



Explanatory statement

The discretionary disqualification power: power to disqualify from being a trustee

Introduction

This explanatory statement sets out the Charity Commission's ('the commission's') approach when making decisions about the use of the power introduced by the Charities (Protection and Social Investment) Act 2016¹ to disqualify persons from being trustees and, consequently², from senior management functions in charities. This power is commonly referred to as the 'discretionary disqualification' power.

This explanatory statement focuses on the 3 statutory criteria that must be met before the commission can exercise the power to disqualify charity trustees or trustees for a charity. It also explains how the commission will approach making decisions about the disqualification period.

The commission may update or amend this statement in the light of its regulatory experience and/or decisions of the Tribunal or courts.

Discretionary disqualification: the power

The discretionary disqualification power enables the commission, by way of order, where the 3 statutory criteria are met, to disqualify a person³ for a period of up to 15 years.

In doing so, the commission is acting to protect either all charities, specific charities or classes of charities from being run by persons whose conduct shows that they are unfit to be trustees. A disqualification order will aim to protect trustees, employees and volunteers of charities as well as the beneficiaries, donors and the public.

The commission will exercise this power in furtherance of its statutory objectives, general functions and general duties. As with the use of all of its powers, the commission will have regard to its public law duties, the duties that may arise under the Equality Act 2010 and the Human Rights Act 1998. The commission is required to have regard to the principles of best regulatory practice - to be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.

If a disqualification order is made, the impact will differ in each case: a disqualification order can be made to disqualify the person from acting either in relation to all charities, specified charities or a class of charities and can be made for any period up to 15 years (although the period of time for the disqualification in each case must be proportionate in the circumstances).

1 The power is now in the Charities Act 2011 and any references to the Act in this explanatory statement are to the Charities Act 2011.

2 Unless otherwise specified in the disqualification order.

3 Person also includes a corporate body.

If a disqualification order is made, while a person is disqualified, they will also be disqualified from holding senior management functions (whether paid or unpaid) within the charity or charities concerned unless the commission includes an exception in the disqualification order that this is not the case. Given the potentially substantial impact a disqualification order might have on a person holding employed positions, the commission will actively consider whether or not the disqualification order should contain such an exception in each case.

This power also enables the commission to suspend a person pending disqualification and it will notify the person and trustees accordingly if this is the case.

Safeguards

There are a number of important safeguards built into the use of this power:

- the commission must give the person at least one month's notice of its intention to make a disqualification order in respect of them and the person must be invited to make representations on the proposal; the notice will include the commission's reasons for using the power
- if the person is known or believed to be a serving trustee of a charity, the commission must also give notice to each of the other trustees of that charity
- if the person is known or believed to be a serving trustee of a charity, the commission must give public notice of its proposals, inviting representations, unless it is unnecessary to do so
- the commission must take into account any representations received during the relevant period before it makes a final decision in respect of the disqualification order
- a statement of reasons will be provided when the disqualification order is made setting out the grounds for the making of the order
- if a disqualification order is made, the person has the right to appeal it to the first-tier Tribunal (charity) ('the Tribunal')
- the person can apply to the commission for an order to vary or discharge the disqualification order
- the commission may discharge a discretionary disqualification order with or without a request from the person; any decision to discharge a disqualification order will be informed by the commission's policy on applying for waivers for automatic disqualification
- the disqualification order (at the earliest) takes effect after the period of 42 days for appealing to the Tribunal expires

The 3 statutory criteria that must be met

The commission can only use this power if it is satisfied that each of the following 3 statutory criteria are met.

1. At least 1 of 6 'conditions' (A to F), which are set out in the Act, is/are met.
2. The person is unfit to be a trustee⁴.
3. The disqualification order is desirable in the public interest in order to protect public trust and confidence in charities⁵.

The statutory criteria are as set out in the legislation. The commission has no power to define or expand them further and nor can the commission fetter its discretion as a public authority by confirming categorically in what circumstances and when it will or will not use the power. The commission will use the ordinary meaning of the language used in the Act, applied on a case by case basis.

