



Draft Protection of Charities Bill

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

October 2014



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Foreword

This country has a long and rich tradition of voluntary work and community action. Charities operate in every community, providing support to those that need it most. There are over 164,000 registered charities in England and Wales with a combined income that has grown since 2010 from £54 billion to £64 billion.

Overseeing these charities are an estimated 900,000 trustees who volunteer their time to orchestrate all of this incredible voluntary action, which touches on all our lives in one way or another and delivers a huge positive social impact.

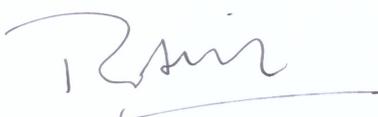
However, there is a small minority who seek to abuse the status of charity for their own ends. An effective and independent regulator is therefore essential in maintaining public confidence in both individual charities and the charity sector as a whole.

The Charity Commission faces challenging circumstances and is sometimes restricted by legal powers that are over 20 years old. The Government is committed to supporting the Commission to do its job effectively and so we consulted on a range of new measures that would strengthen the Commission and bolster public trust and confidence in charities.

I am pleased to be able to publish the Government's proposals to extend the powers granted to the Charity Commission for pre-legislative scrutiny. By publishing the Bill in draft, we hope to build support for an important issue and ensure that the correct balance is met.

I would particularly like to thank everyone who contributed to the consultation, along with Lord Hodgson of Astley Abbots and the National Audit Office, both of whom identified some of the gaps the bill seeks now to address. There was a very wide range of responses to the consultation, all of which were considered fully, and we have made several adjustments to our proposals accordingly as you will see.

We very much welcome the forthcoming Parliamentary pre-legislative scrutiny on whether the draft Bill achieves the right balance and will enhance the protection of charities from abuse.



ROB WILSON

Draft Protection of Charities Bill

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DRAFT
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TO

Amend the Charities Act 2011.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1 Official warnings by the Commission

In section 15 of the Charities Act 2011 (Commission’s general functions), after subsection (3) insert—

- “(3A) In connection with its second and third general functions, the Commission—
- (a) may issue a warning to a charity or any charity trustee or trustee for a charity, and
 - (b) may publish a warning it has issued, and it may issue or publish a warning in any way it considers appropriate.”

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2 Investigations and power to suspend

- (1) Section 76 of the Charities Act 2011 (suspension of trustees etc. and appointment of interim managers) is amended as follows.
- (2) In subsection (1)(a), for “any” substitute “a failure to comply with an order or direction of the Commission or any other”.
- (3) In subsection (4), at the end insert “, subject to any extension under subsection (7)”.
- (4) At the end add—
 - “(7) At any time before the expiry of an order under paragraph (a) of subsection (3) the Commission may extend or further extend the suspension by an order under that paragraph, provided that—

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- (a) the order does not extend the suspension for a period of more than 12 months, and
- (b) the total period of suspension is not more than 2 years.”

3 Range of conduct to be considered when exercising powers

After section 76 of the Charities Act 2011 insert – 5

“76A Exercise of powers where section 76(1)(a) applies

- (1) This section applies to any power under this Part which is exercisable in cases where the Commission is satisfied as mentioned in section 76(1)(a) in relation to a charity (misconduct or mismanagement), with or without any other condition. 10
- (2) If in such a case the Commission is also satisfied –
 - (a) that a particular person has been responsible for or privy to the misconduct or mismanagement, or
 - (b) that a particular person’s conduct contributed to it or facilitated it, 15
 the Commission may take into account the matters mentioned in subsection (3) in deciding whether or how to exercise the power.
- (3) Those matters are –
 - (a) the conduct of that person in relation to any other charity;
 - (b) 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.” 20

4 Power to remove trustees etc following an inquiry

- (1) The Charities Act 2011 is amended as follows. 25
- (2) For section 79 (Commission’s power to remove trustees etc following an inquiry) substitute –

“79 Removal of trustee or officer etc for protective etc purposes

- (1) Subsection (2) applies where, at any time after it has instituted an inquiry under section 46 with respect to any charity, the Commission is satisfied either as mentioned in section 76(1)(a) (misconduct or mismanagement etc) or as mentioned in section 76(1)(b) (need to protect property etc). 30
- (2) The Commission may of its own motion by order establish a scheme for the administration of the charity. 35
- (3) Subsection (4) applies where, at any time after it has instituted an inquiry under section 46 with respect to any charity, the Commission is satisfied both as mentioned in section 76(1)(a) (misconduct or mismanagement etc) and as mentioned in section 76(1)(b) (need to protect property etc). 40
- (4) Whether or not it acts under subsection (2), the Commission may of its own motion by order remove any trustee, charity trustee, officer, agent or employee of the charity –

- (a) who has been responsible for or privy to the misconduct or mismanagement, or
- (b) whose conduct contributed to it or facilitated it.
- (5) Where the Commission has given notice under section 82 of its intention to make an order under subsection (4) removing a person from an office or employment but, before the Commission makes the order, the person ceases to hold the office or employment, the Commission may proceed to make the order. 5
- (6) Where an order is made relying on subsection (5) –
- (a) section 81(1) (power to make supplementary provision) and Case D in section 178(1) (disqualification) apply as if the person was removed by the order, but 10
- (b) the order does not affect the time when the person ceased to hold the office or employment.”
- (3) In section 83(3) (power to suspend or remove trustees etc from membership of charity) – 15
- (a) for “79(2)” substitute “79(4)”;
- (b) for “an officer,” substitute “a trustee, charity trustee, officer,”.
- (4) In section 87(1) (supervision by Commission of certain Scottish charities), for “79(2)(b)” substitute “79(1) and (2)”. 20
- (5) In section 178(1) (automatic disqualification of charity trustees), in Case D for “79(2)(a)” substitute “79(4)”.
- (6) In Schedule 6 (appeals to tribunals), in the entry relating to an order made by the Commission under section 79(2) in relation to a charity –
- (a) in column 1, after “79(2)” insert “or (4)”;
- (b) in column 2, for “79(2)(a)” substitute “79(4)”. 25
- 5 Power to remove disqualified trustee**
- (1) The Charities Act 2011 is amended as follows.
- (2) After section 79 insert –
- “79A Removal of disqualified trustee 30**
- The Commission may remove a charity trustee or trustee for a charity by order made of its own motion if the person is disqualified from being a charity trustee or trustee for a charity –
- (a) by virtue of section 178, or
- (b) (generally or in relation to the charity concerned) by an order under section 181A.” 35
- (3) In section 82(1) (removal of trustees etc: notice), after “79” insert “, 79A”.
- (4) In section 89(1) (orders relating to trustees etc: exceptions to publicity requirement), after paragraph (b) insert, “or
- (c) an order under section 79A (removal of disqualified trustee),”.
- (5) In section 89(5) (notice inviting representations on order to remove), after “an order under this Act” insert “, other than an order under section 79A,”. 40

6 Power to direct winding up

(1) The Charities Act 2011 is amended as follows.

