



Questions and answers

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

These Q and A provide information about the commission's new power to disqualify¹.

The commission has produced these Q and A to help trustees and those concerned about when the commission might use this power, to understand the explanatory statement which sets out the commission's approach to using the discretionary disqualification power. The Q and A also provide information about the more practical side of the process for making an order and the consequences of disqualification.

The power to disqualify and when the commission will use it

What is this power?

The power enables the commission to make a disqualification order where the 3 statutory criteria, set out in section 181 (A) of the Charities Act 2011, are met. The disqualification order will state whether the person is disqualified in relation to all charities, specified charities or a class of charities. The period of disqualification depends on the seriousness of the case but can be for a maximum of 15 years.

The effect of being disqualified is that the person is prevented from being or acting as a charity trustee, or a trustee for a charity, in relation to those charities specified in the disqualification order. While a person is disqualified they will also be disqualified from holding positions with 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.

Why does the commission need this power?

Before this power was introduced, the commission's ability to prevent persons from controlling or influencing charities where they were clearly unfit to do so was extremely limited. The commission could only remove a person actually in a role in a charity who committed misconduct or mismanagement in that charity, and only if they did not resign from the role, before the commission took action. This power is important as it will allow the commission to protect charities from those persons who have displayed conduct whether in

¹ See sections 181A, B, C and D of the Charities Act 2011: these were introduced by section 10 of the Charities (Protection and Social Investment) Act 2016 and came into effect on 1 October 2016.

the charity or outside of it, which calls into question their fitness to be a trustee, and would continue to be of serious concern if they continue to hold or take on the position of a charity trustee, trustee for a charity, or a senior management function in a charity. A disqualification order will aim to protect other trustees, employees and volunteers of charities as well as the beneficiaries, donors and the public from people who should clearly not be involved in a charity.

How is this power different to the commission's other powers to remove trustees?

This power differs from the commission's power to remove a charity trustee, officer or agent in section 79 of the Charities Act 2011 as:

- it is not confined to removing someone who is currently holding a role in a charity
- the conduct that gives rise to the concern is not confined to misconduct or mismanagement in that charity
- it does not require a statutory inquiry to be opened (inquiries can only be opened into charities, not individuals)
- there are different criteria to be met before using this power

However, as with the existing power of removal, advance notice must be given to the individual concerned and to the other trustees of any charity at which the individual is a trustee (see 'Will the commission be able to use the power without prior warning').

The commission will always make an assessment of which of its powers is the most appropriate and proportionate to use in the circumstances of the case.

When will the commission use this power?

The commission will only use this power in cases where it is satisfied on the facts that there are sufficiently serious and substantial grounds that make it necessary or desirable to act: this is the commission's approach to the use of any of its compliance powers. The commission can only use the power where the 3 following statutory criteria have been met:

1. At least one of the 6 conditions applies.
2. The commission is satisfied the person is unfit to be a trustee.
3. The commission is satisfied it is desirable in the public interest to make the disqualification order to protect public trust and confidence in charity or charities.

As with any of the commission's powers, before using this power the commission will also have regard to equalities and human rights considerations and the principles of best regulatory practice.

Will the commission be able to use the power without prior warning?

Although there could be cases where the commission has not had any regulatory engagement before using this power, this is unlikely: if the commission has concerns about someone which are so serious it raises questions about their fitness to be a trustee, it will usually already have been in contact with them.

In all cases before the power can be used, the commission has to:

- give at least one month's notice to the person it is proposing to disqualify inviting representations within the period specified in the notice
- give notice to the other trustees of any charity where the person is also a trustee
- give public notice of its proposals inviting representations within the period specified in the notice, unless it is satisfied that giving public notice is unnecessary

Even where the commission decides to make a disqualification order after the notice period has ended and after considering any representations made, the order does not take effect to disqualify the person until at least a further 42 days from the date of issuing the order have elapsed. This is so the person has a chance to appeal to the Tribunal.

The commission will, however, be able to (as an interim measure) suspend a person from acting as a trustee once it has given notice of its intention to disqualify.

The criteria that must be met for making a disqualification order

How many of the criteria need to be met?

All 3 of the statutory criteria must be met for the commission to use this power:

1. At least one of the 6 conditions applies.
2. The person is unfit to be a trustee.
3. It is desirable in the public interest to make the disqualification order to protect public trust and confidence in charity or charities.

What are the 6 conditions in criterion 1?

The 6 conditions are set out in the first criterion: if the commission considers that at least one of them is met, it will then assess whether the second and third criteria apply. The 6 conditions are:

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.

