

CONSULTATION ON EXTENDING THE CHARITY COMMISSION'S POWERS TO TACKLE ABUSE IN CHARITIES

4 December 2013

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Part I - About this consultation

Topic of this consultation

1. This consultation is about strengthening the Charity Commission's powers to act where there is abuse of a charity and/or non-compliance with charity law, in particular where there is misconduct or mismanagement or risk to charity property, and considering whether the criteria for disqualification from acting as a charity trustee should be extended. The aim is to ensure more effective regulation of charities by tackling malpractice and to support public trust and confidence in charities, the regulator and the regulation of the charity sector.
2. We want to seek views on several changes proposed by the Charity Commission. The proposals would close loopholes in and extend the Charity Commission's existing powers to investigate and remedy non-compliance in relation to charities in England and Wales, including the provisions that disqualify someone from acting as a charity trustee. A number of proposals have been made, based on evidence from past and current cases of loopholes and weaknesses. In this consultation we seek specific comments on the suggested options, such as the extent to which an existing power should be extended, or whether alternative options may be preferable. A complete list of questions asked in this consultation can be found in Part III.

Scope

3. This consultation applies to the law of England and Wales, as charity law is devolved in Scotland and Northern Ireland. However provisions of this consultation may impact on trustees of English or Welsh charities who are not based in England or Wales.
4. The Charity Commission's powers relate to registered charities, excepted charities (both those with incomes below the £5,000 general registration threshold, and those excepted by order), and may also impact on exempt charities where a principal regulator has invited the Charity Commission to open a statutory inquiry. The new disqualification provisions would apply to trusteeship of any charity established in England or Wales, including exempt charities.

Audience

5. Anyone may respond to this consultation and all responses will be fully considered. The Cabinet Office would be particularly interested to hear from charities, charity sector umbrella bodies, charities' advisers and the enforcement community.

Body responsible for the consultation

6. Cabinet Office Ministers are responsible for the legal and regulatory framework for charities in England and Wales. The Cabinet Office is responsible for this consultation, but at the request of the Charity Commission which has asked for and supports the proposed measures.

Duration

7. The Government wishes to consult over 10 weeks from 4 December 2013 to 12 February 2014. The deadline for responses is 12 February 2014.
8. We recognise that this consultation is only for 10 weeks, but we want to develop legislative proposals quickly. We would not want to miss the opportunity to close loopholes and strengthen the Charity Commission's powers, particularly in light of the criticism of the Commission in the NAO report ("The regulatory effectiveness of the Charity Commission", HC 813 2013-14).

How to respond, or make an enquiry

9. There are a number of ways to respond to the consultation:

Email: Submit your response or enquiry via email to charities.act@cabinet-office.gsi.gov.uk

Postal: Send a written response to
Ben Harrison
Office for Civil Society,
Cabinet Office,
4th Floor,
1 Horse Guards Road
London, SW1A 2HQ.

10. If you have any questions about the consultation, please e-mail them to charities.act@cabinet-office.gsi.gov.uk
11. When they respond, representative groups are asked to give a summary of the people and organisations they represent, and where relevant who else they have consulted in reaching their conclusions.
12. Responses to this consultation will be shared with the Charity Commission and may be shared with other Government departments. Responses may be published in full or in a summary of responses.
13. All information in responses, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000, the Data Protection Act

1998 and the Environmental Information Regulations 2004). If you want your response to remain confidential, you should explain why confidentiality is necessary and your request will be acceded to only if it is appropriate in the circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

After the consultation

14. We will acknowledge receipt of all responses, and all responses will be considered. The aim is for a summary of the consultation responses to be published in early 2014 together with the Government's response. The intention is to legislate to make consequent changes as soon as Parliamentary time allows.

Part II - Background

Role of the Charity Commission

15. The Charity Commission is the independent registrar and civil regulator of charities in England and Wales.
16. The Charity Commission's five statutory objectives (s.14 Charities Act 2011) are:
 - a. to increase public trust and confidence in charities,
 - b. to promote awareness and understanding of the operation of the public benefit requirement,
 - c. to promote compliance by charity trustees with their legal obligations in exercising control and management of their charities,
 - d. to promote the effective use of charitable resources,
 - e. to enhance the accountability of charities to donors, beneficiaries and the general public.
17. Charity trustees are the people responsible for the proper administration and management of their charities. Should they fail to comply with their legal obligations they are answerable to the Commission, which in some cases may take remedial or protective action.
18. The Commission has a range of investigatory and enforcement powers designed to protect charitable assets where there is serious misconduct or mismanagement. As a civil regulator, the Commission has no powers of prosecution, so if the Commission discovers criminal activities it reports those activities to the police or other appropriate law enforcement agencies where they have charity related cases. Its information sharing powers are crucial to the success of its relationship with other enforcement agencies. The Commission is not allowed to become directly involved in the running of or administration of a charity, although it can under certain circumstances give directions to charity trustees, appoint interim managers to displace the trustees and make remedial schemes.
19. The compliance framework and powers available to the Commission are designed to protect charity assets, to ensure their use for the purposes for which they were intended, holding the trustees of a charity accountable for non-compliance. Generally, the Commission works with charity trustees to get a charity back on its feet and ensure they remedy the non-compliance themselves. But this may not be appropriate or possible. In some cases the charity trustees are either unwilling or incapable of taking the necessary action, and it is in these and other cases the public would expect a regulator to act, the Commission may need access to compliance powers to secure the proper application of charitable funds.

20. Where the Charity Commission exercises its powers, they are generally targeted at protecting a particular charity and its assets, rather than protecting charity more widely.

21. There are several safeguards in relation to the Commission's use of its powers.

Duty to have regard to the principles of best regulatory practice

22. In performing its functions the Charity Commission is under a statutory duty to have regard to the principles of best regulatory practice (s.16 Charities Act 2011):

“In performing its functions the Commission must, so far as relevant, have regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).”

23. This is also reflected in the Commission's own guidance on its regulatory approach to use of powers and its risk framework: <http://www.charitycommission.gov.uk/our-regulatory-work/how-we-regulate-charities/our-regulatory-approach/>

Statement of reasons

24. In relation to most of its compliance powers the Commission is legally obliged to send a copy of the order to the charity concerned or to each of the charity's trustees (s.86 Charities Act 2011). It must also send a statement of the Commission's reasons for making the order. There is a temporary exception where providing this would prejudice an inquiry or investigation or would not be in the interests of the charity. A copy of the order and statement of reasons is required to be sent where the Commission exercises the following powers under the Charities Act 2011:

- section 76 (suspension of trustees etc. and appointment of interim managers);
- section 79 (removal of trustee or officer etc. for protective etc. purposes);
- section 80 (other powers to remove or appoint charity trustees);
- section 81 (removal or appointment of charity trustees etc.: supplementary);
- section 83 (power to suspend or remove trustees etc. from membership of charity);
- section 84 (power to direct specified action to be taken);
- section 85 (power to direct application of charity property).

The Commission's Decision Review Process

25. The Commission has procedures to review a decision if trustees or other persons affected by it think it was mistaken. The aim of a review is to ensure that the decision was a proper exercise of the Commission's powers and consistent with its statutory objectives. The review also checks that the reasons for decisions were adequately expressed.

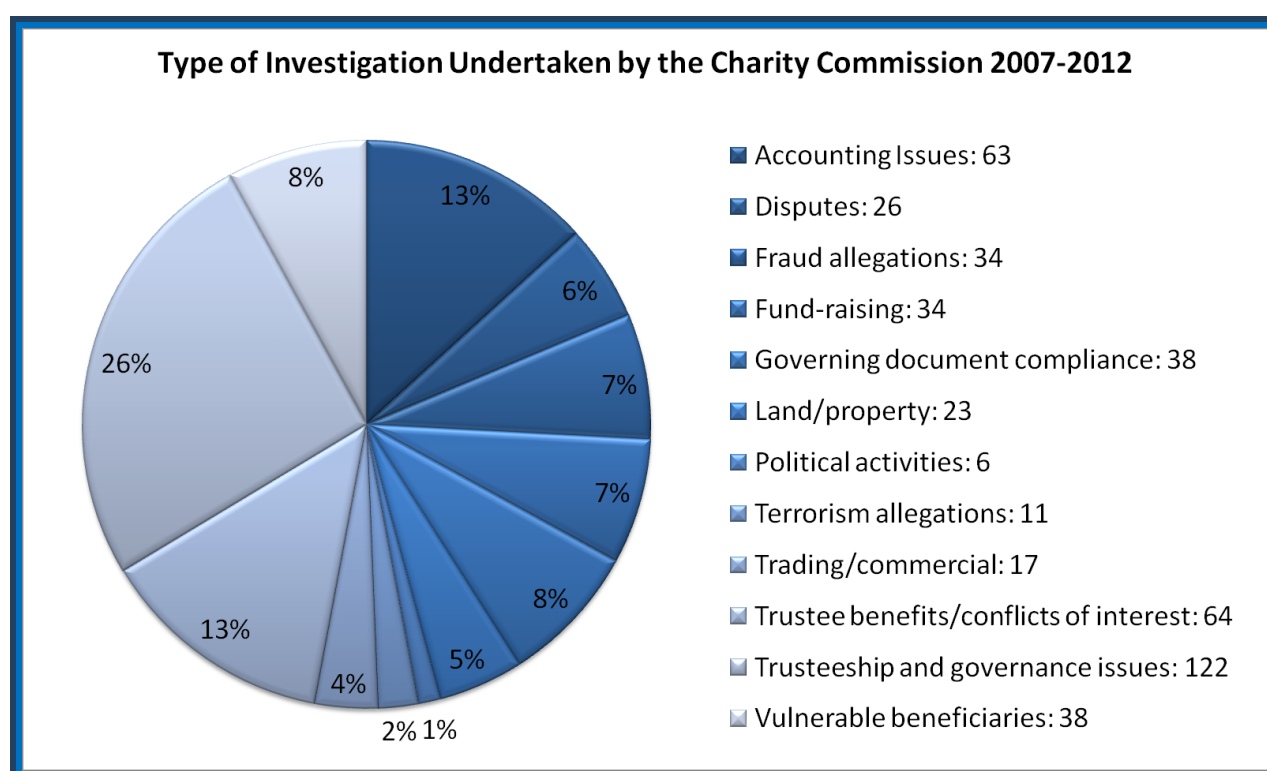
26. All reviews are carried out by a member of the Commission's staff or its Board members. Some are conducted by a single reviewer, while others are considered by a panel. The seniority of the people involved varies from case to case and is dependent on the nature of the decision to be reviewed and the level at which the original decision was made. However, to ensure that the review is carried out objectively, the reviewer will not be the person who made the original decision.
27. In cases where a decision directly affects the rights of an individual or an organisation (such as a decision to remove a trustee or remove a charity from the register) or imposes obligations on a charity (such as a direction to produce documents or attend a meeting), the applicant will (unless exceptional circumstances apply) get the opportunity to speak to the reviewer to discuss any information deemed relevant and to ensure that the reviewer has a clear understanding of the facts and issues before making a decision. In other cases the reviewer may also find it helpful to contact decision review applicants to check the understanding of the points they have raised and to clarify anything that is not clear from the information provided. An applicant does not have to speak to the reviewer if they do not want to.
28. A review may conclude that:
- the original decision was correct and appropriate in the circumstances; or
 - the original decision should be changed or discharged, either in full or in part.