It is therefore not possible to give an exhaustive list of factors the commission may, must or must not have regard to when deciding whether the statutory criteria are met, and in exercising its discretion as to whether to make a disqualification order. In accordance with ordinary public law principles, the commission must consider all relevant factors and must not consider irrelevant factors. Each case will be considered on its own merits. The relevant and irrelevant factors will vary between cases, even similar cases, and decisions will turn on the facts and circumstances of the case. As with the use of its other powers, in any given case the commission needs to be satisfied on the facts that there are sufficiently serious and substantial grounds that make it necessary or desirable to act.

However, in broad terms the commission considers that this power is aimed at disqualification of persons from being a trustee when their conduct, whether in relation to a charity or more generally, is such that there is a public interest in making a disqualification order so as to protect public trust and confidence in charity. The power will aim to ensure that charities are protected from persons who are not fit to run a charity and who pose a risk of damage or loss to its activities, beneficiaries and public trust and confidence. Whilst providing protection, in some instances it may also serve as a deterrent for further or wider improper conduct in the sector.

To help charities, trustees, and their advisers, we have provided an indication of the types of factors the commission is likely to consider under each statutory criterion when deciding whether such criterion is met.

Statutory criterion 1: At least 1 of 6 'conditions' must apply

The conditions are listed in the Act itself, described as conditions A-F. They describe the conduct or circumstances that might affect a person's fitness to act.

The commission considers that it will either be a matter of fact whether a condition is met or will require the commission to form its view, by reference to, or analysis of, certain facts, as to whether a condition is met.

Condition A: a person has been cautioned for an offence against a charity or in the administration of a charity for which a conviction would bring automatic disqualification.

A caution is a formal warning that is given to a person who has admitted a particular criminal offence. If the person refuses the caution then they will normally be prosecuted through the normal channels for the offence.

⁴ This may be generally or in relation to a charity or class of charity.

⁵ This may be generally or in relation to a charity or class of charity.

This condition will involve looking at the facts of each case to see whether or not (and when) the caution was given and whether it is one that would have been a disqualifying offence if it was a conviction.

The caution must relate to an offence against the charity or in the administration of the charity. Cautions which do not relate to a charity or would not bring about automatic disqualification would not meet condition A.

Cautions which occurred before 1 October 2016⁶ are caught by condition A.

Condition B: the person has been convicted of an offence in another country (outside the UK) that:

- is against, or involves the administration of, a charity⁷, and
- if it had been committed in the UK, would have been an offence which brought automatic disqualification from being a trustee

Condition C: a person has been found by HMRC not to be a ‘fit and proper person’ to be a manager of a body or trust⁸.

HMRC is the body that makes a decision as to whether a person is considered not to be a ‘fit and proper person’ to be a manager of a body or trust for the purposes of charity tax law. It has published detailed guidance on this.⁹

Before this condition can be met, HMRC must have made a finding that the person is not a fit and proper person. The commission will seek confirmation of this from HMRC.

Condition D: a trustee, officer, agent or employee of a charity was responsible for, contributed to or facilitated misconduct or mismanagement in a charity or the person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it.

The commission will need to be satisfied that there has been misconduct or mismanagement in the administration of a charity. Misconduct and mismanagement in the administration of the charity is already a term used by the commission. It is already in the Act and relevant to many of the commission’s other existing compliance powers.

Misconduct includes any act (or failure to act) in the administration of the charity where the person committing it knew (or ought to have known) that it was criminal, unlawful or improper. Mismanagement includes any act (or failure to act) in the administration of the charity that may result in charitable resources being misused or the people who benefit from the charity being put at risk. A charity’s reputation may be regarded as property of the charity.

Part of this condition is the extent to which the misconduct or mismanagement is linked to the person. This is similar in that respect to the power the commission has to remove a person from their specific and current post of trustee in a charity under section 79 of the Act. There must be a specific link between the person and the misconduct or mismanagement.

⁶ The date the power came into force.

⁷ The meaning of charity for condition B includes an institution that is a charity under the law of any part of the UK (this would include a charity that is not registered with the commission as well as those recognised by the charity regulators of Scotland and Northern Ireland) and those set up under the law of another country which are ‘established ... principally for charitable, benevolent or philanthropic purposes’.

⁸ For the purposes of paragraph 4 of Schedule 6 to the Finance Act 2010 (which deals with taxation issues and charity).

