

Charities (Protection and Social Investment) Act 2016 Post-Implementation Review

Department for Digital, Culture, Media and Sport



Charities (Protection and Social Investment) Act 2016 Post-Implementation Review

Presented to Parliament by the Secretary of State for the Department for Digital,
Culture, Media and Sport
by Command of Her Majesty

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1. What were the policy objectives of the measure?

The Charities (Protection and Social Investment) Act 2016 (“the 2016 Act”) had four main policy objectives:

- I. Provide **new and strengthened powers for the Charity Commission** for England and Wales (“the Charity Commission”), enabling it to more effectively promote compliance and tackle abuse of charity and increase public confidence in charities;
- II. Extend the criteria for **automatic disqualification** from charity trusteeship and apply disqualification to senior management positions, in order to better protect charities from individuals who present a known risk;
- III. Strengthen the **transparency and accountability of charity fundraising** by requiring disclosures in trustees’ annual reports and more robust arrangements where charities use commercial partners to fundraise on their behalf, in particular to protect vulnerable people from inappropriate fundraising;
- IV. Give charity trustees an explicit legal **power to make social investments**, enabling their investments to pursue both a financial and social return.

The Impact Assessment (18/04/2017) covered the Charity Commission powers and the changes to transparency and accountability in fundraising. It explains that the policy objectives and intended effect were:

- To provide more effective and efficient compliance and enforcement by the Charity Commission where there is serious misconduct or mismanagement or risk to charity property by equipping them with appropriate and proportionate powers to effectively and efficiently tackle abuse of charities.
- To prevent unsuitable people from being involved in running charities (with safeguards to facilitate rehabilitation of people with criminal convictions) and doing so in a way that has a minimal regulatory impact on the vast majority of legitimate charities and individuals who are legitimately involved in charities.
- To ensure no significant regulatory impacts on compliant charities/individuals.
- To support public trust and confidence in charities and their regulation.

A separate Regulatory Triage Assessment considered the new power to make social investments which had been developed by the Law Commission for England and Wales following consultation. Complexity of the legal framework had led charities to be cautious in their approach to social investment and to incur legal fees as they take advice on the extent of their existing powers. The purpose of the new power was to “*catalyse the provision of capital, as well as reducing investment transaction costs*”.

2. What evidence has informed the Post Implementation Review?

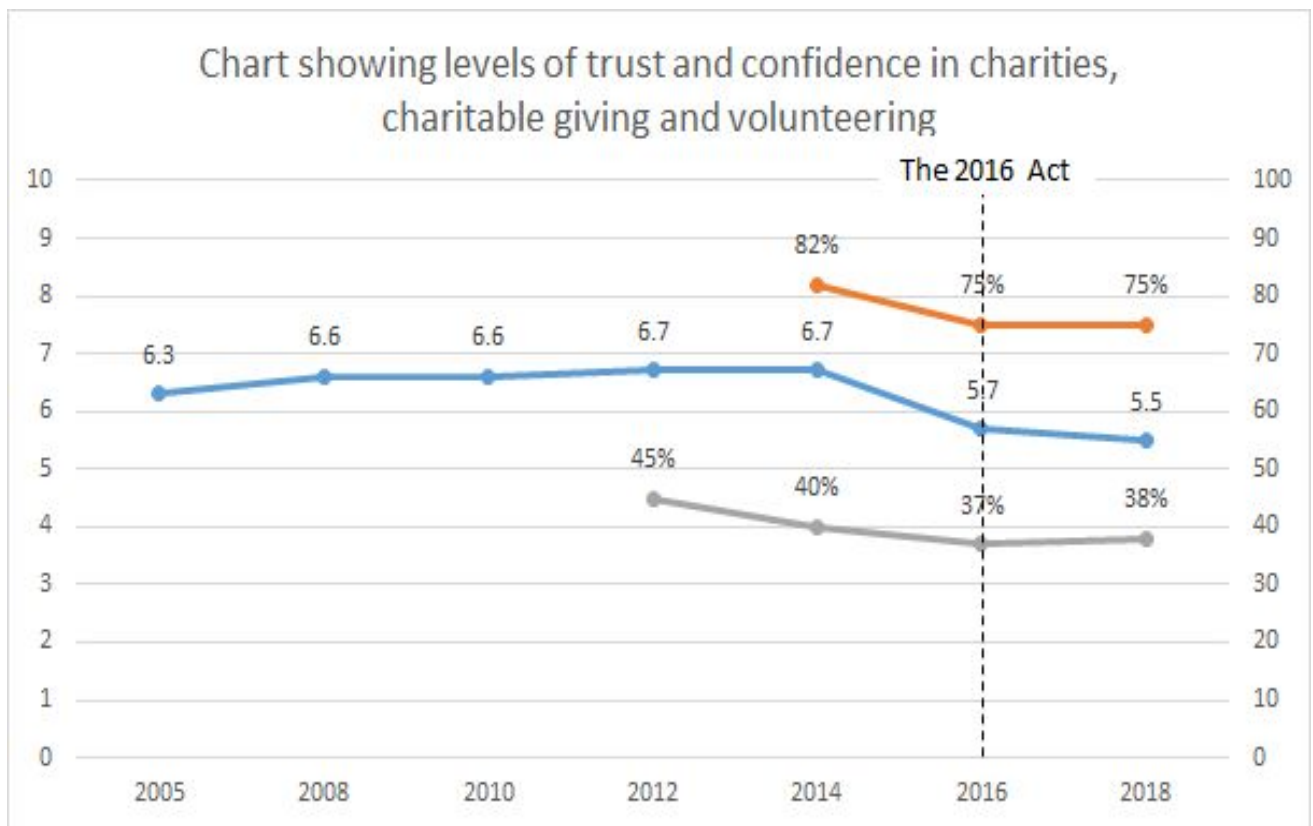
The Post-Implementation Review will consider the two main aims of the 2016 Act:

- To answer the questions posed in the 2016 Act in regards to public confidence in charities, levels of charitable donations, and willingness to volunteer.

- To determine if the policy objectives were met as set out in the Impact Assessment or Regulatory Triage Assessment.

Evidence on levels of trust and confidence in charities, charitable giving and volunteering

The 2016 Act states that the review needed to consider the effects the 2016 Act had on public confidence in charities, the level of charitable donations and people’s willingness to volunteer (Section 16). It is difficult to measure the effect the 2016 Act has had on these three factors as they are influenced by a variety of variables including high profile cases, media attention, personal experiences and a general downwards trend in overall trust. The trends of these three factors are considered below.