The First-tier Tribunal (Charity)

29. It is not necessary to use the Commission's own Decision Review procedure before applying to the Tribunal, but it is often used as a first step.
30. The Tribunal is an independent legal body which has the power to look again at some of the decisions made by the Commission and to quash, change or add to them. In some cases the Tribunal may direct the Commission to take further action or rectify its decision. The decisions the Tribunal can consider and who can appeal to it are listed in Schedule 6 of the Charities Act 2011. The Commission's guidance also contains a table that can be used to check if a decision can be considered by the Tribunal and who is eligible to make an appeal or request for review.
31. The National Council for Voluntary Organisations has produced helpful guide for charities on the Tribunal and how it can be used to appeal or review the Charity Commission's decisions: <http://blogs.ncvo.org.uk/wp-content/uploads/elizabeth-chamberlain/NCVO-The-Charity-Tribunal.pdf>

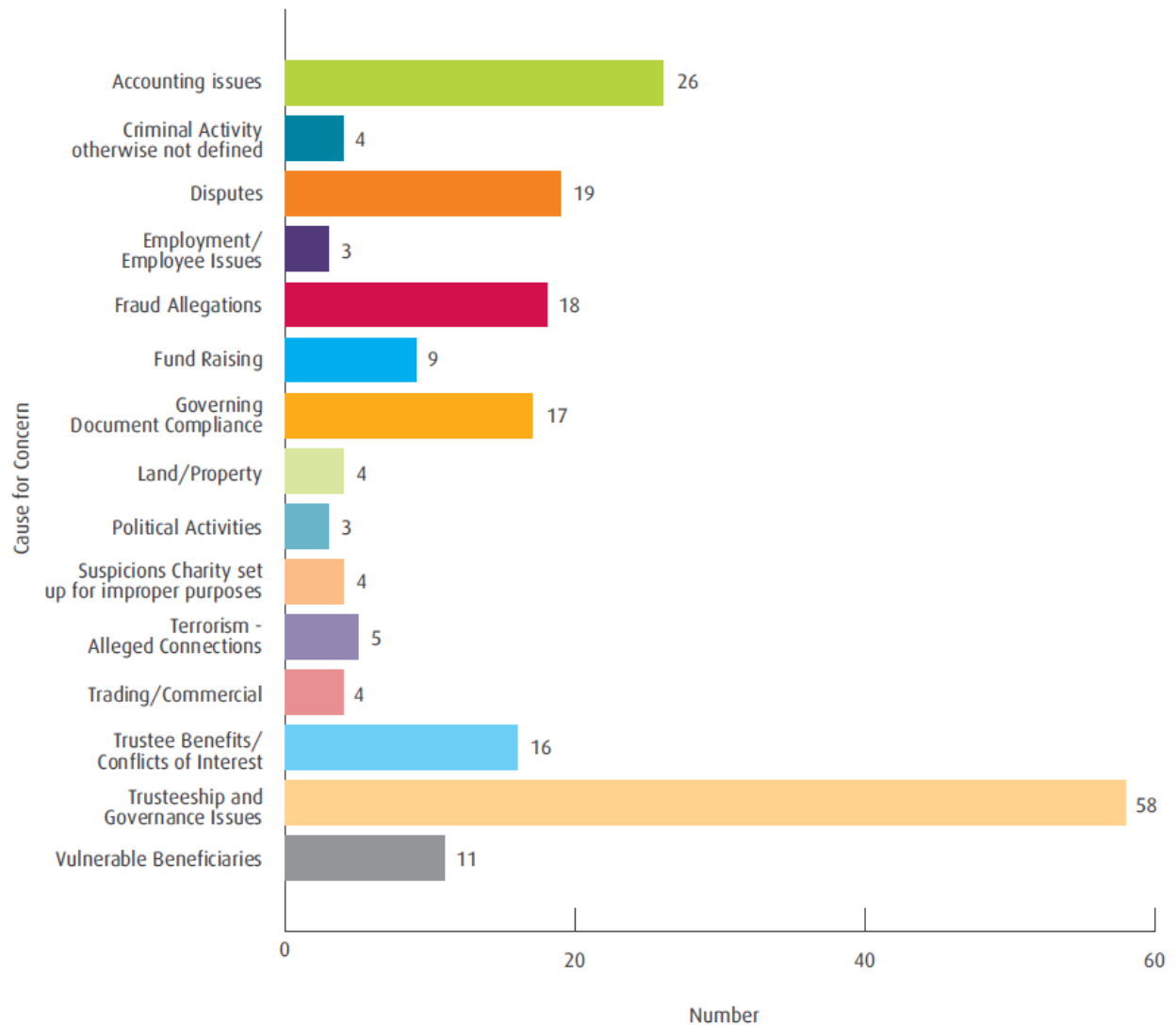
Cases Requiring the Commission's Involvement

32. There are a range of non-compliance and abuse issues that occur in charities. Some may be minor, some are more serious. The Commission's responsibility is to identify and investigate non-compliance and it does this in a variety of ways, for example through its serious incident reporting regime, dealing with concerns from members of the public, working with other agencies and monitoring charities and their accounts. It has published strategies for dealing with fraud, terrorism and safeguarding concerns in charities. In the most serious cases, it opens an investigation and uses powers. 476 cases have been formally investigated by the Charity Commission in the past five years.
33. The main types of issues investigated in the past five years concerned trusteeship and governance issues (25.6%), trustee benefits/conflicts of interest (13.4%), accounting issues (13.2%), governing document compliance (7.98%), vulnerable beneficiaries (7.98%), fraud allegations (7.14%), fund-raising (7.14%), disputes (5.46%), land/property (4.83%), trading/commercial (3.57%), terrorism allegations (2.31%) and political activities (1.26%).¹



¹ As a percentage of all investigations closed by the Commission. All figures based on figures from Charity Commission Back on Track reports 2007-12.

