



## Parliamentary Briefing

# Charities (Protection and Social Investment) Bill - House of Lords, Committee Stage

### The purpose of the Bill

The Charity Commission has a wide range of powers but there are basic, underlying weaknesses in our enforcement powers that limit our ability to act to prevent and/or tackle abuse in charities and are powers that are necessary for a regulator to have.

All of the powers within the Bill have a number of specific safeguards to ensure they are used appropriately. Under the Charities Act 2011, we are also bound to have regard to the principles of best regulatory practice and act in a way that is *"proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed"*. This remains a fundamental part of the way that we must exercise these powers.

The Bill contains fourteen substantive clauses that are needed for five main reasons:

- to plug loopholes in current regime
- as basic powers you'd expect a modern regulator to have
- to enable the commission to use effective, targeted and proportionate sanctions
- to deal with the complicated and technical issues that have arisen as our work becomes more complex requiring more nuanced and sophisticated powers
- as a deterrent value

The purpose of this briefing is to provide a clause-by-clause commentary for interested Peers ahead of Committee Stage.

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**Clause 1: Official Warnings by the commission** - the commission would be able to issue an Official Warning to charities or trustees.

We want a more reasonable and proportionate way of dealing with low level breaches of statutory provisions of Charities Act 2011 or breaches of fiduciary duty where the risks and impact on charitable assets and services are relatively low. In those cases it would be as a more proportionate alternative to the use of remedial powers such as suspensions, or removal of trustees. Many other regulators already have similar, low-level powers.

### When would the commission use the power?

A charity is consistently a little late in submitting its accounts. It would not be proportionate to refer the matter to the police (who would be very unlikely to take action) or to remove the trustees, but a warning would be a shot across the bows to tell them not to do it again or risk our taking stronger action.

Trustees make a poor investment without professional advice but the impact of decision is low cost. It would not be proportionate to take action to make them repay funds but we could issue an Official Warning on future conduct.

Breaches of a charity's governing document that lead to governance problems. For example, not running internal elections properly, which leads to complaints and disputes within the charity but often the impact is not great enough to justify the use of current powers. A published warning could promote compliance and increase transparency and wider public trust and confidence.

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**Clause 2: Investigations and power to suspend** - confirms that breach of a commission order is misconduct and increases the maximum length of suspension under s76.

This clause has two main effects:

1. Makes clear that a breach of a commission order, warning or direction is in itself an act of misconduct which can be used to justify the use of our other compliance powers, including opening an inquiry or trustee disqualification.
2. Suspension of a trustee is designed as a short term protective measure while we conduct further investigations. We conduct those investigations as quickly as we reasonably can. But sometimes we have to put action on hold for reasons outside our control. The Bill would allow us to extend the protective suspension while other proceedings continue or investigations continue, thereby ensuring that where needed, any risk to a charity, its assets or beneficiaries, continue to be protected.

### When would the commission use the power?

Trustee of a charity which looks after children is charged with multiple offences against the person, some of which include offences against young persons. Due to the complexity of the trial issues the trial does not take place for 16 months after charge, after which time the case is thrown out on procedural default. The commission would want to be able to continue the suspension (currently limited to 12 months) until the trial determined the matter.

**Clause 3: Range of conduct to be considered when exercising powers** - in an inquiry into a charity where misconduct or mismanagement has been found this will allow the commission also to take account of conduct outside the charity under inquiry.

Clause 3 would help us to prevent unsuitable people being in a position to exploit charities by enabling us to take an overall view of the person's behaviour when considering what action we could take. We disagree with the view that this power is too broad. An inquiry must be open and we must have found misconduct or mismanagement before other conduct can be taken into account. It should also be emphasised that this power can only be used in line with the best regulatory practice principles and that there is an appeal to the Tribunal.

#### When would the commission use the power?

Trustee takes a large amount of cash overseas allegedly for charity A in furtherance of its charitable purposes (relief of need) although there is no evidence to indicate what charitable activity will be carried out. The charity's assets are seized and subject to a forfeiture order. Trustee resigns during the course of a commission investigation, and then sets up a new charity B with similar objects, and becomes a trustee of that charity. Misconduct and mismanagement of the same trustee in the new charity B is established regarding similar cash transactions overseas but currently we cannot take into consideration his conduct in charity A.

A trustee is known for serious concerns in the conduct of his or her employment eg by local authorities for intimidating conduct whilst caring for vulnerable people. The individual subsequently takes up trusteeship in a charity which runs a care home for the elderly and we identify further misconduct or mismanagement by the individual in that charity. The commission cannot currently take the past conduct into account.

**Clause 4: Power to remove trustees etc following an inquiry** - prevents resignation being means to avoid disqualification.

