

Charities (Protection and Social Investment) Bill [HL] – Public Bill Committee
Submission by ACEVO, CFG, DSC, ACF, Bond and BWB

- 1) This submission has been made by:
- ACEVO - the UK's largest network for Charity and Social Enterprise Leaders.
 - Charities Finance Group – the charity that champions best practice in finance management in the voluntary sector.
 - Directory of Social Change - has helped thousands of charities since 1974 and is the leading provider of training, publications and funding sources to the voluntary sector.
 - Association of Charitable Foundations - the membership association for foundations and grant-making charities in the UK.
 - Bond – The civil society network representing 450 international development organisations.
 - Bates Wells Braithwaite - the leading charity solicitors

Together we represent a range of organisations and individuals from across the charitable community in the UK.

Introduction

- 2) The main objective of the Bill is to confer increased regulatory powers on the Charity Commission. We are supportive of many of the provisions, while acknowledging that the Charity Commission already has a wide range of powers that it can use (we have outlined these in Appendix 1).
- 3) The Charity Commission seeks to act in a robust and proactive manner. We firmly believe in the importance of a well-resourced regulator which acts with appropriate powers. However, we know that actions by the Commission can have a significant impact on those affected by its decisions. Some additional powers provided by this Bill do not come with sufficient safeguards.
- 4) It is important that this Bill is considered in the context where the vast majority of charities and charity trustees act in the best interest of their beneficiaries, doing so without any need for the Charity Commission to use its existing powers. Cases of wrongdoing are rare.

Clause 1 - Official Warning by the Commission

- 5) Clause 1 of the Bill introduces a new provision into the Charities Act 2011 which would allow the Charity Commission to issue official warnings when the Commission considered there had been a breach of trust or duty or other misconduct or mismanagement.
- 6) The Charity Commission already has significant powers, including the ability to open a statutory inquiry without notice in urgent cases. We understand that this clause would enable the Charity Commission to take a more proportionate approach to low-level misconduct and mismanagement. We have serious concerns that the provisions as currently drafted lack sufficient safeguards. As such, their disproportionate application could threaten to further undermine public trust and confidence in charities.

- 7) **Publication of a Warning** – The Bill provides the Charity Commission with absolute discretion to publish a warning to a wider audience. If warnings are published they could have unforeseen or unintended consequences (such as a loss of opportunity or funding, or unwarranted reputational damage) for charities. Experience suggests the publication of a complaint often creates more publicity than any findings of a compliance review, and the Commission could use the ‘threat of publicity’ to encourage compliance by charity trustees.

We would propose amending the existing wording of clause 1 to delete subsection (2) of the new section 75A and replace it with:

“(2) The Commission may issue a warning to a charity trustee, a trustee for a charity or a charity in any way it considers appropriate but may not publish a warning to a wider audience.”

If the committee feels that lessons could be learned by the wider charitable sector through the publication of a warning, the Commission could make details of the warning public without referencing the charity by name, or a charity trustee by name.

This would require the Bill to be amended so that the existing wording of clause 1 is changed in order to introduce a new subsection (3) into the new section 75A (and change the numbering and the cross referencing of the rest of the new section 75A):

New subsection 75A(3):

“(3) If the Commission decides to publish a warning under subsection (2) it must do so in a manner which does not identify the charity, or charity trustee, in relation to which the warning is issued.”

Subsection 75A(2) would become “subject to subsection (3)”.

- 8) **Notice of a Warning** – While the Commission must give a charity notice of intention to issue a warning there is no minimum period for this. We would propose a clear notice period for a warning before it is made public, so that charity trustees are given ‘at least 28 days’ notice’ to make representations.

In a recent High Court case, the Lord Chief Justice referred to short time limits imposed by the Commission as “ludicrous”. Given trustees are volunteers it is unreasonable that a notice could be issued within 24 hours, providing almost no time to allow trustees to assess the warning, and work with staff to reflect and respond as appropriate.

We would propose amending clause 1 of the Bill by amending proposed subsection 75A(3) to include “at least 28 days” at the end of the first line (after “give” and before “notice”).

- 9) **Right to Appeal** – The clause provides the Commission with wide discretion to exercise its power to issue a warning. But the implications of issuing a warning for the charity concerned are significant. This includes the risk of adverse publicity and significant regulatory action could lead to resources being taken away from organisations, preventing them from achieving their mission.

Charities should have the right to appeal. The current option – judicial review – is an expensive, protracted route to challenging the Commission’s decision (both for the charity

involved and the Commission itself), instead any charities in receipt of a warning should be able to appeal to the Charity Tribunal.

The Tribunal was introduced with the specific purpose of allowing charities to challenge the Commission without going through the expensive and time consuming process of involving the High Court. If the warning power is to be used for low-level misconduct and mismanagement the right to appeal to the Charity Tribunal is much more proportionate, rather than through a judicial review, which is known to be a ‘remedy of last resort’ for public bodies.

We would propose introducing a new sub clause into clause 1 which says:

“In Schedule 6 of the Charities Act 2011 (appeals and applications to Tribunal), insert in the appropriate place –

“Decision of the Commission to issue a warning under section 75A to a charity trustee, trustee for a charity or a charity.

[vertical line]

The persons are –

*(a) any of the charity trustees of the charity; and
(b) (if a body corporate) the charity itself.*

[vertical line]

Power to quash the decision and (if appropriate) remit the matter to the Commission.””