Investigations completed in 2011-12 – type and frequency of issues of concern²

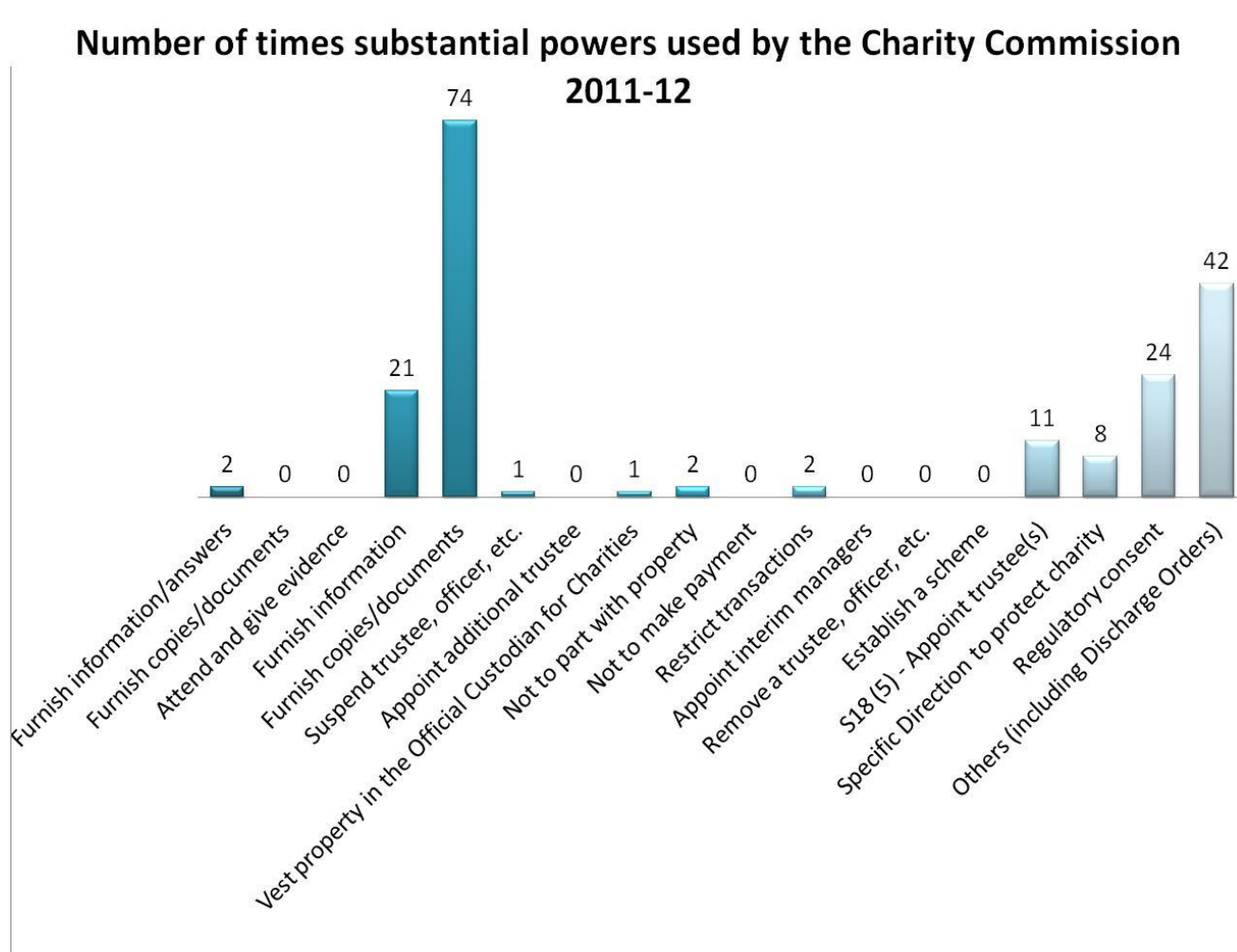


34. While the Commission will generally look to work with the trustees of the charity to ensure they stop the non compliance themselves, this will not always be appropriate. In more serious cases of non compliance or where the charity's trustees are unwilling or unable to take the necessary steps the Commission may make use of its legal powers, for example to direct trustees to take specific actions, suspend or remove trustees, appoint new trustees, or appoint an interim manager to run the charity.

² Charity Commission Back on Track report, 2011-12, p.37

Existing Powers of the Charity Commission

35. The Charities Act 2011 regulates charities and the work of the Charity Commission, and sets out the powers available to the Commission.
36. The Charity Commission has a range of powers available to it including those to protect charity funds and property. Some of the Commission's powers can only be exercised where it has opened a statutory inquiry into a charity, and then in most cases only where there is clear evidence of misconduct or mismanagement **and/or** risk to charity property, **and** the Commission deems the use of the power to be necessary and proportionate in line with the Commission's statutory duties (see paragraph 22).
37. Every year the Charity Commission reports on its compliance and enforcement work including any themes or lessons for the wider charity sector: [Charities back on track.](#)



The Problem: Weaknesses in the Charity Commission's Existing Powers

Overview

38. Following recent high profile cases the Charity Commission's compliance and enforcement work has been under scrutiny from Parliament, the media and the public. Some high profile cases are currently ongoing and/or are before the Tribunal. As such they are sub judice and we make no reference to them in this paper.
39. The Public Accounts Committee (PAC) called for the Charity Commission to make more extensive use of the statutory powers granted by Parliament. They expressed concern about the use of enforcement powers and numbers of trustees removed for misconduct or mismanagement. Weaknesses in the removal power mean that in the last three financial years, the Commission has not removed anyone from office, and has only suspended trustees in three cases. It only froze the bank accounts of two charities last year. The PAC asked the National Audit Office (NAO) to review the Charity Commission's effectiveness as a regulator and report back to Parliament.
40. The NAO report ("The regulatory effectiveness of the Charity Commission", HC 813 SESSION 2013-14) was published on 4 December. It specifically identifies some of the deficiencies and loopholes in existing Charity Commission powers that are being considered in this consultation, and recommends that the Cabinet Office "*assist the Commission in securing legislative changes to address gaps and deficiencies in the Commission's powers.*"
41. In his statutory review of the Charities Act 2006, Lord Hodgson of Astley Abbotts recommended that the Charity Commission needed to prioritise its core regulatory functions. Lord Hodgson said "In a time of significantly reduced resources, the 'friend' side of the Commission's work can only be seen as an extra, and the regulatory role must come to the fore".
42. On fraud and abuse specifically he said "Proactively identifying and tackling fraud and abuse should be a key part of the Commission's work and it is unsurprising that there is an expectation of high performance in this field."
43. Like the rest of the public sector, the Charity Commission faces the challenge of reduced resources. Its budget is reducing from around £30m in 2010-11 to £20m in 2015-16. To meet this challenge the Charity Commission undertook a strategic review in 2011 to prioritise its work; business as usual was not an option. The Government has welcomed the Charity Commission's approach, following its 2011 Strategic Review of focusing more narrowly on its core regulatory functions of registering charities, maintaining the public register of charities, promoting compliance through guidance, and identifying and tackling abuse of charities.
44. However, a reduction in resources available to the Charity Commission is only part of the issue. For the Charity Commission to be confident in exercising its powers we need to ensure the powers it has are effective and offer no loopholes that can be exploited by people seeking to avoid or frustrate the Charity

Commission's compliance and enforcement actions, whilst ensuring continued access to the Tribunal to challenge the Charity Commission's exercise of its powers. The Charity Commission approached the Government this summer to ask that some of its compliance powers be strengthened to enable it to more effectively tackle abuse.

45. A number of areas have been identified:

- a. **Automatic disqualification of trustees.** There are concerns that the existing criteria that automatically disqualify someone from acting as a charity trustee are too narrow. For example, conviction of serious terrorism or money-laundering offences would not result in automatic disqualification. This issue was raised by Lord Hodgson in his statutory review of the Charities Act 2006, and the Government agreed to act on his recommendation. In this consultation we explore the additional offences that, in our view, should result in automatic disqualification.
- b. **Charity Commission disqualification of trustees.** The Charity Commission lacks a power to disqualify a person from acting as a charity trustee where their conduct means they are not fit to act. There are limited circumstances in which the Commission can remove someone from their position as a trustee, and the effect of doing so is that they are then disqualified and cannot act as a trustee for that charity or another charity. Under the current regime there are loopholes that have been exploited. An individual can avoid removal – and the consequent disqualification – by resigning before the Commission has time to act. The Commission must give the individual at least one month's notice that it intends to remove them, enabling the individual to resign to avoid removal. Having avoided removal the individual can then become a trustee of another charity. The Commission cannot remove them from that position because their previous behaviour related to a different charity. To close these loopholes we believe that the Charity Commission should have a new power to disqualify individuals from being a charity trustee.
- c. **The Charity Commission cannot currently close down charities that have been involved in abuse.** The Charity Commission cannot close down charities that have been involved in misconduct or mismanagement because of the prohibition of interfering in running a charity. The legal framework designed to protect assets, envisages a charity continuing after the Commission has dealt with misconduct or mismanagement, albeit perhaps with different trustees in control of the charity. It may be more appropriate in some cases for the Charity Commission to direct that the trustees transfer any assets to another existing charity with similar purposes, to ensure that assets continue to be used for the charitable purposes intended, and then wind up the charity. The current restrictions on the powers of direction mean this may not be possible or straight forward under existing powers. This could ensure the more effective use of charitable resources for the relevant charitable purposes and

beneficiaries, than attempting to resurrect or prolong the life of a defunct or dysfunctional charity.

- d. Some of the Charity Commission's compliance and enforcement powers are limited to circumstances where there is both; (a) misconduct or mismanagement, **and** (b) risk to charity property. There are some cases where because of the misconduct or mismanagement there is no longer any charity property immediately at risk, or where there has been no misconduct or mismanagement at that point in time but where the Charity Commission has reliable information indicating that there is serious risk to the charity's property.

