

Consultation on Extending the Charity Commission's Powers to
Tackle Abuse in Charities

Response of the National Council of Voluntary Organisations
(NCVO)

12 February 2014

General Comments

NCVO welcomes this consultation aimed at strengthening the Charity Commission's powers to ensure more effective regulations of charities, and ultimately preserve public trust and confidence in charities, the regulator and the regulation of the charity sector.

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 functions of the Charity Commission could not be delivered by another non-specialist regulator, so it is important to enable it to carry out its role effectively and efficiently, while striking the appropriate balance between ensuring compliance and preventing abuse of charities, and respecting the independence of charity trustees in their decision making.

We think this is a timely consultation, for two reasons:

- recent high profile cases of abuse have led to questioning by Parliament, the media and parts of the sector itself about the Charity Commission's compliance and enforcement work;
- following the changes made by the Charities Act 2006 the Charity Commission is a more accountable body, so any additional powers will have to comply with a range of high standards (such as principles of best regulatory practice, judicial review parameters, human rights provisions).

In considering the specific proposals within this consultation, we have however questioned the extent to which the new powers are actually necessary, or whether the concerns highlighted in the consultation document can already be addressed by the Commission's existing powers.

In particular, we are not convinced that all the case studies cited in the consultation provide a convincing explanation for the need for a particular new power: some of the scenarios described as examples where the proposed new powers would be necessary are rather extreme, but the powers as drafted could be used a lot more broadly, raising concerns about possible abuse.

Aside from our specific response to the proposals, NCVO remains of the view that the real change that is required is not a legal one, but a cultural and strategic one. The key question remains whether the Commission's too cautious approach to tackling recent high profile cases of abuse was due to existing powers not being used (because of a policy decision, or an overly legalistic approach, or a lack of resources), rather than because the existing powers are inadequate.

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Proposals 1 and 2 – Disqualification from charity trusteeship

The consultation makes a number of proposals to increase the scope of disqualification from trusteeship. These include:

1. extending the list of criteria that trigger automatic disqualification from trusteeship, and
2. giving the Charity Commission the power to judge disqualification from charity trusteeship on a case by case basis.

This new power would be

- a) either a limited power to disqualify restricted to circumstances which both fall within a list of specified criteria, and where the Charity Commission considers disqualification is expedient in the public interest;
- b) or a broad discretionary power based on whether a person's conduct makes them unfit to be a charity trustee.

NCVO broadly agrees that the types of criminal offences disqualifying individuals from charity trusteeship need to be expanded beyond only those involving deception and dishonesty.

However, we are concerned that the majority of proposed criteria (both for automatic disqualification and for judgement on a case by case basis) are too broad. They would allow the Charity Commission a significant degree of discretion, and in particular raise the risk that the Commission could choose to use its general power to disqualify when there is insufficient evidence to institute an inquiry.

We therefore suggest that an alternative solution would be to create the following three categories:

1. Asset based crimes (such as deception, dishonesty, fraud, bribery) - if committed these would make an individual unfit to hold property on trust and lead to automatic disqualification.
2. Offences that, although not directly related to an individuals' suitability to act as a charity trustee, are so repugnant to society that the individual would not be tolerated in a position of trusteeship - these would also lead to automatic disqualification.
3. Crimes that may be relevant to charity objectives - these would be judged on a case by case basis by the Charity Commission.

Terrorism related offences should not trigger automatic disqualification but should be analysed by the Charity Commission on a case by case basis. The reason for this is that, whilst we understand the inclusion of terrorism offences in the list of crimes that could lead to disqualification, and support moves to prevent links between charities and terrorist activity, it has been widely acknowledged that anti-terrorist legislation is extremely broad.

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In particular, it includes not only offences that have an element of clear and deliberate wrongdoing, but also inadvertent involvement. This causes a risk that in certain circumstances charities working in difficult areas of the world could potentially fall foul of the legislation.

It is therefore necessary to give careful consideration to which offences under the Terrorist Acts would lead to disqualification, drawing a distinction between more serious offences with a degree of knowledge or recklessness on behalf of the perpetrator and other offences that are so widely drafted that they could have an unintentional impact on charities providing humanitarian relief in difficult areas of the world.

As proposed by the consultation, disqualification should only apply to offences which are not spent, in order to not frustrate the need to support rehabilitation of former offenders. We have some concern about the impact that this might have on young offenders, since conviction resulting in a sentence for over two and a half years' imprisonment in a young offenders' institution is never spent. However, this concern is partly addressed by the possibility to apply for a waiver in individual cases.

