



Government Response to the Joint Committee on the Draft Protection of Charities Bill

Presented to Parliament
by the Minister for the Cabinet Office
by Command of Her Majesty

March 2015

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Introduction

The Government welcomes the report of the Joint Committee on the draft Protection of Charities Bill (HL Paper 108, HC 813), and would like to express its thanks to the Committee for its thorough pre-legislative scrutiny of the draft Protection of Charities bill. The Committee worked to a short timetable to scrutinise the draft bill but still managed to take evidence from a wide range of stakeholders and has produced a detailed and high quality report. We also express our thanks to all of the stakeholders who supported the pre-legislative scrutiny process by giving either oral or written evidence to the Committee.

The Joint Committee's Conclusions and recommendations, and the Government's response

Abuse in the charitable sector—how big is the problem?

1. The consensus of opinion is that abuse, distinct from honest mistakes and persistent mismanagement, is rare in the charity sector. There is, moreover, insufficient evidence available to make an accurate assessment of the incidence or significance of such abuse. We heard that, when such abuse does occur, the financial costs and reputational damage to the charity sector can be considerable. It is right that the Charity Commission should be more effective at tackling it than has historically been the case. This raises the question of whether this would also need additional legislative underpinning and, if so, whether the proposals in the draft Bill are the correct ones. (Paragraph 37)

The Government shares the Committee's characterisation that deliberate abuse is distinct from persistent mismanagement and honest mistakes. The Charity Commission has argued that deliberate abuse is no longer rare, but that the number of cases is small in comparison to the size of the charity sector. We welcome the Committee's view that the Charity Commission should be more effective at tackling abuse than has historically been the case.

Excepted and exempted charities

2. A significant number of charities are excepted or exempted from the requirement to register with the Charity Commission. This denies the Charity Commission full regulatory control over the charity sector, and makes it harder to ascertain the full scale of abuse. (Paragraph 43)

3. We recognise that the draft Bill is not the correct vehicle to address this issue. We therefore urge the Government to consider whether all charities should be brought within the requirement to register with the Commission in the next substantial review of charity law. We hope that the Commission's new investment in digitisation will help these registrations to be carried out without undue additional cost. (Para 44)

The Government's view is that all charities should be subject to appropriate regulation as charities. Excepted charities are already subject to the Charity Commission's regulatory jurisdiction, and following the Charities Act 2006, most groups of formerly exempt charities are either now registered with the Charity Commission or remain exempt with a principal regulator, the Commission being regulator in the last resort.

Requiring all charities to be registered with the Charity Commission would have resource implications for the regulator and would subject some groups of charities to disproportionate regulation.

We accept the Committee's recommendation that the position of excepted and exempt charities should, however, be reviewed in any substantial future review of charity law.

A more active approach by the Charity Commission

4. We are satisfied that, notwithstanding the evident increase in the Commission's use of its existing powers, there remains an overall case for legislative gaps in its regulatory armoury to be addressed now, rather than waiting for it to exhaust the benefits of its more proactive use of its existing powers. The case for each specific power is addressed in the remaining chapters of this Report. (Paragraph 51)

The Government and Charity Commission welcome the Committee's broad support for addressing gaps in the Charity Commission's powers.

5. The Charity Commission has to tread a fine line in its dealings with the sector. Its primary focus has to be that of civil regulator. It must also carry out its core operational functions, such as registering charities, granting regulatory consents and making orders and schemes. However, it should also act as a 'facilitator', helping charities, especially smaller charities, understand the nature of their obligations under the law. Nevertheless, the Commission has to guard against providing advice that inevitably is seen by the recipient as regulation, so contributing to 'regulatory creep'. (Paragraph 57)

The Government welcomes the Committee's conclusion that the primary focus of the Charity Commission is as a civil regulator. The Charity Commission has to strike a difficult balance in delivering its different functions with limited resources.

The Commission has said that it is alive to the dangers of regulatory creep, and endeavours in its guidance to clearly distinguish between legal requirements and advice on good practice. It should be noted that there are some areas where the Commission's guidance highlights examples of good practice which can help (or in some cases may be necessary for) charity trustees to demonstrate their compliance with a charity trustee's duties, rather than a specific statutory requirement. In these particular cases, the onus is on the trustees to demonstrate to the regulator how they have complied with their legal duties and sometimes this could be demonstrated in ways other than by following good practice guidance. But as part of the Commission's 'facilitator' function, it is right that it provides guidance to trustees, particularly of small charities, on simple ways that they can evidence compliance with their legal duties.