⁹ **Guidance on the fit and proper persons test.**

In deciding whether condition D is met, the commission will need to be clear about the acts of misconduct and/or mismanagement and how the person was (i) responsible for it, (ii) knew about it and failed to take any reasonable steps to oppose it or (iii) contributed to or facilitated it.

Condition E: an officer or employee of a corporate trustee was responsible for, contributed to or facilitated misconduct or mismanagement in a charity or the person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it.

The most common form of corporate trustee are charitable companies and local authorities appointed as a trustee, often as a sole trustee, of a charity. A corporate trustee can only act through its officers and employees and, in practice, either all or a specific number of officers in corporate trustees have responsibility for making decisions about a charity.

This condition largely mirrors condition D. It applies to situations involving persons employed by, or who were an officer of, a corporate trustee and who, in the particular circumstances, made the decisions or were behind or at fault for the decisions of the corporate trustees which led to or carried out the mismanagement or misconduct in the charity.

Condition E applies where the person was an officer or employee at the corporate trustee at the relevant time of the misconduct or mismanagement. Persons who were appointed after any misconduct or mismanagement arose would not be caught. It also has to be shown that the person was somehow responsible for the misconduct or mismanagement, or they knew about it and failed to take any reasonable steps to oppose it, or their own conduct contributed to or facilitated it. The most obvious situation is where they were on the decision making committee.

The same comments and approach about establishing that there has been misconduct or mismanagement for condition D will be applicable under this condition. The commission will consider any aspects of corporate trusteeship in the context of, and the principles set out in, the commission's guidance OG38: Corporate trustees.

Condition F: past or continuing conduct, whether or not in relation to a charity that is, or is likely to be damaging to public trust and confidence in a charity or charities.

This condition relates to other conduct by a person which damages public trust and confidence in charities. The conduct in question can be past conduct or may be continuing conduct. The conduct is not confined to a charity; it can be conduct outside a charity in the person's professional or personal life. However, the conduct in all cases must, in the commission's determination, be damaging or likely to be damaging to public trust and confidence in charities generally or in the charity or classes of charity as specified in the proposed disqualification order.

The commission will need to identify and set out the conduct which might mean this condition is met. Conduct by a person can include an omission, a lack of action or abrogation of responsibility.

The commission will look at such conduct, which may relate to a particular incident or a sustained course of action, to consider whether it is damaging or likely to be damaging to public trust and confidence in charities.

There is no requirement that the person was at the time of the conduct, or is at the time the disqualification order is being considered, a trustee in order for the power to be used. The conduct does also not have to relate to charitable activity or even charity itself.

The commission acknowledges that it would have to identify how such conduct is or would be likely to be damaging to public trust and confidence in a charity or charities. 'Likely' denotes more than just a hypothetical or remote possibility.

In many situations, it will be self-evident that the conduct of the person is damaging or likely to be damaging to public trust and confidence in charity. This is more likely to be where the conduct in question occurred in the context of charity, perhaps by someone who was a trustee when the conduct occurred. In other cases, the damage or likely damage will need to be assessed by considering a number of factors, which will vary from case to case, depending on the conduct in issue.

When determining whether the conduct in question is, or is likely to be, damaging to public trust and confidence in charities generally, a specific charity or charities or class of charities for the purposes of condition F, the commission will have regard to a number of considerations, including, but not limited to:

- the seriousness of the conduct and circumstances in which it took place
- how long ago the conduct occurred
- whether the conduct occurred in the person's capacity or role in a charity or another fiduciary position
- whether the conduct would be considered misconduct or mismanagement in the administration of the charity (whether or not it occurred in the context of a charity or not) or put the property (including reputation) of a charity at undue risk
- whether the person is currently or likely to be a trustee or connected to a charity or charities

The commission will always consider the actual or likely damage to public trust and confidence on a case by case basis, taking into account all of the circumstances of the particular situation.

