

# **DIRECTORY OF SOCIAL CHANGE**

**INFORMATION AND TRAINING FOR THE VOLUNTARY SECTOR**

## **DSC Evidence Submission to the Parliamentary Joint Committee on the Draft Protection of Charities Bill**

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## Background to the consultation

In December 2013 the Office for Civil Society consulted on extending the Charity Commission's powers to tackle abuse in charities, following reports from the House of Commons Public Accounts Committee and the National Audit Office that were critical of the Commission's performance.

The initial public consultation closed in February 2014, and the Office for Civil Society (OCS) then responded on behalf of the Government. Subsequently OCS published a Draft Protection of Charities Bill in October 2014, which contains many but not all of the changes suggested in the original consultation (as well as a few items which were not originally proposed). A Joint House of Lords / House of Commons Committee has been set up in Parliament to examine this draft Bill, including a further call for written and oral evidence during November and December 2014. The report of this Committee is expected on 28 February 2015.

The draft Bill would amend a number of sections of the Charities Act 2011 (a consolidation of the Charities Act 2006 and several other Acts). The legislation is quite technical, but in summary if enacted it would enhance the Charity Commission's powers to issue official warnings to charities, to wind up charities and move their assets to other charities, and to disqualify trustees with certain criminal records or where there is other evidence of their misconduct or mismanagement. It is this last class of proposed changes that DSC is most concerned about in our comments below.

An added complication is that the UK General Election will be held on 7 May 2015, which means Parliament will be dissolved on 30 March 2015. It remains unclear whether there will be time for a Protection of Charities Bill to be passed into law under this Parliament, given that there is only one month between the Committee's anticipated report and the dissolution of Parliament. In any case, it is likely that the issues examined in this and previous consultations will feed into any future charity legislation.

## DSC's points in response to the draft Bill

The main points we wish to make regarding the draft bill are below:

- 1. DSC believes that effective charity regulation is vital and that the Charity Commission generally does a good job in understanding, applying and communicating the law. We believe charity regulation should be proportionate, appropriate and enabling** (see our Principle of Responsible Regulation below). The Commission's role in enabling charities to comply with the law via guidance and advice is integral to the regulatory approach, not an added 'extra' or luxury that can be dissociated from enforcement and compliance. Nothing in the current Bill addresses that issue.
- 2. There do appear to be some quite specific gaps in the enforcement powers available to the Charity Commission and it is in the public interest and the interest of the charitable sector that these are addressed.** However, changes to the law need to balance the public interest with fundamental civil liberties, and some of the proposed changes in the Bill go too far (see especially point 7 below).
- 3. We do not believe misconduct, mismanagement, fraud and especially 'terrorism' in the charity sector to be widespread.** Much recent debate about this has been high on hyperbole and low on fact – particularly concerning terrorism.

Parliament should avoid using ‘sledgehammers to crack nuts’ in the law. It is also crucial to fully consider and avoid unintended consequences of any legal changes, for example a dampening of public enthusiasm for volunteering and voluntary trusteeship.

4. **The Charity Commission already has substantial legal powers compared to other regulators. The charity sector in England and Wales is arguably the most highly regulated in the world.** We are not aware, for example, of any other UK regulator which has the power to directly determine who can be employed or involved with an organisation on a voluntary basis. For example, OFSTED does not appear to have the power to directly fire teachers, though it supplies performance information. Companies House cannot fire CEOs or other senior company staff; it requires documentation from directors but has no investigatory powers. The Insolvency Service can disqualify company directors and wind up companies but its powers do not appear to involve banning employees from employment. Such powers are available to the Charity Commission under the current law, within a statutory inquiry.
5. **The normal regulatory and governance relationship must remain between the Charity Commission and a charity’s trustees, who are jointly responsible and liable for the charity. The Commission’s powers to effectively circumvent the trustees and get involved in the administration of a charity must only be exercised in justifiable circumstances and should remain confined within the context of statutory inquiries** (S.46 Charities Act 2011). Bearing in mind the current pressure on the Commission to act - or to be seen to act - more robustly in this respect, we are likely to see more statutory inquiries in the future (and hence more frequent application of powers under S.79 and S.178). This needs to be kept under independent review. We must be mindful of ‘regulatory creep’ towards more frequent involvement of the Commission in directly determining who can work, volunteer for or otherwise be involved in a charity, as there is a risk this a) erodes the proper relationship between trustees and the Commission and b) impinges on fundamental civil liberties.
6. **As part of passing this Bill Parliament should plan a clear review point in the near future**, to address the frequency of statutory inquiries and the application of S.79 and S.178 powers in particular, and the wider impact on voluntary trusteeship.
7. **The proposed power to disqualify trustees based on ‘fitness’ contained in S.181A(3)(b) and S.181A(4)(F) of the Bill is extraordinarily broad and should be scrapped.** This entirely new section of the Act would appear to give the Commission wide and subjective powers to disqualify a trustee based on whether ‘any other past or continuing conduct by the person, whether or not in relation to a charity, is damaging or likely to be damaging to public trust and confidence in charities generally’. In our reading of it this means that the Charity Commission could disqualify anybody from being a trustee if it thinks they should be disqualified.
8. **The power to disqualify trustees based on having failed HMRC’s ‘fit and proper persons’ test should not be included in this Bill.** Including this provision in charity law as a criterion for disqualification would seem to validate a problematic and controversial administrative procedure introduced by HMRC. It also results in a rather circular legal situation (as one part of the HMRC form involves stating that you have not been disqualified as a charity trustee). We see no reason why the existing law, which gives the Charity Commission power to disqualify trustees who have been disqualified as company directors, is not sufficient.