6. It has been suggested in evidence that greater emphasis on investigation and enforcement has had a negative impact on the Commission's ability to process new registrations and to provide support and advisory services, which were referred to as "back office" functions by its Chairman. The draft Bill would give the Commission new powers in the area of enforcement and thus potentially new areas of activity. If the Commission is to be asked to fulfil its existing statutory remit in the most effective way the question of its resources must be considered. (Paragraph 58)

As noted above, the Charity Commission has to strike a difficult balance in delivering its different functions. The Commission has already said that it recognises there are some areas where its performance is under pressure, as resources are redeployed and new business processes implemented, and these are being addressed as a priority.

If the Charity Commission were granted these proposed new powers, they should allow the Charity Commission to move more quickly and more proportionately, in some cases obviating the need for more severe regulatory action or prolonged examination or correspondence.

The Government notes the Committee's comments on the Commission's resources.

7. We note the weight of evidence which suggests that providing the Commission's online advice within the current pared-down framework of the gov.uk website is unlikely to give charities, particularly the smaller ones, what they need and that it has become more difficult for users to navigate. (Paragraph 60)

8. We recommend that, in light of the evidence we have received, the Government reviews the Charity Commission's pages on gov.uk and works with them to improve the availability and accessibility of the Commission's information. (Paragraph 61)

The Government recognises that accessibility of Charity Commission guidance is important, particularly to small charities. Moving the Charity Commission's website onto GOV.UK, along with 250 other departments and agencies, has seen a significant increase in traffic to the Commission's online content. GOV.UK has been built and tested in public, so that feedback from real users could be gathered and fed into successive improvements. We would encourage users to provide feedback where they have difficulty in finding the guidance they need. The Charity Commission is already working with the Government Digital Service to improve their content and structure on GOV.UK.

9. There has been much debate about whether the resources available to the Charity Commission are sufficient. The pressure on these resources is unlikely to be eased in the new Parliament, whatever the composition of the Government. It remains the case that the Commission will be unlikely to live

up to the increased expectations of it, which include continually improving its non-regulatory functions, without additional resource. Nevertheless, the additional funding for greater digitisation is welcome in that it should free up additional resource for other work. (Paragraph 67)

10. We note the NAO's finding that although the Charity Commission has made a start in understanding the cost of regulating the sector effectively, it needs to do more particularly as regards developing a better understanding of the costs and benefits of effective regulation. Its doing so will be essential if it is to make a persuasive case to Government for any additional resource we suspect it may need. (Paragraph 68)

The Commission has said that it is working to develop a better cost/benefit understanding of the effective regulation of the charitable sector. In part this will be achieved through greater use of data and a more refined risk framework to focus its regulation.

11. Provided a single point of registration does not add unduly to the time taken to register a charity, we consider that it could have significant advantages for all parties involved, particularly well-intentioned but thinly resourced charities. It is regrettable, therefore that roll-out of the new system has been delayed until April 2016. (Paragraph 79)

We note the Committee's comments. The Charity Commission is working closely with HMRC on development of the joint application portal. The roll-out of this has not been delayed; implementation before April 2016 was always unlikely.

12. We note the conclusion in the NAO report of 22 January 2015 that while the Commission is exchanging more information with other public bodies "it typically makes twice the number of disclosures [than] it receives". (Paragraph 80)

13. In the modern interconnected world regulation is a 360 degree matter and it is vital that other public bodies have confidence in the Commission and are as open with it as it is with them. (Paragraph 80)

The Government notes the Committee's comments. The Charity Commission has worked hard to strengthen its relationships with relevant other regulators and public bodies, to mutual benefit and has made clear it will continue to do so.

Clause 1: The power to issue a statutory warning

Would the power to issue a statutory warning be an effective addition?

14. We note the view from a number of witnesses that giving the power to the Charity Commission to issue a statutory warning will not contribute

significantly to its regulatory armoury. We are however persuaded that in principle it would be useful for the Commission to have at its disposal “something in between” guidance and the opening of an inquiry. Our support in principle is qualified by some concerns over the detailed operation of the new power. (Paragraph 90)

The Government welcomes the Committee’s support for the power to issue a statutory warning, and the conclusion that it would represent a more proportionate response in some cases that require more than guidance but do not warrant the opening of a statutory inquiry.

Are appropriate safeguards in place?