Types of conduct which might be caught by condition F include, but are not limited to:

- some convictions that do not result in automatic disqualification but, given the nature, seriousness and circumstances of the offence, it damages or is likely to damage public trust and confidence in a charity, for example, an animal cruelty offence by a trustee of an animal welfare charity or a child welfare or child related offence by a trustee of a children's charity
- regulatory breaches that have been established by another governmental or regulatory authority, for example legal requirements on tax, health and safety or data protection matters
- adverse findings of misconduct or unfitness by a professional, regulatory or self-regulatory body, for example the Fundraising Regulator, the Solicitors' Regulatory Authority or Bar Standards Board, the ACCA or ICAEW or the Financial Report Council
- dismissal for relevant, improper conduct from employment or from another fiduciary or public appointment

Statutory criterion 2: The person is considered to be unfit to be a trustee, either generally or in relation to a charity or charities or class of charity

If someone meets 1 or more of the conditions in the first statutory criterion, then the commission has to consider whether it is satisfied that the person is unfit to be a trustee, either generally or in relation to a charity or charities or a class of charity.

The word 'unfitness' is not defined in the Act. 'Unfitness' will therefore be given its ordinary English language meaning.

There would normally be some causal link or connection between the identified conduct and how that is, or is likely to, impact on the person's ability to be a trustee.

Conduct does not need to be deliberate. Non-deliberate conduct, for example conduct which is reckless, negligent, or done in wilful disregard, or failing to act, could demonstrate a person's unfitness to be a trustee.

It is not the commission's intention to make a finding of unfitness in relation to well-meaning persons who have made an honest mistake in good faith or who were well-meaning in what they did but made an error in judgment, whether whilst administering a charity or charitable funds or in the context of their work or personal life.

For the most part, trustees are unpaid volunteers who give up their personal time to do something for social good. The commission supports and encourages voluntary participation in charities, in accordance with its statutory duties, and does not want to penalise a person simply because they made a mistake or misjudgement, particularly if the impact is low or minimal.

However, the commission also has statutory objectives to promote trustees' compliance with their legal obligations and increase public trust and confidence in charities. It therefore needs to ensure that charities and other trustees are protected from those whose involvement with charity poses a risk to the charity, is damaging to the charity or to the sector. One aim of this power is to reduce the risk of and enable the commission to act before any misconduct or mismanagement by the person is committed in a charity.

It is not possible, when assessing questions of unfitness, to give an exhaustive list of the factors the commission must, may and must not have regard to when determining whether a person is 'unfit' within the meaning of the Act. It is therefore not possible to set out comprehensive standards of conduct which would justify the commission establishing whether the person was unfit to be a trustee.

The commission will consider all of the evidence it has in a particular case when considering unfitness, but it will pay particular regard to evidence concerning the person's honesty, integrity, competence to discharge their duties as a charity trustee or other conduct that affects their suitability, such as credibility to command as a trustee public trust and confidence in a charity or charities.

There may be situations that fall outside these which the commission will also consider on a case by case basis. The commission will have particular regard to, but will not be limited by, the categories below or the features under each category when considering the question of unfitness.

Competence

Competence ordinarily concerns a person's ability or preparedness to carry out and comply with the essential duties and responsibilities of a trustee to a reasonable standard. The commission will examine the extent to which a person has complied with the key duties set out in **The essential trustee: what you need to know, what you need to do (CC3)**:

- carrying out the charity's purposes for the public benefit
- acting in compliance with the governing document and the law
- acting in the best interests of the charity
- managing the charity's resources responsibly
- ensuring the charity is accountable
- acting with reasonable care and skill

The commission considers that conduct which shows the person has failed to comply with these or similar duties in a charity or in other fiduciary positions will call into question their competence to act. The commission recognises that the office of trustee is ordinarily a voluntary one and that there are no specified criteria setting out the qualifications for being a trustee or any prerequisite experience. However, the commission expects all trustees to have read and understood, and to comply with, the duties and responsibilities of trustees in The essential trustee (CC3). When assessing the competence category, the commission will take into account:

1. Any protected characteristics of the person under the Equality Act 2010.
2. Whether the person is a professional trustee.

With regard to (1), the commission wants to encourage a diverse range of people taking up trusteeship. As a public authority, the commission has a duty to consider how its decisions affect people who have protected characteristics under the Equality Act 2010. The presence of a protected characteristic does not of itself mean that a person is either fit or unfit to act as a trustee.