(2) After section 84 insert –

“84A Power to direct winding up

(1) This section applies where the conditions in section 84(1) are met for that section to apply, but the Commission is satisfied – 5

(a) that the charity does not operate, or

(b) that its purposes can be promoted more effectively if it ceases to operate,

and that exercising the power in subsection (2) is likely to help to increase public trust and confidence in charities. 10

(2) The Commission may by order direct –

(a) the charity trustees,

(b) any trustee for the charity,

(c) any officer or employee of the charity, or 15

(d) (if a body corporate) the charity itself,

to take any action specified in the order for the purpose of having the charity wound up and dissolved, and any remaining property transferred to a charity with the same purposes.

(3) An order under this section – 20

(a) may require action to be taken whether or not it would otherwise be within the powers exercisable by the person or persons concerned, or by the charity, in relation to the winding up and dissolution of the charity or to its property, and

(b) in particular, may require the person or persons concerned to do anything for the purpose of having the charity wound up and dissolved and its property transferred that could otherwise only be done by the members of the charity or any of them, 25

but may not require any action to be taken which is prohibited by any Act. 30

(4) Anything done by a person or body under the authority of an order under this section is to be treated as properly done in the exercise of the powers mentioned in subsection (3)(a).

(5) Subsection (4) does not affect any contractual or other rights arising in connection with anything which has been done under the authority of such an order.” 35

(3) In section 20 (incidental powers), in subsection (3) after “84” insert “, 84A”.

(4) In section 86(2) (copy of certain orders, and reasons, to be sent to charity) and section 336(2)(a) (enforcement of orders of Commission) insert in the appropriate place – 40
“section 84A (power to direct winding up),”.

(5) In Schedule 6 (appeals and applications to Tribunal), insert in the appropriate place –

“Order made by the Commission under section 84A(2) which directs a person to take action specified in the order.	The persons are any person who is directed by the order to take the specified action.	Power to quash the order and (if appropriate) remit the matter to the Commission.	5
Order made by the Commission under section 84A(2) which directs a person to do anything that could otherwise only be done by the members of the charity or any of them.	The persons are the member or members concerned.	Power to quash the order and (if appropriate) remit the matter to the Commission.”	10

7 Power to direct property to be applied to another charity

In section 85 of the Charities Act 2011 (power to direct application of charity property where person is unwilling) in subsection (1)(a) after “unwilling” insert “or unable”. 15

8 Automatic disqualification from being a trustee

- (1) The Charities Act 2011 is amended as follows.
- (2) Section 178 (persons disqualified from being charity trustees or trustees for a charity) is amended as follows.
- (3) In subsection (1), in Case A, for “of any offence involving dishonesty or deception” substitute “of – 20
 - (a) an offence specified in section 178A;
 - (b) an offence, not specified in section 178A, that involves dishonesty or deception.”
- (4) In Case D, for “from the office of charity trustee or trustee for a charity” substitute “as a trustee, charity trustee, officer, agent or employee of a charity”. 25
- (5) At the end of subsection (1) insert –

“Case H

P has been found to be in contempt of court under Civil Procedure Rules for – 30

- (a) making a false disclosure statement, or causing one to be made, or
- (b) making a false statement in a document verified by a statement of truth, or causing one to be made.

Case I

P has been found guilty of disobedience to an order or direction of the Commission on an application to the High Court under section 336(1). 35

Case J

P is a designated person for the purposes of – 40

- (a) Part 1 of the Terrorist Asset-Freezing etc Act 2010, or
- (b) the Al-Qaida (Asset-Freezing) Regulations 2011.”

(6) After section 178 insert –

“178A Case A: specified offences

- (1) The following offences are specified for the purposes of Case A –
- 1 An offence to which Part 4 of the Counter-Terrorism Act 2008 applies (see sections 41 to 43 of that Act). 5
 - 2 An offence under section 13 or 19 of the Terrorism Act 2000 (wearing of uniform etc, and failure to disclose information).
 - 3 A money laundering offence within the meaning of section 415 of the Proceeds of Crime Act 2002.
 - 4 An offence under any of the following provisions of the Bribery Act 2010 – 10
 - (a) section 1 (bribing another person),
 - (b) section 2 (offences relating to being bribed),
 - (c) section 6 (bribery of foreign public officials),
 - (d) section 7 (failure of commercial organisations to prevent bribery). 15
 - 5 An offence under section 77 of this Act.
 - 6 An offence of – 20
 - (a) misconduct in public office,
 - (b) perjury,
 - (c) perverting the course of justice.
- (2) An offence which has been superseded (directly or indirectly) by an offence specified in subsection (1) is also specified for the purposes of Case A.
- (3) In relation to an offence specified in subsection (1) or (2), the following offences are also specified for the purposes of Case A – 25
- (a) an offence of attempt, conspiracy or incitement to commit the offence;
 - (b) an offence of aiding, abetting, counselling or procuring the commission of the offence; 30
 - (c) An offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting) in relation to the offence.
- (4) The Minister may amend this section by regulations to add or remove an offence.”
- (7) Section 179 (disqualification: pre-commencement events etc) is amended as follows. 35
- (8) In subsection (1), after “178(1)” insert “or section 178A or any amendment of that section”.
- (9) At the end add –
- “(7) Case H does not apply in relation to a finding of contempt which, if it had been a conviction for which P was dealt with in the same way, 40

would be a spent conviction for the purposes of the Rehabilitation of Offenders Act 1974.”

(10) In section 181(3) (presumption for waiver of disqualification after 5 years), for “or E” substitute “, E or I”.