Condition B: a person has been convicted of an offence in another country that:

- is against, or involves the administration of, a charity or similar body, and
- if committed in the United Kingdom would bring automatic disqualification from acting as 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 trust.

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.

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.

Condition F: other 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.

More details about these conditions are in the **explanatory statement**.

How does the commission decide if a person is unfit to be a charity trustee (criterion 2)?

If someone meets one or more of the conditions in the first statutory criterion, then, if the commission considers that it may need to use its disqualification power, it must 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.

‘Unfitness’ is not defined in the Act and so has the meaning used in ordinary language. It is not possible to give an exhaustive list of the factors the commission must, may and must not have regard to but the commission thinks that there would normally be some causal link or connection between the conduct of concern and how that is, or is likely to, impact on the person’s ability to be a trustee. The conduct does not need to be deliberate. It might be reckless, negligent or a failure to act that demonstrates a person’s unfitness. The commission will look at all the evidence in a case when considering the fitness of that person to carry out the duties of trusteeship, whether or not they are or have been a trustee. It will pay particular regard to concerns about the person’s honesty, integrity, competence to discharge their duties as a charity trustee or trustee for a charity, or to other conduct that affects their suitability, such as credibility to command as a trustee public trust and confidence in a charity or charities - as described in the explanatory statement.

The commission does not intend 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. The commission does not want to penalise a person simply because they made an honest mistake or misjudgement, particularly if the impact is low or minimal.

The commission wants to encourage a diverse range of people to take up trusteeship. As a public authority, it 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.

Details of the factors the commission will take into account when deciding whether someone is unfit are in the **explanatory statement**.

The commission can only use this power if it is in the public interest to - what does that mean (criterion 3)?

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, even if the first 2 criteria are met.

Public interest encompasses a number of considerations which are not defined categorically and which cannot be set out in a simple statement. It involves a balancing test whereby the commission will look at the facts of the case and the impact of the person's conduct as well as wider factors that may affect the confidence in, or protection of, the sector. This will ensure that making a disqualification order addresses 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 commission will also take into account circumstances where it may not be in the public interest to disqualify an individual, for example because of the infirmity of the person because of age or illness, or because the person has never had and is not likely to have any relevant relationship with a charity in the future.

Further details of the factors the commission will take into account when deciding whether disqualification is in the public interest are in the **explanatory statement**.

The process for making a disqualification order

When will I know that the commission is considering disqualifying me?

If the commission has concerns about someone which are so serious it raises questions about their fitness to be a trustee, it will usually already have been in contact with them.

In all cases - whether the commission has been in correspondence with the person already or not - it will give the person at least one month's notice of its intention to exercise the power to disqualify them. When it does this it will set out the reasons why it is considering disqualification and will give the person the opportunity to make representations within the period set out in the notice.

It will be clear in the notice of intention whether the proposal is to disqualify them from an individual charity or charities specifically or generally.

Is the commission required to let anyone else know that it is considering making a disqualification order?

Yes. If the person the commission is proposing to disqualify is a charity trustee/trustee for a charity then the commission is under a legal obligation to let all the other trustees of that charity know of its intention. In those cases, the commission must also give public notice that it is intending to make a disqualification order, unless it considers in the circumstances this is unnecessary. The commission will usually give public notice by issuing a notice on GOV.UK: it may also arrange for public notice to be given locally if the charity operates in a particular location and if this is likely to serve a useful purpose or is a more effective way of reaching affected parties and the beneficiaries of that charity. If public notice is issued, the commission must invite representations to be made on the proposals within a time limit which must be specified in the notice.

After I have been given notice of the intention to disqualify me, can I continue to act as a trustee?

This will depend on whether the commission decides to suspend the person from being a trustee, pending its decision on disqualification. The commission will let the person know whether or not it is also suspending them after it sends the notice of its intention to disqualify. If the commission does suspend someone, the person will not be able to act as a trustee without the written approval of the commission. If the commission does not suspend the person from acting, they can continue to act and carry out their role as a trustee until any disqualification order is made.

How long will the suspension last?

The suspension will last for the period specified in the suspension order. Initially this can be for a period of up to 12 months if the commission has not within that period made or discharged the disqualification order, or decided not to disqualify the person. If it needs to, for example, because the process is still ongoing, or the matter is before the Tribunal, the commission may extend the suspension order, but the total suspension period must not exceed 2 years.

How long will I have to respond to a notice of disqualification?

The person who has been served with the formal notice of intention to disqualify them will have at least one month's notice of these proposals, during which time they can make representations to the commission.

If the person being disqualified is a charity trustee the commission must also give notice to each of the other trustees. If the commission has also decided to give public notice, the public notice will give details of the date by which representations must be received by the commission.