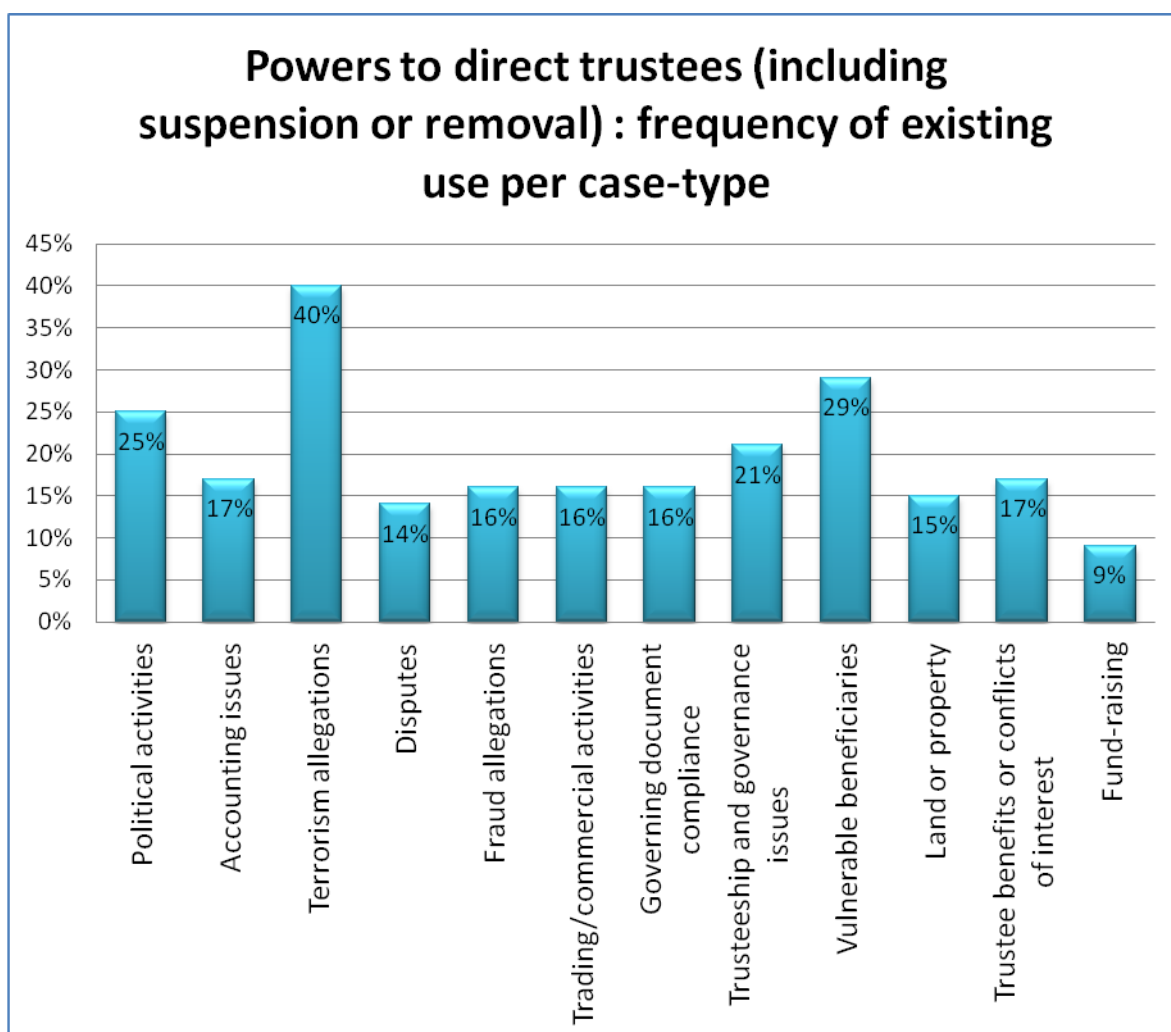
Case Studies

The case studies in the next section indicate some of the current weaknesses in the Charity Commission's compliance and enforcement powers. Most of these are based on real cases where the Charity Commission's enforcement or compliance work has been frustrated, and which we are seeking to address through the proposals set out below. References to powers in the Charities Act 2011 include powers exercised under equivalent preceding legislation (the Charities Act 1993 as amended by the Charities Act 2006).

Part III – Proposals for consultation

Proposed Changes: Charity trustees

46. Charity trustees are the persons who are responsible for the management and administration of a charity, no matter its size or whether there are employees. They are in a position of trust over the assets and activities of their charity. They are almost always unpaid volunteers.
47. Charity Commission compliance powers to direct trustees (including on occasion suspending or removing trustees) are some of their most used powers.³



48. We propose a number of changes to the existing powers, and some new powers to ensure that persons not suitable for a charity trustee role, because of their conduct in relation to a charity, are prevented from running any charities, either as trustees or in other positions of control.

³ Figures calculated using the Charity Commission's Back on Track Reports 2007-2012.

49. Currently certain people are automatically disqualified from charity trusteeship under s.178 Charities Act 2011. The Charity Commission also has a power to suspend (s.76 Charities Act 2011) or remove (s.79 Charities Act 2011) a charity trustee (or other office holder) from their position, but only where it has opened a statutory inquiry and certain criteria are met – namely that there is misconduct or mismanagement and risk to charity property, and the trustee (or other office holder) has been responsible for or privy to the misconduct or mismanagement or whose conduct facilitated it. In practice the high legal hurdles mean that it is rarely used despite there being concerns about a person's suitability and fitness to hold office. Anyone removed as a trustee by the Commission is disqualified from acting.
50. There are three specific issues we are consulting on relating to the disqualification of trustees:
- 1) whether there should be additional circumstances in which a person is automatically disqualified from being a charity trustee;
 - 2) whether the Commission should have a power to disqualify a person from being a charity trustee; and,
 - 3) closing loopholes in the powers to ensure they can be used effectively.

Automatic disqualification from trusteeship

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

51. At present the criteria for automatic disqualification are set out in section 178 Charities Act 2011. The current criteria are;
- when the court or the Commission removes an individual using its legal powers because of misconduct or mismanagement in a charity,
 - on personal insolvency and voluntary arrangements,
 - undischarged bankruptcy,
 - disqualified company directors, and
 - unspent convictions for criminal offences involving an element of "dishonesty or deception".
52. The criticism of the current criteria is that they are too narrow and fail to capture other behaviours that should automatically disqualify an unsuitable person from acting as a charity trustee. The narrowness of the criteria for automatic disqualification has been questioned over several years (see, for example a Parliamentary Question asked by Lord Avebury in 2009 ([HL Official Report 21 Apr 2009: Column WA3893](#))).
53. Lord Hodgson, in his [statutory review of the Charities Act 2006](#) also questioned whether the criteria for automatic disqualification were sufficiently robust, whilst recognising the need for any extension of the criteria (in relation to

disqualification consequential on a criminal conviction) not to adversely impact offender rehabilitation. Lord Hodgson's recommendation was as follows:

The Government should consider if and how to widen the types of criminal offences disqualifying individuals from charity trusteeship, taking into account the need to support rehabilitation of former offenders. (Chapter 4, recommendation 19)

The Government's response to this recommendation was:

The Government accepts this recommendation and believes there is also a need to consider whether there are loopholes in the way the current suspension and removal powers operate. The Law Commission has been asked to consider this recommendation. However, if an early legislative opportunity arises the Government may take this recommendation forward outside of the Law Commission project.

54. The Government has decided that automatic disqualification is best considered alongside other proposals relating to disqualification of trustees and Charity Commission powers and has therefore decided to take forward these measures directly rather than through the Law Commission charity law project.

Examples of real cases where convictions for criminal offences have not led to automatic disqualification

Money laundering offences

Concerns were raised about the funds applied by a charity in relation to contracts to house and support asylum seekers. A police investigation resulted in criminal convictions for fraud and money laundering offences. The persons convicted of fraud were thereby disqualified from acting as charity trustees by virtue of s.178 Charities Act 2011 because fraud falls within the definition of a crime involving deception and dishonesty. However, the persons convicted of money laundering were not disqualified, because the offence of money laundering does not fall within that definition. The latter persons are no longer charity trustees, but there is currently no bar on their becoming trustees or being otherwise involved in running a charity in future.

Terrorism offences

- A charity volunteer who undertook fundraising was designated under s.2 Terrorist Asset Freezing etc. Act 2010. This offence is not caught by the criteria for automatic disqualification in s.178 Charities Act 2011 and so there is currently no bar to his becoming a trustee or being otherwise involved in running a charity in the future.*
- A number of individuals convicted of terrorist offences including offences under s.5(1) of the Terrorism Act 2006 (Preparation of Terrorist Acts) had raised funds publicly purportedly for charitable purposes. The majority of the money raised was not paid to the charity in whose name the collection took place. Although currently serving custodial sentences, if these individuals wanted to become charity trustees they would not be caught by the existing disqualification provisions.*

55. The proposal is to expand the list of relevant criminal offences, beyond only those involving deception and dishonesty, to unspent convictions for the following other offences:

- i. money laundering (Proceeds of Crime Act 2002),
- ii. bribery and corruption (including Bribery Act 2010),
- iii. terrorism related offences, including terrorist acts, financing, glorification of terrorism (Terrorism Act 2000 and 2006),
- iv. persons or entities “designated” under the Terrorist Asset-Freezing etc. Act 2010. The Act implements UN and EU requirements. It provides HM Treasury with powers to “designate” those suspected or believed to be involved in terrorist activities, freeze their funds and economic resources, and restrict the making available of funds, financial services and economic resources to, or for the benefit of such persons. The current list of designated persons is available [here](#).
- v. the incitement of racial or religious hatred, or inciting hatred on the ground of sexual orientation (Public Order Act 1986 as amended); and,
- vi. perjury, misconduct in a public office, perverting the course of justice.

56. There would also need to be a power for the Minister to add to the list by Secondary legislation, subject to Parliamentary scrutiny and approval.

57. In each case, disqualification would apply only in relation to offences which are not “spent”. Once the conviction is spent, the person would no longer be disqualified from being a charity trustee.

58. A spent conviction is a conviction which, under the terms of the Rehabilitation of Offenders Act 1974, can be effectively ignored after a specified amount of time. The amount of time for rehabilitation depends on the sentence imposed; the more serious the conviction, the longer the period of rehabilitation.

59. Convictions where someone is sentenced to over 2½ years imprisonment (or detention in a young offenders’ institution) are never spent. For lesser sentences, there are different time periods after which convictions become spent, depending on the seriousness of the offence and the age of the offender. Simple cautions are spent immediately. Details of the rehabilitation period (the length of time before a caution or conviction becomes spent) are set out in Ministry of Justice [guidance](#).

