

Charity Commission – via email

13 September 2016

Dear Sir,

### **Official warnings to charities and trustees: Consultation document**

On behalf of ICSA: The Governance Institute I am pleased to submit comments on the above consultation.

ICSA: The Governance Institute is the professional body for governance. We have members in all sectors and are required by our Royal Charter to lead 'effective governance and efficient administration of commerce, industry and public affairs'. With 125 years' experience, we work with regulators and policy makers to champion high standards of governance and provide qualifications, training and guidance.

We are the professional body qualifying and supporting Chartered Secretaries, corporate governance, risk and compliance professionals in all sectors of the UK economy. Members are educated in a range of topics including finance, company law, administration and governance, which enables them to add value to any organisation.

ICSA has an extensive pedigree in the governance arena, advising governments and regulators on company law, charity law and corporate governance. The breadth and experience of our membership enables ICSA to access a variety of applied experience in order to provide pragmatic insights into effective practices across a range of organisations. Our members' wealth of expertise and experience of charities, of the independent examiner regime and their detailed understanding of charity and company legislation and regulation, has informed our submission.

#### **General comments**

Under the Charities (Protection and Social Investment) Act the Commission has gained a number of new powers that, depending on how they are used, could have a significant impact on trustee volunteering. Consequently, any guidance to trustees, and those working with them, should demonstrate a thorough understanding of the real life circumstances in which trustees volunteer their time, expertise and good will.

Most trustees do their best for the charity that they serve, and its charitable objects. Unfortunately sometimes they struggle and fall short of minimum regulatory and legal expectations. Given the varied nature of the sector and the fact that a large proportion of registered charities have no staff and few resources, the approach to applying official warnings should be duly nuanced and staggered to reflect



each individual situation. The draft guidance, in its current form, does not, in our view, sufficiently balance the Commission's duties to protect charity assets and to promote public trust and confidence.

In some circumstances, the approach used could indeed prevent a charity from being able to rectify the situation swiftly. For instance, a charity that receives an official warning for not appointing trustees in accordance with the governing document could find it more difficult to appoint new trustees (in the appropriate manner) because of the stigma of the warning being attached to the charity's entry on the commission's public register for two years. In the worst case scenario, the charity may have to wind up or merge because it can no longer attract trustees of an appropriate calibre.

While charities not acting in accordance with their governing document can be common failing, it should not be condoned. There must, however, be some middle way in which regulatory action can be taken without an undue risk to the future of the charity, if it is effective and compliant in the majority of cases. The impact of some warnings could therefore be disproportionate for smaller charities than for those with bigger profiles and more resources.

The draft guidance presents an opportunity to reassure trustee boards that their best endeavours, performed with honest and good intentions, will not see them subject to this new power unless absolutely necessary. By tightening, through the new definitions and examples, the circumstances in which a board could fall foul of the new power, the document may provide clearer expectations of trustees. While a softly-softly approach may not have materially improved the standards of trusteeship in England and Wales, there is currently no evidence-base to suggest that a more robust and stringent approach will raise trustee standards either. In many instances, where a charity receives guidance from the Commission, accompanying an official warning, the charity is likely to implement those recommendations unthinkingly; if they can. The warning is likely to alarm many trustees, and may see many resign as a result. For some charities that could present the death-knell and see viable, effective and successful charities close, with the desperate impact that will have on its beneficiaries.

## **Specific questions**

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

#### **Q1. Having read the draft guidance, do you have any views or comments on how the Commission proposes to use official warnings?**

An approach that is reasonable and proportionate to the potential risk to the charity, and the wider sector, would be an appropriate use of this power. Given the size, diversity and complexity of the sector it would be difficult to establish a set of 'hard and fast rules' by which the Commission intends to use the new power. The guidance however, could emphasize more fully the risk-based approach it intends to take, perhaps outlining how that approach would differ from existing examples of 'naming and shaming' repeated late filers.

It would be helpful to include a section within the guidance setting out how other regulators use similar powers so as to compare whether the outlined approach is reasonable and proportionate for the sector.