If I am the person who may be disqualified, will I hear from the commission again after I make my views known?

Yes. Whether or not the person being disqualified has made representations to the commission, it will write to them after the one month notice period to let them know whether or not it is proceeding with disqualification.

If the commission has decided to proceed with making a disqualification order, it will send the disqualification order together with a copy of a "statement of reasons" for making the order to the person being disqualified, and details of the process to appeal that decision. It must also send a copy of the order and statement of reasons to any charity that the commission knows or believes they are a trustee of.

When does the disqualification period start?

The disqualification order is made on the date specified in the order but it does not come into effect until either:

- the time for an appeal to the Tribunal has elapsed, which is at the end of 42 days (including weekends and bank holidays) from the date the commission sends the disqualification order to the person being disqualified
- the appeal is withdrawn, or determined by the Tribunal

If the person who has been disqualified appeals the disqualification order in time, it will not come into effect until the appeal is either withdrawn, or the Tribunal makes a determination that the decision of the commission to disqualify should stand. There is more information about making an appeal to the Tribunal on [GOV.UK](#)

Will details of the disqualification be made public?

When the disqualification order comes into effect, the name of the person who has been disqualified will be added to the register of persons removed from office - these are people who have been disqualified by or removed from their position by an order of the commission. This [register](#) is searchable on GOV.UK. The register includes the names of all people who have been removed by the commission or the High Court and people who have been disqualified by the commission using this power.

I don't want to do anything that might cause the commission to disqualify me - how can I avoid being disqualified?

The commission uses this power only where it is satisfied that the 3 criteria are met and there are sufficiently serious and substantial grounds that make it necessary or desirable to disqualify a person.

The commission can only consider disqualifying someone where one of the 6 conditions specified by Parliament in the Charities Act in criterion 1 is met.

Where one or more of the conditions does apply, the commission does not intend to use the power 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.

Make sure you understand and comply with your legal duties and responsibilities. The commission expects all trustees to have read and understand and to comply with the duties and responsibilities set out in [The essential trustee \(CC3\)](#). The key duties are:

- 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

For someone who is concerned about the possibility of disqualification (whether or not they are a trustee), they can get a good understanding from the [explanatory statement](#) of the commission's approach to the use of the disqualification power, including the factors that will or will not lead it to decide to exercise the power.

How long will the disqualification last?

The maximum period that the commission can disqualify someone for is 15 years. However, the length of the disqualification will depend on the facts of each case, including the seriousness of the conduct that has led to the disqualification of the person and any aggravating or mitigating factors. Details of how the commission will decide the length of any disqualification are set out in the **explanatory statement**.

The following 2 fictitious examples involving a similar trigger event (unauthorised remuneration) give an indication of how the presence of aggravating and mitigating factors can influence the length of disqualification.

Example A

The commission has identified that a trustee has without authority paid herself a salary from the charity's funds. This was a breach of the charity's governing document and the duty not to profit from the position as a trustee, which is misconduct and mismanagement and therefore falls within condition D of criterion 1. Criteria 2 and 3 were also met. In the course of fact gathering the commission found that the amount she had paid herself was £100,000 a year for 3 years and that she had done it without the knowledge of her co-trustees. The charity relies heavily on public fundraising and it saw a 50% drop in its income and the closure of some of its services as a result of this coming to light. The trustee concerned failed to co-operate with the commission and sought to cover up the evidence.

In this case, involving unauthorised enrichment at the expense of the charity, the aggravating factors mean that the individual presents a considerable serious risk to charities, having appeared to use the charity as a vehicle for personal gain, acted dishonestly and without any regard for the charity's reputation or her duties to ensure the charity operates for public benefit in accordance with the law. In view of the circumstances of the case, including the number of aggravating factors, the commission is likely to conclude that disqualification in the range of 10-15 years is justified.

Example B

The commission has identified that a trustee has without authority paid herself fees for 'administrative' services from the charity's funds. The commission found little evidence of any services being provided and considered if anything this was in effect a salary for being a trustee. This was a breach of the charity's governing document and the duty not to profit from the position as a trustee, which is misconduct and mismanagement and therefore falls within condition D of criterion 1. Criteria 2 and 3 were also met. In the course of fact gathering, the commission found that the amount she had paid herself was £2,000 over the course of 3 years. The trustee concerned co-operated with the commission's inquiry, admitted what she had done very quickly, offered to repay the funds and tendered her resignation as a trustee. There was no apparent immediate impact on the charity's ability to fundraise.