60. Currently disqualified trustees may apply to the Charity Commission for a waiver (s.181 Charities Act 2011). The Charity Commission may grant a waiver from disqualification generally, or in relation to a particular charity or class of charities. A waiver cannot be granted in relation to certain disqualifications under company law. It is proposed that these waiver provisions would equally apply to automatic disqualification resulting from the above criteria. The existence of a waiver regime supports the rehabilitation of offenders.

61. An alternative approach that was considered and ruled out would be to define a wider, more generic class of serious offences (for example any indictable offence) after which an individual would be generally considered unsuitable to act as trustee and so disqualified. However such a broad approach could result in people being disqualified from acting as a charity trustee where they had an unspent conviction for an offence which had no real bearing on their fitness to be a charity trustee.
62. We consider that unspent convictions for the offences set out above are justifiable in disqualifying a person from acting as a charity trustee. However we are keen to understand whether there are other offences that should be added to the criteria for automatic disqualification, or if there are any reasons why unspent convictions for any of the proposed offences listed above should not result in automatic disqualification. In particular we would like to seek views on whether other offences in Part 1 of the Public Order Act 1986 as amended should automatically disqualify a person from charity trusteeship. The offences include riot, violent disorder and affray.

QUESTIONS

- Q1) *Do you consider that unspent convictions for the range of offences listed above should automatically disqualify a person from charity trusteeship?*
- 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?*
- Q3) *Do you have any other views on automatic disqualification from acting as charity trustee?*

A new power for the Charity Commission to disqualify a person from charity trusteeship

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.

63. At the moment the Charity Commission has no general power to disqualify a person from being a charity trustee on the basis that their conduct makes them unsuitable to act as one. Under their existing power in section 79 Charities Act 2011, the Charity Commission can only remove someone from their position of

charity trustee where they have instituted a statutory inquiry into the charity and the Charity Commission is satisfied both that there is or has been misconduct or mismanagement in relation to that charity and that there is a need to protect the charity's property or secure its proper application. Anyone who has been removed under this power is automatically disqualified.

Examples of the need for a disqualification power

Where a caution is accepted

Concerns were raised about the Chair of trustees (who was also the CEO) of a charity being investigated by the police for creating charity invoices in order to claim funding from a public body but which were actually for the benefit of the Chair's personal use. The trustee subsequently accepted two police cautions which, although given in relation to offences under section 1 and 2 of the Fraud Act 2006, did not meet the criteria for automatic disqualification. Although the trustee subsequently resigned as Chair and CEO, they were at liberty to become a trustee/CEO of another charity in the future and the Commission could do nothing to stop them.

Resignation to avoid removal and consequent disqualification

Having reviewed evidence showing that there had been misappropriation of charity funds the Charity Commission concluded it had sufficient grounds of mismanagement/misconduct to remove a trustee. The Charity Commission served notice to that effect (as required by statute). The trustee resigned before the period of notice expired, which meant that the Commission was unable to proceed with the removal (which would have resulted in disqualification) or take any further protective action with regard to that individual and charities generally. There is nothing preventing the individual from becoming a trustee (or taking another position of responsibility) in future.

Conviction for an offence that does not warrant automatic disqualification

A trustee of a charity was found guilty of a public order offence (s.5 Public Order Act 1986) as a result of burning poppies on Armistice Day. He had a public profile linking him to extremism, which is corrosive of public trust and confidence in charities. The individual is not caught under any existing disqualification provisions.

Option 1 – a limited power to disqualify

64. One option is to introduce a limited power to disqualify for a specified period a person from being a charity trustee. The power to disqualify would be restricted to circumstances which both fall within a list of specified criteria, and where the Charity Commission considers disqualification is expedient in the public interest. The Charity Commission would not need to have instituted an inquiry. Such a change could also be accompanied by a power to specify additional criteria under Secondary Legislation, subject to Parliamentary scrutiny and approval. A disqualification decision would be appealable to the Tribunal. The proposed specified criteria are:

- a. acts of misconduct or mismanagement by the individual in the administration of any charity irrespective of whether they are currently a trustee;
 - b. where an individual was a trustee of two or more charities each of which, while he has been a trustee of them, went into insolvency and his conduct contributed to or facilitated those insolvencies;
 - c. conviction overseas of offences equivalent to those which would result in automatic disqualification if they were convictions in the UK;
 - d. where cautions have been accepted for offences that would result in automatic disqualification if there had been a conviction;
 - e. providing false or misleading information to the Charity Commission;
 - f. where the charity fails to comply with a Commission order or direction or is in persistent default in relation to compliance with other provisions of the charity law (e.g. filing accounts on time);
 - g. where the Charity Commission considers that conduct as a trustee or officer of any charity makes a person unfit to be concerned in the management of a charity - including for example any misfeasance or breach of any fiduciary or other duty by the trustee in relation to a charity, or any misapplication or retention by the person of, or any conduct by the person giving rise to an obligation to account for, any money or other property of a charity – this would enable the Charity Commission to disqualify the individual even if the trustee resigned his position;
 - 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; and,
 - i. where a corporate trustee is removed by the Charity Commission under s.79 Charities Act 2011 for misconduct, and the conduct of the directors (or equivalent) of the corporate trustee contributed to or facilitated the misconduct or mismanagement that led to removal of the corporate trustee, that director could be disqualified from being a trustee of a charity.
65. The existing provisions relating to waiver would be relied upon (s.181 Charities Act 2011). The disqualified individual would be able to apply to the Charity Commission for their disqualification to be waived. It would be for the Charity Commission to decide whether, in all the circumstances of the case, it is appropriate to grant a waiver.
66. There may also be serious criminal offences where an unspent conviction would not warrant automatic disqualification from charity trusteeship, but where the circumstances of a particular case would warrant disqualification. This may include some public order offences (see recommendation 1 above) or, for example, indictable firearms offences or contempt of court. We are keen to seek views on whether any offences that do not result in automatic disqualification should be considered as relevant criteria for the Charity Commission’s limited disqualification power.

Option 2 – a broad power based on fitness

67. A second option would be to give the Charity Commission a broad discretionary power to disqualify for a specified period a person whose conduct makes them unfit to be a charity trustee. Any such determination would be appealable to the Tribunal. The test would need to be prescribed in the legislation and could be similar to that used in the Company Directors Disqualification Act 1986, for example: “his conduct makes him unfit to be concerned in the management of a charity and it is expedient in the public interest to disqualify”.
68. This could enable conduct outside of a charity which affects a person’s suitability and ability to act as a charity trustee to be considered. At present the ability to suspend and remove has to be based on conduct relating to the charity of which they are a trustee.
69. As with option 1, the new power would allow the disqualified person to apply to the Charity Commission to waive the disqualification.

QUESTIONS

- 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?*
- Q5) *Do you have a preference between option 1 (the limited power) or option 2 (the broad power)?*
- 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?*
- Q7) *Do you agree with the proposals for waiver of disqualification, that they should follow the current arrangements that apply?*

Other provisions relating to trustee disqualification

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

70. It is already a criminal offence under s.183 Charities Act 2011 to act whilst disqualified as a charity trustee (there is also potential civil liability). However the effect of disqualification does not automatically take the person out of the position they hold. Under the current framework the Charity Commission regularly has to pressurise disqualified trustees to step down voluntarily.
71. The proposal is to add to the existing removal power in s.80 Charities Act 2011 to enable the Commission by order to remove a disqualified trustee from their trustee position(s) or other position(s) of power as soon as they are disqualified. Where a disqualified trustee fails to step down from their position, the Charity Commission may exercise this power to ensure he is removed from his position, and to notify the other trustees.

QUESTION

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

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

72. Generally, there must always be at least two trustees to be able to give good receipt to comply with both trust law and company law.
73. In tandem with any new power for the Charity Commission to remove trustees, we will need to ensure that the Charity Commission can resolve any situation where disqualification or removal of trustees would reduce the number of active trustees in the charity to below the minimum. The Commission already has the ability to act in consequence of removing trustees:
- 1) Under s.80 Charities Act 2011, the Charity Commission has the power to appoint new trustees in place of those it removes.
 - 2) Under s.81 Charities Act 2011 the Charity Commission can deal with vesting or transfer of land or other property in consequence of a removal.
74. Although rare, the problem faced by the Charity Commission is a practical one. Arranging for the appointment of a new trustee can take time, and can cause unnecessary delays in its investigation or inquiry into the charity. The

appointment process can take even longer than usual in investigation cases as it is more difficult to attract suitable candidates for a charity in those circumstances.

75. Both powers may need minor amendments to enable the Charity Commission to act swiftly where there is a need either in relation to a removal or a disqualification. This could provide a mechanism to ensure that there would continue to be at least two trustees, or that the charitable property (or the benefit of any claims due to the charity) would vest in the Official Custodian to secure charitable assets that might otherwise be lost and ensure they could be reapplied for similar charitable purposes.

