



# CHARITY COMMISSION CONSULTATION ON OFFICIAL WARNINGS TO CHARITIES AND TRUSTEES

## RESPONSE BY NCVO AND ACF

23 September 2016

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### **About NCVO**

Established in 1919, the National Council for Voluntary Organisations (NCVO) represents over 12,000 organisations, from large 'household name' charities to small voluntary and community groups involved at the local level. NCVO champions voluntary action: our vision is a society where we can all make a difference to the causes that we believe in. A vibrant voluntary sector deserves a strong voice and the best support. NCVO works to provide that support and voice.

### **About ACF**

The Association of Charitable Foundations (ACF) is the membership association for foundations and charitable grant-making trusts in the United Kingdom. ACF's priorities include enabling trusts and foundations to achieve good practice in grant-making and helping them to be effective in the many ways that they use their resources, including their investments for charitable purposes.

### **Views on the Commission's approach**

Having read the draft guidance, our view is that greater clarity is needed.

In particular, it is not clear to us where this new power sits within the range of the Commission's available regulatory powers. The power was initially proposed to be exercisable in "'medium' range abuses where the Commission's protective powers could be

used but it would not be proportionate to do so". The Joint Committee was persuaded that in principle it would be useful for the Commission to have this power at its disposal, on the understanding that it was "something in between" guidance and the opening of an inquiry. However, the draft guidance does not reflect this: on the contrary, the power is being proposed as a sanction rather than a warning - a punitive measure, close to the Commission's statutory inquiry power.

Even as a warning, it must also be made clear in the guidance that the power cannot be used to direct charity trustees to act or not act: the warning may contain advice and guidance, but the charity trustees remain responsible for running the charity.

Other points that would benefit from greater clarity are:

- The process of engagement before an official warning is issued.
- The aim of an official warning: in particular, if the aim continues to be a preventative one, this should be better reflected throughout the guidance.
- To whom the official warning is directed.
- The circumstances in which a warning may be published.

## **How the Commission will use the new power – principles and examples**

The guidance should also be clearer as to the circumstances in which the warning power may be used. To this end, more examples to explain the circumstances in which the power is intended to be used would be helpful. Especially we feel that it is important to clarify the intent of the power to warn – in other words when it is directed towards a particular board of trustees with the aim of preventing (further) harm or abuse, and those times when the 'warning' may be directed at the wider sector, highlighting cases of bad governance. This is particularly relevant to those circumstances in which the Commission may choose or not choose to publish the fact of a warning having been given.

By providing more information about the type of situations in which the warning power would be used (as opposed to other powers) it will be easier to understand where precisely the power sits within the Commission's spectrum of regulatory powers.

Even more important is for the guidance to explain when the power would *not* be used. In particular, it is our understanding that acting inconsistently with the recommended good practice in the CC3 guidance ('The Essential Trustee') would not of itself be a reason for using the power. This should be made clear in the guidance.

## **Notice and representations**

We are concerned that the proposed 14 days' notice period is too short. Although we understand that there may be need for quick remedial action, a notice period of 14 days is unlikely to allow sufficient time for charities and their trustees to respond to the warning.

In our view, the length of the notice period should:

- reflect whether there has been any previous engagement process with the charity;
- be proportionate to the seriousness of the issue.

## **Publishing official warnings**

NCVO and others have consistently raised concerns about the publicity aspect of official warnings. These concerns were partly addressed by the statements made to the Joint Committee by the chair of the Commission William Shawcross, who confirmed that the Commission “would definitely not publish all warnings” and would be likely to publish warnings in cases where “it thought that potential donors ought to be aware of the concerns that we have over a charity” or “if it was something clear cut, like persistent non-submission of accounts, which often can be a sign of maladministration”.

We therefore do not agree with the approach set out in the guidance that the Commission will usually publish an official warning. The publication brings again into question the aim of official warnings, since it has a clear punitive aspect that overshadows any preventative purposes.

We think that the default position should be that official warnings are not published. Aggravating circumstances or certain behaviours by the charity could instead be factors to consider when deciding whether to publish, and even then the purpose of the power should inform the reason for publication, i.e. that a warning will be published in order to warn the wider sector about an instance of bad practice with the aims of reinforcing norms of good governance.

When publication does take place, we are concerned by the proposal that they will remain on the Commission’s website for up to 2 years. Such a length of time seems disproportionate, and the reference to statutory inquiries risks again creating confusion as to the seriousness of the circumstances in which a warning may be issued.

Furthermore, where a warning has been made and published, but a charity has taken appropriate action to rectify whatever failing caused the warning to be made, we would suggest that the flag on the charity’s register entry should be removed immediately. It would be misleading to the public and unfair to the charity to continue publicising a warning based on grounds that are no longer valid. Such an approach would also encourage charities to act promptly on the warning, and would therefore bring into greater focus the preventative and rehabilitative aspect of the power. The fact of the warning and the reasons behind it would of course remain on the public record, but more appropriately with the aim of encouraging good practice.

## **Other comments**

We recommend that the draft guidance be revised to provide clarity on all the issues raised above, and to better set the new power in the context of the Commission’s regulatory tools.

A possible solution that the Commission may want to consider is the two-tiered approach suggested below. This would be based on the following key factors:

- who is being warned;
- what is the purpose of the warning.

#### Tier 1 – A ‘yellow card’

This warning would be addressed to the trustee board of the charity concerned. The aim is to ensure remedial action is taken and prevent any further misconduct or mismanagement. This type of warning would not be published, and no further regulatory action would be required if the trustees take action to rectify the issue.

#### Tier 2 – A ‘red card’

This warning would be published and communicated to the whole sector. It would act as a sanction to the charity concerned, which has failed to heed previous advice or has acted in such severe breach of trust or duty that a public warning is proportionate and necessary. In these circumstances, the warning would also be an effective way in which the Commission can reinforce and communicate general norms of good governance.