

DIRECTORY OF SOCIAL CHANGE

INFORMATION AND TRAINING FOR THE VOLUNTARY SECTOR

Consultation on extending the Charity Commission's power to tackle abuse in charities

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About the Directory of Social Change

The Directory of Social Change (DSC) 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.

Introduction

- DSC agrees that there are important gaps in the existing powers available to the Commission and believe it is in the interest of the wider charitable sector and public trust and confidence in charity that they are addressed. Despite the shortened consultation (including the Christmas period), we have been impressed by the clear way in which the case for these new powers have been communicated in the consultation.
- Many of the powers, however, touch upon important civil liberties. Therefore it is important that the correct checks and balances also come attached to any new powers.
- Further, it is vital to consider potential unintended consequences of these changes – both from the narrow legal and regulatory perspective and the wider perspective of social attitudes and perceptions towards charity.
- Voluntary trusteeship is the bedrock of charitable endeavour and it is what allows a large part of civil society in the UK to function. While we agree with taking action against abuse in charities it is important that regulations and their enforcement also avoid discouraging voluntary action. This is in line with DSC's policy principle on 'Responsible Regulation' (below).

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.

Summary

We hope that the introduction of the new powers will save the Commission time and resources by removing the need to act through the courts and reduce the number of cases requiring judgment from the charity tribunal. The Commission's strategic review highlights its focus on regulatory powers and 'promotion of compliance through guidance.' We can't help but noting the tension between this approach and these proposals which suggest a more active, interventionist approach. This tension is particularly acute considering the diminishing budget of the Commission.

Overall while we appreciate that there is a need for new powers - which should help the Commission identify and tackle abuse - we would caution against the Commission pursuing this goal at the expense of its other statutory duties. The granting of these new powers should be seen within the current political context which has seen many of the Commission's critics as well as the Commission's board focus on a very small number of problematic charities and enforcement issues. We are concerned that the Commission may become too narrowly focused on one strategic area at the expense of others.

The Commission has a difficult job. It is fanciful to believe that it could actively regulate over 165,000 charities without relying on the informed support of trustees – the overwhelming majority of whom have no interest in defrauding the exchequer or plotting terrorist acts. These trustees need the guidance that the Commission – as interpreter and arbiter of charity law – is best placed, above all others, to provide.

Likewise the Commission acts as the protector of public trust and confidence through managing admission to and the marshalling of the public register. Charity status is no guarantee of efficacy, however, it does at least prove that a charity has met sufficient statutory tests to qualify for registration which it must then continue to comply with. Further, once it is registered it has to then comply with Charity Law.

These are still vital functions. They are the flip side of the rogue charity coin. The Commission must help charities to act with propriety as well as pursuing those who abuse the public trust. But it must do and be seen to be doing both. An overemphasis on the powers presented here risks painting a distorted picture of the sector and may unwittingly do damage to that precious public trust and confidence that these powers seek to preserve.

Consultation questions

Proposal 1 - Extending the list of criteria that trigger automatic disqualification from trusteeship

Q1) Do you consider that unspent convictions for the range of offences listed above should automatically disqualify a person from charity trusteeship?

The list of proposed convictions which would result in an automatic disqualification contains some offences which directly relate to a trustee's fitness to manage charitable assets (offences i, ii, and iii) and in this instance immediate disqualification would seem reasonable.

The proposals relating to the suspicion of terrorist activities may seem more controversial, as proposal (iv) only requires being on the 'designated' list under the Terrorist Asset-Freezing etc. Act 2010. It is sufficient for the suspicion and/or belief of potential involvement in terrorist activities to be confirmed for disqualification to occur. On balance, however, given the low numbers of individuals designated and the potential damage to public trust and confidence as well as the potential real risk of abuse of charities we are satisfied with the inclusion of this provision.

Automatic disqualification in the case of offences (v) and (vi) makes sense given the grievous nature of the offences and the risk to public trust and confidence in charities that appointment of trustees convicted of these offences could bring.

Q2) Are there any other offences not listed above which should automatically disqualify a person from acting as a charity trustee? In particular do you have any views on whether other offences under Part 1 of the Public Order Act 1986 as amended should be added to the list?

We are not sure why all of Part 1 POA 1986 offences would be added. There are a number of reasons why we are uncertain about this. Firstly, there is not always an obvious or immediate link between the Part 1 offences and fitness to manage a charity. Public order convictions can have a political character and this is a contentious area of law – for example many charges of riot have been and could be disputed by those involved in peaceful protest who have been caught up in a riot situation.