Example of the need to be able to act where there would be insufficient trustees

- *Having reviewed evidence showing that there had been misapplication of charity funds the Charity Commission concluded it had sufficient grounds of mismanagement/misconduct to remove a trustee. However, removal would have resulted in the charity being incapable of operation (insufficient trustees) so the Commission was unable to proceed with the removal (which would have resulted in disqualification). The Commission appointed an interim manager but this has cost implications (interim managers are usually funded by the charity) and is only ever a temporary measure.*
- *The Commission had concerns that both a charity and its wholly owned trading subsidiary had been trading whilst insolvent for several years. Having reviewed evidence showing that there had been misappropriation of charity funds the Commission concluded it had sufficient grounds of mismanagement/misconduct to remove a trustee. However before the Commission issued notice of its intention one of the trustees resigned leaving only two remaining trustees. Generally, there must always be at least two trustees to be able to give good receipt to comply with both trust law and company law. Thus, in the circumstances, the Commission was not able to remove the trustee as it would have left the charity incapable of operating.*

QUESTION

- 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?*

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

76. The current provisions only disqualify a person from acting as a charity trustee. It would be possible for a disqualified person to be appointed to another office or significant position of responsibility within a charity – such as the Chief Executive or Finance Director.
77. The proposal is to extend the effect of the disqualifying provisions so that a disqualified person would not be able to be concerned or take part in the

promotion, formation or management of a charity (following the approach in the Company Directors Disqualification Act 1986). The aim would be to prevent disqualified persons exercising management control over charity funds by other offices or management positions, particularly those which involve specific responsibility for the finances of a charity (e.g. Chief Executive, Treasurer, Finance Manager or Director). It would still be open to them to apply for a waiver from the Charity Commission.

Examples of the need for disqualification to extend to other positions of responsibility

- *An individual disqualified in law from being a trustee (unspent conviction) established and effectively ran the charity and associated trading subsidiaries as its 'General Secretary'. The individual was able to legally hold a position within the charity, although not the office of trustee. Acting as 'General Secretary' the individual committed acts conspiring to defraud relating to the charity and its subsidiaries.*
- *Having investigated allegations of intimidation, deterioration of charity premises and inappropriate use of charity premises, the Commission used its power under what is now s.79(2) Charities Act 2011 to remove an individual (who was not a trustee) from his position as officer and/or agent of the charity. Although he was subsequently imprisoned (convicted of inciting murder and racial hatred) and latterly extradited to the United States of America where he awaits trial, he may at some point in the future act as an officer and/or agent of another charity, or indeed as a trustee, because his removal does not have the effect of disqualification (and his conviction does not relate to an offence falling within the scope of s178).*

QUESTION

- 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?*

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.

78. In the case of a charity with a sole corporate trustee, we propose to make provision so that an individual who has been disqualified from being a charity trustee who is a director of a corporate trustee of cannot take part in decisions of the corporate trustee about the charity's affairs.

Example of the need to prevent disqualified persons from participating in the management of a charity as a director of a corporate trustee

Initial consideration was given to the removal of a corporate trustee of a charity on the grounds of mismanagement and misconduct in that the trustee failed to prevent certain actions/conflicts of interest arising within its body of directors, but this was not developed because it would leave the charity without a trustee (see proposal 4 above). There was one particular director who appeared to be in a leading role and whose conduct was of concern. Had the removal taken place, the corporate trustee would have been disqualified from acting as trustee thereafter but the directors, as individuals, would not themselves have been disqualified.

QUESTION

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

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.

79. At the moment, under s.79(2) Charities Act 2011, the Charity Commission has a power to remove a charity trustee where:

- a) It has opened a statutory inquiry, **and**
- b) There is misconduct or mismanagement in which the individual was involved, **and**
- c) There is risk to the charity's property.

80. We propose to change the legal tests to make it easier for the Commission to remove an individual from their position as trustee, officer or agent in a charity (and make what is called a "remedial scheme"): so that the power can be exercised EITHER where there is misconduct/mismanagement OR a need to protect charity property at risk, rather than both limbs being required as at present. This would overcome the problem of not being able to remove a trustee where the charity is or is going into liquidation, is winding up, or there are no or little assets left in the charity. A statutory inquiry would still need to be opened in order to exercise the power.

81. This would enable the Commission to remove a trustee (or other office holder) where the misconduct or mismanagement had taken place but there were no remaining assets in the charity that would be at risk. It would also be possible, although less likely, for the Commission to act where no misconduct or mismanagement had taken place but where there is a risk to the charity's property, for example where the Commission has reliable information indicating

misconduct has been planned and presents a serious risk to the charity's property.

Example of the need for removal of a trustee where there is either misconduct/mismanagement OR risk to charity property

Concerns were raised about the receipt, in tranches, of multi-million dollar deposits into an account set up under the charity's name, but controlled by an individual who was not a charity trustee, and the subsequent return of these funds to the remitting bank by the receiving bank, which was not satisfied as to the origin of the funds. The Commission concluded that the charity had not benefited from the deposits and the trustees had not acted prudently, were unable to produce records of the transactions, did not take appropriate professional advice and did not act collectively. The Commission was unable to remove the trustees, which would have resulted in their disqualification, because the charity had no assets and so the Commission could not satisfy the second limb of the current legal test.

QUESTION

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

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

82. Under s.89(5) the Charity Commission must provide at least one month's notice before it removes a person from their position of trustee (or other office holder). This results in the situation where people who have been given notice that the Charity Commission intends to remove them resign their position before the Charity Commission can actually remove them. As they are not removed, they are not automatically disqualified, so there is then nothing to stop them from being reappointed as a trustee (or other office holder) of the charity concerned, or to another charity.
83. This loophole would be closed by the new power for the Charity Commission to disqualify. Under the limited power option (see 2 above, option 1), this could be achieved by specifying that the Charity Commission could disqualify a person if they had been served notice of proposed removal under s.89(5) but had resigned their position before the Charity Commission could give effect to the removal.
84. Alternatively, specific provision could be made that would enable the Commission to proceed to a removal order where the trustee had resigned their position after notice of the proposed removal had been given.

Examples of cases where a trustee resigned to avoid removal and consequent disqualification

- *Having reviewed evidence showing that there had been misappropriation of charity funds the Commission concluded it had sufficient grounds of mismanagement/misconduct to remove a trustee. The Commission served notice to that effect (as required by statute). The trustee resigned before the period of notice expired, which meant that the Commission was unable to proceed with the removal (which would have resulted in disqualification) or take any further protective action with regard to that individual and charities generally. Had the Commission been able to prevent the resignation, removal – and resultant disqualification – would have been effected and the sector protected.*
- *Whilst a Charity Commission investigation was establishing if there had been misappropriation of charity funds a number of the charity's trustees resigned which meant although the Commission had established that there were sufficient grounds of mismanagement/misconduct it was unable to remove those individuals. Had the Commission been able to do so (because they still occupied the office of trustee) the effect of their removal would have been disqualification.*

QUESTION

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

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

85. We propose to amend the provisions of s.79 Charities Act 2011 (removal of trustee or officer etc... for protective purposes) so that misconduct or mismanagement by the person in any charity (not just the charity in question) can be taken into account.

Example of a case where misconduct in other charities is relevant

One of the trustees of charity A was also a trustee of charity B which was under investigation. That investigation was more developed than the charity A investigation. The trustee, in his role as trustee of charity B, had received extensive advice and guidance from the Commission over a number of years and this, and his behaviour as a trustee for charity B, were significant factors when considering taking action against him in the charity B investigation. Clearly, the trustee's conduct across both charities was a concern but the Commission was limited to considering the facts specific to each investigation rather than be able to take a holistic view. A power given to the Commission to make a disqualifying determination based on a broader perspective than that currently permitted for removal under s79 would have facilitated swifter resolution of this matter in the public interest.

QUESTION

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

Proposed changes to other Charity Commission compliance powers

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.

86. Amend the legal test in s.84 Charities Act 2011 (power to direct specific action expedient in the interests of the charity) so that in cases where it is not necessary for the Commission to investigate matters further (and open an inquiry), as there is already clear evidence that one of the two limbs is established, the direction can just be made without opening a statutory inquiry first. The power can currently be exercised only after a s.46 statutory inquiry is open and one of the two limbs of misconduct/mismanagement or risk to property is met. The power is already appealable to the Tribunal and can be challenged under the Commission's internal decision review procedures. In addition, the usual existing safeguards of the Commission needing to set out a Statement of Reasons and the power being subject to an overriding proportionality test would continue to apply (see Paragraph 22).

87. If the issue/concern is clear and needs redress and no inquiry is necessary to find further information to justify the use of the power, then it is bureaucratic for the Charity Commission to have to open an inquiry merely to exercise the power. It also opens up a second route of challenge unnecessarily.

Example of a case where a direction power would have proved effective without the need for a statutory inquiry

- *The Commission has concerns about a trustee's willingness/ability to fulfil an action plan that is due to be completed by November 2013. The Plan set out, for example, the need for the trustees to hold an AGM, establish the position regarding a connected organization and the use of charity funds overseas, put in place appropriate internal control measures and consider the long term strategy/viability of the charity for the future. The Commission has received information that the trustees have failed to call the AGM (which was due in July) and has asked the trustees to comment. Given the likelihood that the trustees may fail to carry out the action plan in part or in full, the Commission would be in a stronger position to take further action if it had been able to direct that actions be taken rather than agree a way forward on a consensual basis.*

QUESTION

Q15) *Do you agree with this proposed change?*

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

88. Either extend s.84 Charities Act 2011 direction provisions or the s.79 Charities Act permanent remedial powers (extended as proposed in 4 above) to enable, after an inquiry has been opened and misconduct/mismanagement or risk to property has been established, the Commission to make a direction to prevent (further) acts of misconduct or mismanagement or breach of fiduciary duty taking place (such as dealings with a particular body or person, if necessary, without the Commission's consent). The Commission is currently only able to do this (under s76(3)(f)) by restricting, while the inquiry is ongoing, the transactions which may be entered into without the Charity Commission's authority.
89. A potential safeguard could be an obligation to review such directions every 12 months. The review could be subject to an assumption that the direction would be discharged unless the original grounds still stood and there was good reason to renew it. Any decision to renew would be appealable. Within any 12 month period the Commission would also be able to consider applications for discharge where if it could be shown that the original grounds no longer stood.

