



## Policy paper

# Proposed disqualification power

How the Charity Commission would use the statutory power proposed in the Charities (Protection and Social Investment) Bill to disqualify individuals from acting as trustees<sup>1</sup>: initial thinking.

## Background

The Charities (Protection and Social Investment) Bill ('the Bill') would give the commission power to make orders disqualifying individuals from acting as trustees under certain circumstances.

This is a power for which the commission has long argued and the commission welcomes its inclusion in the Bill. The power will enable the commission to protect charities from being run by individuals who are clearly not fit to do so.

The commission recognises, however, that this is a significant new power. It is important that the commission provides reassurance that it will only use it when there is a clear case for doing so and that the commission should clearly explain what it will take into account before using the power.

This paper is designed to provide that reassurance. It gives the commission's initial thoughts on its approach to using this power and the commission has published it now to help answer questions that may arise during the passage of the Bill.

The commission would also mention that there are important safeguards built into the process. Before an order is made there will be a notice period in which the individual would be able to make representations to the commission contesting its decision. They will also have the right to appeal to the First-tier Tribunal (Charity) ('the Tribunal') if an order is made and to apply for the equivalent of a waiver.

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1 (i) The existing disqualification regime and the proposed changes cover both charity trustees and trustees for a charity. Charity trustees are responsible for the control and management of a charity. A trustee for a charity is person who isn't a charity trustee but holds property of the charity (an example is someone who holds money raised for a charity). (ii) The Bill would also extend the effect of disqualification beyond trustees to a small number of senior management positions. The proposed disqualification power would also cover these positions. Rather than repeatedly referring to both types of trustee and other positions this paper, for ease of reference, simply refers to 'trustees'.

## How the commission is developing its policy

The approach the commission outlines takes account of the Bill as currently drafted, the commission's experience as regulator, and that of other bodies with similar powers of disqualification or sanction, including:

- the disqualification regime for company directors
- the approach taken by HMRC in tax issues
- the Care Quality Commission

If the Bill becomes law the commission will work on this further and intends to hold a public consultation on its approach before it is finalised.

The commission will then continue to develop its approach in the light of its experience of using the power including cases that are considered by the Tribunal.

## The 3 tests that would have to be met

The Bill proposes that the commission would only be able to make a disqualification order when it is satisfied that each of the following tests is met:

1. At least 1 of 6 'conditions' applies.
2. The person is unfit to be a trustee<sup>2</sup>.
3. The order is desirable in the public interest in order to protect public trust and confidence in charities<sup>3</sup>.

The following are the factors the commission would take into account for each of these tests and the relevant principles of good regulation and the human rights and equalities protections that the commission would apply.

### Test 1: at least 1 of 6 'conditions' must apply

The following table includes the 6 conditions and some examples and comments on what they would mean in practice. The commission would emphasise that the conditions are only 1 of 3 tests that would have to be met. The commission could not exercise the power simply because 1 of these conditions applied.

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<sup>2</sup> This may be generally or in relation to a charity or class of charity.

<sup>3</sup> This may be generally or in relation to a charity or class of charity.

Condition	Example/comment
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	The person accepted a caution for stealing charity funds
B: a person has been convicted of an offence in another country that: <ul style="list-style-type: none"> <li>• is against, or involves the administration of, a charity or similar body<sup>4</sup></li> <li>• if committed here would bring automatic disqualification from acting as a trustee</li> </ul>	A conviction abroad for bribery or terrorist financing in connection with a charity or similar body  When considering an overseas conviction the commission would take account of any concerns raised about any court or other legal processes, their compliance with right to a fair trial (including evidence submitted) and whether the standards of evidence and justice would not be accepted in a UK or European court
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 <sup>5</sup>	This is a decision taken by HMRC
D: a trustee, officer, agent or employee of a charity was responsible for, contributed to or facilitated misconduct or mismanagement in a charity	This is the same test that applies when using the commission's existing compliance powers
E: an officer or employee of a corporate trustee was responsible for, contributed to or facilitated misconduct or mismanagement in a charity	This covers the same ground as condition D but will capture individuals responsible for decisions taken by a corporate trustee

4 This will cover any body that is a charity in the UK and those set up under the law of another country 'established ... principally for charitable, benevolent or philanthropic purposes'.