(11) In section 348 (regulations subject to affirmative procedure etc) – 5

(a) in subsection (1), after paragraph (c) add –

“(d) regulations under section 178A(4) (offences specified for automatic disqualification of charity trustees).”;

(b) in subsection (2) for “(c)” substitute “(d)”.

9 Power to disqualify from being a trustee 10

(1) The Charities Act 2011 is amended as follows.

(2) After section 181 insert –

“181A Disqualification orders

(1) The Commission may by order disqualify a person from being a charity trustee or trustee for a charity. 15

(2) The order may disqualify a person –

(a) in relation to all charities, or

(b) in relation to such charities or classes of charity as may be specified or described in the order.

(3) The Commission may make an order under this section only if it is satisfied that – 20

(a) one or more of the conditions listed in subsection (4) are met in relation to the person, and

(b) the person is unfit to be a charity trustee or trustee for a charity (either generally or in relation to the charities or classes of charity specified or described in the order). 25

(4) These are the conditions –

A that the person has been cautioned for a disqualifying offence.

B that –

(a) under the law of a country or territory outside the United Kingdom the person has been convicted or cautioned in respect of an offence, and 30

(b) the act which constituted the offence would have constituted a disqualifying offence if it had been done in any part of the United Kingdom. 35

C that the person has been found by Her Majesty’s Revenue and Customs not to be a fit and proper person to be a manager of a body or trust, for the purposes of paragraph 4 of Schedule 6 to the Finance Act 2010 (definition of charity for tax purposes), and the finding has not been overturned. 40

- D that the person was a trustee, charity trustee, officer, agent or employee of a charity at a time when there was misconduct or mismanagement in the administration of the charity, and either –
- (a) the person was responsible for or privy to the misconduct or mismanagement, or 5
 - (b) the person’s conduct contributed to or facilitated the misconduct or mismanagement.
- E that the person was an officer or employee of a body corporate at a time when the body was a trustee or charity trustee for a charity and when there was misconduct or mismanagement by it in the administration of the charity, and either – 10
- (a) the person was responsible for or privy to the misconduct or mismanagement, or
 - (b) the person’s conduct contributed to or facilitated the misconduct or mismanagement. 15
- F that any other past or continuing conduct by the person, whether or not in relation to a charity, is damaging or likely to be damaging to public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order. 20
- (5) The Minister may amend this section by regulations to add or remove a condition.
- (6) In this section “disqualifying offence” means an offence within Case A in section 178(1). 25
- (7) Conditions A and B apply whether the conviction or caution occurred before or after the commencement of this section.
- (8) Condition B does not apply in relation to a conviction which is spent under the law of the country or territory concerned.
- (9) For the purposes of condition B, an act punishable under the law of a country or territory outside the United Kingdom constitutes an offence under that law, however it is described in that law. 30
- 181B Duration of disqualification, and suspension pending disqualification**
- (1) An order under section 181A must specify the period for which the person is disqualified. 35
- (2) The period –
- (a) must be not more than 15 years beginning with the day on which the order takes effect, and
 - (b) must be proportionate, having regard in particular to the time when a conviction becomes spent and to circumstances in which, in the case of disqualification under section 178, the Commission may or must grant a waiver under section 181. 40
- (3) An order takes effect –

- (a) at the end of the time specified by Tribunal Procedure Rules for starting proceedings for an appeal against the order, if no proceedings are started within that time, or
- (b) (subject to the decision on the appeal) when any proceedings started within that time are withdrawn or finally determined. 5
- (4) The Commission may by order suspend a person from being a charity trustee or trustee for a charity if it has given notice under section 181C(1)(a) of its proposal to make an order under section 181A in respect of the person.
- (5) The Commission may not make an order under subsection (4) so as to suspend a person for a period of more than 12 months, but at any time before the expiry of an order the Commission may extend or further extend the suspension by a further order under that subsection, provided that— 10
- (a) the order does not extend the suspension for a period of more than 12 months, and 15
- (b) the total period of suspension is not more than 2 years.
- (6) An order under subsection (4) ceases to have effect—
- (a) if the Commission notifies the person that it will not proceed with its proposal, on the notification being given; 20
- (b) if the Commission makes the order under section 181A, on the order taking effect;
- or, if earlier, at the end of the period specified in accordance with subsection (5).
- (7) The Commission must review any order under subsection (4), at such intervals as it thinks fit. 25
- (8) If on a review it appears to the Commission that it would be appropriate to discharge an order under subsection (4) in whole or in part, the Commission must do so (whether subject to any savings or other transitional provisions or not). 30
- (9) An order under subsection (4) made in the case of any person (“P”) may make provision, as respects the period of P’s suspension, for matters arising out of it, and in particular—
- (a) for enabling any person to execute any instrument in P’s name or otherwise act for P, and 35
- (b) in the case of a charity trustee, for adjusting any rules governing the proceedings of the charity trustees to take account of the reduction in the number capable of acting.
- This does not affect the generality of section 337(1) and (2).
- (10) While an order under subsection (4) is in force suspending a person from being a charity trustee or trustee for a charity, the person must not take up any appointment as a charity trustee or trustee for any other charity without the written approval of the Commission. 40
- 181C Disqualification orders: procedure**
- (1) Before making an order in respect of a person under section 181A without the person’s consent the Commission must— 45