15. We welcome the Minister’s commitment to consider putting more detail on the face of the Bill. We are convinced by the evidence we have received that this would ensure that the Charity Commission will exercise the power appropriately. (Paragraph 99)

16. We are grateful to the CLA Working Group for its suggested amendments to clause 1 and invite the Government to consider their inclusion in the Bill. (Paragraph 100)

17. At a minimum, we recommend that the following points should be on the face of the Bill:

- a) a restriction of the circumstances in which a warning may be issued to a failure to comply either with a requirement of the 2011 Act or with an order or direction of the Commission;
- b) a requirement on the Commission to issue written notice of its intent to issue a warning, which would imply that that the Commission would have a duty to provide the recipient with the draft content of the warning before it is issued;
- c) a reasonable minimum period to make representations over the warning thereafter; and
- d) a restriction on publicising a warning until this period has elapsed and a requirement that the charity on whom the warning is due to be served is given advance notice of the intention to publish. (Paragraph 101)

The Government accepts the Committee’s recommendation to include more detail of the operation of the statutory warning power on the face of the Bill.

However, if it is to be an effective power for the regulator, the Government takes the view that the Commission should be able to issue a statutory warning for a breach of trust or duty in addition to circumstances where there is a failure to comply either with a requirement of the 2011 Act or with an order or direction of the Commission.

Charity law is a mixture of statute and case law. To limit the warning power to failure to comply with a limited range of statutory provisions, or order or

direction of the Commission, would result in a power that is at best only half-effective. The Commission would need to clearly indicate the detail of any breach of trust or duty in any relevant warning issued.

We accept the need for stronger safeguards on the face of the bill in relation to a statutory warning, so that a recipient has an explanation of the reasons for the warning and has an opportunity to make representations, and for them to be considered by the Commission before it is published. We will amend the draft bill accordingly.

18. Although we note the arguments by some that the issue of a warning should be subject to appeal to the Tribunal, we see the practical difficulty this would present to the Commission as disproportionate to the benefits of doing so. On the assumption that the Government agrees to our recommendation that the necessary details be added to the face of the Bill, we are satisfied that the issuance of a warning does not need the further safeguard of an appeal beyond the ability to seek judicial review. (Paragraph 104)

The Government welcomes the Committee's conclusion that a specific right of appeal to the Tribunal would be disproportionate. In relation to statutory warnings we propose to add additional safeguards to the bill as set out in our response above.

Investigation and inquiry powers

Clause 2: Actions that constitute misconduct and the power to suspend

19. We conclude that, assuming the Government agrees to include the further details in the Charity Commission's warning power for which we have called, failure to respond adequately to a statutory warning should be considered an act of misconduct or mismanagement which could trigger further action by the Commission. (Paragraph 109)

20. We therefore recommend an amendment to delete "or direction" and insert ",direction or a warning under s15" in clause 2 (2) lines 14–15 (Paragraph 110)

The Government welcomes the Committee's recommendation that failure to respond adequately to a statutory warning should be considered an act of misconduct or mismanagement, and will look to amend the draft bill accordingly.

21. However, failure to follow specified good practice should not in itself be considered sufficient evidence of misconduct or mismanagement. This should be made clear in the Charity Commission's guidance to trustees and in the explanatory notes to the Bill. (Paragraph 111)

The Government accepts that failure to follow specified good practice per se should not automatically be considered evidence of misconduct or mismanagement. However, the onus is on the trustees to demonstrate to the regulator how they have complied with their legal duties. As noted above, that there are some areas of good practice which can help (or in some cases may be necessary for) charity trustees to demonstrate their compliance with a charity trustee's fiduciary duties. Each case must be considered on its facts. The Government will reflect this in the explanatory notes to the Bill.

22. The explanatory notes to the Bill should also clarify that failure to follow an order or direction can only be treated as evidence of misconduct or mismanagement once any appeals process has been completed. (Paragraph 112)

The Government does not accept this recommendation. There are some circumstances where it would not be appropriate for the Charity Commission to wait for the conclusion of the appeals process before it acts for the protection of charity. If the Commission were to act on the basis of a failure to follow an order or direction, the Commission's actions, such as opening a statutory inquiry, and potentially exercising temporary protective powers would themselves be amenable to appeal to the Tribunal, which would be able to properly consider all of the evidence resulting in the exercise of the relevant power.