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

Condition	Example/comment
<p>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</p> <p>NB: the commission will consider this condition in the light of existing definitions. If it takes any action on the basis of the condition being met the commission will provide an explanation identifying the conduct in question and why it thinks the conduct meets this condition</p>	<p>This is a widely expressed condition and relevant factors will include:</p> <p>(a) if the conduct had been by a trustee of a charity, would it:</p> <ul style="list-style-type: none"> <li>• be considered misconduct or mismanagement in the administration of the charity</li> <li>• put the property or reputation of the charity property at undue risk</li> </ul> <p>(b) whether there was misconduct in another position of trust and responsibility</p> <p>Conduct the commission believes might damage public trust and confidence includes:</p> <p>(i) some convictions that do not mean automatic disqualification, including:</p> <ul style="list-style-type: none"> <li>• for serious sexual offences by a trustee of a charity working with children or vulnerable adults</li> <li>• for animal cruelty by a trustee of an animal welfare charity</li> </ul> <p>(ii) regulatory breaches that have been penalised by another authority, for example legal requirements on tax matters</p> <p>(iii) a finding of misconduct by a professional body or regulator</p> <p>(iv) an adverse finding by a charity self-regulatory body or umbrella body</p> <p>(v) dismissal from employment or from another fiduciary or public appointment</p>

## Test 2: the person is unfit to be a trustee

If someone meets 1 or more of the preceding conditions the commission will then consider whether the conduct in question makes them unfit to be a trustee. In doing so the commission proposes to base its assessment on:

- the general expectations of what is required of trustees
- the inherent duty of the Court, the Tribunal and the commission to ensure that the trusts of a charity are properly executed by the trustees

In practice the commission believes that unfitness is likely to be a result of a failure in one or more of the following broad categories:

- honesty and integrity
- competence
- credibility

### Honesty and integrity

The commission is likely to have concerns about someone's honesty or integrity if it finds evidence they have abused a position in which they were trusted to hold and properly use charity or public funds or any funds not belonging to them. Conduct of that type or that abuses the trust of others more generally will also call into question their fitness to act.

Examples of such conduct will include (but not be limited to):

- exploiting a position of trust for personal gain
- dishonesty, deception or cheating
- breach of a trust or confidence
- misleading a public body or failing to tell the whole truth
- hiding any personal interests or conflicts of interest

### Competence

Concerns about someone's competence would be raised by evidence that they are incapable of, or unwilling to, fulfil the duties and responsibilities of a trustee. In [The essential trustee \(CC3\)](#), the commission describes the main ones as follows:

- carrying out the charity's purposes for the public benefit
- acting in compliance with the governing document and rules of the charity
- acting in the best interests of the charity - this includes ensuring that conflicts of interest do not interfere with a trustee's ability to make a decision only in the best interests of the charity and not putting themselves in a position where this appears to be the case
- managing its resources responsibly
- acting with reasonable care and skill - this means acting responsibly and honestly in a way a prudent person would in managing their own affairs

Examples of the type of conduct that would suggest a lack of competence to an extent that might make a person unfit include, but are not limited to:

- failure to comply with trustee duties - this would cover persistent failure to comply with specific charity law requirements including those around the submission of accounts and returns, or keeping financial records
- misapplication of their own or others' funds or irresponsible management of others' finances
- failure to discharge similar duties in their personal or business affairs
- exploitation of a position of trust
- being unable to act in the best interest of a charity
- being unable or unwilling to set aside obligations to others - financial or otherwise - who might seek to influence them in the performance of their duties
- a wilful disregard for management of conflicts of interests
- the person would not be able to comply with charity law requirements for trustees

The commission stresses that it would not argue that a person was unfit simply because they took a trustee role or applied for one without any prior knowledge or experience of acting as a trustee or the regulatory requirements for charities.

### **Credibility**

A person's conduct can damage their personal credibility and reputation in a way that affects the confidence beneficiaries and the public have in their ability to properly carry out the work of a charity trustee. Sometimes this is so acute and intractable that it calls into question their fitness to act in the quasi-public role of trustee.

Examples of how this could happen are when conduct indicates or relates to:

- a risk to a charity and those it is meant to help - for example a person with convictions for offences against children being involved in a charity working with children or vulnerable adults
- negligent and repeated failure to comply with legal requirements on tax matters that has been penalised by HMRC
- support for and participation in discredited tax avoidance schemes
- actions in fundraising that gave them high personal benefits to the detriment of the charity or in which they used high pressure selling or other discredited methods
- other poor standards in charity fundraising
- repeated or persistent insolvency or administration of their businesses
- failure to comply with immigration laws that has been penalised by the relevant authority by a person who works, or wants to work, in an immigration charity
- conduct which shows a material risk of harm to the work of charities in general
- carrying out duties in a position similar to trustee or a position of public office to produce significant financial/other benefits for themselves, their family or their friends

### Test 3: the disqualification must be desirable in the public interest in order to protect public trust and confidence

The third test is only relevant if the others are met.