- (a) give the person not less than one month's notice of its proposals, and
- (b) invite representations to be made to it within a period specified in the notice.
- (2) Before making an order under section 181A in respect of a person who the Commission knows or believes to be a charity trustee or trustee for a charity, the Commission must also –
- (a) give notice of its proposals to each of the charity trustees of the charity in question;
- (b) comply with the publicity requirement, unless the Commission is satisfied that for any reason compliance with the requirement is unnecessary.
- (3) The publicity requirement is that the Commission must give public notice of its proposals, inviting representations to be made to it within a period specified in the notice.
- (4) The time when any such notice is given is to be decided by the Commission.
- (5) Any notice of any proposals which is to be given under this section is to contain such particulars of the proposals, or such directions for obtaining information about them, as the Commission thinks sufficient and appropriate.
- (6) Where the Commission gives notice of any proposals under this section –
- (a) it must take into account any representations made to it within the period specified in the notice, and
- (b) it may (without further notice) proceed with the proposals either without modifications or with such modifications as it thinks desirable;
- but a notice under subsection (2)(a) need not specify a period for the purposes of paragraph (a) if the charity came to the Commission's knowledge or belief after the expiry of the period specified for the purposes of subsection (1)(b).
- (7) A notice under subsection (1) or (2)(a) –
- (a) may be given by post, and
- (b) if given by post, may be addressed to the recipient's last known address in the United Kingdom.
- (8) A notice under subsection (2)(b) is to be given in such manner as the Commission thinks sufficient and appropriate.
- (9) Where the Commission makes an order under section 181A in respect of a person it knows or believes to be a charity trustee or trustee for a charity it must (as well as serving it on that person) send a copy of the order and a statement of the Commission's reasons for making it –
- (a) to the charity in question (if a body corporate), or
- (b) (if not) to each of the charity trustees of the charity in question.
- (10) Nothing in this section requires the Commission to give notice, or send a document, to a person who cannot be found or has no known address in the United Kingdom.

- (11) Any documents required to be sent to a person under this section may be sent to, or otherwise served on, the person in the same way as an order made by the Commission under this Act could be served on the person in accordance with section 339.

181D Disqualification orders: variation and revocation 5

A person in respect of whom an order under section 181A is in force may at any time apply to the Commission for an order varying or discharging that order.”

- (3) In section 183 (criminal consequences of acting while disqualified) –
 - (a) in subsection (1), after “section 178” insert “or an order under section 181A”;
 - (b) in subsection (2)(b), after “G” insert “in section 178”.10
- (4) In section 184 (civil consequences of acting while disqualified) –
 - (a) in subsection (1), after “section 178” insert “or an order under section 181A”;
 - (b) in subsection (2)(a), after “section 178” insert “or an order under section 181A.”15
- (5) In section 348 (regulations subject to affirmative procedure etc) –
 - (a) in subsection (1), after paragraph (d) add –
 - “(e) regulations under section 181A(5) (conditions for disqualification by order).”;
 - (b) in subsection (2) for “(c)” substitute “(e)”.20
- (6) In Schedule 6 (appeals and applications to tribunal), after the entry relating to a decision of the Commission under section 181(2) to waive, or not waive, a person’s disqualification insert –
 25

<p>“Order made by the Commission under section 181A.</p>	<p>The persons are the person who is the subject of the order.</p>	<p>Power to–</p> <ul style="list-style-type: none"> (a) quash the order in whole or in part and (if appropriate) remit the matter to the Commission; (b) substitute for all or part of the order any other order which could have been made by the Commission; (c) add to the order anything which could have been contained in an order made by the Commission. 	<p>30</p> <p>35</p>
<p>Order made by the Commission under section 181B(4).</p>	<p>The persons are the person who is the subject of the order.</p>	<p>Power to–</p> <ul style="list-style-type: none"> (a) quash the order in whole or in part and (if appropriate) remit the matter to the Commission; (b) substitute for all or part of the order any other order which could have been made by the Commission; (c) add to the order anything which could have been contained in an order made by the Commission. 	<p>40</p> <p>45</p>

<p>Decision of the Commission—</p> <p>(a) to discharge an order following a review under section 181B(7), or</p> <p>(b) not to discharge an order following such a review.</p>	<p>The persons are—</p> <p>(a) the person who is the subject of the order,</p> <p>(b) the charity trustees of the charity to which the order relates,</p> <p>(c) (if a body corporate) the charity itself, and</p> <p>(d) any other person who is or may be affected by the order.</p>	<p>Power to—</p> <p>(a) quash the decision and (if appropriate) remit the matter to the Commission;</p> <p>(b) make the discharge of the order subject to savings or other transitional provisions;</p> <p>(c) remove any savings or other transitional provisions to which the discharge of the order was subject;</p> <p>(d) discharge the order in whole or in part (whether subject to any savings or other transitional provisions or not).</p> <p style="text-align: right;">5</p>
<p>Decision of the Commission under section 181D not to revoke or vary an order under section 181A.</p>	<p>The persons are the person who is the subject of the order.</p>	<p>Power to—</p> <p>(a) quash the decision and (if appropriate) remit the matter to the Commission;</p> <p>(b) substitute for the decision any other decision of a kind which could have been made by the Commission.”</p> <p style="text-align: right;">10</p>

10 Records of disqualification and removal

- (1) Section 182 of the Charities Act 2011 (records of persons removed from office) is amended as follows. 15
- (2) In subsection (1) —
 - (a) for “181” substitute “181A”.
 - (b) after “a register of” insert, “the following.”
- (3) The words in subsection (1) from “all persons” to the end become subsection (1A). 20
- (4) At the beginning of that subsection insert —

“(1A) The register must include”.
- (5) After subsection (1A) insert —

“(1B) The register must include all persons who have been disqualified by an order of the Commission under section 181A. 25

(1C) The register must include all persons who have been removed from office by an order of the Commission under section 79A (removal of disqualified trustee).”

11 Participation in corporate decisions while disqualified

In the Charities Act 2011, after section 184 insert — 30

“184A Sections 183 and 184: participation in corporate decisions

- (1) For the purposes of sections 183 and 184, a person who is not a charity trustee or trustee for a charity is treated as acting as one if that person —
 - (a) is an officer of a body corporate which is a charity trustee or trustee for a charity, and 35
 - (b) takes part in that capacity in any decision relating to the administration of the charity.

- (2) In subsection (1) “officer” includes any of the persons having general control and management of the administration of the body.”

12 Reviews of the operation of this Act

- (1) The Minister for the Cabinet Office must carry out reviews of the operation of this Act including, on each review, how the Act affects – 5
- (a) public confidence in charities,
 - (b) the level of charitable donations, and
 - (c) people’s willingness to volunteer.
- (2) After each review the Minister must publish a report of the review and lay a copy before Parliament. 10
- (3) The reports must be published not more than 5 years apart, and the first must be published within 5 years after this Act is passed.