**9. The unforeseen impact of some of the proposed legislative changes could be socially damaging, particularly regarding the offences and criteria leading to automatic disqualification from trusteeship and the Commission's powers to disqualify.** Parliament must recognise that people with criminal records can and do make valuable and innovative contributions to charity and society. Most of the offences leading to automatic disqualification listed in the draft Bill seem reasonable grounds, but the overall approach risks closing off the valuable and innovative contribution that people who have done wrong in the past can make as charity trustees. The risk of getting this wrong is increased where the lists of offences or the offences themselves are broadly drawn or loosely defined. For example:

- a. Under counter-terrorism legislation a person can be found guilty of an offence if they merely *suspect* terrorist activity and do not report it to the police. What if a person were convicted under these laws – not directly involved in terrorism – and subsequently wanted to set up or serve as a trustee for a charity which aimed to prevent terrorism or extremism? They would be automatically disqualified and their positive civic contribution stifled.
- b. Power to automatically disqualify a person from acting as a trustee on the grounds of 'misconduct or mismanagement', including as an employee, could be wildly open to interpretation. If for example a charity CEO was found to be guilty of misconduct, why could the rest of the charity's management team be disqualified from trusteeship if they were merely 'privy to' the CEO's misconduct? Why would that be fair or productive?
- c. The Bill gives powers to Ministers to change the list of offences resulting in automatic disqualification through regulations. This may be standard practice, but it opens the door to further regulatory creep without robust scrutiny by Parliament. We are concerned that other offences, such as those in Part I of the Public Order Act 1986 which were mooted in the original consultation to this Bill, could find their way into the criteria for disqualification in the future without sufficient debate.

**10. Forms of redress may be insufficient in comparison to the potential expansion of powers, namely:**

- a. The Charity Tribunal is an important mechanism for redress but it is debatable whether it has so far lived up to its billing as a 'swift and low-cost means of challenging the Charity Commission's decisions'. Challenging a disqualification order via the Tribunal may still be beyond the reasonable means of many trustees.
- b. The waiver process in S.181 also may not prove fit for purpose in future as a form of redress, if the Commission significantly expands the numbers of people it disqualifies from trusteeship, and, given its well-publicised resource constraints, does not prioritise requests to review and waive disqualifications.
- c. Further consideration is needed regarding the Register of disqualified trustees in S.182 – i.e. it needs to be updated regularly and quickly as waivers are granted and new disqualifications are added.

## DSC's principle of Responsible Regulation

DSC believes that voluntary activity should be regulated responsibly. Some regulation is necessary to safeguard and maintain the interests of the general public, the beneficiary, and of the organisations and individuals being regulated. However, it should have a demonstrable benefit and should aim to empower and strengthen voluntary activity rather than control it unnecessarily.

We believe that:

- a) Regulation should be **proportionate** – it must strike a balance between perceived risk and intended benefit. It should recognise the diversity of voluntary sector activity and be developed and applied in a proportionate way.
- b) Regulation should be **appropriate** – it must be informed by the characteristics, capacity, and needs of the organisations and individuals that are being regulated. Insofar as is possible it should be focussed, rather than acting as a blunt instrument that has unintended effects.
- c) Regulation should be **enabling** – it should seek to empower rather than control voluntary activity. The reasons for the regulation and the regulation itself must be properly understood by those institutions which are applying it. It should be accessible and intelligible to those being regulated. It should seek as far as possible to encourage self-regulation rather than focus simply on enforcement.

## About the Directory of Social Change

The Directory of Social Change has a vision of an independent voluntary sector at the heart of social change. We believe that the activities of charities and other voluntary organisations are crucial to the health of our society.

Through our publications, courses and conferences, we come in contact with thousands of organisations each year. The majority are small to medium-sized, rely on volunteers and are constantly struggling to maintain and improve the services they provide.

We are not a membership body. Our public commentary and the policy positions we take are based on clear principles, and are informed by the contact we have with these organisations. We also undertake campaigns on issues that affect them or which evolve out of our research.

We view our role as that of a 'concerned citizen', acting as a champion on behalf of the voluntary sector in its widest sense. We ask critical questions, challenge the prevailing view, and try to promote debate on issues we consider to be important.

DSC has a long-standing interest in charity law and the Charity Commission.