- % who have given money to charitable causes in the previous 4 weeks ¹
- Mean trust and confidence in charities (out of 10) ²
- % who reported they had volunteered at least once a year ³

Public confidence in charities

The Charity Commission publishes a report on trust in charities every two years. The most recent report was published in 2018 and had a demographically representative sample of 2,059 collected by Populus. Overall trust and confidence in charities remained at a similar level to

¹ Department for Digital, Culture, Media and Sport (2019) *Community Life Survey 2018-2019* OGL
² Charity Commission for England and Wales (2018) *Trust in Charities, 2018*
³ Department for Digital, Culture, Media and Sport (2019) *Community Life Survey 2018-2019* OGL

2016 when the research was last carried out. In both years, high profile cases involving major humanitarian charities were reported in the media prior to the poll, this is likely to have negatively impacted the overall trust and confidence. Overall trust in charities has decreased since 2014 when trust was reported as 6.7 out of 10 compared to 5.5 out of 10 in 2018. In addition there has been a long-term growth in the percentage who report that their trust has decreased (18% in 2014, 33% in 2016 and 45% in 2018). One unintended consequence of the 2016 Act could be that greater use by the Charity Commission of its (more proportionate) powers could lead to a public perception that wrongdoing in charities is becoming more prevalent. However, as there are many factors affecting public trust it would be difficult to isolate this as a causal factor.

Despite the reduction in overall trust, charities compared favourably to other organisations and groups. The charity sector was still more trusted, for instance, than private companies and banks. However, the sector was less trusted than the average person in the street. Trust in charities had not fallen relative to other sectors, it had moved up a 'rank' since 2016 to 4th place in mean trust and confidence by sector/group. Those who said their trust had decreased most commonly cited news stories relating to charities in recent months (62%). nfpSynergy wrote that there was a need for a multi-party, multi-faceted effort to increase trust and warned of the limitations of interpreting headline trust scores in isolation from other evidence.

The level of charitable donations

The Community Life Survey 2018-19 examined trends in charitable giving and had a large sample size of 10,627. In 2018-19, 75% of respondents said they had given money to charitable causes in the previous 4 weeks, this is the same as in 2017-18 and 2016-17 but lower than 2013-14 (82%). However, the rate in 2013-14 was higher than all other subsequent survey years. Data is not available from years prior to this, therefore it is not possible to conclude whether 2013-14 had isolated higher levels of charitable giving, or whether this was part of a longer downward trend.

People's willingness to volunteer

It is difficult to assess a person's willingness to volunteer, most data on volunteering examines the numbers actually partaking. Therefore willingness to volunteer will be assessed in terms of numbers partaking in volunteering. The Community Life Survey also examined trends in volunteering. Participation has reduced since 2013-14 when 44% of those surveyed had partaken in either formal or informal volunteering, but the rate of regular volunteering (at least once a month) has remained stable since 2016-17 at 38%.

The National Council for Voluntary Organisation (NCVO) Volunteer Experience published in January 2019 found different trends and also had a large sample size of 10,103 respondents. It found that 38% of people had volunteered in the past 12 months, 11% in the last 1-3 years, 20% 3 or more years ago and 31% had never volunteered. It found that only 7% were consistently and heavily involved in volunteering over their lifetime. 96% of those who had volunteered said they were very or fairly satisfied with their volunteering experience. One unintended consequence of increased regulatory powers could be that people are dissuaded

from volunteering as charity trustees. However, there is currently no data on the number of people who volunteer as charity trustees, or whether there has been a change over time.

Conclusion

Overall, it is not possible to identify the effect of the 2016 Act on public trust, willingness to volunteer and charitable giving as there are a number of other potentially more influential variables affecting the three factors. It's also unclear what the level of public awareness is of changes made to the 2016 Act. The 2016 Act is still relatively new and some changes such as the automatic disqualification powers were phased in in 2018, therefore the full effect is imperceptible at this stage as charities are still adapting to the changes.

Other evidence

The views expressed in the responses from contributing individuals/organisations should not be seen as constituting the opinion of organisation members as a whole, or the organisations that individual members may represent. However, gathering evidence in this way is a proportionate approach to inform this type of review.

1. Evidence has been provided by the Charity Commission on their use of the new powers and their perceived impact.
2. The Charity Law Association (CLA) provided information and evidence from their 16 members of the Executive Committee and members of the CLA more widely, including via a member survey, on the impact of the 2016 Act.
3. The charity Unlock, which supports people with criminal convictions provided evidence of their experience of how the automatic disqualification provisions have affected the charity sector, in particular charities working on the rehabilitation of people with criminal convictions.
4. The Fundraising Regulator has published a report on the compliance with fundraising disclosure in the charity sector. The Institute of Fundraising and the CLA provided their views on the experiences of their members as a result of the fundraising section of the 2016 Act
5. Representatives from The Association of Charitable Foundations (ACF), a lawyer from the law firm Bates Wells and the CLA provided their experiences of the Social Investment section of the 2016 Act.
6. DCMS also reached out to Big Society Capital and NCVO but neither consented to be included in this review

3. To what extent have the policy objectives been achieved?

To assess whether the policy objectives have been achieved, the four main policy objectives will be assessed individually in the order listed above.

Implementation of the 2016 Act was somewhat complex. While there were only two Commencement orders, they ranged across five implementation dates. The CLA suggested that this created confusion amongst charities and advisers, especially as they fell within several consultations and the publication of guidance, the CLA felt that the Explanatory Notes were published late (the end of September 2016).

(I) New and Strengthened Powers for the Charity Commission

These powers include; notice and issue of official warnings, investigations and power to suspend, range of conduct to be considered when exercising powers, power to remove trustees and other officers during an inquiry, power to remove disqualified trustees, the power to direct specified action not be taken, power to direct winding up, power to direct application of charity property and power to disqualify trustees and senior managers.

In the Impact Assessment it was estimated that all charities and their trustee boards would have to bear the cost of familiarisation with the new regulations on trustee disqualification. Each charity was estimated to incur a transitional administration cost of around £23, based on the value of an hour of a trustee's time. Charities do not then need to familiarise themselves with the other changes to the Charity Commission's powers, which will only apply in cases of misconduct or mismanagement or where charity assets are at serious risk of loss. As trustees undertake their duties on a voluntary basis, the actual costs since these powers have been implemented has not been measured.

The Impact Assessment predicted that the Charity Commission would also incur some transitional familiarisation costs with the new powers. It was estimated that these costs would be low as the Charity Commission itself requested these changes. It was also predicted that the Charity Commission would incur costs from additional investigations from exercising the new powers. It was estimated that this would happen on 109 occasions per annum. The Charity Commission suggested that this would be offset by the benefits of making all investigations more efficient in terms of both administrative burden and time. Costs to the Charity Commission were therefore not monetised.