13 Short title, extent and commencement

- (1) This Act may be cited as the Protection of Charities Act 2014.
- (2) This Act extends to England and Wales only. 15
- (3) This Act comes into force on whatever day the Minister for the Cabinet Office appoints by regulations made by statutory instrument.
- (4) The regulations –
- (a) may appoint different days for different purposes;
 - (b) may make transitional, transitory or saving provision. 20

DRAFT PROTECTION OF CHARITIES BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Draft Protection of Charities Bill as published on 22 October 2014.

- These Explanatory Notes have been prepared by the Cabinet Office in consultation with the Charity Commission in order to assist the reader of the draft Bill and to help inform debate on it. They do not form part of the draft Bill and have not been endorsed by Parliament.
- The Notes explain what each part of the draft Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the draft Bill will affect existing legislation in this area.
- These Notes might best be read alongside the draft Bill. They are not, and are not intended to be, a comprehensive description of the draft Bill. So where a clause or part of a clause does not seem to require any explanation or comment, none is given.

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Overview of the Draft Bill

The draft Bill:

- provides stronger protection for charities in England and Wales from individuals who are unfit to be charity trustees, and;
- equips the Charity Commission with new or strengthened powers to tackle abuse of charity more effectively and efficiently.

Policy background

The Charity Commission's statutory objectives include increasing public trust and confidence in charities and promoting charities' compliance with their legal obligations. A significant part of the Charity Commission's compliance work involves identifying and investigating misconduct or mismanagement in charities and taking appropriate and proportionate action in response.

The Charity Commission already has a range of investigatory and enforcement powers designed to protect charitable assets where there is serious misconduct or mismanagement. As a civil regulator, the Commission has no powers of prosecution, so if the Charity Commission discovers criminal activities it reports those activities to the police or other appropriate law enforcement agencies. The Charity Commission must not become directly involved in the running of or administration of a charity, although it can under certain circumstances give directions to charity trustees, appoint interim managers to displace the trustees and make remedial schemes.

Currently, people with an unspent conviction for a criminal offence involving dishonesty or deception are automatically disqualified from acting as a charity trustee until their conviction is spent or they obtain a waiver from the disqualification from the Charity Commission.

In his statutory review of the Charities Act 2006 "Trusted and Independent; giving charity back to charities", Lord Hodgson of Astley Abbott's recommended that the Government consider extending the range of offences that automatically disqualify a person from being a charity trustee. The Government accepted his recommendation in its response in September 2013 (see figure 1 below).

Figure 1 - Extract from the government's response to reports by the Public Administration Select Committee (PASC) and Lord Hodgson on the legal framework for charities

18. The Government should consider if and how to widen the types of criminal offences disqualifying individuals from charity trusteeship, taking into account the need to support rehabilitation of former offenders. (Chapter 4, recommendation 19)

The Government accepts this recommendation and believes there is also a need to consider whether there are loopholes in the way the current suspension and removal powers operate. The Law Commission has been asked to consider this recommendation. However, if an early legislative opportunity arises the Government may take this recommendation forward outside of the Law Commission project.

In December 2013 the National Audit Office (NAO) published a report on the regulatory effectiveness of the Charity Commission. The report concluded that the Charity Commission does not do enough to identify and tackle abuse of charitable status, and that this “*undermines the Commission’s ability to meet its statutory objective to increase public trust and confidence in charities*”.

The report found that the Charity Commission “*needs to make greater use of its statutory powers in line with its objective of maintaining confidence in the sector; and develop an approach to identify and deal with those few trustees who deliberately abuse charitable status*”.

The report also identified several deficiencies in the Charity Commission’s powers and barriers to their use. For example, the Charity Commission is currently required to give prior notice that it intends to remove a charity trustee which can mean the trustee resigns before the Commission is able to remove them, thus enabling the individual to avoid disqualification and leaving other charities vulnerable. The report made a number of recommendations to the Charity Commission and recommended that the Cabinet Office should “*assist the Commission in securing legislative changes to address gaps and deficiencies in the Commission’s powers*.”

The Government's Extremism Task Force also recommended addressing gaps and deficiencies in the Charity Commission's powers in the specific context of tackling extremism. It recommended "*consulting on new legislation to strengthen the powers of the Charity Commission: these powers will help us tackle extremism, as well as other abuses of charitable status such as tax avoidance and fraud.*" Subsequently, the Home Affairs Select Committee, in its 2014 report on counter-terrorism also recommended stronger legal powers for the Charity Commission to counter the abuse of charities by terrorists.

On 4 December 2013 (the day that the NAO report was published), the Government published a consultation on 17 proposals for reform put forward by the Charity Commission and which dealt both with the range of offences resulting in automatic disqualification from charity trusteeship, and gaps and weaknesses in the Charity Commission's existing range of powers.

Public consultation ran until February 2014. A summary of the consultation responses and the Government's response is available at: www.gov.uk. In summary, feedback indicated broad support for the role of the Charity Commission and for ensuring it has the tools it needs to do its job. Not all of the proposals attracted support from the majority of respondents, and the Government carefully considered consultation responses in deciding which proposals to include in the draft Bill. Ten of the original 17 proposals are being taken forward.

The Draft Bill:

- adds to the criteria which automatically disqualify a person from being a charity trustee in England and Wales.
- gives the Charity Commission a new power to disqualify a person in certain circumstances from being a charity trustee for up to 15 years, subject to safeguards.
- enables the Charity Commission to continue to proceed with removal where a trustee resigns after notice of removal has been served.
- gives the Charity Commission a new warning power, enabling it to issue a statutory warning in connection with its general functions of facilitating the better administration of charities or taking remedial action in connection with misconduct or mismanagement.

- gives the Charity Commission a new power to direct a charity to be wound-up following an investigation and where that would be more appropriate than attempting to restore the charity to health.

The Draft Bill also:

- makes clear that failure to follow a Charity Commission order or direction constitutes misconduct;
- extends the period for which the Charity Commission may suspend a person from charity trusteeship pending removal from a maximum of one year to a maximum of two years.
- enables the Charity Commission to exercise its existing scheme-making power in the context of a statutory inquiry where it is satisfied that there has been misconduct or mismanagement *or* there is a need to protect charity property. Currently both misconduct/mismanagement and need to protect charity property limbs must be met.
- enables the Charity Commission to remove a disqualified trustee from a charity where they have not stepped down.
- updates the existing power to direct charity property to be applied to another charity to deal with a particular problem.
- prevents a person disqualified as a charity trustee who is also an officer of a corporate body that is a charity trustee from participating in discussions and decisions when the corporate body is acting as a charity trustee.

