

Parliamentary briefing

Charities (Protection and Social Investment) Bill

Committee Stage in the House of Lords

Tuesday 23 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.

Background

- 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.
- NCVO firmly believes in the importance of a competent and adequately resourced regulator, able to act effectively and fairly with the appropriate powers. The presence of an independent regulator for charities with expertise in the sector is essential for ensuring compliance with charity law and regulation.
- 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.
- However, action by the Commission can have a significant impact on those affected by its decisions: not only the individuals directly concerned, but also the charity, and those connected to the charity and benefiting from its services.
- It is therefore very important that any additional powers should only be granted where it is clear (and has been satisfactorily demonstrated) that they really are necessary, and that appropriate safeguards have been put in place.
- Given the criticism directed at the Commission that in the past it has failed to make sufficient use of its existing powers, it will have a responsibility to demonstrate that the new powers conferred are improving its regulatory performance.
- Any additional power granted to the Commission requires a relationship of trust with the sector it regulates. Any perception of the Commission acting in a way that is not in pursuance of its duty to protect the public interest in charities, could have a detrimental impact on both the effectiveness of the powers and levels of public trust and confidence in charities.

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Executive Summary

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

Clause 3 – Conduct to be considered when exercising powers

- 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.
- ***NCVO supports Amendment 5 to Clause 3 tabled by Baroness Barker and Lord Wallace of Saltaire.***

Clause 9 – Automatic disqualification from being a 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.
- ***NCVO supports the recommendation from the Independent Reviewer of Terrorism to bring together Home Office, Treasury and international NGOs representatives to discuss in further detail how this provision would work.***

Clause 10: Power to disqualify from being a trustee

- This is a significant new power. The Commission should only use the power when there is a clear case for doing so, and provide clear guidance on what conduct it will consider when making its assessment. In particular, it is essential that the criteria for a test of unfitness are properly defined.
- A recent policy paper from the Charity Commission has provided welcome clarification but there remain concerns that the legislation as currently drafted allows too much discretion to the Commission, creating the possibility of misapplication of this power.
- ***NCVO supports Amendment 10 to Clause 10 tabled by Baroness Barker and Lord Wallace of Saltaire.***

New clauses

- Recent proposals to extend the ‘right to buy’ scheme to housing associations would set a worrying precedent of government interference in the running of independent charities by enabling the compulsory sale of charity assets at a discount. It would also contradict the rule according to which charities cannot dispose of assets for less than their full value or other than in pursuit of charitable objectives to ensure that they are used for charitable, rather than political or private benefit.
NCVO supports Amendment 12 relating to the disposal of assets tabled by Baroness Hayter of Kentish Town and Lord Watson of Invergowrie.
- NCVO’s view is that effective self-regulation is preferable to statutory regulation because it is more flexible, responsive, and cost effective. However it is important that the regulatory regime secures public trust in fundraising.
NCVO supports Amendment 13 on regulation of fundraising which proposes that all charities must be members of the Fundraising Standards Board and abide by the Code of Fundraising Practice.

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 'any other conduct of that person that appears to the Commission to be damaging or likely to be damaging to public trust and confidence in charities generally or particular charities or classes of 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 since what is damaging to public trust and confidence in charities is an open and potentially subjective test. In particular, we have concerns that in the absence of guidance trustees and charities will be uncertain about the possible consequences of their conduct in relation to matters which may not be relevant to the management or administration of a charity.

NCVO supports the amendment to Clause 3 tabled by Baroness Barker and Lord Wallace of Saltaire

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. It is therefore important that the Commission provides reassurance that it will only use the power when there is a clear case for doing so, and provide clear guidance on what conduct it will consider when making its assessment. In particular, it is essential that the criteria for a test of unfitness are properly defined.

The Charity Commission has published a policy paper outlining its approach to using the discretionary power, with a non-exhaustive list of criteria for unfitness.