Secondly, we believe that this may unnecessarily close down trusteeship opportunities to a number of individuals who could potentially contribute a lot – for example a reformed gang member who may have unspent POA convictions who wanted to work to prevent vulnerable young men from joining gangs. Even though the waiver scheme (under s.181) exists this may still act as a disincentive for potential trustees.

We would therefore not support the inclusion of Part 1 POA offences and would call on the Government and Commission to explain why they feel inclusion may be necessary.

Q3) *Do you have any other views on automatic disqualification from acting as charity trustee?*

We believe that it is reasonable to reject a 'more generic class of serious offences' as too broad and find the list of offences more appropriate.

We believe that there would need to be further safeguards attached to the proposal at paragraph 56 concerning the expansion of the list of offences through secondary legislation. It is often the case that secondary legislation makes its way into law very quietly without the knowledge or input of concerned stakeholders. Therefore we would recommend that in addition to Parliamentary scrutiny and approval the Government (via the OCS or Charity Commission) should consult the voluntary and community sector on any proposed additions to the list of offences which trigger automatic disqualification.

Proposal 2 - There are other circumstances where rather than being automatic, disqualification from charity trusteeship should be left to the Charity Commission's judgement on a case by case basis

Option 1 – a limited power to disqualify

Option 2 – a broad power based on fitness

Q4) *Do you agree that the Charity Commission should have a new power to disqualify someone whose behaviour means they are unsuitable to act as a charity trustee?*

Yes, we believe that the Commission should have a new power to disqualify based on the option 1 model. We would not support an option 2 model.

Q5) *Do you have a preference between option 1 (the limited power) or option 2 (the broad power)?*

We prefer option 1 which seems like a more reasonable option. While limited it still offers sufficient flexibility to the Commission, even within the specified criteria. The use of a specified list of criteria retains a legal safeguard and an element of predictability. We would be in favour of implementing option 1 with either a review clause to ensure it was effective or secondary legislation enabling additional criteria to be inserted (as suggested). The second option is needlessly broad when considering the powers already available to the Commission which would be extensively and sufficiently extended by the use of an option 1 style list. Option 1 enables the extension of the Commission's powers without damaging the role of trusteeship by giving the Commission wide and potentially unbounded powers to intervene.

Q6) *In relation to the limited power, do you agree with the criteria listed above? Do you think there are any criteria that should be added to the list or removed from the list? In particular do you think that there are any criminal offences, conviction for which should enable disqualification where the Charity Commission considers it is in the public interest?*

The proposed list of criteria encompasses misconduct and offences which have or may have a negative impact on a charity's operation, however it still requires the disqualification to be 'expedient in public interest' therefore would provide a legal safeguard.

While broadly in favour of the proposed list we have two qualifications:

(e) 'Providing false or misleading information to the Charity Commission' – we believe that this proposal is too widely drawn at present and should be qualified with reference to intention. The Commission should have the power to disqualify a person who has been found to have 'intentionally or deliberately' provided false or misleading information. It is beyond our expertise to say how the Commission might establish proof in such a case but we would like to see the Commission make some effort to establish an intention to defraud or deceive, rather than having the power to disqualify trustees who have unintentionally or mistakenly supplied false or misleading information. Further clarification from the Charity Commission and Government is needed here.

(h) 'Where a person has been refused registration with HMRC for charity or donor tax reliefs on the grounds that they fail HMRC's 'fit and proper person' test.' We are concerned that this criterion allows judgment to be passed by another body, namely HMRC. Furthermore it relies on a test which is messy, dependent on a large element of HMRC discretion – therefore introducing uncertainty and inefficiency – and applies only to the tax benefits a charity receives and not the overall financial health or risk attached to the management of a charity.

We suspect that the intention behind proposal (h) is to disqualify those complicit in tax avoidance schemes, to avoid future Cup Trust style cases. We feel that it would be better to exclude the fit and proper person test and instead include a more explicit provision which directly excludes those who have been involved in designing or promoting tax avoidance schemes, particularly the improper use of charitable tax reliefs for the purposes of tax avoidance.

We would also recommend that convictions for market abuse offences under s.118 of the Financial Services and Markets Act 2000 should be included in the list. These offences clearly have an element of dishonesty and/or deception in relation to financial transactions, even if the legislation does not state this explicitly. Disqualifying trustees who have unspent convictions under s.118 would help certify the financial probity of a trustee board and ensure both a charity's assets and reputation were protected.

Q7) Do you agree with the proposals for waiver of disqualification, that they should follow the current arrangements that apply?