Legal background

The Charities Act 2011 contains the current provisions relating to removal and disqualification of charity trustees, and powers of the Charity Commission to act for the protection of charity. The current provisions are:

- sections 76 to 87 of the Charities Act 2011 (“Powers of Commission to act for the protection of charities etc”)¹. Most of these powers can only be exercised after the Commission has opened an inquiry under section 46 of the Charities Act 2011.
- sections 178 to 184 of the Charities Act 2011 (“Disqualification of charity trustees and trustees etc.”)²

¹ Section 80 is amended by the Tribunals, Courts and Enforcement Act 2007 (Consequential Amendments) Order 2012 to add reference to debt relief orders.

The Charities Act 2011 will continue to be the main Act of Parliament dealing with charity law, and this draft Bill inserts new provisions into the 2011 Act and makes changes to it. In order to assist readers of the draft Bill, a “Proposed version of the Charities Act 2011” has been prepared which shows how the relevant parts of the Charities Act 2011 would appear as amended by the draft Bill. This is available at www.legislation.gov.uk/ukpga/2011/25/contents/proposed/charities-act-2011

Territorial application of the Draft Bill in the UK

The draft Protection of Charities Bill extends to England and Wales only. Charity law and regulation is devolved in Scotland and Northern Ireland.

Scotland

The draft Bill does not contain any provisions falling within the terms of the Sewel Convention. Because the Sewel Convention provides that Westminster will not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish Parliament, if there are amendments relating to such matters which trigger the Convention, the consent of the Scottish Parliament will be sought for them.

Wales

The draft Bill does not contain any provisions relating to devolved matters. If there are amendments which relate to such matters, the consent of the National Assembly of Wales will be sought for them.

Northern Ireland

The draft Bill does not contain any provisions relating to devolved matters. If there are amendments which relate to such matters, the consent of the Northern Ireland Assembly will be sought for them.

Commentary on provisions of Draft Bill

1. The Charities Act 2011 and the draft bill refer to the terms “charity trustees” and “trustees of a charity”. “Trustees of a charity” are people who hold property for a charity established as a trust. These people are usually, but not necessarily always, the charity trustees, and are treated in the same way by the legislation

² Sections 178 and 180 are amended by the Tribunals, Courts and Enforcement Act 2007 (Consequential Amendments) Order 2012 to add reference to debt relief orders.

Section 180 is amended by the Charitable Incorporated Organisations (Consequential Amendments) Order 2012 to add reference to CIOs.

whether or not they are. In these notes we use the term “charity trustees” to refer to both for simplicity.

Clause 1: Official warnings by the Commission

England & Wales

2. Clause 1 amends section 15 of the Charities Act 2011 by inserting a new subsection (3A), which provides the Commission with a power to issue an official warning to a charity or charity trustee in connection with its second and third general functions. The Commission’s second general function is “Encouraging and facilitating the better administration of charities” and its third general function is “identifying and investigating apparent misconduct or mismanagement in the administration of charities, and taking remedial or protective action...”. The provision enables the Commission to publish a warning in such manner as it sees fit.
3. There is no right of appeal to the Charity Tribunal against an official warning, as is currently the case with non-statutory warnings issued by the Commission. However an official warning could be challenged through judicial review.
4. The statutory official warning is intended to be a more reasonable and proportionate way of dealing with breaches of statutory provisions of the Charities Act 2011 or breaches of fiduciary duty where the risks and impact on charitable assets and services are relatively low. Sometimes this may be as a more proportionate alternative to use of remedial powers such as suspensions, or removal of trustees or restitution action against trustees. In such cases it could be made clear that continuing or repeating the breach will lead to tougher action being taken straight away next time. In other cases, a warning might be used alongside or with reference to other powers to increase the incentive to comply.
5. The Commission would be able, but is not required, to publish official warnings. If it does publish it can do so in any form. The Commission will publish its policy for when and how this will be done and expects to apply a similar process to the way it currently deals with its discretion to publish the results of inquiries under the Charities Act 2011.
6. The Commission has provided the following examples of when the warning power could be used:
 - A charity makes unauthorised payments to a connected company or that benefit a trustee. The size of the sums involved mean it is disproportionate

to take stronger action but the Commission could issue an Official Warning on future conduct.

- Breaches of a charity's governing document that lead to governance problems. For example, not running internal elections properly or repeated failure to call Annual General Meetings. This can lead to complaints and disputes within the charity but often the impact is not great enough to justify the use of current powers. A published Warning could promote compliance and increase transparency and wider public trust and confidence.
- The Commission is unable to make directions outside of an inquiry (the consultation proposed changing this but it was rejected by Government in the light of responses). Where the Commission considers it disproportionate and unnecessary to open an inquiry purely for the purpose of making a direction, issuing an Official Warning could be an alternative way of making it clear to a charity that they should take action.

Clause 2: Investigations and power to suspend

England and Wales

7. Clause 2 amends section 76 of the Charities Act 2011, which deals with the exercise of the Commission's temporary protective powers. It puts beyond doubt that failure to comply with an order of the Commission constitutes misconduct or mismanagement (clause 2(2)).
8. It also enables the Commission to extend a suspension pending removal by up to one year, subject to a two year overall limit. The Commission asked for this change because in some cases it must await 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

England and Wales

9. Clause 3 inserts into the Charities Act 2011 new section 76A. Where the Commission has opened an inquiry into charity A, provided there has been misconduct/mismanagement in charity A and the Commission can link it to a person, this provision enables the Commission to take into account any other evidence of that person's conduct for example in charity B or outside of charity but which may damage public trust and confidence in charity, for the purpose of

deciding what protective power(s) it would be proportionate/appropriate to exercise in relation to charity A. In effect, once misconduct or mismanagement has been established this provision enables the Commission to consider whether there is other evidence of misconduct or mismanagement in other charities, or conduct outside of charities which could undermine public trust and confidence in charities before determining how to act.