Based on the Impact Assessment and since implementation it has not been possible to quantify or monetise the benefits of the Charity Commission's new or strengthened powers. It was predicted that the principal benefit would be to public trust and confidence in the regulation of charities, and charitable funds of individual charities would be protected from abuse or mismanagement.

Many of the Charity Commission's decisions can be challenged through their internal review procedure. Some decisions can also be challenged through the First Tier Tribunal (Charity Tribunal), which is independent of the Charity Commission and free to use. Charities can represent themselves at the Charity Tribunal, avoiding legal fees. However, in practice, the majority of charities or individuals appealing to the Tribunal choose to pay for legal representation, in the Impact Assessment this was conservatively estimated to incur legal costs of £10,000. If a decision cannot be legally challenged through the Charity Tribunal, a decision can be challenged through the courts by way of Judicial Review but this incurs a fee. For each

of the powers, the number of times a decision has gone through the Charity Commission's internal review procedure or the Charity Tribunal is stated.

The Charity Commission does not capture the costs of internal appeals or tribunal appeals but estimate that on average a decision review takes at least three days of work for a case officer. The Commission deals with many cases in-house and uses its own lawyers and other officers, but the cost of this is variable and depends on the nature of the case. In cases where the Charity Commission instructs external counsel e.g. a barrister the average cost is between £7,000 and £10,000 a case (this is excluding the cost of time spent by the Charity Commission's in-house team).

Notice/Issue of Official Warning

Evidence about the impact of notice/issue of official warnings has come from the Charity Commission and the CLA.

The 2016 Act added a new power for the Charity Commission to issue an official warning to a charity or its trustee(s) (Section 1). The purpose of issuing an official warning is to ensure that the charity and/or trustee(s) concerned know that a breach of trust, misconduct or mismanagement has taken place and that it needs to be rectified, and to provide guidance on the actions they could take to stop the misconduct or mismanagement or to prevent a recurrence. The Charity Commission cannot use an official warning to direct trustees to take specific action, and before issuing an official warning the Charity Commission must give notice to the charity and consider any representations. An official warning is subject to the Charity Commission's decision review procedure and cannot be appealed to the tribunal.

The Impact Assessment explained that the aim of this new power was for a more proportionate sanction for mid-level mismanagement or misconduct or where charity resources are put at serious risk. Previously the options available to the Charity Commission were to send the charity a letter which held no legal weight or to open a full statutory inquiry which may be disproportionate given the issues concerned.

According to the Charity Commission, up to the end of 2018/19 it had issued 33 notices of official warnings resulting in 25 official warnings being issued to a total of 15 charities (in eight cases the notice of a warning did not proceed to a warning being issued). Out of the 15 charities affected, in five of these cases a statutory inquiry was already open when the official warning was issued. In the other 10 cases, there was no inquiry open when the warning was issued (and an inquiry was not subsequently opened). The CLA working group said that notice of official warning appears to be effective, in that a charity can rectify the situation after the notice is issued by taking the steps listed in the notice, in order to avoid the warning being issued. They suggest that it would be helpful if the Charity Commission were to publish more detail on the effect of issuing a notice so that this could be confirmed. While it cannot be conclusively argued that the use of the official warning prevented the need for an inquiry, in the cases where an official warning was issued outside of an inquiry, an inquiry has not then been opened.

The number of official warnings has increased year on year since the power was introduced in 2016. None have been Judicially Reviewed, however the notice of official warning has regularly been through the Charity Commission's internal decision review process. In 2016/17 the power

was used only once with one internal decision review, used six times in 2017/18 with four internal decision reviews and used 26 times in 2018/19 with seven internal decision reviews. Only one decision was overturned on internal decision review.

Power	Years	Frequency of use	Internal decision review	Decisions Upheld	Decisions overturned
Notice of Official Warning	2016/17	1	1	1	0
	2017/18	6	4	4	0
	2018/19	26	7	6	1

The Charity Commission believes that the power to issue official warnings has proved effective. It enables the Charity Commission to address breaches of trust, misconduct or mismanagement at an earlier stage and therefore avoid the need to open a more resource-intensive, and potentially disproportionate statutory inquiry. This has empowered the Charity Commission to safeguard against wrongdoing and harm occurring in charities in the first place, or to stop further abuse or mismanagement from occurring. The Charity Commission argues that this allows them to protect charities, their assets and beneficiaries in a way that was not previously possible, ensuring the efficient and proportionate use of the Charity Commission’s resources.

The CLA had some concerns in regards to official warnings prior to the passage of the legislation and feel that these concerns still stand. The CLA working group has some concerns that the official warning power is being used in a directive manner. The CLA feels that official warnings lack transparency, particularly in regards to the numbers being issued and the way that the warnings are published. However, it should be noted that the Charity Commission publishes the numbers of official warnings issued and the number of intentions to issue an official warning in its annual reports. The Charity Commission has been consistent with its policy with regards to publishing official warnings.

The CLA also raised concerns about the lack of a specific right of appeal to challenge the Charity Commission’s decision. The appeal procedures are set out in the legislation and formed part of pre legislative scrutiny. Charities can appeal to the courts, but as stated earlier, to date there have been no judicial review proceedings in relation to official warnings. In addition, the Charity Commission is not required to notify trustees of its decision or the final terms of the official warning (including any modifications) or its decision on publication before proceeding to act. The CLA feels that it is redundant appealing after publication as damage has already been done. They feel that providing for an appeal structure would not put undue pressure on Charity Commission resources.

Based on the increasing frequency of the use of this power, DCMS can infer that the Charity Commission is gaining confidence in using this power. Based on the data provided by the Charity Commission, it would appear that this power has been effective as more notices of

official warnings have been issued than official warnings and it may have reduced the need to open statutory inquiries which decreases the use of Charity Commission resources. However, the CLA continues to have concerns that this power may be used to direct charities and there are concerns about the process itself. However, since the provisions came into force, DCMS has not seen any evidence to suggest the new power has had a negative impact on charities, public trust and confidence or the willingness of people to volunteer or donate. The number of official warnings is still very low relative to the 168,000 charities that are registered with the Charity Commission. This, coupled with the low rate of success on decision review, provides an indication that the power is being used proportionately.

Investigations and power to suspend

In order to exercise many of its temporary protective powers (under Section 76 of the 2011 Act), the Charity Commission needs to be satisfied that there is misconduct or mismanagement in a charity, or that it needs to act to protect charity property or secure its proper application. The 2016 Act makes clear that failure to follow a Charity Commission order or direction, or remedy a breach specified in an official warning, automatically constitutes misconduct/mismanagement. This saves the Charity Commission time as it does not need to make the case every time that such a failure constitutes mismanagement or misconduct.