Yes, this offers clarity rather than adding a new process. A right to appeal to the tribunal is attached to the s.181 power through schedule 6 which we believe offers an adequate safeguard. We would also add that this right of appeal needs to be a real one and the tribunal ought to be sufficiently accessible and sufficiently resourced to enable appeals to be heard in a timely and inexpensive manner. It is important that the right to redress exists in practice as well as on paper.

Proposal 3 - Removal from trustee body and notification of other trustees.

Q8) Do you agree that existing removal powers should be amended to enable the Commission to remove a disqualified trustee?

The proposal appears to close down a much exploited loophole, whereby the trustees retain their position or assume another role of power within the charity even after disqualification. We agree that the extension of powers in this case seems sensible.

Proposal 4 - Dealing with disqualification where only one or two trustees remain.

Q9) Do you agree that the existing s.80 and s.81 powers should be amended to enable the Commission to act swiftly to deal with disqualifications which would otherwise result in an insufficient number of trustees for the charity to continue to operate?

The proposal mentions that the existing powers under ss. 80 and 81 'may need minor amendments', however it does not specify what exactly these would be. Nonetheless, the idea behind the proposal of 'enabling the Commission to act swiftly' or vest and secure the charitable assets elsewhere, is correct and could ensure the charitable assets do not lose their value and charities continue to operate to fulfil their objectives even throughout times of crisis.

Proposal 5 - Preventing disqualified trustees acting in another position of power in a charity.

Q10) Do you agree that a person who is disqualified from being a trustee should also be prevented from acting in other positions of power in a charity?

Whilst we can see the motivations behind this proposal given the specific cases cited in the consultation, we think this a step too far. It fails to fully consider potentially unintended consequences and requires greater exploration and consideration. Such a power would appear to extend the Commission's authority into problematic areas.

Such a power would appear to extend the Commission's reach beyond charity regulation, arguably into realms of employment law and civil liberties – by effectively giving it a right to veto an individual's right to employment, based on past actions in a different capacity. We would question whether the legal basis for this has been fully considered.

It is important that the role of trustee and that of executive staff remains distinct – this measure would appear to blur the boundary unhelpfully. Rather than the chain of accountability being between the Commission and the trustee board, it would effectively bypass the board and give the Commission power to determine who the charity could employ. If a staff member was unfit then the legal burden of liability should remain with the trustees, who are responsible for deciding whether or not to employ that person, whether in a voluntary or paid capacity.

Proposal 6 - Where a disqualified person is a director of a corporate trustee of another charity, preventing them from participating in decisions about the charity's affairs.

Q11) Do you have any comments on this proposed change?

The proposal is closely related to proposals 3 and 5. Reiterating the arguments above (and a similar point under proposal 9), if a person is held not to be a reliable trustee of one charity, such a person should be equally prevented from making decisions over another charity.

Proposal 7 - Extend the existing power to remove a trustee (or other officer holder) so that it can be exercised where there is misconduct or mismanagement OR a need to protect charity property.

Q12) Do you have any comments on this proposed change?

This seems inherently sensible and would enable the Commission to prevent future misconduct where a future risk to charity property is known to the Commission and/or steps to commit misconduct have been planned. We are in favour of this change.

Proposal 8 - Preventing trustee resignation as a means to avoid disqualification.

Q13) Do you agree that this loophole should be closed? Do you have any other comments on this proposal?

Yes. It clearly appears to be a loophole which is easily exploited at present.

Proposal 9 - Misconduct or mismanagement in any charity can be used as evidence.

Q14) Do you agree that misconduct or mismanagement in any charity can be used as evidence by the Charity Commission?

Yes, as long as the misconduct/mismanagement is directly connected to the trustee's fitness to act, and is demonstrable. This needs to be based on clear evidence of wrongdoing not broad 'suspicion' or 'concern'.

Proposal 10 - Amend the existing power to direct specific action when an inquiry is open and there is misconduct/mismanagement OR there is a risk to property so that the Commission can exercise it without opening an inquiry.

Q15) Do you agree with this proposed change?

Yes. The safeguards in place and ability to appeal continue to offer adequate protection against potential improper use of this power.

Proposal 11 - Extend existing powers to enable direction to prevent acts of misconduct/mismanagement or acts in breach of fiduciary duty taking place.

Q16) Do you have any comments on proposal 11?

