon in reaching the decision to use the power.
* Use of this power allows for representations to be made following notice before the warning is made. In cases where no representations are received, the decision maker on making notice of intention to warn can proceed to decide whether to make the order.
* Where representations are received, the decision review process normally takes effect, and the litigation and review team should be notified. Any representations received will provide an opportunity to look again at the circumstances for making the warning and whether there is any new information that would cause us to reconsider. The person(s) carrying out the decision review will decide whether or not to make the warning and whether to publish.
* Whoever signs the warning must ensure that its content properly represents what has been authorised.
* After the warning has been issued there may be limited grounds for further decision review, for example if the warning was issued by mistake or on misrepresentation or otherwise than in conformity with the Charities Act. Legal advice should be obtained.
* Any decision review must be allocated by a PB6a or above but can be undertaken by a PB5 (Deputy Head or Specialist case officer, or a person so designated) or above

## B4 Key issues – Complying with the legal framework

* Must be breach of trust or duty, or other misconduct and/ or mismanagement
* Power to issue a warning to the charity, charity trustee(s) or trustee(s) for the charity
* Must give notice to the charity and each charity trustee and trustee for the charity, which specifies:
	+ that we intend to issue an official warning under s.75A of the Charities Act
	+ the grounds for the warning – the misconduct and/ 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 and/ or mismanagement
	+ whether and, if so, how the Commission intends to publish the warning
	+ the time period within which trustees can make representations to the Commission about the content of the proposed warning

* Must take account of representations about the content of the proposed warning
* If we intend to vary a warning once issued:
	+ must give further notice (specifying the change) and invite and consider further representations
	+ should consider whether to publish the varied warning

### F Q&A

* We have produced [Q&A](https://www.gov.uk/government/publications/official-warnings-to-charities-and-trustees-q-and-a) on Official warnings to charities and trustees.