

## DSC Policy Briefing

# Charities (Protection and Social Investment) Bill

December 2015

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## 1. Background

The Charities (Protection and Social Investment) Bill has its origins in 2013, when the House of Commons Public Accounts Committee and the National Audit Office produced reports that were critical of the Charity Commission's performance. This translated into a consultation by the Charity Commission and the Office for Civil Society on expanded powers for the Commission in early 2014, followed by the publication of a Draft Protection of Charities Bill which was the subject of additional scrutiny and evidence gathering by a joint House of Commons / House of Lords committee at the end of 2014. Much of the current Bill, which was introduced in the House of Lords during 2015, flows from the draft bill and the previous consultation phases.

Despite the extended backstory, DSC maintains that a number of critical problems with the Bill which could seriously damage charity independence have still not been adequately grasped and addressed by the Government. Concerns have been repeatedly raised by DSC and other interested parties, yet sufficient explanations have not been forthcoming.

The 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 if the Commission believes them to be unfit to be charity trustees. It is this last class of proposed changes that DSC is most concerned with.

## 2. Issues and Proposed Amendments

### 2.1 Issue: Statutory warning powers

Clause 1 of the Bill would allow the Commission to issue an official warning to a charity when it considered there had been a breach of trust or duty or other misconduct or mismanagement. The Commission wants a way to publicly warn (or name and shame) charities and charity trustees without the full process of opening a statutory enquiry under Section 46 of the Charities Act 2011. DSC believes the process of redress for these warnings needs to be significantly reinforced (by a right of appeal to the Charity Tribunal) and the risk of unwarranted reputational damage needs to be reduced in relation to this power. Giving the Commission power to potentially damage the public reputation of a charity without fully investigating the facts or on the basis of little evidence is not proportionate.

#### Amendments:

DSC supports amendments drafted by Bates Wells Braithwaite solicitors, jointly put forward together with ACF, CFG, Bond, and Acevo. Precise drafting is not repeated below but the amendments cover the following areas:

- **Publication of a warning** – the amendment would restrict the Commission’s power to publish the warning to a wider audience.
- **Notice of a warning** – the amendment would require a minimum notice period of 28 days to the charity’s trustees before a warning could be published, allowing them time to make representations.
- **Right to appeal a warning** – the amendment would enable charities to appeal an official warning to the Charity Tribunal.
- **Directing Trustees or fettering their discretion** – the amendment would clarify that issuance of an official warning does not confer on the Charity Commission power to direct trustees or fetter their future discretion.
- **Failure to comply with a warning** – the amendment would ensure that that failure to comply with a warning does not, of itself, trigger the ability for the Commission to take more significant protective action in relation to a charity.

## **2.2 Issue: Automatic disqualification from trusteeship for people with certain criminal records**

There are a number of principled and practical problems with the increasingly specified lists of criminal offences in the Bill that would automatically disqualify people from charity trusteeship, and also from employment in senior management positions within a charity.

Many charities, particularly working in the offender rehabilitation area, rely on contributions from people with criminal records – for example by founding a charity to reduce offending or serving as a trustee for such a charity. The provisions in the Bill would make those kinds of vital contributions (which can be effective for individual offenders and in the services provided by those charities) far more difficult.

If passed, these powers would automatically disqualify potentially thousands of serving trustees with unspent criminal records, who until now have been performing their duties satisfactorily. The total number is uncertain but could be in the thousands – this could result in a significant caseload of waiver requests to the Charity Commission, and the potential loss of many qualified trustees. It would also extend the effects of disqualification to senior employees in the charity – effectively curtailing the employment rights of people with criminal records. Despite the lengthy consultation, the Government has so far completely failed to address these concerns.

The Charity Commission and the Government point to waivers from disqualification as a safeguard – but we doubt this will be a priority given the Commission’s past record in granting them and other pressures on the regulator. The net effect will be to push anyone with a criminal record away from involvement with a charity, despite the fact that precisely because of their personal experience they may be able to make highly effective contributions.

## **Amendments:**

DSC supports the amendment proposed by the charities Unlock, Clinks and the Prison Reform Trust to revise Clause 10, so that automatic disqualification from trusteeship for specified criminal offences does not extend to that person's employment in senior management positions in a charity. Specifically, to amend Clause 10 as follows:

- **Clause 10, page 7, leave out lines 37 to 40**
- **Clause 10, page 8, leave out lines 1 to 8**

We would also urge the Bill Committee to consider the robustness of the Charity Commission's waiver system for disqualified trustees in the context of other proposed amendments to Clause 10.

### **2.3 Issue: Discretionary power to disqualify trustees**

The proposed discretionary power to disqualify trustees based on extremely broad tests including 'unfitness' and 'damaging public trust and confidence in charity' is DSC's biggest concern with this Bill. DSC has consistently opposed this power since it was first proposed in the February 2014 consultation by the Office for Civil Society and the Charity Commission.

This is not a minor detail in the Bill - it actually represents a tectonic shift in power between the state (in the form of the regulator) and civil society. The discretion afforded by the language is so wide it essentially means the Commission could disqualify anybody for practically any reason from being a trustee, regardless of whether that person had been convicted of any crime or found guilty of wrongdoing. It is fundamentally an illiberal power, granting huge authority to a government agency – making the Commission judge, jury and executioner regarding any citizen's ability to engage in voluntary action.

If enacted, this clause would mean that the judgment about who can volunteer to be a trustee of a charity could be made based on the subjective views and opinions of whomever is running the Charity Commission – which might be unduly influenced by media or political pressure – as opposed to an objective consideration of the facts and legal due process.

We understand the reasons the Commission wants this power - to deal with a handful of tricky enforcement cases - but ultimately the enactment of Clause 11 would not be in the interest of a free and liberal society or the charity sector at large. The Commission has plenty of other powers to deal with bad trustees, including a raft of new measures in the current Bill. We may or may not have faith in the Charity Commission of 2015 to use this power proportionately and judiciously, but what about in five or ten years' time?

## **Amendment:**

DSC would therefore prefer to see Clause 11 scrapped completely. Given that is unlikely, DSC supports the amendment drafted by Bates Wells Braithwaite solicitors, jointly put

forward together with ACF, CFG, Bond, and Acevo, to remove ‘condition F’. This is arguably the most open-ended part of the disqualification test, relating to ‘damaging public trust and confidence in charity’. Removing Condition F would still leave the Commission with very wide discretion to disqualify trustees based on ‘unfitness’ and the other specified conditions. DSC urges the Committee to amend:

- **Clause 11, page 11, leave out lines 34-38. This would amend subclause 11(2) of the Bill by deleting condition F**

### 3. About DSC and our role

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.

### 4. 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.