Clause 4 will close an obvious loophole in the current legislation. If we begin the process of removing a person from trusteeship we will be able to continue the process even if the person resigns before it is finished. The person would then also be disqualified from acting as a trustee of any other charity. Currently, they can resign and will be free to take up another position elsewhere and avoid disqualification.

#### When would the commission use the power?

Three charity trustees entered into a series of dubious loan agreements in which the charity loaned money to connected third parties with no security, in return for an interest rate of 5% per annum. The loan was never repaid, and the charity was entered into voluntary liquidation. Whilst the commission investigation was ongoing 2 of the trustees resigned. Although the commission had established sufficient grounds of mismanagement/misconduct it was unable to remove those individuals. The new power would remedy this, so that the effect of their removal would be disqualification, and protect the sector.

**Clause 5: Power to remove disqualified trustee** - improve our powers by allowing easier removal of disqualified individuals from post.

Disqualification from acting as a trustee does not in itself remove an individual from their position as trustee. So, for example, although they are disqualified, depending on the terms of the governing document, they may still be in post although unable to act as a trustee. If they will not resign this creates governance and reputation risks for the charity. We believe that removal should be a consequence of disqualification. This clause gives us the power to remove a disqualified trustee.

#### **When would the commission use the power?**

A trustee is disqualified by virtue of bankruptcy pursuant to s178 of CA 2011. However disqualification does not remove the person from the position of trustee. Similarly, the charity's governing document does not remove the individual either. In these circumstances, the commission or trustee body has to try to secure resignation of the individual. The individual refuses to co-operate and does not resign, which means that the trustees may not be able to operate quorately or appoint new trustees. This power would enable the commission to remove the disqualified trustee.

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**Clause 6: Power to direct specified action not to be taken** - power to direct a charity not to take certain actions in the context of a statutory inquiry.

Clause 6 will enable us, once a statutory inquiry has been opened and we consider that any action if taken or continued by the charity or its trustees would constitute misconduct or mismanagement, to direct it or its trustees not to take or continue that action. The commission can currently direct a charity to take a course of action and prevent it entering into transactions. This is a logical extension of these powers to ensure we can also direct not to do something, which is not solely contractual or transactional.

#### **When would the commission use the power?**

The commission could act to stop trustees acting whilst in quorate and, for example, calling elections (invalidly) where there has been a wilful and/or reckless disregard for the rules set out under the charity's governing document.

In any case to prevent the wilful or reckless transfer of charity funds out of our jurisdiction where this is not in the charity's best interests or is being done in clear breach of duty.

**Clause 7: Power to direct winding up** - power, in rare circumstances, for commission to direct a charity to wind up.

Our general approach is to try and put a charity back on a proper footing. But there are cases where it would be better if the charity was wound up and any remaining assets passed on to another charity. The trustees may not be capable of, or willing to, take the necessary action and it is impractical to find alternative trustees or appoint an Interim Manager. This power is designed to be used in very rare circumstances where we can show that the continued existence of a charity would be harmful. We are pleased that the Bill now includes a period of public notice before this power is exercised.

#### **When would the commission use the power?**

We had information suggesting one of the only two trustees was acting while disqualified, the finances were being grossly misrepresented, funds were being misappropriated and that we had been given false or misleading information. We reported our concerns to the police. The disqualified trustee left the charity, leaving only one trustee who was unable to explain the position. We found that the charity had been used to personally benefit the disqualified trustee (who was later convicted and imprisoned for theft and providing us with misleading information). Little had been applied for its charitable purposes. As it was not operating, the charity should be removed from the register. The remaining trustee would not take action to wind up the charity and we had no power to resolve the issue. In such cases the use of the proposed power would clarify the position, provide for the proper application of assets and ensure that the charity could not later restart operations with the risk of further abuse.

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**Clause 8: Power to direct property to be applied to another charity** - amends the existing power to direct application of property so that compliance with a commission order does not result in a breach of contractual obligations to the charity.

#### **When would the commission use the power?**

A number of charities subject to a class inquiry ceased to operate but funds remained in their bank accounts. Our powers relating to dormant accounts could not be used until a certain time had elapsed and there was a risk that the remaining funds could be misapplied by individuals on the mandate. Before we could use this power as currently worded we had to establish that a number of banks were unwilling to apply the funds without an order of the commission. This was a particularly resource intensive process which could be significantly reduced if s85 were to be amended. The amendment will provide comfort to money holding institutions that in complying with an order they will not be breaching existing contractual obligations.

**Clause 9: Automatic disqualification from being a trustee** - extends the criteria for a person to be automatically disqualified, extends disqualification beyond trusteeship to cover other positions of power, and says that anyone we remove from a non-trustee position is also disqualified.