With regard to (2), where the person holds themselves out as, or is or has been, a professional trustee, it is reasonable to expect them to demonstrate a higher standard of care and skill as reflects the profession or expertise they profess to have. The commission will generally have regard to the threshold for the duty of care as set out in section 1 of the Trustee Act 2000 in that a trustee must exercise such care and skill as is reasonable in the circumstances, having regard in particular:

- to any special knowledge or experience he or she has or holds himself or herself out as having
- if he or she acts as a trustee in the course of a business or profession, to any special knowledge or experience it is reasonable to expect of a person acting in the course of that kind of business or profession

The commission will also take into account whether the person is or has been remunerated by a trust or charity because of this special knowledge or experience. If a trustee is remunerated, whether or not they hold themselves out to be a professional, the commission considers it is reasonable to expect them to demonstrate a higher standard of skill and care as represented by the level of remuneration.

When considering unfitness, the commission may take account of, and have regard to, whether and to what extent the conduct shows or involves a lack of competence on the part of the person including by:

- failure to comply with trustee legal duties where such failure is more than technical or minor, particularly where these are significant, persistent, deliberate, or in wilful disregard of the law or contrary to professional advice
- mismanagement of private affairs which demonstrate a person could not act to the standard of a prudent person of business in the conduct of their own affairs

Honesty or integrity

In making a decision about a person's unfitness, the commission will consider whether that person's honesty or integrity is undermined in a material way.

Being a trustee is a position of trust where the beneficiaries, donors and the public place trust in that person to discharge their legal duties. Trustees are responsible for looking after donors' money and so must set aside their personal and other interests and act honestly and with integrity. As such, conduct which impacts on honesty or integrity raises questions about someone's fitness to be a trustee.

Concerns about unfitness includes, but is not limited to, evidence that the person has abused a position, acted improperly or unlawfully, acted in breach of trust or misapplied charity or public funds or funds belonging to others.

When considering unfitness, the commission may take account of, and have regard to, whether and to what extent the conduct shows or involves a lack of honesty or integrity on the part of the person including by:

- a breach of trust in a fiduciary position or trust obligation, particularly if the conduct is deliberate, reckless, significant, persistent, or contrary to professional advice
- conduct which exploits a position of trust or responsibility for personal or financial gain or causes loss
- deceptive or dishonest conduct
- deliberately or recklessly misleading the public, a public body or regulator in a material way
- an abrogation of responsibility by way of taking no or minimal steps to discharge fiduciary responsibilities
- failing to act which enables others to engage in inappropriate conduct

Other indicators of unfitness

Conduct falling within conditions A-F may make a person unfit to be a trustee even where that conduct does not call into question a person's honesty, integrity or competence. Such conduct may be otherwise sufficiently serious that it calls into question a person's fitness to be a trustee because it impacts or is likely to impact on public trust and confidence.

When considering other indicators of unfitness, the commission may take account of, and have regard to, whether and to what extent the conduct identified in the condition(s) shows or involves a lack of fitness on the part of the person by:

- conduct by the person which is or is likely to impact adversely on the confidence and/or trust that beneficiaries, donors or members of the public have in them and their ability to carry out the role and duties of a trustee (whether presently a trustee or not)
- conduct by the person which damages their personal credibility and reputation in a way which may impact the confidence of beneficiaries, donors and/or the public and which puts or is likely to put the charity, its reputation and/or work at undue risk
- significant, repetitive or otherwise systematic acts of misconduct or mismanagement against or in the administration of a charity
- breach of a fiduciary or contractual obligation, without justification, in relation to a charity or otherwise
- reckless, negligent or deliberate disregard for compliance with the law or regulation
- repeated or persistent insolvency or administration of the person's businesses which calls into question their ability to properly manage the affairs of a charity
- conduct which shows a material risk of harm to the work of charities in general
- conduct or actions which are inimical to charity

Statutory criterion 3: the disqualification must be desirable in the public interest in order to protect public trust and confidence in charities generally or in a charity or charities or classes of charity

Once the first 2 criteria have been met, the commission will then consider whether it is in the public interest to protect public trust and confidence to make the disqualification order. As the commission will have already identified 1 of the conditions and relevant conduct and concluded that the person is unfit, it will not ordinarily be necessary to re-examine in detail these aspects again under the public interest aspect of the test. However, they will form evidence from which, in part, this criteria will be assessed.