There has been increased reliance on Section 76 since the 2016 Act with it being relied upon 22 times in 2015/16 and 58 times in 2016/17. However, the number of Tribunal appeals against decisions under s.76 Charities Act 2011 as amended since the 2016 Act has been very small with two appeals in 2016/17 and none of these decisions being overturned. The number of appeals has remained stable since the 2016 Act was introduced. In 2014/15 two appeals were made with one being upheld and one decision discontinued and in 2015/16, one appeal was withdrawn, this would suggest that the Charity Commission are using this power appropriately and hence saving resources.

Power	Years	Frequency of use	Internal decision reviews	Upheld	Overtuned	Number of appeals to First-tier Tribunal	Number of appeals to Upper Tribunal
Investigations and power to suspend	2014/15	34	2	2 (but 1 was discontinued)	0	9	1
	2015/16	22	1	1 (review withdrawn)	0	0	1
	2016/17	58	2	2	0	0	0
	2017/18	43	0	N/A	N/A	0	0
	2018/19	62	2	1	1	1	0

Section 2 of the 2016 Act also extended the period for which the Charity Commission may suspend a person from charity trusteeship, pending removal, from up to one year to a maximum of two years. Since the provision came into force, the Charity Commission has not needed to extend trustee suspension beyond twelve months because the circumstances have not required it. However, the Charity Commission still argues that the power is needed as there have been cases in the past where awaiting the outcome of litigation, police investigation, or other agency activity can mean a delay in the Charity Commission taking regulatory action, in some cases beyond one year. The power means that the Charity Commission only has to justify the need for an extension rather than having to establish entirely new grounds for a fresh suspension, this reduces pressure on Charity Commission resources.

The Charity Commission believes these powers have improved efficiency. DCMS considers these powers have been used appropriately and has not seen evidence to suggest a negative impact on charities, public trust and confidence or the willingness of people to volunteer or donate.

Range of conduct to be considered when exercising powers

The 2016 Act added a new power on range of conduct that can be considered by the Charity Commission when exercising its powers (Section 3). Once misconduct or mismanagement is established, the Charity Commission is able to take the following into account before deciding whether or not to exercise its powers in relation to a person:

- the conduct of that person in relation to any other charity; and
- any other conduct of that person that appears to the Charity Commission to be damaging or likely to be damaging to public trust and confidence in charities generally or particular charities or classes of charity.

The Charity Commission does not hold data on these updated provisions but stated that they had relied on this power on a number of occasions. The Charity Commission provided DCMS with one such example where a trustee was responsible for a range of misconduct and mismanagement across two charities. These were taken into account and the trustee responsible was removed as a result. This was taken to the Charity Tribunal who upheld the decision and agreed that the Charity Commission had used this power appropriately. The Charity Commission feels that this power gives it the ability to consider a wider range of conduct when deciding whether to take regulatory action. It allows the Charity Commission to establish that the criteria for exercising its regulatory powers have been met and allows them to demonstrate that their actions are proportionate in the circumstances. This power allows the Charity Commission to protect charities from individuals who are responsible for failures in a range of charities which, if viewed in isolation, may not necessarily meet the threshold for regulatory action but when considered collectively are significant. The Charity Commission feels the power allows it to deal with wrongdoing and harm in charities more efficiently and effectively and therefore protect charities from those who are not fit to lead them.

Although the Charity Commission holds no data on this power, they have provided evidence to DCMS on its usage. They consider this allows them to more effectively and efficiently safeguard charities by ensuring the broader conduct of a person can be taken into account. As a result, the Charity Commission believes this protects public trust and confidence. However,

as mentioned above, these factors are difficult to measure in isolation and as the powers were implemented recently it is too soon to observe any wider impacts these powers may have had. No evidence of negative impact has been brought to the attention of DCMS.

Power to remove trustees and other officers during an inquiry/Power to remove disqualified trustees

The power to remove trustees and other officers during an inquiry was strengthened under the 2016 Act (Section 4). This enables the Charity Commission to continue the process of formally removing a trustee, officer, agent or employee of a charity even if they have resigned their office or employment. In addition, the 2016 Act provides a new power that enables the Charity Commission to remove a disqualified trustee from a charity if they continue to remain in their position once disqualified (Section 5).

The Charity Commission does not record the number of cases where trustees or officers have resigned during removal proceedings. The power (s.79 Charities Act 2011) to remove a trustee or employee during an inquiry has been used relatively few times. In 2016/17 the power was used twice, in 2017/18 it was used ten times, in 2018/19 it was used four times. Internal decision reviews overturned one decision in 2016/17 and one decision in 2017/18. In 2017/18 two cases were appealed to the Charity Tribunal, unsuccessfully.

Power	Years	Frequency of use	Number of internal decision reviews	Upheld	Overturned	Number of First-tier Tribunal appeals	Number of Upper Tribunal appeals
Power to remove trustees and other officers during an inquiry	2014/15	4	3	2 (3rd no decision made as trustees convicted of criminal offences so no need to remove)	0	1	0
	2015/16	8	2	2	0	0	0
	2016/17	2	5	3 (another was put on hold - more evidence needed)	1	0	0
	2017/18	10	6	5	1	2	0
	2018/19	4	0	N/A	N/A	0	0
Removal of disqualified	2016/17	1	0	N/A	N/A	0	0

trustee	2017/18	6	0	N/A	N/A	2	0
	2018/19	6	0	N/A	N/A	0	0

Both of these powers close loopholes that prevented the Charity Commission from removing people from their trusteeship or office within a charity, consequently avoiding being automatically disqualified from acting as a charity trustee or senior manager in a charity. This happened because the Charity Commission is required to give notice before they remove a person from trusteeship or other office. In the past, persons who received the notice often resigned their position before the Charity Commission could take action to remove them. This meant they could go on to be a trustee or to take on another position of responsibility in another charity, putting that charity at risk. The Charity Commission has reported that in most cases, trustees and senior managers no longer resign when they receive notice of the Charity Commission's intention to remove them, because there is no longer any benefit to doing this. This indicates that the 2016 Act has closed the loophole in the pre-existing law effectively. The Charity Commission considers that this power enables them to safeguard charities from individuals who are unfit to lead them.

DCMS considers that this simply closed a pre-existing loophole in the law. These new and strengthened powers safeguard charities by preventing disqualified trustees and other officers from moving on to a different charity.

The Power to Direct Specified Action not be Taken

The 2016 Act gave the Charity Commission a new power to direct specified action not to be taken. This is used in the context of a formal statutory inquiry and has empowered the Charity Commission to issue an order directing the charity trustee(s), any officer or employee of the charity, or the charity itself (if a corporate body) not take, or to stop taking, any action specified in the order that the Charity Commission considers would constitute misconduct or mismanagement in the charity (Section 6).