The broader list of offences should be accompanied by a requirement that all charity trustees should 'self-certify' and make an annual declaration, as part of the Annual Return, that they are eligible to act.

Other offences to be added

NCVO supports the proposal of a Ministerial power to add to the list by making secondary legislation. This is provided that the secondary legislation is made subject to the affirmative resolution procedure, as suggested in the consultation document.

Waiver

There is currently scope to apply for a waiver from disqualification under s181 of the 2011 Act. NCVO agrees that it is appropriate to extend the waiver provisions so that it is possible to apply for a waiver from disqualification based on conviction for the new offences.

However, due to the extension of the list of relevant offences, it is likely that the numbers of individuals who may be eligible to apply for a waiver will grow. It will therefore be essential that the Commission ensures its process for determining waiver applications is efficient and effective with sufficient resources, so that issues can be dealt with swiftly and fairly.

Proposal 3 – Removal from trustee body and notification of other trustees

NCVO supports extending the power in s.80 so that the Commission may remove disqualified trustees from the trusteeship. This would eliminate the current anomaly, which means that a

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disqualified trustee may continue to act, even though guilty of a criminal offence for so doing, and cannot be removed by the Commission if he/she refuses to retire.

Proposal 4 – Dealing with disqualification where only one or two trustees remain

NCVO supports the proposed extension to s.80 and s.81 so the Commission can act swiftly to deal with disqualifications which would otherwise result in an insufficient number of trustees for the charity to continue to operate. This will allow the Commission to resolve any situation where disqualification or removal of trustees would reduce the number of active trustees in the charity below the legal minimum, without the delay of arranging for the appointment of a new trustee.

This is a technical amendment, but we suggest that it should be accompanied by the establishment of a register of experienced trustees who would be prepared to act in such cases. These trustees would be act as “interim professional trustees”, and because there may be a significant amount of work and risks involved, they should be provided with the appropriate indemnities.

Proposal 5 – Preventing disqualified trustees acting in another position of power in a charity

NCVO agrees that a person who is disqualified from being a trustee should also be prevented from being appointed to another office or position of significant responsibility within a charity, particularly those which involve exercising management control over charity finances – such as the Chief Executive or Finance Director.

However, appropriate safeguards would need to be introduced given the potential implications for employment opportunities and human rights.

We would also recommend further clarity, by including a detailed list of roles that are considered as constituting a ‘position of power’.

Proposal 6 – Where a disqualified person is a director of a corporate trustee of another charity, preventing them from participating in decisions about the charity’s affairs.

NCVO agrees that it is necessary to close the existing loophole in legislation, so that an individual who has been disqualified from acting as a charity trustee should not then take part in decisions about a charity in their capacity as director of a corporate trustee.

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Proposal 7 – Extend the existing power to remove a trustee (or other office holder) so that it can be exercised where there is misconduct or mismanagement OR a need to protect charity property

NCVO suggests that the existing power should only be extended so that the Commission is able to remove a trustee where the misconduct or mismanagement has taken place but there are no remaining assets. This would solve the legal problem of not being able to prove risk to charity property, for example because the charity is going into liquidation, winding up, or there are no or little assets left in the charity.

However, an element of mismanagement/misconduct should always be required, and it should not be possible for the Commission to act where no misconduct or mismanagement has taken place.

Proposal 8 – Preventing trustee resignation as a means to avoid disqualification

NCVO agrees that this is a loophole that needs to be closed: at the moment the Charity Commission must provide at least one month's notice before it removes a person from their position of trustee, which results in the situation where people who have been given notice 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.

Proposal 9 – Misconduct or mismanagement in ANY charity can be used as evidence

NCVO agrees that the Commission should be allowed to rely on a broader evidence base when making its decision, and not limited to misconduct/mismanagement in the administration of the specific charity. In particular if there is a pattern of misconduct across a number of different charities in relation to which the individual has been involved, the possibility of taking a holistic view could facilitate the Commission's investigation.

Proposal 10 – Amend the existing power to direct specific action when an inquiry is open and there is misconduct/mismanagement OR there is a risk to property so that the Commission can exercise it without opening an inquiry

NCVO does not agree with this proposal because it would allow the Commission to make use of its inquiry powers without actually opening an inquiry. It is a fundamental principle of charity

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regulation that the Commission must not act in the administration of a charity, and the power to direct specific actions would be contrary to such principle if it were not confined to the most serious cases.