This statutory criterion provides a filter for circumstances in which the disqualification would serve no useful purpose or is otherwise not justified on public interest grounds. The commission will take account of circumstances where it is not desirable in the public interest to make a disqualification order in the particular case, even if there are concerns about the person's fitness to be a trustee.

The public interest test will ensure that in making a disqualification order the commission is acting to address a genuine risk or concern. This means that the commission will assess what the impact of making a disqualification order would be for both the charity or charities concerned and the sector generally.

The public interest test involves a balancing test whereby the commission will look at the facts of the case, the impact of the person's conduct on trust and confidence as well as other factors that may affect the protection of public trust and confidence in charities generally, a specific charity or charities or classes of charity.

When determining whether making the disqualification order is desirable in the public interest in order to protect public trust and confidence in charity or a class of charity, the commission may take account of (where relevant) a number of factors. What factors are relevant will vary from case to case, but they may include:

- the nature and seriousness of the conduct including whether it was deliberate or negligent conduct
- the extent of the unfitness and whether it might be temporary or time specific
- how long ago the event or conduct took place to which the unfitness relates
- whether the person profited from the conduct
- the impact of the conduct including who and how many people were affected by it
- adverse or positive public reaction to the conduct and/or whether the conduct relates to an issue of public importance
- if the conduct or act involves a charity, the impact on the standing of the charity and the integrity of charity generally if the person is free to become, or continue, as a trustee of the charity
- if the conduct or act involves a charity, whether it is reasonable to conclude that the person has acted in a way that they knew or should have known was likely to adversely impact their personal reputation, or that of a charity, charities, classes of charities or charities generally
- any adverse impact on or risk posed to charity including risk to charity property; it could also include impact on a charity's:
 - current and future funding
 - access to services
 - ability to carry out certain activities, with particular regard to those that are high risk or engage vulnerable beneficiaries
 - reputation
 - prominent or high profile persons, such as trustees, founders, employees, volunteers, patrons or sponsors

The commission will also take into account whether and to what extent any of the following features are present and might lean towards it not being in the public interest to make a disqualification order:

- the person has never had and is not likely to have a relevant relationship with charity
- there is no likelihood or prospect of the person concerned seeking to be a trustee based on current information
- the conduct and its impact was exacerbated by circumstances outside the direct control of the person
- infirmity due to age or terminal illness
- the person is subject to automatic disqualification and it is unlikely that anything would be gained from making an order for discretionary disqualification
- evidence that a trustee's continued involvement in a particular charity as a trustee is important; the commission may go on to consider excluding that particular charity or particular positions in the scope of a disqualification order (in accordance with powers in section 181A(2)(b) of the Act)

- no additional protection for charities, trustees, employees and volunteers of charities, beneficiaries, donors and/or the public would be achieved by a disqualification order
- the disqualification order will not achieve the purpose of protecting public trust and confidence in charities
- where 1 of conditions A or B is met but the public interest would not be served by the making of an order because of issues relating to:
 - the seriousness of any offence and the circumstances in which it was committed
 - particular circumstances as to why a caution was offered or accepted
 - concerns about any court or other legal processes, or compliance with the right to a fair trial
 - whether the standards of evidence and justice for any overseas actions or convictions would be likely to be accepted in a UK or European court
- the direct or analogous applicability of the Rehabilitation of Offenders Act 1974
- where condition C is met, and there is a finding by HMRC that the person is not a fit and proper person using condition C, the commission may:
 - request information from HMRC about why they made a finding the person is not a fit and proper person to be a manager of a charity under tax law
 - consider when the finding was made
 - take into account what and how much information has been or can be provided to the person by HMRC about why HMRC made their finding and are considered not a fit and proper person
 - consider any information provided by HMRC in relation to any finding made by them relevant to whether they are unfit for the purposes of the Charities Act 2011

Any of these features which apply in a particular case will need to be balanced against the need to protect other trustees, beneficiaries and charities from people who are considered to be unfit. The factors which led to the assessment of unfitness would also be taken into account as a part of balancing the factors listed previously.