Clause 4: Power to remove charity trustees following an inquiry

England and Wales

10. Clause 4 inserts into the Charities Act 2011 a substitute section 79 which deals with removal of charity trustees following an inquiry, and makes several consequential amendments. The revised section 79 makes it clear that the Commission can 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 risk to charity property. The test for the Commission to exercise its power to remove a charity trustee, or other office holder, remains that there must be *both* misconduct or mismanagement *and* risk to charity property.
11. The difference between the two tests is because it is considered that there must always be misconduct or mismanagement in order to remove a person from their position in the charity. However there are cases where the Commission considers it may need to make a scheme where only one limb of the test is met.
12. Substitute section 79(5) and (6) enable the Commission to continue the removal process (and consequent automatic disqualification) where a person ceases to hold office. This is to enable 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 disqualified trustee

England and Wales

Clause 5 inserts into the Charities Act 2011 a new section 79A which enables the Commission to remove a disqualified charity trustee if they continue to remain in their position once disqualified. The Commission is required to give notice to each of the charity's trustees, but is not required to give public notice of the order, and is not required to provide a particular period of notice or a mechanism for

representations as this is not considered necessary where an already disqualified trustee is being removed.

Clause 6: Power to direct winding up

England and Wales

13. Clause 6 inserts into the Charities Act 2011 a new section 84A which enables the Commission to direct a charity to wind up in certain circumstances.
14. The Commission's usual practice is to attempt to restore a charity to health following a statutory inquiry. However there are rare cases where it would be more appropriate for any remaining assets to be transferred to another charity with the same or similar purposes (something the Commission can already do under existing powers) and the shell of the charity to then be wound up (which this new power would enable). The Commission itself cannot wind up the charity, as this would be acting in the charity's administration, so this new power enables the Commission to direct the trustees (or if necessary other persons in the charity) to take the necessary steps to wind it up (new section 84A(2)).
15. The power would only be available in the context of a statutory inquiry and where there is misconduct or mismanagement or risk to charity property. In addition, the Commission must be satisfied that the charity does not operate or that its purposes could be more effectively promoted if it were to cease to operate, and that the exercise of this power is likely to help to increase public trust and confidence in charities (new section 84A(1)).
16. New section 84A(3) enables an order to give the recipient(s) of the order powers that they may not have, in particular powers that normally only the members of the charity would be able to exercise in the context of winding up the charity. New section 84A(3) also prevents the order from requiring action to be taken that is prohibited by statute. Similar provision already exists in sections 84(3) (Power to direct specified action to be taken) and 85(3) (Power to direct application of charity property) of the Charities Act 2011. Action taken under such an order is treated as properly done (new section 84A(4)) but existing contractual rights are protected (new section 84A(5)).
17. Clause 6(5) provides for a right of appeal to the Tribunal, both for the recipient(s) of a winding-up order and where the order displaces members' rights or powers, the members of the charity.

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

England and Wales

18. Clause 7 amends section 85 of the Charities Act 2011 to extend the circumstances where the Commission may direct the application of charity property. Currently the Commission may only exercise this power where the person holding the property is “unwilling” to apply it properly for the purposes of the charity, and where the Commission is satisfied that an order is necessary or desirable to secure the proper application of the property. The amendment extends the existing provision to include circumstances where the person holding the charity property is “unable” to transfer the charity property. The Commission asked for this provision following several cases where financial institutions holding charity property were contractually unable to transfer it to secure its proper charitable application but would have been willing to do so.

Clause 8: Automatic disqualification of charity trustees

England and Wales

19. Clause 8 amends section 178 of the Charities Act 2011 and inserts new section 178A into the Act to extend the criteria that automatically disqualify a person from being a charity trustee.
20. The existing criteria for automatic disqualification remain unchanged. So, for example, a person with an unspent conviction for an offence involving deception or dishonesty is automatically disqualified until the conviction is spent or a waiver is granted by the Commission.
21. Cases “H” to “J” are new criteria for automatic disqualification which are not criminal offences.
22. Case “H” is where a person has been found guilty of contempt of court in civil proceedings where a false statement or disclosure is made.
23. Case “I” is where a person has been found guilty in the High Court of disobedience to a Commission order or direction.
24. Case “J” is designation under terrorist asset-freezing legislation. Designation under terrorist asset-freezing legislation can be made only on the basis of reasonable belief of involvement in terrorism, and only if it is necessary for

purposes connected with protecting the public from terrorism. There is a right of appeal against such a designation. Under Case J the disqualification would last until the designation is removed.

25. New section 178A introduces convictions for several criminal offences as new criteria which would automatically disqualify a person from acting as a charity trustee until the conviction is spent or a waiver granted by the Commission. There is the potential for an overlap with the current “offences involving dishonesty or deception” criteria, which is dealt with by clause 8(3).
26. Offences that have been superseded by those listed are also caught by new section 178A(2), and ancillary or inchoate offences are caught by new section 178A(3).
27. New section 178A(4) provides a power for the Minister for the Cabinet Office to make regulations to amend the list of criteria. Such regulations would be subject to Parliamentary debate and approval before they could be made.
28. The existing regime of waiver under section 181 Charities Act 2011 would also apply to persons disqualified under these new criteria, enabling such persons to apply for their disqualification to be waived in relation to a particular charity, class of charities, or any charity. In Case “I” there would be a presumption in favour of waiver after five years.

Clause 9: Power to disqualify from being a charity trustee or trustee for a charity