While we understand that government does not want to unduly fetter the Charity Commission with inflexible criteria, there remain concerns that the amount of discretion allowed to the Commission is too wide, creating the possibility for misapplication of this power.

This is especially with regards to the provision according to which the Commission may consider 'any other past or continuing conduct by the person, whether or not in relation to a charity' that 'is damaging or likely to be damaging to public trust and confidence in charities generally'. As currently drafted, this condition would appear to open up the possibility of a continually shifting ground of conduct (whether or not related to charities) which might give rise to disqualification.

NCVO supports the amendment to Clause 10 tabled by Baroness Barker and Lord Wallace of Saltaire

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.

Further provisions

Disposal of assets

The law requires that charitable assets must be properly managed in the charity's interests.

Charity Commission guidance is clear that trustees must act in accordance with this legal duty when disposing of charitable assets.

NCVO therefore shares the concerns expressed by charities that provide housing services with regards to the proposal to extend the 'right to buy' scheme to housing associations.

Such extension would set a worrying precedent of government interference in the running of independent charities by enabling the compulsory sale of charity assets at a discount. It would also contradict the rule according to which charities cannot dispose of assets for less than their full value or other than in pursuit of charitable objectives to ensure that they are used for charitable, rather than political or private benefit.

NCVO therefore supports the amendment that further clarifies that charities may not, and may not be compelled to, use or dispose of their assets in a way which is inconsistent with their charitable purposes.

Regulation of fundraising

NCVO agrees that there is clear public concern over fundraising which needs to be taken seriously.

NCVO's view is that effective self-regulation is preferable to statutory regulation because it is more flexible, responsive, and cost effective.

However it is important that the regulatory regime secures public trust in fundraising.

This means that self-regulation needs to be strengthened, to a point where an objective observer would say beyond doubt that the interests of the public are sufficiently represented.

As Sir Stuart Etherington, chief executive of NCVO, said in a recent speech:

'The correct regulatory regime is not one that is convenient for those who are being regulated, but one that adequately balances the interests of the public and the regulated'.

'Fundraising self-regulation *can* be successful in securing the confidence of the public, the sector, and government. But it will only be so when it is both sufficiently robust and seen to be sufficiently robust.'

Structural change is required, and one element of such reform is to give the Fundraising Standards Board remit over all charities that fundraise above a certain level.

NCVO therefore supports the amendment proposing that all charities must be members of the Fundraising Standards Board and abide by the Code of Fundraising Practice.

Power to make representations

It is well established charity law that campaigning and political activity can be legitimate and valuable activities for charities to undertake, provided that they are undertaken by a charity in the context of supporting the delivery of its charitable purposes.

The Charity Commission's guidance on campaigning and political activities by charities (CC9 'Speaking Out') recognises that there may be situations where carrying out political activity is the best way for trustees to support the charity's purposes.

It is also clearly stated that, although a charity cannot exist for a political purpose, charities can campaign for a change in the law, policy or decisions where such change would support the charity's purposes. Charities can also campaign to ensure that existing laws are observed.

A separate issue which causes difficulty for charities is the current interplay between charity law and electoral law, and particularly the non-party campaigning rules set out in the Political Parties, Elections and Referendums Act as amended by the Transparency of Lobbying Act.

At the moment there is insufficient clarity on whether and when legitimate non-partisan campaigning by charities and other voluntary groups, and awareness-raising on policy issues, would be regulated by the Electoral Commission, even if they were not intended to have an electoral effect.

NCVO is concerned that, due to this uncertainty, charities and other voluntary groups could be deterred from engaging in public policy issues and speaking out on behalf of the people they support during election periods.

A review into the impact of the non-party campaigning rules is currently being led by Lord Hodgson of Astley Abbots, who has indicated his interest in seeing evidence of self-policing by charities as a consequence of the rules.

NCVO is engaging in this review to ensure that charities and other voluntary organisations have as much clarity as possible on what activities come within the scope of the non-party campaigning rules, so that legitimate campaigning activity is not inhibited in any way.

Background 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).