Scope of the disqualification

A charity or charities

This power provides that the commission can disqualify a person from being a trustee in relation to all charities or in relation to such charities or classes of charities as it specifies in the disqualification order.

This will be informed by considerations which have already been made in deciding whether the person is unfit (criterion 2) and whether it is desirable in the public interest to protect public trust and confidence (criterion 3). The commission will take all relevant factors into account in deciding the scope of the disqualification and this will be reflected in the disqualification order which is made. The scope of the disqualification order will be determined by the requirement in the public interest criterion to protect public confidence in charities generally or in classes of charity.

Any disqualification order will apply to being a charity trustee or trustee for any charity, registered, unregistered, exempt or excepted, subject to the scope of the disqualification provided in the order. It will also apply to trusts of money for example holding funds raised for a charity.

Senior management functions

If a disqualification order is made, a person is also disqualified from holding senior management functions (whether paid or unpaid) within the charity or charities concerned, unless the commission includes an exception in the disqualification order that this is not the case.

Given the potentially substantial impact a disqualification order can have on a person holding employed positions, the commission will specifically consider whether or not the disqualification order should contain an exception in each case. It will also specifically invite comments and representations from the person about the impact any disqualification that includes senior management functions (paid or unpaid) will have on them.

The commission will consider the impact on the person in each case and whether the disqualification order should, in all the circumstances, extend to disqualification from holding office or employment in a charity with senior management functions. The commission recognises that there may be employment and contractual consequences in so doing and therefore will ensure its actions remain consistent with the principles of best regulatory practice, which is to ensure the action is targeted only where needed.

The period of disqualification

In cases where the 3 statutory criteria have been met and the commission decides to make a disqualification order, it will need to decide on the appropriate length of the disqualification, up to a maximum of 15 years.

The disqualification order must specify the period the person is disqualified for. The period:

- must be not more than 15 years, beginning on the day the order takes effect, and
- must be proportionate, having regard in particular to the time when a conviction becomes spent, or where condition B applies, would become spent if it were a conviction for the relevant disqualifying offence and to circumstances in which the commission may or must grant a waiver if it were an automatic disqualification

In considering the length of the disqualification period, the commission will consider the seriousness of the conduct which gives rise to the disqualification and of the risk to and its impact on a charity or charities. To determine this, the commission will look at all relevant information received, the facts of each case that led to the criteria for disqualification being met and the consequences to the charity in question.

When deciding on the period of disqualification, the commission may take account of (where relevant) a number of factors. What factors are relevant will vary from case to case, but they are likely to include:

- the gravity of the conduct giving rise to the assessment of unfitness
- the extent, nature and duration of the risk that the person poses or may pose to the charity, class of charities or charities generally
- the level of knowledge or culpability on the part of the person whose conduct is identified as unfit
- the extent of any loss to a charity or charities caused by the conduct
- the extent of any damage to a charity or charity's reputation caused by the conduct
- any considerations which relate to the Human Rights Act 1998 and Equality Act 2010
- the limits imposed by the Rehabilitation of Offenders Act 1974 and in particular whether a conviction or caution relied upon to satisfy the conditions under the Act would become spent during a potential period for disqualification and, if so, at what stage

The 3 bands for disqualification

In considering what is proportionate in any particular case, the commission will use as a reference point 3 disqualification 'bands' as an aid to inform its decision on the length of disqualification. The bands are not provided for by statute and will be applied on a case by case basis. The following are some examples of the types of cases that are likely to fall within each of the 3 bands.

