

## Parliamentary briefing

### Charities (Protection and Social Investment) Bill

#### Second Reading in the House of Lords

Wednesday 10 June 2015



The National Council for Voluntary Organisations (NCVO) is the largest membership organisation for the voluntary sector in England. With over 11,000 members, NCVO represents all types of organisations, from large ‘household name’ charities to small voluntary and community groups involved at the local level.

#### Executive Summary

- The Charities (Protection and Social Investment) Bill equips the Charity Commission with new or stronger powers to prevent individuals who are unfit to be charity trustees, and to tackle abuse or mismanagement of charity more efficiently.
- The vast majority of charities and charity trustees act in the best interest of charities and their beneficiaries, and cases of deliberate wrongdoing are rare.
- Nevertheless, NCVO broadly supports the aim of strengthening the Charity Commission’s powers to ensure more effective regulation of charities, and ultimately preserve public trust and confidence in charities.
- The Bill has been subject to pre-legislative scrutiny by the Joint Committee on the Draft Protection of Charities Bill, and has been greatly improved as a result.
- NCVO has some remaining concerns with regards to the following:
  - The fact that the Commission is being given the power to take into account any other evidence of a person’s conduct once a statutory inquiry has been opened, and this extends not only to conduct in other charities, but also to ‘conduct outside of charity but which may damage public trust and confidence in charity’. This provision is broadly drawn, and NCVO has concerns that past conduct could also be brought into decision making where it is not relevant to the case in question.
  - The unintended consequences of expanding the list of criminal offences that automatically disqualify a person from being a charity trustee, to include a number of offences under terrorism legislation. This is due to the extraordinary breadth of the definition of terrorism, which includes not only offences that have an element of clear and deliberate wrongdoing, but also inadvertent involvement.
- Due to recent tragic events, there have been calls on government to introduce an ‘Olive’s Law’ to reform fundraising regulation. High standards of fundraising practice are essential to uphold levels of public trust. However, NCVO’s view is that this Bill is not the right place to introduce further rules on fundraising.

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## Overview of the Bill

The Bill:

- addresses gaps and deficiencies in the Charity Commission's existing powers;
- provides stronger protection for charities from individuals who are considered unfit to be charity trustees;
- equips the Charity Commission with new or strengthened powers to tackle abuse of charity more effectively and efficiently;
- introduces a new power for charities to make social investments.

The Charities Act 2011 will continue to be the main Act of Parliament dealing with charity law: this Bill inserts new provisions in the 2011 Act and makes changes to it.

A draft Bill has been subject to government consultation and pre-legislative scrutiny by the Joint Committee on the Draft Protection of Charities Bill. The proposals have been considerably improved as a result.

Initially NCVO, while generally supportive of the intention behind the Bill, raised concerns about some of the proposals and their potential impact:

- some powers were very broad in scope and potentially allowed too much discretion to the Commission;
- it was proposed that some of the powers could be used without the need to open a statutory inquiry;
- there were insufficient safeguards for the individuals affected by the Commission's decision.

Most of these concerns have been addressed by:

- requiring the Charity Commission to produce guidance on how and when the new powers will be used (and the Commission has now published a policy paper on how it proposes to use the disqualification power);
- limiting the use of some powers to the context of a statutory inquiry (e.g. the power to prevent a charity from taking further action can now only be exercised if a statutory inquiry has been opened);
- putting in place safeguards to ensure the powers are not exercisable on subjective grounds by the Commission and do not give rise to unwarranted interventions in charities (e.g. with regards to the power to issue official warnings, the Bill now requires the official warning to specify certain matters such as the grounds on which it has been issued).

### **NCVO continues to have concerns with regards to the following provisions:**

#### ***Range of conduct to be considered when exercising powers***

Once an inquiry has been opened into a charity, the Commission is being given the power to take into account any other evidence of the person's conduct. This extends not only to conduct in other charities, but also to 'conduct outside of charity but which may damage public trust and confidence in charity'.

This provision is broadly drawn, and NCVO has concerns that past conduct could also be brought into decision making where it is not relevant to the case in question, since what is damaging to public trust and confidence in charities is an open and potentially subjective test.

#### ***Automatic disqualification from being a trustee***

The Bill expands the list of criminal offences that automatically disqualify a person from being a charity trustee, beyond those only involving deception and dishonesty.