The current criteria are too narrow and do not cover several areas that ought to merit disqualification including convictions for serious terrorism offences, money laundering or bribery. Most would be surprised that these offences are not automatic provisions already. Those with unspent convictions are able to apply for a waiver. In light of concerns raised during pre-legislative scrutiny, the commission has already made changes to the information available online. A cross-commission working group has also begun its work in reviewing our staff guidance and the process of issuing waivers, as well as how information about waivers is communicated to those who are disqualified.

Also, currently, disqualification does not prevent individuals being appointed to other positions of authority within charities. It is counter-intuitive that someone can be disqualified from acting as a trustee however unfit people can still further abuse charities by taking up other posts in which they could exploit their influence. The clause deals with this by preventing disqualified individuals properly acting in other senior positions, so reducing the risk of abuse.

#### Examples of cases in which extended criteria would have applied:

Money laundering offences. A police investigation resulted in a number of convictions for fraud and money laundering offences. They related to the funds applied by a charity in relation to contracts to house and support asylum seekers. Those convicted of fraud were disqualified from acting as trustees because fraud is a crime involving deception or dishonesty as in s178 of the CA 2006. Those convicted of money laundering were not disqualified, however, because the offence of money laundering does not fall within the s178 definition. The latter are no longer charity trustees, but there is currently no bar on their becoming trustees again.

Offences related to terrorism. Individuals convicted of terrorist offences - including offences under s.5(1) of the Terrorism Act 2006 (Preparation of Terrorist Acts) - had raised funds publicly for charitable purposes. The majority of the money raised was not paid to the charity in whose name the collection took place. The individual - currently serving prison sentences - are not disqualified from trusteeship as these offences are not included in current criteria in the CA 2006.

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**Clause 10: Power to disqualify from being a trustee** - This would enable us to disqualify a person from trusteeship if they meet criteria set out in the proposed legislation.

The criteria complement those for automatic disqualification by covering behaviour that raises questions about fitness but does not necessarily merit automatic disqualification. This wider power will significantly improve our ability to prevent unsuitable individuals being able to abuse charity by exploiting the position of a trustee. During pre-legislative scrutiny, some parties requested further detail on how we might use this power. The commission's initial thoughts can be found in our [published document](#). We will consult more widely on this before the provisions are implemented.

### When would the commission use the power?

A person has no relevant unspent conviction. But a serious event such as disqualification from a professional organisation while a trustee of a related charity; or a judgement in the Employment Tribunal for repeated bullying of/racism towards staff members may mean he or she is unfit to be a trustee. Often individuals use the charity brand to reinforce their public status at the expense of the charity's interests.

The police investigated concerns that a trustee had created charity invoices to claim public funding for their personal use. The trustee accepted two police cautions for offences involving dishonesty or deception. The criteria for automatic disqualification only refer to convictions for such offences. Cautions are not considered convictions and so do not result in disqualification. In this case, the person resigned as a trustee but they are free to take up trustee roles and the commission currently has no power to prevent them. The new power would have enabled us to disqualify the individual on the grounds that their conduct made them unfit to be a trustee.

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### Clause 11: Records of disqualification and removal.

We currently have to keep a register of individuals who have been removed from trusteeship either by ourselves or the High Court. They are disqualified from trusteeship as a result. The entries in the register must be publicly available. This enables charities to check if potential trustees are disqualified as a result of removal. Clause 11 extends the scope of the register so that it also has to include individuals we disqualify directly using the new power in the Bill or remove from non-trustee positions under s76 CA 2011.

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### Clause 12: Participation in corporate decisions while disqualified - prevent disqualified individuals participating in decisions about charity's affairs if director of its corporate trustee.

A person disqualified from acting as a trustee can still act as an officer (a director, or a member of a local authority or other public body, for example) of a corporate body that is a trustee of a charity. Currently, this allows someone judged unfit to be a trustee to play an active role in the management of a charity by taking part in decisions about the charity through its corporate trustee. Extending the effect of disqualification will close this loophole.

### When would the commission use the power?

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

### **Clause 13: Power to make social investments.**

Social investment is an investment that aims to achieve both a financial and a social return. Clause 13 removes any doubt as to whether charities or their trustees can make social investments and sets out the duties of trustees in using the power. We welcome this addition to the Bill.

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### **Clause 14: Reviews of the operation of this Act.**

This provides that the Minister for the Cabinet Office must carry out a review of the operation of the Act within 5 years of the Act being passed. We believe that the timescales in this clause are correct and that 5 years is an appropriate amount of time for the use of the powers to have become embedded in order that a review can fully assess their impact.

If you have any questions, would like any information or would like to meet to discuss the Charities (Protection and Social Investment) Bill then please contact the commission's Public Affairs Manager, Jack Rowley - 0300 065 2066/[jack.rowley@charitycommission.gsi.gov.uk](mailto:jack.rowley@charitycommission.gsi.gov.uk)