23. The Committee supports the extension of the maximum suspension period from 12 months to 2 years. (Paragraph 114)

The Government welcomes the Committee's support for this provision.

24. We recommend that the Charity Commission include statistics in its annual report of the number of instances where a suspension beyond 12 months has been required and the duration of those suspensions, so that the effect of extended suspensions can be monitored. (Paragraph 115)

The Charity Commission has said that it will include these statistics with the other published statistics in its annual reporting of its compliance work.

25. The Committee supports the inclusion of clause 2 of the draft Bill subject to these conditions. (Paragraph 116)

The Government welcomes the Committee's support for clause 2.

Clause 3: Misconduct/mismanagement outside of a charity

26. We support the principle of clause 3, as these provisions would only apply after a statutory inquiry had begun and the Charity Commission was satisfied that there had been misconduct or mismanagement. However we share the concerns of the JCHR and other witnesses about the risks associated with the power and its lack of clarity. The condition that a person is 'privity' to misconduct could be replaced by one that states they are 'aware of' an action that constituted misconduct and did not report it to the Commission. (Paragraph 124)

27. We recommend that the term 'privity to' be removed from clause 3 (and elsewhere in the Bill and the 2011 Act) and replaced with 'aware of'. We consider that the term 'facilitated' is sufficiently clearly understood for it to be included in the Bill. (Paragraph 125)

The Government notes the Committee's conclusion and the points made by the Joint Committee on Human Rights about the lack of clarity in relation to conduct outside of a charity that the Charity Commission may take into account. The Charity Commission's intention is only to take account of conduct that would be relevant to the management and administration of a charity, and we will look to revise the draft Bill to make this clearer.

The Government will explore implementing the Committee's recommendation to replace "privity to" with "aware of" with Parliamentary Counsel. The term "privity to" is already widely used in the existing legislation and we want to carefully consider the implications of any change before committing to a change of wording.

28. We also recommend that an amendment be made to require that the Charity Commission states what conduct it has taken into account when reporting on an investigation and how this conduct is demonstrated to be relevant. (Paragraph 126)

The Charity Commission is already required to produce a statement of reasons under section 86 Charities Act 2011 when it exercises its compliance powers. Where the Commission relies on evidence from outside of a charity we would already expect the statement of reasons to set out the conduct which the Commission has taken into account in making its decision, and its relevance to the decision. We will explore whether an amendment to the bill is needed to make this clear.

Clause 4: Resignation to avoid disqualification

29. We support the inclusion of clause 4, subject to the clarification of language suggested for clause 3. (Paragraph 129)

The Government welcomes the Committee's support for this provision.

Clause 5: Power to remove disqualified trustees

30. We support the inclusion of clause 5. (Paragraph 131)

The Government welcomes the Committee's support for this provision.

Clause 6: Winding up

31. We are persuaded that the power to direct the trustees of a charity to wind it up in certain circumstances and transfer resources elsewhere would only be used in rare circumstances and that, in such circumstances, the Charity Commission would use it sparingly, given its significance. (Paragraph 138)

32. We therefore support the inclusion of clause 6 of the draft Bill, subject to an amendment setting out the publication scheme for a notice of intention to direct the winding up a charity. (Paragraph 139)

The Government welcomes the Committee's support for this provision, and will amend the draft Bill to include provision for a publication scheme of notice of intention to direct the winding up of a charity.

33. We recommend that the condition in proposed section 84A(1) that the exercise of the power is "likely to help increase public trust and confidence in charities" be removed, as suggested by the JCHR and the Charity Law Association. We also suggest that the Government considers the proposal of the CLA to re-draft the power as an adjunct to section 84 of the Charities Act 2011. (Paragraph 140)

The Government accepts the Committee's recommendation to remove the condition on public trust and confidence proposed in section 84A(1). Our intention behind the inclusion of this condition was ensure the power was narrowly drawn and could not be used lightly. We may therefore want to replace this formulation rather than simply discard it, to ensure that the power remains relatively narrowly drawn to reflect the limited circumstances when the power could be used.

We note the recommendation to consider re-drafting the power as an adjunct to section 84 of the Charities Act 2011. However, attaching the power to section 84 would require significant changes to the current condition for use of section 84, as we have taken the view that winding up can never be expedient in the interests of the charity (which is why the current draft bill refers to the charity's purposes rather than the charity).