The criticism of the current criteria is that they are too narrow and fail to capture other behaviours

that should automatically disqualify an unsuitable person from acting as a charity trustee.

NCVO does not object to the addition of new criminal offences to the list of criteria that lead to automatic disqualification. However the inclusion of a number of offences under terrorism legislation has raised concerns, due to the extraordinary breadth of the definition of terrorism and the unforeseen impact this could have on the work of international NGOs. In particular, anti-terrorist legislation includes not only offences that have an element of clear and deliberate wrongdoing, but also inadvertent involvement.

### **Regulation of Fundraising**

Due to recent tragic events, there have been calls on government to introduce an 'Olive's Law' to reform fundraising regulation.

Charities depend on the trust and confidence of the public, and high standards of fundraising practice are essential to uphold levels of public trust. However, NCVO's view is that this Bill is not the right place to introduce further rules on fundraising:

- The Fundraising Standards Board (FRSB) is currently conducting an in-depth investigation, which goes beyond the issues of the specific case and will address key broader issues, including the amount of public dissatisfaction with fundraising practices. It is important for this investigation to run its course.
- The Institute of Fundraising (IoF) has announced that it will review and strengthen its Code of Practice.
- There is much consensus for the general principle of self-regulation: effective self-regulation is preferable to statutory regulation because it is more flexible, responsive, and cost effective.
- In any case, the 2006 Charities Act already contains a 'reserve' power to control fundraising. The power is such that at any time the Minister for the Cabinet Office has can make such regulations as appear necessary or desirable for, or in connection with, regulating charity fundraising.
- This means that, if, at a future stage, despite the forthcoming action to be taken by the FRSB and IoF, the prevailing opinion is that the self-regulation of fundraising is not working, there are already provisions in place to implement government regulation.

## **Commentary on provisions of the Bill**

### ***Clause 1: Official warnings by the Commission***

Clause 1 provides the Commission with a power to issue an official warning to a charity or charity trustee, where there has been a breach of fiduciary duty or non-compliance with a Commission order.

This power is intended for mid-level mismanagement or misconduct where the Commission's more severe protective powers could be used but it is not likely to be proportionate to do so.

NCVO is in principle supportive of equipping the Charity Commission with a broader range of tools to rectify non-compliance or prevent non-compliance.

### ***Clause 2: Investigations and power to suspend***

Clause 2 makes amendments to clarify that failure to comply with an order or direction of the Commission constitutes misconduct or mismanagement, and that the Commission may then exercise a range of sanctions.

The provision also enables the Commission to extend a suspension by an additional year up to a two year overall limit.

NCVO agrees that these amendments are helpful:

- to put beyond doubt that failure to comply with an order of the Commission constitutes misconduct or mismanagement;
- because sometimes it may be necessary for the Commission to suspend a trustee for more than a year, while it waits for the outcome of a criminal prosecution before it can proceed with its regulatory action.

### ***Clause 3: Range of conduct to be considered when exercising powers***

Clause 3 enables the Commission, once misconduct or mismanagement has been established and a statutory inquiry has been opened, to consider any other evidence of the person's conduct. This extends not only to conduct in other charities, but also to 'conduct outside of charity but which may damage public trust and confidence in charity'.

NCVO agrees that in the course of a statutory inquiry the Commission should not be limited to evidence of misconduct and/or mismanagement in the administration of the specific charity subject to statutory inquiry. In particular, NCVO is mindful of cases such as the 'Cup Trust', where the promoters of the scheme had a past history in using charities in tax schemes.

However, the provision is broadly drawn: we have concerns that past conduct could also be brought into decision making where it is not relevant to the case in question, since what is damaging to public trust and confidence in charities is an open and potentially subjective test.

### ***Clause 4: Power to remove trustees following an inquiry***

Clause 4 makes two changes:

- it enables the Commission to make a scheme in relation to a charity when there is an inquiry open and the Commission is satisfied that there is either misconduct or mismanagement, or there is a risk to charity property;
- it enables the Commission to continue the removal process of a trustee even if they resign or otherwise cease to hold office.

NCVO supports the strengthening of the Commission's power to remove a trustee, because it enables the Commission to deal with cases where the person they have been seeking to remove resigns their position in order to avoid removal and consequent disqualification.

### ***Clause 5: Power to remove a disqualified trustee***

Clause 5 enables the Commission to remove a disqualified charity trustee if they continue to remain in their position once disqualified.