We see no problem in introducing these additional powers. We fully support the responsible regulation of charities and understand that this power would enable the Commission to act more swiftly and more effectively. We are satisfied that s.79 powers can only be used when misconduct or mismanagement is or appears to be in evidence in the administration of a charity. It therefore makes sense to extend the power to make a direction after an inquiry has closed rather than perpetually keeping a charity inquiry open or tying the Commission's hands from acting pragmatically after an inquiry has closed. Likewise we see no problem in the Commission having further powers to direct trustees to act under s.84 as well as having powers to prevent them acting under s.79.

Proposal 12 - Power to direct application of charity money to another charity when individuals are unable to apply money properly (currently the power can only be exercised if they are “unwilling”).

Q17) Do you have any comments on proposal 12?

The modification of this power seems sensible, but it is vital that it is only exercised with clear justification. The Commission and the Government need to provide further information on how it might be exercised in practice – for example, how the decision about which other charity the money should be applied to would be made and what criteria would be taken into account. These kinds of decisions can be controversial and subject to legal challenges – the Commission will need to be clear about how and why the power is exercised.

It goes without saying that there are other considerations at play in this type of scenario – for example the wishes of donors and the community, and the needs of the charity’s beneficiaries. Obviously, the charity’s governing document and any other legally binding agreements (possibly endowments, covenants, legacies etc.) and the principle of cy pres would have to be considered whenever the Commission takes action in this respect.

Proposal 13 - Where an inquiry has been instigated, the Commission can restrict/prevent actions (for example preventing the use of premises for unlawful purposes) as well as financial/land transactions and enable the Commission to direct, for example, that a speaker does not speak at a charity event or on charity premises where to do so would amount to the trustees committing misconduct or mismanagement.

Q18) Do you agree with this proposed change?

We would give this proposal qualified support. It is important that the Commission can act to prevent misconduct or mismanagement whenever an inquiry has been instigated. The prerequisite for an enquiry is important, however, as to otherwise take these actions represents a serious restriction of an individual’s liberties.

Proposal 14 – Extend an existing power to enable the Commission to direct a bank to notify the Commission of certain movements on a bank account.

Q19) Do you have any comments on this proposed change?

We support this proposal.

Proposal 15 - Breach of a Commission order or direction is in itself an act of misconduct which can result in use of Commission’s other compliance powers including disqualification.

Q20) Do you have any comments on this proposed change?

We agree that introducing this change would make sound administrative sense and avoid needless and expensive appeals to the Tribunal. It makes sense that the Commission should not be hampered by an incomplete power.

Proposal 16 - Ability to issue official warnings, which if not heeded could result in the Commission using its other powers.

Q21) Do you have any comments on this proposed change?

This power seems sensible and proportionate in cases where it would not be appropriate to open a full inquiry.

Proposal 17 - A new power for the Charity Commission to direct a charity to wind up and apply all of its net assets for charitable purposes by direction or scheme where necessary.

Q22) Do you have any comments on this proposed change?

Based on the examples provided this power seems sensible, but the drafting of the phrase above is far too vague – ‘where necessary’ seems to grant the Commission very wide latitude and discretion. We would echo the concerns outlined in Q17 above.

This would seem to represent a significant extension of the Commission’s powers which ought to be balanced. It is important that a right of appeal is available alongside this power and as we have said earlier the appeal option should be a realistic one. It would also be advisable to enact the power with guidance or in terms which state that the power may only be used when the Commission is satisfied that the use of the power is proportionate and only in cases of serious misconduct, mismanagement, misapplication of resources, fraud or criminal activity.

Q23) Do you have any comments on the impacts of the proposed changes on charities, the Charity Commission, the Tribunal, or on public trust and confidence in charities?

We acknowledge the need for these powers and welcome them, except where qualifications or objections have been noted above. We also acknowledge that “the proposals would not add any regulatory burdens for the vast majority of legitimate charities (para. 123).” Our concern stems from balancing the extended enforcement role that the introduction of these powers introduces with the Commission’s other statutory duties. The re-orientation of the Commission’s focus towards tackling cases of abuse at a time of astringent budget cuts threatens to limit the Commission’s capacity for fulfilling its other statutory duties.

Even though the total number of cases of regulatory investigation noted in Part IV are not high, in relative terms they are likely to require a significant scaling of the Commission’s current regulatory and enforcement role. The resources to tackle this work must come from somewhere.

The danger is that a withdrawal of the ‘soft’ regulatory powers to enable redeployment of resources may have the unintended and paradoxical effect of increasing the demand for corrective regulatory work. We believe that it is sensible to have an informed trustee population that can rely on sound legal guidance from the Commission and a well maintained and fully accessible public register. Removing these functions makes it more likely that trustees will make mistakes and therefore create demand for more intervention by the Commission.