Clause 7: Power to direct property to be applied to another charity

34. We support the inclusion of clause 7. (Paragraph 143)

35. In reflection of the CLA's point, we recommend the Government consider the inclusion of some form of statutory protection for a financial institution in cases where compliance with a direction from the Charity Commission in these circumstances might constitute a breach of its contract with a charity. (Paragraph 144)

The Government welcomes the Committee's support for this provision. We will explore with Parliamentary Counsel and others the Committee's recommendation to include some form of statutory protection where compliance with a direction might constitute a breach of contract.

Proposal 10: Use of directions outside an inquiry

36. While there will be instances in which the opening of a statutory inquiry will be nothing more than a bureaucratic exercise, it should not be a particularly burdensome one and the process has valuable safeguards that should not be foregone. On this basis, the Committee would not support the addition of this power to the draft Bill. (Paragraph 150)

The Government accepts the Committee's recommendation not to include this power in the bill.

Proposals 11 & 13: Preventative directions against acts of potential misconduct

37. We suggest that it would be helpful if the Government chose to revisit Proposal 13. If so, the relevant clauses must be tightly drawn to clarify the circumstances in which the power can be used and the safeguards that apply, particularly the right of appeal. The Government may wish to consider whether the OSCR's powers provide an effective template. (Paragraph 155)

The Government accepts the Committee's recommendation and will revisit proposal 13 for inclusion in the bill. We accept that such a power would need to be tightly drawn to clearly indicate the circumstances in which it could be used, and that it would need to be accompanied by appropriate safeguards. We will consider whether OSCR's powers provide an appropriate template.

Proposal 14: Monitoring bank accounts

38. We consider that giving the Commission this power would require significant additional safeguards which would make it insufficiently useful in practice to justify including it in the Bill. (Paragraph 162)

The Government accepts the Committee's recommendation not to include this power in the bill.

Clause 8: Offences leading to automatic disqualification

Money laundering, bribery, misconduct in a public office, perjury and perverting the course of justice (section 178A(1)3–6 added by clause 8)

39. The inclusion of these offences in clause 8 of the Bill is appropriate as they sensibly close loopholes in the law. (Paragraph 170)

The Government welcomes the Committee's support for the inclusion of these offences as giving rise to automatic disqualification from charity trusteeship.

40. We recommend however that consideration should be given to: (a) the concern raised by the CLA as to whether removal from a post as officer, agent or employee of a charity should lead to automatic disqualification as a charity trustee or would be more appropriately addressed through the discretionary disqualification provisions in clause 9; and (b) the DPRRC's concern as to the immediate effect of an automatic disqualification which could lead to the trustee concerned being prosecuted under section 183 of the 2011 Act for acting as a charity trustee whilst disqualified (which carries a maximum penalty of two years imprisonment) and could also leave a charity with administrative difficulties, including the need to find an immediate replacement trustee. The Committee considers that it should be possible to address these issues whilst not damaging the principal intended effect of these provisions (i.e. the closure of the loopholes which have been identified). (Paragraph 171)

The Government notes these points raised by the Committee and will give them due consideration.

a) We will consider in more detail the concern raised by the CLA as to whether removal from post, under current legislation, should automatically result in disqualification from charity trusteeship. Our initial view is that it should by default. If matters are so serious that the Charity Commission has to make use of its remedial power to remove a person from his or her post in a charity, it is difficult to see how that person could be considered suitable to serve in the capacity of charity trustee of any other charity.

b) We note the concern raised by the Delegated Powers and Regulatory Reform Committee about the commencement of any provisions (either in the bill or any subsequent Secondary Legislation) that would give rise to automatic disqualification, and commit to ensuring that sufficient time would be allowed before the commencement of such provisions. We would also work closely with the Charity Commission to ensure that such measures were properly publicised to give trustees who would be affected by the change time to step down before the relevant provision is commenced.

Terrorism offences (clause 8 section 178A(1)1–2)

41. Notwithstanding that the scale of the problem has not been quantified, on balance we consider that the inclusion of a conviction for terrorism offences to the list of specified offences in clause 8 is likely to be a useful tool in preventing the abuse of charitable funds in connection with terrorism. There is no good reason that an individual with such convictions should be allowed to be a trustee. We therefore support the inclusion of convictions for terrorism offences in clause 8 of the Bill. (Paragraph 176)

The Government welcomes the Committee's support for the inclusion in the bill of terrorism offences giving rise to automatic disqualification from charity trusteeship.