NCVO agrees that this power is appropriate to close a loophole that has been identified in the current law. At the moment the Charity Commission must provide at least one month's notice before it removes a disqualified trustee from their position. This can result in the situation where people who have been disqualified continue to remain in their position, or give their notice to resign before the Charity Commission can act.

We also support the principle underlying the proposal: the aim should be not only to protect a particular charity but the sector more widely, and the new power means that the individual cannot then be reappointed as a trustee or other office holder in another charity.

### ***Clause 6: Power to direct specified action not to be taken***

Clause 6 enables the Commission, once a statutory inquiry has been opened, to direct the charity or its trustees not take an action that it considers would constitute misconduct or mismanagement.

NCVO understands that such a power is appropriate, considering that in the context of a statutory inquiry the Commission already has the power to direct that a charity or its trustees take certain actions.

### ***Clause 7: Power to direct winding up***

Clause 7 enables the Commission to direct trustees to wind up a charity in specific circumstances: the new power will only be available in the context of a statutory inquiry and where there is misconduct or mismanagement, or risk to charity property.

NCVO acknowledges that there may be cases where it would represent a more effective use of charitable resources to direct a charity to transfer any remaining assets to another charity with the same or similar charitable purposes, and then to wind up the empty shell, rather than attempt to restore the charity to health.

### ***Clause 8: Power to direct property to be applied to another charity***

Clause 8 extends the circumstances where the Commission may direct the application of charity property, to cases where the person holding the property is 'unable' rather than just 'unwilling'.

In NCVO's view this seems a sensible extension of the existing test, which has apparently caused difficulties when financial institutions holding charity property have been unable to transfer it due to their contractual obligations, even if they were willing to do so.

### ***Clause 9: Automatic disqualification from being a trustee***

The Bill extends the criteria that automatically disqualify a person from being a charity trustee.

The criticism of the current criteria is that they are too narrow and fail to capture other behaviours that should automatically disqualify an unsuitable person from acting as a charity trustee. The proposal is therefore to expand the list of relevant criminal offences, beyond those only involving deception and dishonesty.

NCVO broadly agrees that the types of criminal offences disqualifying individuals from charity trusteeship need to be updated and expanded, in order to provide a more accurate reflection of current practices and of what the public is likely to consider as unacceptable behaviour from a person in a position of trust.

However the inclusion of a number of offences under the Counter-Terrorism Act 2008 and Terrorism Act 2000 has raised concerns, due to the extraordinary breadth of the definition of terrorism and the unforeseen impact this could have on the work of international NGOs. In particular, anti-terrorist

legislation includes not only offences that have an element of clear and deliberate wrongdoing, but also inadvertent involvement.

The Independent Reviewer of Terrorism has already expressed concern about the fact that there are criminal offences under UK anti-terrorism legislation which are also capable of impeding the legitimate activities of international NGOs in conflict areas. NCVO therefore supports the recommendation that: 'The Home Office, Treasury and international NGOs should meet to discuss how the objectives of anti-terrorism law can be met without necessarily prejudicing the ability of NGOs to deliver humanitarian aid'.

***Clause 10: Power to disqualify from being a trustee***

The Bill provides the Commission with a power to disqualify a person from being a charity trustee if it is satisfied that:

- a) one or more of the listed conditions is met, and
- b) the person is 'unfit' to be a charity trustee.

NCVO in principle agrees 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, this is a significant new power. NCVO therefore welcomes the Charity Commission's paper outlining its approach to using the power, and the criteria that may make someone 'unfit' to be a charity trustee.

***Clause 11: Records of disqualification and removal***

Clause 11 extends the register of persons who have been removed from office by the Commission or the High Court, to include details of persons subject to a disqualification order.

NCVO supports this provision, which is a sensible consequential amendment to the Register of removed trustees.

***Clause 12: Participation in corporate decisions while disqualified***

Clause 12 prohibits a person who is disqualified and is an officer of a corporate body that is a charity trustee from participating in decisions relating to the charity's administration.

NCVO is satisfied that this provision closes an existing loophole in legislation.

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

Clause 13 confers a general power to make social investments.

NCVO supports this explicit recognition of charities' ability to make social investments: a Law Commission consultation has highlighted that there are differences of opinion regarding the ability of charities to make social investment based on their existing charitable powers. This clarification should remove perceived barriers to social investment and reduce the need for costly or excessive legal advice for those charities where uncertainty predominates.