This power has been used rarely with three uses in 2016/17, four in 2017/18 and two in 2018/19. To date the exercise of this power has not been appealed.

The Charity Commission feels that this new power has allowed them to prevent wrongdoing and harm from occurring in charities in the first place, or to prevent further abuse from occurring. They believe this power has enabled them to protect charities, their assets and their beneficiaries.

Although the power has been used rarely, it has been used in specific cases where other powers would be disproportionate. There have been no appeals and DCMS has not heard cases of this power negatively impacting charities.

Power to Direct Winding Up/Power to Direct Application of Charity Property

Evidence for this power has been provided by both the Charity Commission and the CLA.

The Charity Commission gained a new power to make an order to direct that a charity be wound up and dissolved, and any remaining property transferred to a charity with the same

purposes, following a section 46 inquiry (Section 7). The 2016 Act also strengthened the existing power to direct charity property to be applied to another charity to allow this to be used where the person holding the property is 'unable' to apply it for the charity's purposes (Section 8). Previously the power could only be used if the person was 'unwilling'. The amendment enables the Charity Commission to rely on banks and other third parties being 'unable' to apply the property. This is an easier threshold to meet, allowing the Charity Commission to take regulatory action to protect charity property more quickly and cost efficiently.

The Impact Assessment states that the power to direct application of charity property is only available in the context of a statutory inquiry and where there is evidence of misconduct or mismanagement or the need to protect charity property. In addition the Charity Commission has to consider it proportionate in the circumstances.

The power to direct the winding up of a charity has only been used three times since it was introduced. The power to direct the application of charity property has been used more but still relatively few times with eight occasions in both 2017/18 and 2018/19. There has been an increase in cases since 2016/17 when the power was only used three times. This power is rarely appealed against, having gone through the Charity Commission's internal decision review process once (2018/19) and the Charity Tribunal once (2016/17).

The CLA has concerns that a public notice under this section can be issued without the Charity Commission providing more information than the fact that it is satisfied that the conditions for it to issue the order have been met. Therefore, they believe that a party wishing to make representations to the Charity Commission would not have sufficient information to do so.

The Charity Commission feels it has used these powers effectively in a small number of inquiry cases. They feel that the main drawback with this new power is that it requires the trustees to comply/co-operate with the Charity Commission's direction (unless there is an interim manager in place). DCMS feels that as there have been few appeals of these powers they appear to have been used correctly and proportionately.

Power to Disqualify Trustees and Senior Managers

The Charity Commission was given a new power to disqualify an unfit person in certain circumstances from being a charity trustee and/or a senior manager in a charity for up to 15 years, subject to safeguards (Section 10). A person can be deemed unfit for a number of reasons including the individual having accepted a caution for an offence where conviction would have automatically disqualified them, been convicted overseas for an offence which would have disqualified them had it been in the UK or been refused access to charity tax reliefs by HMRC for failing their fit and proper persons test.

The Impact Assessment stated that this power would be subject to the usual optional internal decision review process and the right of appeal to the Charity Tribunal. In addition, those disqualified are able to apply for a waiver if their circumstances change over time once disqualified. The measure was intended to help the Charity Commission safeguard the charity sector from individuals whose conduct makes them unsuitable to serve as charity trustees. This

power should only result in investigation costs if the Charity Commission wrongly investigates a charity or trustee and the decision is overturned on decision review or appeal.

Since the introduction in 2016/17, the power was used 14 times in 2017/18 and 22 times in 2018/19. This power has been internally decision reviewed, twice in 2017/18 and nine times in 2018/19. All decisions were upheld on internal decision review. Three appeals were lodged with the Charity Tribunal; two of these have been dismissed, thereby upholding the Charity Commission’s position, and one is pending tribunal hearing.

Power	Year	Frequency of use	Number of internal decision reviews	Upheld	On hold	Number of appeals to First-tier Tribunal	Number of appeals to Upper Tribunal
Power to disqualify trustees and senior managers	2016/17	0	N/A	N/A	N/A	N/A	N/A
	2017/18	14	2	2	0	0	0
	2018/19	22	9	8	1	3	0

The Charity Commission states that this new power to disqualify trustees and senior managers is the most frequently used of the new powers introduced by the 2016 Act. It believes this is a crucial power because it enables the Charity Commission to protect charities by disqualifying persons who are not fit to lead them. To date, the Charity Commission has disqualified 36 individuals from trusteeship and senior management functions; in these cases it would not have been possible and/or proportionate to remove them under the pre-existing power to remove in section 79 of 2011 Act. The power in the 2016 Act differs from the 2011 Act power as it is not confined to removing someone 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 and there are different criteria to be met before using the power. However, advance notice must be given to the individual concerned and to the other trustees of any charity at which the individual is a trustee.

DCMS has not seen any evidence to suggest that strengthening these powers has had a negative impact on charities, public trust and confidence or the willingness of people to volunteer or donate. This power has enabled the Charity Commission to be more effective in the regulation of the charity sector and hence prevented negative impacts. All appeals have been upheld which could have prevented the Charity Commission having to remove a trustee(s)/manager once they are in post which could be more disruptive and resource intensive.

New and Strengthened Powers for the Charity Commission - Conclusion

Many of the concerns raised during the consultation and drafting of the 2016 Act appear not to have materialised. However, the CLA continues to have concerns about the operation of the official warning power in particular. There is no evidence to suggest that the new Charity Commission powers have had a negative impact on charities and the number of charities that

have been directly impacted by these changes are low. The Charity Commission appears to be using these powers appropriately and proportionately and this is reflected in the low appeal numbers and low success rate of appeals.

Charity Commission Request for Additional Powers

Although it is not in the scope of this review, DCMS are aware that the Charity Commission is looking to discuss further powers in the future.

(II) Automatic Disqualification

Evidence on automatic disqualification has been provided by the Charity Commission and Unlock.

The 2016 Act added new criteria, including certain criminal offences, to the existing criteria which automatically disqualifies a person from being a charity trustee in England and Wales (section 9). It also extended automatic disqualification to senior management positions in charities. The aim of automatic disqualification was to safeguard charities and reduce the risk of wrongdoing within charities and ultimately increase trust in the voluntary, community, and social enterprise sector.

It is not possible to measure the numbers that are affected by automatic disqualification. The Impact Assessment for the Act estimated that 427 trustees and, at the highest estimate, 102 senior managers would be affected by the introduction of automatic disqualifications. The Impact Assessment also predicted that there would be a surge in waiver applications when the legislation first came into force and estimated that there would be around 150 waiver applications from both trustees and senior managers before the 2016 Act came into effect. The Charity Commission estimated that in an average year and with promotion of the waiver process there could be a maximum of 45 applications.