Examples of cases where a preventive direction power would have been useful in the context of a statutory inquiry

- *Concerns were raised about a charity providing a helpline service disclosing information that might have allowed the identification of callers. These concerns were compounded when the Commission received information from one of the trustees that key individuals in the charity were acting without authority and had engaged the services of a publicist. This gave rise to further concerns about the security of the information held by the charity and so, in order to prevent any risk of further disclosures that would be detrimental to the charity's beneficiaries and damaging to the public trust and confidence in the charity sector for helplines generally, the Commission made an Order under what is now s76(3)(d) preventing the charity from parting with certain information or data without its prior written consent. This Order was discharged only upon confirmation being received that the information/data had been securely destroyed. The charity ceased to operate and was removed from the Register of Charities. Had the charity continued to operate, it is probable that the information/data would not have been destroyed, in which case an ability to make a preventative/restrictive Order or direction – the effect of which extends beyond the life of the inquiry – would have enabled the Commission to close the inquiry with some confidence that the confidential information/data was secure.*
- *The Commission received concerns that a charity appeared to support a proscribed terrorist organisation and found that there were numerous pictures of members of the proscribed organisation displayed on the premises. In an Action Plan the Commission said that the trustees must remove all such pictures. A monitoring visit confirmed that this had been done but they were put back up again later. This power could have been used to direct that the pictures must not be displayed again.*

QUESTION

Q16) Do you have any comments on proposal 11?

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”).

90. The proposal is a minor extension to the existing legal test in s.85 Charities Act 2011 (power to direct application of charity money to another charity) so that the power is also available where the persons are “unable” to apply money properly for the purposes held. For example, to direct trustees or a bank holding charity money in an account where there are no or an insufficient number of trustees of the charity to authorise it, even if the bank and remaining trustee(s) are willing to do so, or where there is no one authorised to do so on the bank mandate.

Example of a case where a direction couldn't be made under the existing power

In a class inquiry conducted by the Commission a number of charities ceased to operate with funds remaining in their bank accounts. The Commission's power to make directions under s. 107 of the Charities Act 2011 (dormant bank accounts) could not be applied as the statutory time period had not elapsed; there was a risk that funds left in the accounts could be misapplied by individuals on the mandate or simply lost to charity by not being applied for the intended purposes. Before exercising the power under section 85 and due to its use being limited to instances where the individual or organisation holding property is 'unwilling' (as opposed to 'unable') the Commission had to establish that a number of banks were unwilling to apply the funds without an order of the Commission. This was a particularly resource intensive process which could be significantly reduced if s85 were to be amended to include 'unable' as well as 'unwilling'.

QUESTION

Q17) Do you have any comments on proposal 12?

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.

91. Add to s.76(3)(f) Charities Act 2011 (temporary power to restrict transactions) to make it clear the Commission can restrict/prevent the charity undertaking certain actions (for example prohibiting speakers or literature that might incite racial or religious hatred) as well as financial or land "transactions". This would enable the Commission to direct a charity not to allow a speaker to speak at a charity event or on charity premises where to do so would amount to the trustees committing misconduct or mismanagement in the administration of the charity. The exercise of this power would give the Charity Commission a proactive means of addressing these issues that currently does not exist. The power would be to impose such restrictions on a temporary basis, for example in relation to a specific event or publication.

Example of cases where this power could be used

- *If the Commission knew that a charity planned to give a platform at an event to a speaker who was likely to incite racial or religious hatred it could use this power to direct that the charity not do so.*

QUESTION

Q18) *Do you agree with this proposed change?*

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.

92. Extend s.52 Charities Act 2011 (information powers) or s.79 Charities Act 2011 (restricting orders used to “freeze” charity bank accounts) to enable the Commission to direct a bank to notify the Commission of certain movements on a bank account as they happen (similar to bank account monitoring orders under POCA). Currently the only way to maintain oversight of a charity’s bank account is to make several s.52 orders on a number of occasions periodically. The ability to ask for monitoring of an account would prevent the situation where the Commission identified sizeable withdrawals had taken place but only upon receipt of requested bank statements under s.52 orders, at which point the funds had already left the account in the meantime. This power would enable the Commission to identify to the bank in a schedule to the order the information it must notify; for example cash withdrawals, requests to make payments to certain individuals/organisations and/or transactions over a certain amount.

Example of a case where a more flexible power would be used

The Commission had exercised its power under s.52 Charities Act 2011 to obtain financial information about the charity (including bank account information) – the power can currently only be used to obtain information already in existence and does not provide an obligation on the individual or institution to provide information to the Commission created or obtained after the date of the order. Due to this limitation the Commission’s only option was to issue periodic orders under s.52 (or make s.47 directions). In an intervening period between orders sizeable withdrawals from the charity’s bank account had taken place. If the Commission had had a power to monitor accounts or be alerted to sizeable transactions before they occur it could have exercised its power under s.76(3)(d) to prevent the transactions from taking place. As it does not, a resource intensive process of protecting remaining funds and recovering misapplied funds took place.

QUESTION

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

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.

93. Currently the sanction for non-compliance under the legislation is either for the Commission to make yet another order requiring the default to be made good, prosecution for a criminal offence (which is hard to secure and not within the Commission's control or ability to prosecute itself) or disobedience of an order (requiring the Commission to bring contempt of court proceedings). These are not always proportionate responses.
94. As a result the Commission is increasingly interpreting such non-compliance as an act of misconduct, which may trigger the use of one or more protective or remedial powers. The Commission has been challenged in the past about its decision to remove a trustee, where one of the grounds relied upon was non-compliance with a Commission order. The Tribunal upheld that aspect of the Commission's decision, so its approach is tried and tested. However, a small amendment to the legislation on this point would put the matter beyond doubt (and ensure the efficient use of Commission resources).
95. A new sanction should make clear that failure to comply with a Commission order or direction is a serious matter, that is to say an act of mismanagement or misconduct which justifies the use of the Commission's other compliance powers such as opening an inquiry, issuing a direction or even trustee disqualification or removal.

QUESTION

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

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

96. A new power to issue an official warning for non compliance with the provisions of the Act and/or fiduciary duties (appealable to the Tribunal), accompanied by a power of direction that the trustees take corrective action if the non-compliance has not already stopped or if it has, being officially warned not to do it or allow it to occur again. This power would be for 'medium' range abuses where the Commission's protective powers could be used but it is not likely to be proportionate to do so. The Commission would use this for breaches of provisions under the Act or of sufficiently serious breaches of fiduciary duty (i.e. actions that may amount to misconduct and/or mismanagement or putting charity property at serious risk).
97. There is an argument that the Commission can do this now by way of correspondence or in an Action Plan, under its power to give general advice and guidance (s15(2) Charities Act 2011), but this is not enforceable (under s.335 Charities Act 2011). The same power is used in an enabling context to give advice to charities about how to do something like enter into a business arrangement. Having a separate power specifically making clear it is about

rectifying non-compliance or preventing non-compliance in the future will imbue the warning and direction with much-needed gravitas and status, particularly where the Commission can draw attention to the provisions of s.335 Charities Act in the event of non compliance. Such a power could also be used to deal with persistent late-filing of accounts and reports.

Example

On visiting a charity the Commission identified that they carried on the walls several images of the founder and leader (who had been imprisoned on charges of “formation of armed gangs”), and other members of an organisation that is both designated by the European Union and proscribed under the Terrorism Act 2000. They also had on display literature supporting the founder and calling for his release. The trustees claimed this did not support terrorism or a political party, but was rather promotion of their culture and history, and were reluctant to take them down of their own accord (they claimed for fear of upsetting their beneficiaries). The Commission informed the trustees that it is unacceptable to show support for a terrorist organisation and any of its candidates, and that it considered the trustees have been failing to discharge their statutory duties and should immediately remove the images and literature from the premises. In such circumstances, use of a power to issue an official warning, coupled with the making of a direction under s.84 (see above), would formalise the Commission’s engagement with the charity and its trustees and emphasise the serious nature of the Commission’s concerns, whilst giving notice of the likely consequences of further non-compliance (i.e. the opening of a statutory inquiry) and access to the full range of the Commission’s protective and remedial powers.

QUESTION

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

A new power to direct a charity to close down

98. Currently the Charity Commission can only remove a charity from the Register of Charities if it ceases to operate or exist (which is relatively common) or if can be proven to be a sham i.e. it never was a charity in the first place (which is rare). The only other way a charity would effectively cease to exist by action of the regulator would be where the Charity Commission exercises powers in s79(2) Charities Act 2011 to make what is called a “remedial scheme” for an unincorporated charity to vest its assets in another charity (the trustee body and the shell of the charity might continue to exist) or in the case of a charitable company, exercising the power to apply to the court under s.113 with the Attorney General’s consent on limited grounds (insolvency) to wind it up. Both processes are difficult and take a long time to implement. Currently, a direction to wind up cannot be made under existing (s.84 Charities Act 2011) powers as the requirement that the action being directed (i.e. winding up) is expedient in the interests of the charity can never be met.