In this case, there would be some risk to charities if the individual were permitted to serve as a trustee in the immediate future, although her willingness to repay and resign indicated that lessons may have been learned. In view of the circumstances of the case and the number of mitigating factors, the commission is likely to conclude that a starting point of up to 5 years for the period of disqualification would be appropriate.

The effects of disqualification

Will it mean a person who has been disqualified can't be a trustee ever again?

No. Although a person cannot be a trustee for the period of the disqualification, they can become a trustee again once that period is over.

Will it mean I can't be employed by a charity?

When the commission makes a disqualification order, this will also disqualify the person from holding a senior management function in the charity, or within another charity unless the commission has specified an exception in the order.

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 before a disqualification order is made.

Senior management function means:

- a position that relates to the management of the charity and the person holding that position is not responsible to another officer or employee of the charity (other than a trustee)
- a position involving control over money and the only officer or employee (other than a trustee) to whom the person in that position is responsible is a person with senior management functions other than ones involving control over money

This will include such roles as chief executive and finance director.

A person will not be disqualified from being employed by the charity in a role that is not a senior management function. What roles are classed as senior management functions will vary from charity to charity, but the commission will look at the structure of the organisation and the nature of the role to determine whether or not a person holds a senior management function.

Will it mean a person who has been disqualified from a senior management function can't volunteer for a charity?

No. A person who has been disqualified will still be able to volunteer for a charity. The power only disqualifies the person from acting as a trustee and being employed in a senior management function for the period specified in the order. However depending on the nature of the conduct which led to the disqualification the person should consider whether or not it remains appropriate to consider volunteering in a particular role or for a particular charity.

What are the consequences of acting whilst disqualified?

Acting while disqualified is, in most cases, a criminal offence which can result in either a prison sentence or a fine, or both. As this will vary slightly from case to case, the commission will provide more detail in its operational guidance on the use of this power.

What do I need to do if the commission informs me that it has disqualified one of my fellow trustees?

If the commission has informed a charity's trustees that it has disqualified one of their number, they should:

- ensure that the person stops acting as a trustee
- where needed, ask the person to resign or use the powers in the charity's governing document to remove them as a trustee
- inform the commission if the person refuses to resign or cannot be removed by the other trustees, as the commission may be able to take further regulatory action

What do I need to do if I find out that one of my fellow trustees is disqualified but is still acting as a trustee?

The commission recommends that charities ask new trustees to complete a declaration to confirm that they are eligible to act as a trustee and ensure that they notify the charity of any change in their eligibility. Any checks on eligibility should be informed by the changes to the law in this regard.

If the trustees have evidence that one of their fellow trustees is disqualified but is still acting as a trustee they should:

- report the matter to the commission as a **serious incident**
- notify the trustee concerned that they understand they are disqualified from acting as a trustee and they can no longer act as a trustee - depending on the terms of the governing document the trustee may need to resign, be removed or otherwise have their appointment terminated

What do the remaining trustees need to do if the person who has been disqualified holds a senior management function?

If the person the commission has disqualified as a trustee also holds a senior management function within the charity, or within another charity, the commission may also have disqualified them from continuing in that senior management function.

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.

If the commission has decided to disqualify them from continuing in a senior management function in the same charity of which they were a trustee, the rest of the trustee board should consider what alternative arrangements need to be put in place as a result of the disqualification, whether to the position in question or to the functions carried out. See **Q and A** on what we mean by senior management function.

If the person who has been disqualified as a trustee holds a senior management function in another charity and the commission has disqualified them from holding that senior management function, the trustee board of that charity should consider what alternative arrangements need to be put in place as a result of the disqualification.

Informing the commission about someone you think is unfit to be a trustee and checking if someone is disqualified as a trustee

I am concerned that another trustee or someone involved in charity may be unfit for their role. How can I raise my concerns with the commission?

You can find information about how you can raise concerns and how the commission deals with complaints in **Complaints about charities (CC47)**.

How can I check if someone has been disqualified as a trustee?

The name of anyone who has been removed or disqualified will be added to the register of persons removed from office - these are people who have been disqualified by or removed from their position by an order of the commission. This **register** is searchable on GOV.UK. The register includes the names of all people who have been removed by the commission or the High Court and people who have been disqualified by the commission using this power.

If you are appointing a new trustee ask them to confirm that they are not disqualified from being a trustee. The easiest way to do this is to ask them to complete a declaration of eligibility form to confirm they:

- are willing and eligible to act as a trustee and that they are not, for example, disqualified by the commission or automatically under the Charities Act 2011
- understand the charity's purposes
- have passed any checks required if the charity works with children or vulnerable people

A template **declaration of eligibility** is available on GOV.UK.