The number of people applying for waivers is small, and although there was an increase when the provisions came into effect in August 2018 there were far fewer waiver applications than was estimated in the Impact Assessment. In 2017/18 there were eight waiver applications with two being granted (before the provisions came into effect), and in 2018/19 there were 46 waiver applications with 19 waivers being granted. In the context of 850,000 trustee positions and an estimated 20,000 to 34,000 senior management positions in charities these numbers are very low. However, there is no evidence to suggest why the numbers are lower than originally anticipated.

The Charity Commission argues that automatic disqualification reduces the likelihood of charities being run by 'unsuitable persons', which reduces the risk of wrongdoing or harm to the charity assets and beneficiaries. It also reduces pressure on the Charity Commission's resources, because it reduces the likelihood that the Charity Commission will need to take regulatory action to address a breach of trust, misconduct or mismanagement by these persons. The Charity Commission and DCMS worked with rehabilitation charities such as

Unlock, a charity which provides a voice and support for people with criminal convictions, to create guidance on the waiver process and recognises that in the right circumstances appointing a disqualified person can contribute positively to furthering a charity's purpose. Waivers were phased in to prevent those already in post losing their role on the day the relevant provisions were commenced and they were able to remain in post until their application had been fully considered and any appeals concluded.

The Charity Commission estimated that in 2015 there were 350 charities whose main charitable purpose was the rehabilitation of people with criminal convictions. It was estimated that there would be a higher number of people in scope for automatic disqualification amongst this group but the waiver process was put in place to mitigate this. Some rehabilitation charities argued that these provisions may prevent those with lived experience working as trustees or senior managers and ignore the positive contribution that people with criminal convictions can have on the charity sector. Since coming into effect, Unlock argues that this power takes away from charitable autonomy because they have to seek external permission via the waiver application process to appoint their own charity trustees or senior leaders. However, it should be noted, that a waiver process has been in existence since 1993 in relation to a number of existing disqualification criteria without attracting significant comment. Unlock believes there is uncertainty in the sector over how the Charity Commission makes their decisions on granting waivers and that more transparency over how the Charity Commission deals with these applications and the timelines involved would increase trust in the process. These reasons, coupled with a perception that the law extends to more people than it does, may be putting people off applying for a waiver. In addition, some individuals may be discounted due to the effort needed for charities to process waiver applications. The small number of waiver applications received by the Charity Commission could suggest that this may be the case. Unlock's wider-reaching concern was that of perception as it is thought that automatic disqualification could reinforce a negative stereotype of people with criminal convictions.

Conclusion

The automatic disqualification provisions took effect relatively recently (August 2018) following significant work between the Charity Commission, DCMS and criminal justice sector charities to ensure guidance and awareness of the provisions. Since coming into force, DCMS has not seen evidence to suggest the provisions are having a negative impact on charities or individuals seeking to be trustees or senior managers of charities. However, some concerns have been raised by rehabilitation charities in regards to the waiver process and a perceived chilling effect from this extension of automatic disqualification. There is no evidence to inform whether this new process has had an impact on volunteering but there is a chance that automatic disqualification may have had the unintended consequence of deterring some people from volunteering due to either a misconception that they can't or a chilling effect. It is also difficult to know what impact automatic disqualification has had on trust as it is difficult to gauge the public's awareness or whether this power has reduced wrongdoing in charities.

(III) Fundraising Transparency

Evidence on fundraising transparency has been provided by the Fundraising Regulator, Institute of Fundraising and the CLA.

The 2016 Act added two new fundraising requirements for charities designed to improve transparency and trustee oversight of fundraising (Section 13). The first being additions to the written agreements between the charity and any commercial partners that fundraise on behalf of charities including how the commercial partner will protect the public and how the charity will monitor their compliance. The second being that within trustees' annual reports charities now have to include additional information about their fundraising practices. This section was added during the 2016 Act's passage through parliament as an amendment due to concerns about fundraising practices especially the targeting of vulnerable people. Alongside the legislative change, the independent Etherington Review was taking place, leading to the creation in 2016 of the Fundraising Regulator as a non-statutory regulator of charity fundraising.

The Fundraising Regulator reviewed a small sample of trustees' annual reports in order to look at compliance with the 2016 Act, this accounted for an estimated 6% of the charities currently paying a levy to the Fundraising Regulator. These were accounts filed with the Charity Commission after the relevant provisions of the 2016 Act came into force. Therefore the data from this review only captures those charities that were first to adapt to these changes. The sample was selected randomly from the charities paying the Fundraising Regulator levy and represented a cross section of different size organisation in terms of their fundraising spend.

Commercial Partner Agreements

The Impact Assessment assumed that some existing commercial partner agreements would already contain some or all of the required information as best practice. It predicted that some existing agreements would need to be updated to reflect these new requirements, and all new agreements would need to include these matters. It was estimated that it should take no more than 1.5 - 2 hours of professional or commercial participator time to update an agreement to meet the new requirements and a similar amount of time to then agree to the updated agreement. The Impact Assessment estimated that an hour of trustee time would have a value of £23.10. However, we do not have any data about these costs since implementation.

Commercial partner agreements are private contracts so the Fundraising Regulator is relying on the reporting in the trustees' annual reports submitted to the Charity Commission for information on compliance with the 2016 Act. The evidence gathered by the Fundraising Regulator suggests that charities always include a statement on their commercial partner agreement(s) but there was a lack of detail on who the commercial partners were and how their fundraising was monitored by the charity. However, in some reports it was clear they did monitor the fundraising but it was not explicitly written in the statement.

According to the Institute of Fundraising, when the Act came into force there was some discussion about how best to comply and some charities were not clear on how to construct a

good commercial partner agreement and were worried about how their agreements would compare to other charities. Over time this has improved as charities communicate their expected standards to commercial partners. They feel the 2016 Act has made people more aware of their roles and responsibilities, making charities more accountable to the public.

Fundraising in Annual Reports

The Impact Assessment estimated it would take a charity manager an hour to pull together the necessary additional information to put into an annual report and a trustee an hour to read, approve and disseminate the information. The Impact Assessment estimated that an hour of trustee time would have a value of £23.10. However, we do not have any data about these costs since implementation. No assumption was made about the impact on public trust or confidence as it was not considered easily quantifiable.

From its sample survey, the Fundraising Regulator has found that most organisations provided a statement in their annual report but the length and standard was varied, but the inclusion of a statement greatly increases transparency. Many reports covered what fundraising campaigns were undertaken but some lacked details of how the fundraising was conducted and by whom (i.e. whether a commercial partner was used). The Fundraising Regulator found that most larger organisations had detailed how they managed fundraising being undertaken on their behalf. However, 45% had no, or insufficient, description of how they monitored these commercial partners. Some reports provided details of how the charity supported branches of community fundraisers such as through training and guidance. However, others did not include the details of managing and supporting fundraisers in their report even when it was evident that the charity used these approaches. There was often a lack of clarity in reports about who carried out the fundraising which made it difficult to understand whether any monitoring was necessary or was indeed missing from their statements. This also made it difficult to understand if any commercial partners were involved and subsequently to assess compliance with the 2016 Act.