99. However, there are some cases where rather than attempt to get a charity back on its feet following misconduct or mismanagement or where there is serious risk to charity property, it would be more appropriate (and represent a more effective use of charitable resources) to direct a charity to transfer any remaining assets to another charity with charitable purposes as close as possible, and then to wind up the empty shell.

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.

100. This would be a new power to direct a charity and its trustees to wind up, and where necessary apply all of its net assets for charitable purposes by direction or scheme. The power would have to deal with all types of charities (companies, CIOs, trusts and unincorporated association). This new power would be limited to use where the Charity Commission had opened a statutory inquiry and where there is evidence of misconduct or mismanagement or the need to protect charity property. The Charity Commission would need to consider the use of the power proportionate in the circumstances and there would be a right of appeal to the Charity Tribunal.

101. This would not go as far as a specific power for the Commission itself to wind up a charity, which would interfere with the various statutory and court processes that would normally apply depending on the type of charity. However, this power would give the Commission greater ability in certain circumstances to effectively force a charity's winding up which it cannot do now, where there are concerns that the trustee body as a whole are not capable of remedying non compliance or abuse.

Example of a case where a power to direct the winding up of a charity could be used

The Charity Commission opened an investigation into the affairs of a charity because it had information to suggest that one of the two trustees was acting whilst disqualified, income and expenditure were being grossly misrepresented, funds were being misappropriated and false or misleading information had been given to the Commission. The Commission reported its concerns to the police, particularly in terms of potential criminal offences having been committed. In the course of the investigation the disqualified trustee ceased his involvement with the charity, leaving one remaining trustee. The remaining trustee was unable to explain the failures of governance, breaches of duty and misappropriation of funds and sought to distance herself from the charity and her responsibilities as a trustee. It was clear that the charity had for years been used as a vehicle for the personal benefit of the disqualified trustee (he was subsequently convicted of theft and providing the Commission with misleading information and imprisoned), and had, at best, made only nominal applications of funds for its charitable purposes. This being so, the Commission took the view that the charity should be removed from the register on the basis that it was not operating. It was clear that the remaining trustee was not prepared to act to formally wind up the charity, and the Commission was not able to direct that she do so; fortunately, the Commission was able to persuade the trustee to at least indicate to the police (who held seized funds) a charity to which the funds should be passed. In such circumstances, a power to direct a charity to wind up and apply its remaining property would have brought clarity to the situation and ensured that the cessation of the charity was brought about in an orderly fashion.

QUESTION

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

Part IV – Impact

Introduction

102. The Charity Commission’s proposed new or extended powers will only affect charities or their trustees where there is misconduct or mismanagement or risk to charity property, and the Commission considers that the exercise of the power is a proportionate and appropriate response.

103. As has already been stated, there are important safeguards that would apply in the exercise of the proposed new and extended powers. Waiver provisions would apply in relation to the disqualification provisions, supporting the rehabilitation of offenders. The exercise of the Commission’s powers would be subject to its duty to follow best regulatory practice (incorporating, for example, proportionality). The Commission would also have to issue a statement of reasons in exercising its new or extended powers. They would also be subject to the Commission’s decision review process, or appeal to the Charity Tribunal.

104. The Charity Commission has estimated the number of cases in which it expects it would exercise each of these new or extended powers each year. This is set out below.

Proposed Changes: Charity Trustees

Proposal 1 - Automatic disqualification from Trusteeship

105. All those people convicted of offences in the proposed list would be disqualified persons. However, only some of these will be trustees at the time of their convictions. The Commission estimates that this may produce between 30-50 cases per year where this is an issue.

Proposal 2 - A new power for the Commission to disqualify a person from charity trusteeship

Option 1 – a limited power to disqualify

106. Over the last five years, the Commission used the power of removal on 7 occasions. However, given the cases that have arisen where the Commission might have used this power, it estimates that the power may be used up to 8 times a year.

Option 2 – a broad power based on fitness

107. On the same basis as above, but assuming that this option would give more scope than option 1, it is estimated the power might be used one or two more times than above, i.e. up to 10.

Other provisions relating to trustee disqualification

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

108. This would allow the Commission to act more quickly and effectively in existing enforcement cases. Awareness of this power – which the Commission would highlight - would itself be likely to be a significant help and the Commission estimates that it would reduce non-compliance to perhaps 100 - 200 cases. In those cases the Commission would consider use of this power on a case by case basis and estimates that it would give notice of its intention to act in around 80 cases. The Commission expects that stage would produce further resignations to avoid formal action leaving perhaps half of the cases – 40 – in which the Commission may actually need to continue and use the power.

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

109. The Commission expects these changes to be relevant to 1 or 2 cases annually.

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

110. This would affect the individuals disqualified or removed by the Commission under its powers and follows the estimates above.

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

111. Of the c160,000 registered charities, it is estimated that 3,500⁴ charities have a corporate trustee. It is likely that this provision would affect only one or two cases a year maximum.

Proposal 7 - Amend the existing power to remove a trustee (or other officer holder) where there is misconduct or mismanagement OR a need to protect charity property.

112. Over the last five years, the Commission used the power of removal on 7 occasions. However, given the cases that have arisen where the Commission might have used this power, it is estimated that this may impact one or two cases a year.

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

⁴ This figure is an estimate because the data we hold is unreliable.

113. In the Charity Commission's experience there are one or two cases per year in which an individual avoids removal by resigning. The Commission therefore estimates that this power would enable it to take action against an additional one or two unfit trustees each year.

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

114. There are on average two or three compliance cases being investigated which involve connected charities. It is therefore estimated this would impact on one or two cases a year.

Proposed changes to other Charity Commission compliance powers

Proposal 10 - Power to direct specific action where there is misconduct or mismanagement OR there is a risk to property without the need for a statutory inquiry

115. There are a number of cases where this could have been used. It is estimated that this power would be considered in between 5 and 10 cases outside of an inquiry in any year.

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

116. The Commission has used the power of restricting transactions under s.76(3)(f) three times since 2011 and the power of direction under s.84 24 times for positive reasons. If the s.84 power is expanded as proposed to be used outside of inquiry, its use would increase. It is estimated that this power may be used up to 5 times annually.

Proposal 12 - Power to direct application of charity money to another charity when individuals are unable to apply money properly (currently power only available when they are "unwilling").

117. It is estimated this may be used up to 2 or 3 times annually.

Proposal 13 - A new power to enable the Charity Commission to 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 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.

118. It is estimated that this power may be used in one or two cases annually.

Proposal 14 - Extend existing power to enable the Charity commission to direct banks to notify the Commission of certain movements on a bank account

119. The Commission made 195 orders under s52 to compel information, mainly from banks. In the first 6 months of this financial year, the Commission has made 148 orders. It is likely to be used in cases where the Commission is interested in specific transactions (e.g. cash payments or to particular organisations or individuals. It is estimated this may be used in between 50-100 cases.

Proposal 15 - Breach of a Commission order or direction is in itself an act of misconduct and if not remedied can lead to disqualification as a trustee.

120. It is estimated this may arise in serious cases 2 or 3 times annually.

Proposal 16 - Ability to issue warnings.

121. Potentially this power may be used as a proportionate remedy /outcome in non inquiry cases and to ensure future compliance and if so it may be used initially in 20-30 cases a year but if it were to prove an effective remedy to prevent more serious abuse or non-compliance, this figure could increase over time.

Proposed Changes: A new power to direct a charity to close down

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

122. In the last year, the Commission in the course of its investigatory and monitoring work removed nine charities from the Register because they ceased to exist or were no longer operating. This power is limited to use in an inquiry and it is estimated this may be used in one or two cases each year.

Impact on charities

123. The proposals will only affect charities where there is mismanagement or misconduct, or risk to charity assets, and where the Charity Commission considers that use of the relevant power is a proportionate response in the circumstances. The proposals would not add any regulatory burdens for the vast majority of legitimate charities.

124. These proposals will support public trust and confidence in the effective regulation of charities.

Impact on Decision Reviews and Appeals to the Charity Tribunal

125. In 2012-13 the Charity Commission made 216 orders or directions under its compliance powers (including 195 bank account monitoring orders). In 2011-12 it

was 188, and in 2010-11 it was 208. In 2012-13 there were no decision reviews undertaken by the Charity Commission relating to its compliance powers, in 2011-12 there were four reviews of compliance power decisions, and in 2010-11 there were also four reviews of compliance power decisions.

126. In 2012-13 no compliance power decisions were appealed to the Charity Tribunal, in 2011-12 there was one appeal, and in 2010-11 there were no appeals.

127. The Charity Commission estimates that if all of the changes proposed in this consultation were to be implemented, it would make an additional 115 directions or orders each year under its compliance powers. The existing rate of decision review relating to compliance orders or directions is 6% (13 out of 216). However it would be prudent to anticipate that with more effective powers the rate of decision reviews or appeals could increase. We therefore estimate a 10%-20% range for the purposes of this assessment, which would lead to an additional 12-24 decision review cases each year as a result of the proposed powers.

128. There have been only 10 cases before the Charity Tribunal relating to the use of the Charity Commission's compliance powers since the Tribunal was established in 2009 (out of a total of 39 appeals/reviews lodged with the Tribunal), only once have Charity Commission's compliance decisions been overturned on appeal. We estimate that the extended / new powers in this consultation would add three to five new cases to the Tribunal case-load each year.

QUESTION

Q22) 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?