Redesignate the existing wording in clause 1 as sub clause (1) and reformat that clause.

10) Directing trustees or fettering their discretion – The Commission has recently clarified that it has no power to require trustees to fetter the future exercise of their fiduciary powers under its general power to give advice and guidance (which appears in section 15 of the Charities Act 2011). While there are situations where the Commission may direct trustees to act, and clauses 6 and 7 of this Bill provide more situations for specific activities and, for the most part, require prior initiation of a statutory inquiry.

At present the warning power could be used at short notice and with no right of appeal. It could also enable the Commission to instruct a charity to take certain action – for example cancel an event, stop campaigning or change their governance – with no time limit or review period. It should be made absolutely clear that the warning power only allows the Charity Commission to provide advice or guidance as to how the matters raised in the warning can be remedied. It cannot be used to direct trustees; this must be clarified beyond doubt.

We would propose amending clause 1 of the Bill by deleting the existing wording of proposed subsection 75A(5)(b) and replacing it with the following:-

“Such advice or guidance that the Commission considers may assist the charity to remedy the conduct which gave rise to the warning, as referred to in (a) above.”

- 11) **Failure to comply with a warning** – Failure by a charity or charity trustee to remedy any breach specified in a warning should not automatically be seen as evidence of misconduct or mismanagement by a charity. There may be circumstances where there is disagreement between the trustees and the Commission as to where there has been a breach of trust or duty, and therefore whether the issuing of a warning is justified.

The link between failure to comply with a warning and misconduct or mismanagement was not in the original draft Charities Bill; it was introduced following a suggestion from the Joint Committee which examined the draft Bill. However the Joint Committee made this suggestion “assuming the Government agrees to include the further details in the Charity Commission’s warning power for which we have called”¹.

Not all of those suggestions were incorporated into the warning power, particularly the suggestion that the warning power should be restricted to circumstances where there had been a failure to comply with a requirement of the 2011 Act, or an order or direction from the Commission, and a reasonable minimum notice period to make representations on a draft warning before it was issued.

We would propose amending sub clause 2(2) of the Bill by deleting “, a failure to remedy any breach specified in a warning under section 75A,”.

Clause 11 - Power to disqualify from being a trustee

- 12) Clause 11 provides the Commission with a power to disqualify a person from being a charity trustee if it is satisfied that one of the specified conditions is met in relation to the person. If the Charity Commission is to be provided with discretionary powers to disqualify someone who is unsuitable any tests of unfitness should be robustly and clearly defined. Safeguards should be provided to prevent it being used inappropriately.

The inclusion of Condition F which allows the Charity Commission to disqualify a trustee on the grounds ‘*that 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 or in the charities or classes of charity specified or described in the order*’ is far too broad and subjective – effectively leaving the determination of who can be a charity trustee up to the opinion of the Charity Commission’s board and management, rather than any due process.

It opens up the power to be used in relation to any past or continuing conduct, whether or not in relation to a charity. It seems unlikely that there is any conduct which would meet the other alternative Conditions A to E which would not also meet Condition F. In light of the other Conditions in the Bill it seems unnecessary and open to subject interpretation.

We would propose amending sub clause 11(2) of the Bill by amending proposed subsection 181A(7) of the 2011 Act by deleting condition F.

¹ Report of Joint Committee on the Draft Protection of Charities Bill - <http://www.publications.parliament.uk/pa/jt201415/jtselect/jtcharity/108/10802.htm>

Annex 1

Summary of the Charity Commission's key existing powers

- 1) Section 15 Charities Act (CA) 2011 sets out the Commission's general functions. Under section 15(2) CA 2011, the Charity Commission has power 'to give such advice or guidance with respect to the administration of charities as it considers appropriate' to encourage and facilitate the better administration of charities. This advice may be given in relation to charities in general or to any class of charity or particular charity (section 15(3) CA 2011).
- 2) Later sections of the Act set out the powers of the Commission to institute formal statutory inquiries; the additional statutory powers which flow from having done so; and the procedural safeguards which surround the institution of such inquiries. Section 46 CA 2011 permits the Charity Commission to institute formal statutory inquiries into charities, though the decision to do so is subject to appeal by the Charity Tribunal (the First Tier Tribunal) (s319, s322(2)(a) and Schedule 6 CA 2011)
- 3) Section 76(3)(d) CA 2011 permits the Charity Commission to prevent a charity from parting with property without its approval, after institution of a statutory inquiry.
- 4) Sections 76-83 provide powers for the Charity Commission to suspend, remove or appoint trustees in particular circumstances, again after institution of an inquiry, and again subject to appeal to the First Tier Tribunal.
- 5) The Charity Commission's powers of direction are set out in sections 84 and 85 CA 2011.
- 6) Section 84 powers can be exercised only in the context of a statutory inquiry under section 46 CA 2011. Section 84 CA 2011 permits the Charity Commission, in the context of such inquiry, to direct charities, their trustees or employees, to take specific actions if these are necessary to prevent misconduct or mismanagement or to protect property.
- 7) Section 85 CA 2011 permits the Commission to direct where necessary or desirable that charity property be applied in a particular way, if it is satisfied that the persons responsible are unwilling to apply it properly for the charity's purposes.
- 8) These powers of direction are also subject to appeal to the First Tier Tribunal.
- 9) Neither section 84 nor section 85 CA 2011 permits the Commission to direct trustees or to require absolute undertakings as to future exercises of fiduciary duty from trustees.