The Fundraising Regulator reported that there was a lack of standardisation in how annual fundraising reports were written as 22% did not include a discrete statement on fundraising but instead this information was found in other sections of the report. 40% did not set out a specific number of complaints received, some just said “small number of complaints”. A minority of reports covered vulnerable people in a full way, detailing what they did to protect people such as training or issuing a policy or guidelines. The Fundraising Regulator stated that over half did not do this to a satisfactory level as a large majority of these reports did not describe, in any way, how the charity ensures vulnerable people are considered in relation to fundraising.

The Institute of Fundraising felt that when the 2016 Act came into force there was some discussion about how best to comply and some charities were not clear on how to construct a good annual report. Overall the Institute of Fundraising feels that the 2016 Act ensures charities think about their governance and compliance in relation to fundraising and it may have reached those who had not previously thought about it particularly at senior levels in charities. There now seems to be a good understanding of the 2016 Act’s requirements. Whether this has translated into a change in public trust is very difficult to prove but may be something that changes in the long run.

The CLA feels that the fundraising requirements could be clearer. They feel that there is not enough information either from Parliamentary debates or the FAQs on what the requirement for the agreements mean in practice. There is also a feeling that the obligation to report complaints in annual reports is not clear, for example how a complaint is defined. They acknowledge that guidance has been provided by the Fundraising Regulator and the Charity Commission about how these provisions should be compiled but more detailed guidance would be helpful particularly covering the points previously mentioned.

Conclusion

Since the 2016 Act came into force DCMS has not seen evidence to suggest the fundraising transparency requirements have had a negative impact on the sector. It is likely that the new requirements have increased transparency and accountability of charity fundraising as charities did not previously have to report these details. The new requirements also encourage charities to consider how they fundraise and how they protect vulnerable people from inappropriate fundraising. There is some evidence to suggest that guidelines may need to be updated and made clearer to increase compliance. The Institute of Fundraising recommended that more examples of good practice would be beneficial. The Fundraising Regulator recognises that this was the first year that charities had to report fundraising in this new way and it is therefore understandable that adjustments will need to be made. These regulations only came into force in November 2017 so it has been a relatively short period for charities to adjust. Furthermore, differences in the size of charities may also have an impact as some organisations have large fundraising, compliance and corporate teams that are capable of producing higher quality reports. The Fundraising Regulator has said that it plans to use the research to support the sector in complying with the 2016 Act, and re-review compliance with the Act in 2020.

The Fundraising Regulator has published new guidance in response to its review into compliance with the Act. This renewed, clearer guidance, coupled with the length of time since the 2016 Act came into force, should result in increased compliance being reported in the next review. The Fundraising Regulator will continue to review compliance with Section 13 of the 2016 Act on a regular basis to measure improvements in reporting. The Fundraising Regulator published the Complaints Report 2018/19⁴ in February 2020 which found that overall complaints made to the Fundraising Regulator decreased by 33% on the previous year. Public complaints about door-to-door charity fundraising have also decreased by nearly 22% over the past year. Although it is not possible to conclude a causal relationship, the decrease in complaints could suggest that the changes in the 2016 Act have increased awareness and improved fundraising practices.

(IV) Social Investment

Evidence on the Social Investment Section has been provided by ACF, Bates Wells and the CLA.

The 2016 Act made a new provision for charities to engage in social investment (section 14). This section gives charities a new express power to make social investments. It also sets out

⁴ Fundraising Regulator (2020) *Complaints Report 2018/19*

what the duties of charity trustees are in regards to making social investments under this power.

The rationale for these provisions was based on sector feedback that the existing law did not provide a suitable framework for charities to make social investments (investments that pursue both a financial and a social return). The existing law was considered to be a barrier to growth and take-up of social investment, with legal complexity resulting in added transaction costs. These provisions were developed by the Law Commission, following public consultation, and were then adopted into the Charities (Protection and Social Investment) Bill.

The changes were permissive and were only expected to affect charities interested in potentially making social investments. The changes were expected to impose a one-off familiarisation cost on charities considering social investment as they would need to become familiar with the change in the law, the cost will come either from the trustees time or seeking the advice of a lawyer. The main objective was to remove any potential uncertainty as to the legal framework with the benefit that this should save time and legal expenses that trustees felt the need to undertake. The new legislation was also expected to stimulate the consideration and use of social investment by more charities.

Feedback from social investment lawyers and the Association of Charitable Foundations (ACF) is that the new social investment power has resolved some of the uncertainty in the charity sector around making social investments. Some charities were already making these types of investments and these provisions gave them confidence to continue doing so. The 2016 act clarifies a charity's ability to combine investment and grant-making powers in order to make social investments. As the 2016 Act does not specify how these investments have to be made, it allows for advice to be given based on the circumstances and permits market practices to develop and settle. One lawyer argued that as time goes on more charities are becoming more confident in making social investments and this new legislation has emboldened trustees and others who were previously unsure. ACF estimated that they have 10-15 member foundations that are confidently making social investments with a further 80 interested but yet to take action.

The CLA believe that although the power was not strictly necessary, it has been helpful in raising awareness of Social Investment as an option for charities. They also say that anecdotally, charities seem to be increasingly interested in social investment and advisers within the CLA have reported advising on these matters with increasing frequency.

The 2016 Act perhaps hasn't encouraged new charities to make social investments, but there was a recognition that the legislation can only address the legal barriers to the making of social investments, and that broader work needs to work alongside the legislation to showcase what can be achieved through social investment and the relative simplicity of making social investments, and to grow the market.

The UK government has been keen to develop the social investment market since at least 2002, and the emphasis on social investment has increased in recent years. Perhaps one of the biggest ways in which the UK government has supported the growth of the social investment market is in establishing Big Society Capital. Big Society Capital plays a role as a champion for the social investment market by sharing information and experiences from the sector, defining and demonstrating best practice, and informing government policy. In addition,

some examples of the government stimulating the social investment market are through the introduction of Social Investment Tax Relief (SITR) in 2014 as well as the creation of the Northern Cultural Regeneration Fund and the Social Tech Venture Fund.