Charities are publicly accountable for the funds they receive and the privileges they enjoy because of their charitable status. The trustees are responsible for the administration and management of individual charities. In considering whether this test has been met the commission believes it should consider whether disqualification will protect charities from those who would not carry out the role of trustee with integrity, honesty, capability or credibility in the interests of the charity and its beneficiaries, and ultimately be trusted by the public to do so.

This test will, for example, allow the commission the flexibility to take account of circumstances in which the risk of (further) damage to charity is minimal and it would not be in the public interest to act against the individual. This could cover cases involving infirmity due to age or illness. It will also act as a filter for claims that the commission should act against individuals who have never had any relevant relationship with charity and it has no reason to suspect that this will change.

The commission will use the knowledge it gains from the surveys it undertakes into public trust and confidence to inform it of matters which drive the underlying trust and confidence the public has in charities. Previous surveys have indicated that charities are in the top 3 trusted groups by the public, with in the past only the police and doctors seen as more trusted. That trust extends to trust in those that are responsible for running a charity: the trustees. The commission will continue to explore this in future surveys.

If a person is already a trustee, the commission would consider any evidence that their contribution was essential for the continued success of the charity and that they should be allowed to continue as trustee or in another senior position. The commission would balance such evidence against the need to protect trustees, charities, their beneficiaries and the public from people whose conduct has damaged or will damage charity.

In deciding whether it is in the public interest to act, the commission will have regard to a number of factors including:

- the nature and seriousness of the conduct
- the extent of the unfitness and whether it might be temporary or time specific
- any adverse or positive public reaction to the impact in relation to the conduct if it is publicly known, or on charity if their involvement with charity is public
- if the misconduct or act involves a charity, the impact on the standing of the charity and the integrity of charity generally if the person is free to become, or continue as a trustee of this charity
- if the misconduct involved a charity whether it is reasonable to conclude that the person has acted in a way that they knew or should have known was likely to discredit them, the charity or the charity sector more widely

- any adverse impact the conduct and unfitness has on the charity including risk to charity property - for example, would it affect the charity's ability to obtain funding from donors, obtain financial services, would it create risks to safe travel in conflict zones for its staff and their ability to carry out work for the charity?
- any adverse impact the conduct and unfitness may have in the future if the person continues to be involved, or becomes involved, in a charity - for example, does the conduct suggest their involvement would present a high risk of abuse or damage to the charity or its reputation and public support or the capability of that person to retain the confidence of the public in their ability to be a trustee of a charity generally or of a charity or class of charities?

## Overall limitations and considerations in exercising discretion

In considering the use of this power the commission will also be bound by the general requirements in the Charities Act 2011 that any action it takes must:

- further the commission's statutory objectives and functions
- have regard to the principles of best regulatory practice<sup>6</sup> and be proportionate, accountable, consistent, transparent, and targeted only at cases where action is needed

The commission will therefore also consider whether a person should be disqualified in the context of its published [risk framework](#) and other regulatory guidance, such as [The essential trustee \(CC3\)](#). This makes it clear that the commission would be more likely to take action where there is negligent, reckless or deliberate misconduct.

In every case the commission would consider the following before making an order and, if it does, the length of a disqualification:

- are the disqualification and any proposed disqualification period proportionate in the circumstances (it can be for up to 15 years)?
- the commission's obligations as a public authority with regard to human rights and equality and the impact any order might have on the person's rights<sup>7</sup>

## Deciding on the period of disqualification

The commission's final guidance will include a section on this referring to the nature of offences/conduct and the principles of rehabilitation and how the commission will take them into account, particularly when considering cautions.

It will refer to the 5 year period following disqualification and whether the commission grants a waiver (and if the existing special circumstances provided for in the Charities Act 2011 will apply) and to the role of proportionality and so on.

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<sup>6</sup> Under s16 of the Charities Act 2011.

<sup>7</sup> This will include the rights to respect for private and family life, (Article 8 ECHR), freedom of expression and association (Articles 10 and 11 ECHR) and property rights (Article 1, Protocol 1 ECHR).