

DSC response to Charity Commission policy  
paper

# Power to Disqualify from Acting as a Trustee

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## 1. Background

The Charities (Protection and Social Investment) Act was passed in March 2016 after several years of consultation, draft legislation and parliamentary scrutiny, particularly in the House of Lords. Much of the Act is uncontroversial, and closes a number of loopholes which the Commission has said will help it deal with difficult enforcement cases. However, a number of the powers, particularly under Sections 1, 9 and 10 of the Act, are highly problematic in DSC's view and that of many established and respected charity lawyers.

Clause 10 of the Act gives the Charity Commission a new discretionary power to disqualify people from acting as charity trustees, if certain tests are met regarding their 'fitness'. The Commission can already do this in the context of a statutory inquiry, where there is evidence of substantial misconduct or mismanagement at a charity. The new power extends the Commission's jurisdiction beyond the realm of conduct related specifically to a charity.

Section 10 states that a person can be disqualified for up to 15 years from acting as a trustee if they are 'unfit', it is in the public interest, and a number of other conditions are met, including:

*'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'* (Condition F).

This Condition, in concert with the rest of the drafting, provides an extraordinarily wide-ranging power which effectively gives the Commission discretion to consider a citizen's activities at any time, in any context – charity or not – and subsequently to use its judgment about those activities to restrict that person's civil rights and liberties in relation to charity. During the passage of the Bill DSC and many others argued unsuccessfully that Condition F should be removed, because it is fundamentally illiberal and overly subjective.

Despite assurances and guidance published by the Commission, DSC maintains that this clause gives the regulator (and the Charity Commissioners) too much power to decide who can volunteer to be a trustee of a charity. There is a risk – if not now, then in the future – that disqualifications 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. The guidance produced as a policy paper for consultation would not appear to be legally binding and could change in the future.

In its defence, the Commission stresses that there are safeguards in place to guard against the Commission exercising this power unreasonably, such as a notice period to make representations to the Commission, the right to appeal to the Charity Tribunal, and the duty to comply with principles of best regulatory practice.

## 2. Specific points in response to the Commission's policy paper on S10

### 2.1 Tests potentially leading to disqualification

In its policy paper on Section 10 the Commission outlines that in order to disqualify a person from acting as a trustee, three tests must be met:

- **Test 1** – One of six conditions must apply (including Condition F – the condition about conduct damaging to public trust and confidence in charity shown above)
- **Test 2** – The person is unfit to be a trustee – defined as failures of honesty and integrity, competence and/or credibility
- **Test 3** – The disqualification must be desirable in the public interest in order to protect public trust and confidence.

For each test, the Commission gives examples of what might construe meeting that test. A number of these examples are, like the legislation itself, too broad and undefined.

### 2.2 Problematic examples in the policy paper

Under Test one, 'Condition F', the paper says that this might be satisfied if there was misconduct in another position of trust and responsibility, which the Commission views as damaging public trust and confidence, such as:

*(iv) an adverse finding by a charity self-regulatory or umbrella body*

*(v) dismissal from employment or from another fiduciary or public appointment*

Whether that finding or dismissal was warranted, disputed, being appealed, has long been spent or redressed is not apparently relevant – what matters is if in its own judgment the Commission considers the example to damage public trust and confidence. The test is not an objective one about whether that adverse finding or dismissal was correct, but rather about any public interpretation of that action.

Test two offers more helpful context for how the Commission would interpret 'unfitness' to be a charity trustee. However, some of the examples it gives veer too far into questions of competence rather than misconduct – if trustees in the Commission's view were simply not being up to the job this might result in disqualification for an extended period. For example, the policy paper cites:

*the person would not be able to comply with charity law requirements for trustees*

Test two and test three also include problematic references which appear to link public opinion to the Commission's regulatory decision-making. For example:

*Conduct which shows a material risk of harm to the work of charities in general*

*Any adverse or positive public reaction to the impact in relation to the conduct if it is publicly known, or on charity if their involvement with charity is public*

In addition, under the section on 'Deciding on the period of disqualification' the policy paper notes that aggravating factors could be:

*The relevant conduct has resulted in significant loss of public trust and confidence in the charity or in charity generally*

*Serious reputational damage to the charity or to the wider charity sector*

These very non-specific examples do not help illustrate how the power would be used; in fact they mirror the overly wide breadth of the legislation itself and stray too far into the realms of subjective interpretation. They simply cannot be measured objectively (for example, what is 'significant' or 'serious' will be viewed differently) and as a result are not good examples to cite.

The Charity Commission's own research into levels of public trust and confidence demonstrates the difficulties of making such a judgment. In the 2016 report four of the five least trusted charities also number among the top ten most trusted charities.

### **2.3 The issue of potential conflict with human rights remains unaddressed**

It is important to note that the effect of Section 10 is potentially not just on trusteeship, but on employment rights in respect to a charity, because of the way this it interlinks with other sections in the Act. A disqualified trustee is also prevented from employment in 'senior management positions' in a charity, and hence their employment rights are potentially curtailed (we shall see whether this is the subject of any legal action against the Commission in the future).

However, the policy paper's only reference to this problem is that 'relevant principles of human rights and equalities protections' would apply in its use of the power. The Commission should revisit recommendations by the Joint Subcommittee on the Draft Protection of Charities Bill on this matter.

## **3. Conclusion**

The guidance offers a useful insight into the Commission's thinking on how Section 10 will be implemented, but is insufficient on its own to assuage DSC's concerns about the

fundamentally illiberal and subjective nature of the legislation itself – particularly of ‘Condition F’. This is a new power and so is untested – much will depend on how the Commission actually uses it and the subsequent body of public law and case law that develops as a result.

#### 4. About DSC

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.