If the intent is to ensure speed of action, we suggest that a preferable solution would be to streamline the inquiry process, for example by limiting the publication of an inquiry report to a summary of the findings rather than a full report.

The publication of inquiry reports should however be a statutory duty, as opposed to a good practice decision by the Charity Commission, as we understand is currently the case.

Proposal 11 – Extend existing powers to enable direction to prevent acts of misconduct/mismanagement or acts in breach of fiduciary duty taking place

NCVO is concerned that the proposal to allow the Commission to apply indefinitely its existing powers to restrict specific transactions and to direct specific actions (and not only whilst an inquiry is open) could lead to inquiries being closed prematurely, without addressing the underlying problems of the charity.

A way of addressing this concern and making the proposal more acceptable, would be to make the following conditions mandatory in the exercise of such power:

- such directions would have to be reviewed every 12 months;
- the review would be subject to an assumption that the direction would be discharged unless the original grounds still stand and there is good reason to renew it;
- any decision to renew should be appealable;
- within any 12 month period the Commission would be able to consider applications for discharge where it could be shown that the original grounds no longer stand.

Proposal 12 – Power to direct application of charity money to another charity when individuals are unable to apply money properly

In NCVO's view this seems a sensible extension of the existing test: currently the power can only be exercised if the individuals are 'unwilling'. The rationale for the proposal is to enable the Commission to secure the transfer of funds where there are no or insufficient trustees to authorise it, or where the trustees are overseas and/or prevaricating or delaying authorising the transfer.

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The only caveat is that it must not contravene the principle that the Commission cannot exercise functions corresponding to those of a trustee or be directly involved in the administration of a charity.

Proposal 13 - Where an inquiry has been instigated, the Commission can restrict/prevent actions (for example preventing the use of premises for unlawful purposes) as well as financial/land transactions and enable the Commission to direct, for example, that a speaker does not speak at a charity event or on charity premises where to do so would amount to the trustees committing misconduct or mismanagement.

NCVO does not support this proposal. If such a change were made, it would represent a significant extension of the Commission's powers, enabling the Commission to interfere in the administration of a charity when no charity assets are in need of protection and when the trustees have not acted in breach of trust.

While we are sympathetic to the Commission's desire to have a proactive means of addressing issues that could lead to misconduct/mismanagement, this new power would go too far and open up new areas of responsibility for the Commission, where it is not appropriate for it to act.

Furthermore, such a power would only enable the Commission to deal with the symptom not underlying problem of how that particular charity is being managed.

Proposal 14 – Extend an existing power to enable the Commission to direct a bank to notify the Commission of certain movements on a bank account

NCVO understands why the Commission is seeking this extended power and we are broadly supportive of the proposal, provided that it is kept within appropriate bounds. Accordingly we suggest that the Commission's new account monitoring power should be exercisable only for the purposes of an inquiry under s.46.

Proposal 15 – Breach of a Commission order or direction is in itself an act of misconduct which can result in use of Commission's other compliance powers including disqualification

NCVO agrees that it should be made clear that failure to comply with a Commission order or direction is an act of mismanagement or misconduct which justifies the use of the Commission's other compliance powers. This should however be limited to breaches of orders and directions, and should not extend to the Commission's advice.

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Proposal 16 - Ability to issue official warnings, which if not heeded could result in the Commission using its other powers.

Reasons for the proposal: the Commission has evidence of trustees ignoring its directions and is asking for a new power to issue official warnings for non-compliance accompanied by a power of direction that the trustees take corrective action if the non-compliance has not already stopped

NCVO does not believe that this additional power is necessary. Having a separate power specifically to rectify non-compliance or prevent non-compliance seems redundant given that the Commission already has a range of options at its disposal when there is evidence of trustees ignoring its directions.

Proposal 17 - A new power for the Charity Commission to direct a charity to wind up and apply all of its net assets for charitable purposes by direction or scheme where necessary.

NCVO acknowledges that in some circumstances it would represent a more effective use of charitable resources to direct a charity to transfer any remaining assets to another charity with charitable purposes as close as possible, and then to wind up the empty shell, rather than attempt to get a charity back on its feet following misconduct or mismanagement or where there is serious risk to charity property.

However, a general unconstrained power would be going too far as it could lead to excessive interference in the existing statutory and court processes. The new power would therefore need to be limited to specific circumstances. We suggest that the following conditions must be met before such a power can be used:

- there is an open inquiry,
- there is evidence of misconduct or mismanagement or the need to protect charity property,
- the organisation is no longer viable.

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