#### **Q2. Do you have any views or comments on actions the Commission might take following an official warning?**

As mentioned above, any guidance from the Commission accompanying an official warning is likely to have a chilling impact on trustees. Many will see the guidance as something that must be implemented, and as such is more akin to a direction. Great efforts should be made by the Commission to make it clear that guidance is not direction, and therefore trustees can discuss the recommendations and choose

not to apply them, if they feel there are other options available that address the same issue, but in a manner more appropriate for the charity. Good governance is not a one-size-fits-all affair, and other sector regulators apply an approach that embraces an explanation of any deviation from established good governance practice (not to be confused with non-compliance with statutory duties). Given the size and complexity of the sector, the guidance could provide clearer examples of the proportionate approach the Commission intends to take, especially for charities with few resources.

**Q3. Do you have any comments on the factors that the Commission will take into account of and examples of when it might issue an official warning, as explained in the draft guidance?**

Please refer to the response provided to question 1.

**Q4. Are there any particular circumstances in which you think the Commission should issue an official warning?**

Where warnings are issued, the Commission should have due regard for the potential impact on the charity. An official warning could be quite distressing for some trustees, who could decide that continuing as a trustee is no longer desirable or viable. In turn this could have an adverse impact on the charity where new trustees and volunteers are disinclined to help the charity because of the two year publication of the warning. Such an impact could be far more devastating than the use of the Commission's stronger powers.

**Q5. Should charities that repeatedly or persistently default on statutory accounting and reporting requirements automatically be issued with official warnings?**

It would be interesting know the impact of the Commission's previous approach of naming and shaming repeated late filers, and how it believes the new power will improve the situation.

A definition of 'repeatedly' and 'persistently' within the guidance would be helpful, if that is an approach adopted by the Commission.

#### **Notice and representations**

**Q6. The Commission proposes that 14 days should be the normal notice period for an official warning. Do you agree, or do you think notice should normally be shorter or longer than this?**

For many charities, a 14 day notice period will not be sufficient. Even if every trustee is in the country and available, it will take time to arrange a meeting, consider the notice, potentially seek professional advice and draft a response. For charities with no staff and few resources, the process could be even more challenging. A longer notice period would therefore be more appropriate in order to enable trustees to fully consider the contents and implications of the notice. Obviously, in instances of extreme risk to charitable assets or significant losses to charity assets, the Commission would need to act more quickly. However, such instances are likely to be uncommon, and to require the use of other statutory powers in the Commission's armoury, which may be more appropriate.

**Q7. Do you have any comments on the Commission's proposed approach to considering representations on official warnings?**

The approach proposed seem appropriate for the majority of cases. There will be instances where a charity, trustee or trustees feel that the Commission has not taken into account all relevant factors and will want to further challenge the warning. It is unfortunate that there will be no other option in these instances to question the Commission's actions and decisions before the charity is issued a warning. This situation will be worse where the Commission publishes the warning. Where, eventually, the Commission is found to have acted erroneously in the issuing of a warning it would be helpful to have details as to how the Commission would expect to restore the reputation of the charity, trustee or trustees, without recourse to the courts.

**Publish official warnings**

**Q8. Do you agree with the approach set out in the guidance?**

**Q9. Do you agree that the Commission should usually publish warnings on its website for two years (unless a warning is withdrawn before then)?**

**Q10. Do you agree that the Commission should usually highlight warnings on a charity's page in the central register?**

As previously mentioned, there will be instances where the publication of warnings have an unduly adverse impact on the charity or individual(s). A blanket approach to publishing warnings seems incongruent to the proposal to use a proportionate risk-based approach to the issuing of official warnings. The fact that a warning, which may have been relatively minor, and remedied swiftly, can still be publicly displayed for two years appears to be harsh. A tapered approach might be more appropriate for charity, trustee and regulator alike.

I trust the above comments add to the development of the approach to reporting matters of material significance to the charity regulators across the country. Should you require any clarification or have questions, please do not hesitate to contact me directly.

Yours sincerely,

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