42. There are however wider difficulties presented to charities by the effect of terrorism law which came across strongly in evidence, although the operational points are not within the scope of the draft Bill, the concerns are relevant to clause 9. (Paragraph 177)

43. These issues are not and cannot be part of the draft Bill but they do need to be addressed. The difficulties posed by current terrorism legislation to the protection of charities working overseas to deliver humanitarian aid in difficult circumstances were put to the Committee compellingly by a number of witnesses. Although we accept that these difficulties have not led to prosecutions, they appear to present a real risk of a 'chilling effect' on UK NGOs' activities overseas at a time when their efforts are possibly more critical than ever before. (Paragraph 185)

44. We call on the Government to consider the position of these NGOs in the context of terrorism law. It could consider adopting statutory provisions similar to those already in place in Australia and New Zealand. We recognise that it may take time to get agreement on this approach. Accordingly, while this may mean that the Protection of Charities Bill cannot be a vehicle for such provisions. (Paragraph 186)

45. It is important that the Government commits to an early resolution of this problem. Without such a resolution the Protection of Charities Bill could achieve a 'chilling effect' without providing any 'safe harbour' by which these important aid flows can continue. (Paragraph 186)

46. Without minimising the value of the advice provided for charities by the Charity Commission in this area, greater legal certainty is required, particularly because of the likely delay before any further primary legislation. (Paragraph 191)

47. We recommend that the Government ask the Director of Public Prosecutions to publish guidance for charities setting out the approach she would take to prosecutions under counter-terrorism legislation and on the application of the public interest test. (Paragraph 192)

Many aid charities deliver vital humanitarian aid in some of the most difficult and dangerous parts of the world and are to be recognised and commended for their valuable work. The Government recognises that some charities have concerns about the impact of counter-terrorism legislation on their operations, particularly in parts of the world where they may be exposed to heightened risks.

Terrorism legislation is in no way designed to prevent the legitimate humanitarian work of charities, but it needs to be widely drawn to ensure that it captures the ever diversifying nature of the terrorist threat. A legislative exemption of the sort suggested for consideration by the Committee would create loopholes in terrorism legislation that could be exploited by those seeking to abuse charity for terrorist purposes. Further, cases are treated on an individual basis by the independent prosecuting authorities, subject to the evidence available and their judgment on whether or not it is in the public interest to proceed with a case. We are not aware of any recent prosecutions of Non-Governmental Organisations or their staff for a terrorism offence, which suggests that the protections already in place are adequate.

A range of specific guidance for charities, NGOs and NPOs on managing the risks of operating overseas and managing the risks of abuse for terrorist purposes, or the risks of links or associations to terrorist activity or abuse, as well as the requirements under UK counter-terrorism and charity law, are available from a range of sources including the Charity Commission.

The Government has already engaged with a number of NGO charities on their concerns and how we can help address them or provide reassurances. The Government will continue to work with NGO charities on these issues.

We will draw the Committee's recommendation to publish guidance relating to prosecutions under counter-terrorism legislation and the public interest test to the attention of the Director of Public Prosecutions.

We welcome the Committee's conclusion that these issues are not within the scope of the draft bill.

Rehabilitation opportunities for ex-offenders

48. We note the important concerns raised about the limiting the opportunities for the rehabilitation of offenders. We are glad to hear that the Charity Commission is looking to address the issues identified with the waiver process. (Paragraph 200)

49. We recommend that the Charity Commission do more to promote understanding of the availability of waivers and simplify wherever possible the application and decision-making process. (Paragraph 201)

The Charity Commission has accepted the need to make sure the waiver process is accessible and easier to understand. It has already corrected

some specific points and will review the whole process and related guidance in light of the Committee's recommendation.

Delegated powers issues (section 178A(4) inserted by clause 8)

50. We are content that the order making power to add to the list of offences leading to automatic disqualification should be available to the Minister in the form and subject to the procedures which are proposed. (Paragraph 207)

51. We recommend, however, that when using the power, the Minister should be required to consult fully on whether it is appropriate and proportionate to include an offence within the list of disqualifying offences. (Paragraph 208)

The Government accepts the Committee's recommendations.

Clause 9: Discretionary disqualifying power

Fitness to be a charity trustee (section 181A(3)(b) inserted by clause 9)

52. While the word "unfit" is given some context by the rest of the clause as a whole, we recommend that the Cabinet Office considers the criticisms made by witnesses of the present lack of a definition of "unfit". It should follow up the comments made in its own evidence and produces a non-exhaustive list of matters which demonstrate when a person is "unfit" to act as a charity trustee or trustee of a charity. (Paragraph 215)

The Government notes the Committee's comments and accepts the Committee's recommendation. We will work closely with the Charity Commission with view to providing greater clarity on when a person could be considered by the Commission to be unfit to act as a charity trustee or trustee of a charity.