The main concern raised by both ACF and Bates Wells was that charities are worried about the extent of private benefit permitted in relation to social investment, and would welcome clarification. The CLA also feels that the guidance on private benefit is very brief and should ideally be expanded to cover issues of context and proportionality in relation to specific investments. They argued that as certain tax aspects remain unclear, this limited the positive impact of the power. ACF reported that some foundations argued that a lack of consistent terminology can be confusing with different terms used including mixed-motive investment, social investment and programme investment. The Charity Commission, the SORP and the 2016 Act all use different terminology which can make it difficult to navigate. There is a need for trustees to take reasonable advice but it is difficult to determine what is meant by reasonable and the foundations feel that more examples within the guidance would help to clarify this.

The CLA feels that the guidance could be improved. The Guidance is still called “interim guidance” and the CLA believe the Charity Commission should consult on how it should be finalised. The guidance on delegation of decisions could also benefit from clarification as the current wording is confusing and appears contradictory. They suggest it would be helpful if the HMRC’s guidance on “approved charitable investments” could be updated to specifically reference the social investment power, it refers to “program related investments” and “mixed motive investments” terminology which is not used in the 2016 Act.

Conclusion

DCMS has not seen any evidence to suggest that Section 14 has had any negative impact on the charity sector and has some feedback indicating that it has helpfully clarified the legality of charities making social investments. There is some suggestion that guidance may be in need of updating and some further clarifications around private benefit may be beneficial. The Charity Commission is responsible for updating their guidance but their resources are limited. Although the intention behind these provisions was that more charities would consider social investment, providing a permissive power does not guarantee behaviour changes and there would likely need to be a broader cultural shift to encourage more charities to partake in social investment. Since 2002 the government has delivered a number of programmes to increase access to repayable finance for voluntary organisations, and is continuing to have discussions with relevant stakeholders.

4. Overall Assessment Costs and Benefits

The Impact Assessment estimated a Net Benefit (PV) of £-8.96m over a 10 year time horizon which included (figures below are undiscounted);

- Familiarisation Costs (£4.6m); calculated on the assumption that one trustee from each of the 200,000 charities would take one hour to familiarise and feedback to the board.

- Cost to update Professional Fundraiser and Commercial Participator Agreements (£2.7m); calculated on the assumption that each of the 2,000 large charities would have between 2 and 4 agreements to update, and that between 4,200 and 10,500 smaller charities would have 1 agreement to update. The IA assumed it would take between 90-120 minutes to update.
- Cost to amend Annual Report (£9.5m); calculated on the assumption that between 3,565 and 5,358 charities undertaking public fundraising would take 2 hours to attend to this additional reporting requirement.
- Un-monetised Benefits

DCMS did not believe it to be proportionate to the expected impact to directly test the assumptions made in the Impact Assessment to estimate the costs, but on the basis of evidence collected from the stakeholders DCMS do not believe that it has taken the affected charities a significantly different amount of time to those set out in the Impact Assessment. The benefits in the Impact Assessment were not monetised, as the principal benefit is in relation to public trust and confidence in the regulation of charities. We have explored the realisation of expected benefits in the Post-Implementation Review above.

5. Recommendation

Based on the evidence within this Post-Implementation Review of the 2016 Act, a renewal of the legislation is recommended.

Section 16 of the Act 2016 stated that the review needed to consider the effects the 2016 Act has had on public confidence in charities, the level of charitable donations and people's willingness to volunteer. In practice it has proven difficult to determine the impact the 2016 Act has had on these specific issues as there are a number of other variables that may also have influenced these three factors. The review has also taken place relatively soon after the 2016 Act was implemented, making it more difficult to isolate causal factors. The Charity Commission produces the Trust in Charities report every 2 years. The 2018 Trust in Charities report asked more detailed questions than before, which explored the reasons for changes in public trust. As these questions were not asked prior to 2018, it is not possible to measure trends over time. If the Charity Commission continues to measure trust in this way this will mean a richer data set for the next review.

Many risks raised during the consultation and drafting of the 2016 Act appear not to have materialised. There is no evidence to suggest that the new Charity Commission powers have had a negative impact on charities and the number of charities that have been directly impacted by these changes are low. The Charity Commission appears to be using these powers appropriately and proportionately and this is reflected in the low appeal numbers and low success rate of appeals.

The extension of automatic disqualification only took effect in 2018 and it is therefore difficult to know the full impact this may have had on charities. However, DCMS has not seen evidence to suggest this change has had any negative impact on trustees or senior managers and the numbers affected appear to be lower than expected. There are still some concerns from rehabilitation charities about the process for obtaining a waiver and whether this may put some people with criminal convictions off from becoming trustees or senior managers.

Compliance with the new fundraising transparency requirements rules was low in the initial sample of annual reports but as this was early on there may have been improvements since. There is no current data on this. The Fundraising Regulator has improved its guidance and plans to re-review compliance in 2020.

Clarifying charities' powers to make social investments has been welcomed by the sector and professional advisers. There are still some concerns around guidance on private benefit in the context of social investment but overall the evidence is that the new social investment power has had a positive, rather than transformational, impact. DCMS will continue to have discussions with stakeholders on social investment.

Other than the unintended consequences of the automatic disqualification raised by the charity Unlock, DCMS has not seen evidence to suggest the 2016 Act has had any further unintended consequences. However, looking at the sector more broadly, one unintended consequence could be that the greater use of powers by the Charity Commission could lead to a public perception that wrongdoing in charities is becoming more prevalent. Another unintended consequence could be that increased regulation may dissuade people from volunteering as charity trustees. However, DCMS has not seen any evidence to suggest that the implementation of the 2016 Act has led to either of these occurring.

Next Steps

The 2016 Act will be reviewed again within the next 5 years, with more evidence being collected. The next review may be able to assess impact to a greater extent as the 2016 Act will have had time to take effect. In regards to the guidance, it is the Charity Commission's decision on whether it feels the guidance needs updating in light of this review, however, the Charity Commission has limited resources to be able to do this. As previously mentioned DCMS would be happy to meet with Unlock and other rehabilitation charities to discuss automatic disqualification. DCMS would also be happy to meet with the Charity Commission to discuss the findings of this post-implementation review. DCMS is continuing to engage with stakeholders on the regulatory framework, including fundraising regulation and social investment. The Fundraising Regulator has published new guidance and will repeat its research on compliance in 2020.

Sign-off for Post Implementation Review: Chief economist/Head of Analysis and Minister

I have read the PIR and I am satisfied that it represents a fair and proportionate assessment of the impact of the measure.

Signed:

A handwritten signature in black ink, appearing to read 'Dipti Bhadresa', with a horizontal line underneath.

Dipti Bhadresa - Head of Appraisal and Evaluation

Date: 29 - 01 - 2020

Signed:

A handwritten signature in blue ink, appearing to read 'Amin L.', with a horizontal line underneath.

Secretary of State for Digital, Culture, Media and Sport

Date: 05 - 03 - 2020

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