Upper (over 10 years and up to 15 years)

This band will be reserved for particularly serious cases, where, in light of the factors identified previously:

- the person poses a serious risk to the charity or charities, class of charities or charities generally, which in turn poses a serious threat to public trust and confidence
- there is significant level of culpability on the part of the person whose conduct is identified as unfit
- there is or was significant loss to a charity or charities caused by the conduct
- the extent of any damage to a charity or charity's reputation caused by the conduct is significant
- fraudulent and dishonest conduct
- deliberate or grossly negligent conduct
- reckless or grossly negligent disregard for compliance with charity law or other laws as they apply to charities
- conduct in multiple conditions is established
- conduct that indicates total incompetence in the person's ability to discharge the duties of a trustee

Middle (5-10 years)

This band will apply to serious cases which do not merit consideration in the upper band. This is likely to include cases where the person's culpability or the risk or loss to charity is serious but not so serious as to justify the upper band, where, in light of the factors identified previously:

- the person poses a sufficiently serious risk to the charity or charities, class of charities or charities generally, which poses a moderate threat to public trust and confidence
- there is evidence of culpability on the part of the person whose conduct is identified as unfit
- there is or was moderate loss to a charity or charities caused by the conduct
- the extent of any damage to a charity or charity's reputation caused by the conduct is moderate
- the person's conduct shows disregard for compliance with charity law and the duties of trustees
- other reckless, negligent or incompetent conduct

Lower (less than 5 years)

This band will apply where the commission has decided that the circumstances of the case are serious enough to meet the tests for using its power to disqualify but a relatively short period of disqualification is proportionate where, in light of the factors identified previously:

- the person poses some risk to the charity or charities, class of charities or charities generally, which poses some threat to public trust and confidence
- there is some level of knowledge or culpability on the part of the person whose conduct is identified as unfit
- there is or was some loss to a charity or charities caused by the conduct
- there is some damage to a charity or charity's reputation caused by the conduct

Aggravating and mitigating features

When deciding on the proportionate period of disqualification, the commission may take account of (where relevant) the existence of any aggravating or mitigating features to determine whether the banding is correct and, if so, at what point in the band the period for disqualification should sit.

Aggravating features, if present in an individual instance, would tend to indicate either a higher level of culpability on the part of the person or a greater than usual degree of harm or risk caused by the conduct.

Common aggravating features which are likely to be relevant to all bands will include the following:

- the person engaged in conduct which was intended, planned or deliberate
- the person engaged in conduct which was sustained, repeated or over a significant period of time
- a person meets more than 1 of conditions A-F
- the conduct displayed, or continues to display, a persistent disregard for compliance with charity law
- the person received significant personal benefit or intended to receive significant personal benefit as a result of the conduct

- the person has previously been removed by the commission under section 79 of the Charities Act 2011 or has previously been disqualified from being a trustee (this includes disqualification under this power (section 181A of the 2011 Act) or automatic disqualification under section 178 of the 2011 Act)
- the person attempts to mislead or hide relevant information from the commission
- the conduct has resulted in financial loss to a charity or body or person to whom the person owes a fiduciary relationship
- the person engaged in conduct that was unjustifiably contrary to professional advice they received
- in connection with conditions A and B, where the person has more than one relevant previous unspent caution or conviction and a pattern of repeat conduct is evident
- the person's conduct has caused serious reputational damage to a particular charity, charities or charities generally
- where the conduct has caused loss or harm or damage to more than one charity or to a wider community
- where the conduct demonstrates a deliberate targeting of vulnerable beneficiaries

Mitigating features, if present in an individual instance, would tend to indicate either a lower than usual level of culpability on the part of the person or that the harm or risk or loss caused by the conduct is less than usually serious.

Common mitigating features which may indicate that a shorter period of disqualification is merited and which are likely to be relevant to all bands will include the following:

- the person has acted in good faith
- the person's involvement in or facilitation of loss caused to the charity was minor
- genuine and unprompted attempts to remedy the breach have been made by the person
- no or minimal financial or reputational loss has been caused, or is likely to be caused, to the charity or to the sector
- the person concerned brought the issue proactively to the attention of the commission
- the person concerned has co-operated fully and willingly with the commission
- evidence of previous and/or subsequent good conduct in relation to managing the charity
- evidence of previous and/or subsequent good conduct managing other charities
- the advanced age or terminal ill health of the person, in particular where this contributed to the relevant conduct
- professional advice was taken and acted upon
- support from the charity they are involved with or due to be disqualified as acting as a trustee of
- if reliance is made on a finding or disqualification of another regulator, the relevant period of disqualification is short

The period must be proportionate given the particular facts and circumstances of the case and sufficiently meaningful given the underlying objectives to act to protect charities and trustees from someone who is unfit to act.