The intention behind the provision is to capture conduct, whether in a charity or otherwise, that a normal person would consider is irreconcilable with acting in the role of charity trustee (either generally or in a particular class of charities).

Fit and proper person test (section 181A4(C) added by clause 9)

53. We have noted the Government's and the Commission's desire to include a power to disqualify a person where there has been a finding by HMRC that the person is not "fit and proper" in relation to a charity. We have also noted the suggestion that there should be a more joined up approach between tax and charity law. We are concerned, however, that there are significant misgivings over the move to apply tax law, expressed by a number of witnesses in the context of the HMRC test. At present we would not support its inclusion in the Bill. (Paragraph 221)

54. We therefore recommend that, before finalising any provision on a “fit and proper person” test, there should be further discussions between the Charity Commission, HMRC and the Cabinet Office, with a view to addressing the concerns raised. (Paragraph 222)

The Government will review the concerns raised with the Charity Commission and HMRC.

However, our starting position remains that if HMRC has made a finding that a person is not “fit and proper” to manage a charity’s tax affairs (a finding which can be appealed), this fact should be available to the Charity Commission as a trigger to enable them to consider whether the person is also unfit to serve as a charity trustee. A finding from HMRC that a person is not “fit and proper” for the purposes of tax legislation would not automatically result in disqualification from charity trusteeship. The Commission would still need to apply the test of fitness and consider the relevant facts in each case.

Cautions (section 181A(4)B inserted by clause 9)

55. The Committee appreciates that this is a discretionary power and that accepting a caution for a disqualifying offence is only one of the conditions which must be satisfied if the Commission is to exercise its power to disqualify a person from acting as a trustee. The question of fitness to be a trustee also arises. The Committee remains concerned, however, that the clause is not readily understood by those who will be subject to it and/or advise on it. (Paragraph 233)

56. The circumstances (including when the caution was accepted) which will give rise to a caution for a disqualifying offence need to be made clear either on the face of the Bill or in detailed guidance which is needed for this provision. Additionally, factors dictating the length of any disqualification (such as a requirement for the Commission to have regard to when the caution was or is spent) could helpfully be included on the face of the Bill. Such a provision could be an addition to that which has already been drafted to deal with the length of disqualification arising from a conviction which will in due course be spent. The Government is urged to consider this point and address it in its response to this Report. (Paragraph 234)

We have already agreed above that greater clarity is needed over the test of unfitness to serve as a charity trustee.

The Charity Commission already publishes guidance on when a charity trustee is legally disqualified from acting. The Government and Commission agree that this guidance would need to be updated to include the operation of the new disqualification power on the test of fitness itself and the triggers for the Commission’s consideration of a person’s fitness, including the factors that would be taken into account in considering when accepting a caution for a disqualifying offence affects fitness to be a trustee.

We will consider whether additional factors narrowing the circumstances of accepting a caution for a disqualifying offence could be included on the face of the bill as a trigger for the Commission to consider disqualification. The Commission has a particular concern about the acceptance of a caution in relation to a disqualifying offence where the factual circumstances of the offence involved the administration of a charity. In such cases the Commission believes that it should be able to consider whether the person is unfit to be a charity trustee, and make a disqualification order if appropriate and proportionate in the circumstances.

57. The extension of this provision to overseas cautions is not supported by the Committee which has concerns as to evidence and burdens of proof (and justice generally) which are explored in the paragraphs below in relation to overseas convictions. Our conclusions on those aspects of overseas convictions apply equally to overseas cautions. (Paragraph 235)

The Government accepts the Committee's recommendation not to include overseas cautions in the draft bill.

Overseas convictions (section 181A(4)A added by clause 9)

58. The Committee is concerned as to the possible ramifications of this provision and at present we would not support this proposal. (Paragraph 241)

59. Therefore we recommend the Government should reconsider the possibility of overseas convictions which appear to have an equivalent in UK law forming the basis for a disqualification. Our concerns apply equally to overseas cautions. The approach being taken in the Small Business, Enterprise and Employment Bill, currently before Parliament, in relation to both overseas convictions and cautions leading to the disqualification of directors should be considered in the context of charity trustees. (Paragraph 242)

The Government will reconsider this provision, as recommended by the Committee, and will consider the approach being taken in the Small Business, Enterprise and Employment Bill.

