

CHARITY COMMISSION CONSULTATION ON POWER TO DISQUALIFY FROM ACTING AS A TRUSTEE

NCVO RESPONSE

22 August 2016

About NCVO

Established in 1919, the National Council for Voluntary Organisations (NCVO) represents over 12,000 organisations, from large 'household name' charities to small voluntary and community groups involved at the local level. NCVO champions voluntary action: our vision is a society where we can all make a difference to the causes that we believe in. A vibrant voluntary sector deserves a strong voice and the best support. NCVO works to provide that support and voice.

Background

NCVO has been involved in the development of the Charities (Protection and Social Investment) Act from its draft stage, providing written submissions and appearing as a witness to the joint parliamentary committee.

The main objective of the Act is to confer increased regulatory powers on the Commission. We are supportive of many of the provisions of the Act, but we continue to have concerns that some of these new powers lack sufficient safeguards and *threaten the independence* of charities.

One of NCVO's significant concerns is related to the power for the Charity Commission to disqualify trustees. In principle, we agree that it is appropriate for the Commission to have a discretionary power to disqualify someone whose behaviour means they are unsuitable to act as a charity trustee. However, the relevant provisions of the Act are very broad in scope and potentially allow too much discretion to the Commission.

We therefore welcome the Commission's commitment to develop and consult on draft guidance outlining how it will operate the power to disqualify.

Key issues

NCVO's view is that the current policy document leaves room for considerable subjective decision making by the Commission. We remain concerned that – although the three stage test outlined superficially appears to be robust – in fact it is insufficiently defined and lacks

appropriate objective criteria by which to measure the reasonableness of the Commission's decision.

It continues to be unclear what the Commission's intended approach will be when deciding whether to use the power and, if so, what the scope and period of disqualification will be. This issue is not addressed by the examples provided, which on the contrary in some cases are inappropriate.

The paper also lacks sufficient detail regarding the process the Commission will follow in the exercise of its new discretionary disqualification power.

Test 1 – conditions that must apply

We welcome the clarification that the Commission cannot exercise the disqualification power on the criteria set out in 'Test 1' alone: the existence of one of the conditions simply acts as a 'trigger to consider if disqualification is appropriate'.

We also supports the inclusion of illustrative examples of what could constitute 'misconduct or mismanagement' in a charity (condition 'D'). This provides some clarity on the types of matters that may trigger this condition. However, this does not go far enough as many of the examples are vague and it will be difficult for trustees to understand how they might apply in practice.

Furthermore, condition 'F' is too broadly drawn on the face of the Act. This condition allows the Commission to consider any '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'. In light of this, it is especially important for the guidance to provide clear and specific examples. But on the contrary the policy paper similarly uses vague and open wording referring to what the Commission's 'view' 'might' be.

Test 2 – How the Commission assesses whether the person is unfit to be a trustee

The policy paper refers to honesty and integrity, competence and credibility as relevant categories of unfitness.

NCVO understands that the Commission is not in the position to provide a list of exhaustive conducts that would lead to an assessment of unfitness, but these categories are widely expressed. It is therefore our concern that they create confusion for trustees and will not provide the necessary certainty for the individuals potentially affected. In particular, the criteria of 'honesty and integrity' and 'credibility' are broad concepts and leave a considerable amount of discretion to the Commission. Although the Commission has helpfully provided some indication in the guidance about the type of behaviours and situations which may qualify, the overall result is a test that continues to be too subjective.

In particular, we have concerns about the Commission considering an individual's 'personal credibility' for the use of its discretionary power. The concept of 'credibility' is not only an extremely loose one but also does not appear relevant to someone's fitness to be a trustee.

Test 3 – How the Commission assesses whether the disqualification is desirable in the public interest in order to protect public trust and confidence

NCVO agrees that the Commission should consider whether there are circumstances in which the risk of further damage to charity is minimal and acting against the individual does not protect public trust and confidence. Although the guidance refers to what is “in the public interest”: this is not necessarily the same as what is for the “protection of public trust and confidence” in charities, so we would welcome clarification on what test the Commission will apply.

However, we question the appropriateness of basing its decision also on whether the public would trust the individual in running the charity, and making use of the surveys it undertakes into public trust and confidence. Whilst these are important issues for the Commission to consider in its work, we do not believe that what the public thinks should be a key factor in making use of a regulatory power and disqualifying individuals from their role as trustees.

Deciding on the period of disqualification

NCVO agrees that the Commission should inform its decision on the period of disqualification on the nature and level of the risk and how serious it is.

The three-tier banding that is proposed is however insufficiently explained, with no criteria indicating which types of conduct fall within each band.

We welcome the examples of aggravating and mitigating factors the commission will take into account, and would suggest that to provide further clarity they could be listed in order of priority.

Scope of the disqualification

NCVO agrees that, if the power is used, then the starting point should be to disqualify an individual from being a trustee in relation to all charities, unless the individual can demonstrate why they should only be disqualified in relation to a particular charity or class of charities.

This approach is coherent with the Commission’s decision to use the power, and a reflection of the fact that disqualification is based on an individual’s general unfitness to be a trustee.

Conclusion

NCVO is in principle supportive of equipping the Commission with a discretionary disqualification power, but there need to be appropriate safeguards in place that provide clarity and transparency about how the power would be exercised. It is important that any trustee who found themselves subject to the power is able to clearly understand the evidence that is being used to come to a judgment about them.

It is our concern that the current draft of the guidance fails to provide sufficient detail and practical examples for many trustees to feel confident about their position and how they might be affected.

In addition, the guidance overall fails to make clear the seriousness of the conduct that is required to trigger use of the power by the Commission. It therefore doesn't reflect statements made by the Minister for Civil Society during the parliamentary debates, that 'the Commission should only consider conduct that is relevant and serious' in recognition of the fact that this is 'a significant new power'.