However, the Government and Charity Commission are concerned that we do not leave loopholes in the disqualification regime. It would seem odd if the Charity Commission were not able to consider the fitness to act as a charity trustee of a person convicted in a country with high judicial standards where they had been convicted for stealing large sums of money from a charity, for example.

Other offences (and issues of interpretation in section 181A(4)D–F added by clause 9)

60. We understand the need for a broad power to disqualify an individual in certain instances not all of which can be specifically identified and encapsulated in legislation. We are concerned, however, at the lack of safeguards which accompany this power and consider that there should be a review of the way in which other disqualification regimes (for example, in the case of company directors) ensure that there are clear limits on the powers of a regulator and criteria which provide for the circumstances in which a person may be disqualified. We agree with the JCHR and consider that there is a need for condition F (and other broad concepts which occur in the Bill (such “privy to”, considered above)) to be clearly defined. (Paragraph 253)

The Government notes the Committee’s conclusions. We will work with the Charity Commission to refine the provision to ensure that there are limits on the regulator’s powers and clearly defined criteria which provide for the circumstances in which a person may be disqualified, in order to provide legal certainty.

Whilst we will aim to improve the clarity of the power and the circumstances in which the Commission could disqualify a person, we continue to believe that the power should be exercisable by the Commission, with a right of appeal to the Tribunal before any disqualification could take effect.

Power to add or remove a condition (section 181A(5) added by clause 9)

61. We are content that the order making power to amend the list of conditions should be included in the Bill but draw the Cabinet Office’s attention to the comments made by the DPRRC. (Paragraph 256)

The Government accepts the Committee’s recommendation and notes the comments made by the DPRRC. We will look to amend the bill to ensure that any new condition proposed in Secondary Legislation would specify the type of conduct which has a bearing on a person’s fitness to serve as a charity trustee. We also note the DPRRC’s conclusion that this provision does not have retrospective effect.

Proposal 5: Positions of power

62. We understand the potential value of the proposed provision but would only support its inclusion with some additional safeguards. (Paragraph 269)

63. We recommend that consideration should be given to incorporating the procedures for disqualification included in the company directors’ disqualification legislation and that the Cabinet Office should examine the model of the Financial Conduct Authority’s fitness and propriety test to design

a regime which is human rights and employment rights compliant. (Paragraph 270)

The Government welcomes the Committee's recognition of the potential value of this proposed provision, and we accept the need for proper safeguards. We will work closely with the Charity Commission to ensure that any provisions are human rights and employment rights compliant, and will consider the precedents the Committee has suggested in developing a provision for the bill.

Reporting, Reviews and Appeals

Clause 10: Records of disqualification and removal

64. We support the inclusion of clause 10. (Paragraph 274)

The Government welcomes the Committee's support for this provision.

Clause 11: Participation in corporate decisions while disqualified

65. We support the inclusion of clause 11. (Paragraph 277)

The Government welcomes the Committee's support for this provision.

Clause 12: Review of the operation of the Act

66. We agree that a wider review of charity legislation would be more valuable than a narrow review focussing solely on the provisions of this Bill. The timing of the review should take into account the passage of this Bill, assuming it is introduced in the new Parliament, and the implementation of any reforms based on the Law Commission's ongoing charity law project. (Paragraph 281)

The Government does not believe that there is a pressing need for a wide review of charity legislation. In 2012, Lord Hodgson undertook his wide-ranging statutory review of the Charities Act 2006, and the Public Administration Select Committee undertook its review of charity regulation. In the last two years there have been reviews of the Charity Commission undertaken by the National Audit Office and Public Accounts Committee. The Law Commission is currently undertaking its charities project on certain matters of charity law reform.

Appeals against decisions of the Charity Commission

67. We note that the Law Commission's forthcoming work on charity law includes "certain powers" of the Charity Tribunal. (Paragraph 284)

68. Although its terms of reference do not include Schedule 6 to the 2011 Act, we suggest that greater clarity over the formulation of Schedule 6 should be a part of its work in due course. (Paragraph 284)

The Government notes the Committee's conclusions. The Law Commission has already published its Charities Project consultation paper. There are no plans to widen its terms of reference to include providing greater clarity in the formulation of schedule 6 to the 2011 Act.

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