England and Wales

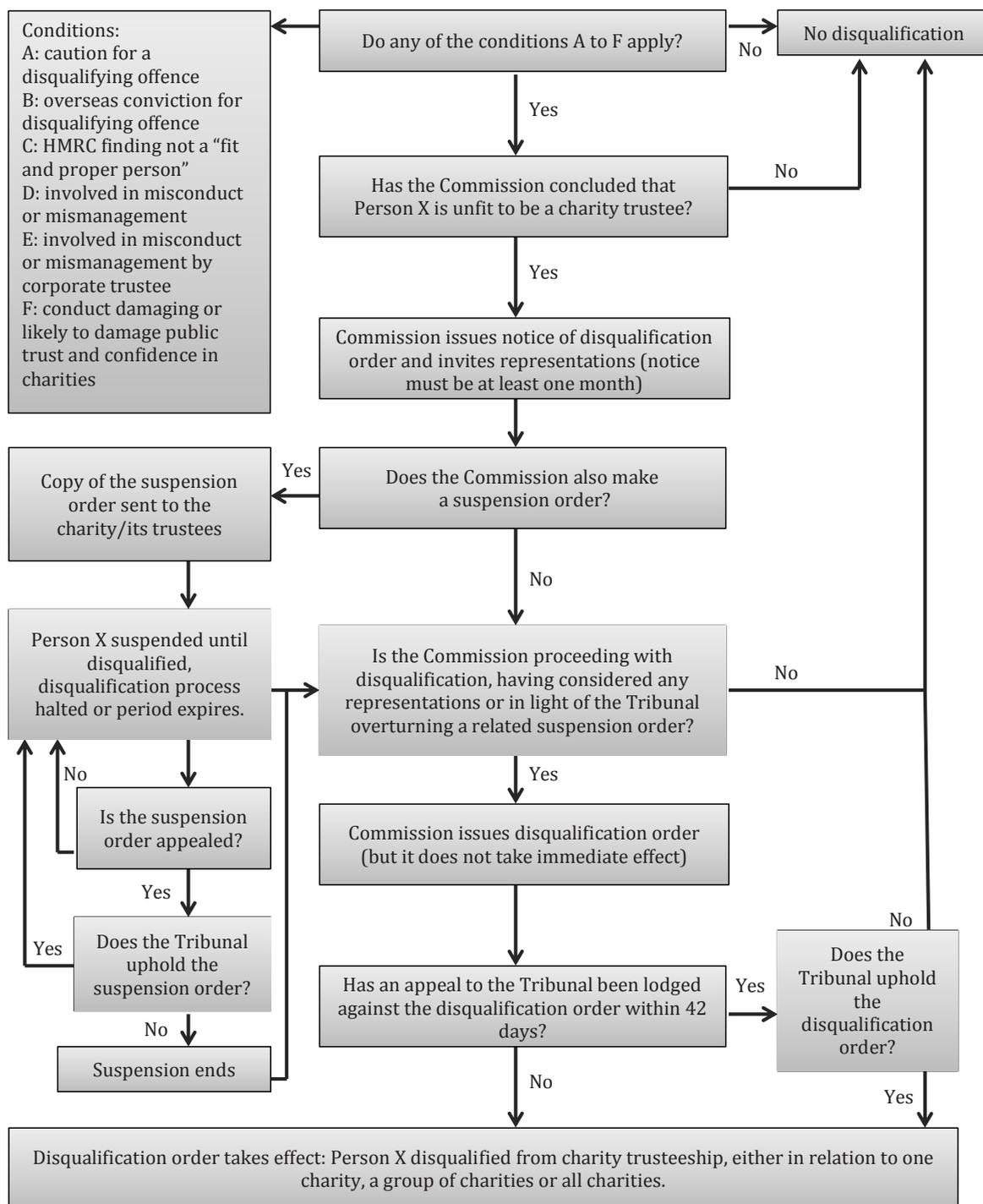
29. Clause 9 inserts four new sections (181A, 181B, 181C and 181D) into the Charities Act 2011, and makes some other consequential changes.
30. New section 181A provides the Commission with a power to disqualify a person from being a charity trustee. It sets out the criteria that must be met for the Commission to make a disqualification order. To make a disqualification order the Commission must be satisfied that one or more of the listed conditions A to F is met, and that the person is unfit to be a charity trustee (either in relation to charities generally or a particular class of charity to be specified in the disqualification order).
31. The Minister for the Cabinet Office can vary the list of conditions by regulations (new section 181A(5)) which would be subject to Parliamentary debate and approval before they could be made (new section 181D(4)).

32. A person subject to a disqualification order would be subject to the same criminal (clause 9(3)) and civil consequences (clause 9(4)) as a person disqualified under section 178 Charities Act 2011.
33. New section 181B provides that a disqualification order must specify the period of disqualification, which can be up to 15 years, but must be proportionate having regard to certain matters. It also provides that a disqualification order can only take effect after the period for lodging an appeal to the Charity Tribunal has expired without an appeal being lodged, or where an appeal is lodged when it is either withdrawn or finally determined by the Tribunal. The right of appeal against the decision to make a disqualification order is provided in clause 9(6).
34. New section 181B also provides the Commission with a power to suspend a person from being a charity trustee once it has served notice of its intention to make a disqualification order against that person (see paragraph 36 below). The suspension would be for up to one year, extendable for up to a further year. The suspension would be subject to periodic review by the Commission (new section 181B(5)). Whilst suspended the person must obtain the Commission's approval before taking up any charity trustee position (new section 181B(10)). The suspension lasts until either the Commission makes a disqualification order, it gives notice of its intention not to make such an order, the period of the suspension expires, or on review the Commission considers the suspension should be discharged.
35. New section 181C sets out the process for making a disqualification order. The Commission must give a person at least one month's notice of its intention to make a disqualification order, and invite the person to make representations. If the person is known or believed to be a serving charity trustee, the Commission must also give notice of its proposals to the other trustees of the charity, and must give public notice of its proposals unless it considers doing so is unnecessary. The Commission must take into account any representations received during the specified period. Where a charity for which the person is a charity trustee comes to light after the specified period, the Commission need not specify a further period for representations, but would still be required to notify the other trustees of the charity. Where the Commission makes a disqualification order in respect of a person it knows or believes is a serving charity trustee, it must send a copy of the order and statement of reasons to the charity (in the case of a corporate structure) or its trustees (if unincorporated).
36. New section 181D provides for the variation or revocation of disqualification orders. It enables a person who is the subject of a disqualification order to apply to the Commission for the order to be varied or revoked, and provides a right of

appeal to the Tribunal against a decision of the Commission not to vary or revoke a disqualification order.

37. The flow chart (figure 2 below), which has been developed with the Commission, sets out how the disqualification process would operate.

Figure 2 - Flowchart showing the application of the Charity Commission's power to disqualify from charity trusteeship



Clause 10: Records of disqualification and removal

England and Wales

38. Clause 10 amends section 182 of the Charities Act 2011. Section 182 of the Charities Act 2011 provides that the Commission must maintain a publicly accessible register of persons who have been removed from office by the Commission or the High Court. Clause 10 extends that register to include details of persons subject to a disqualification order.

Clause 11: Participation in corporate decisions while disqualified

England and Wales

39. Clause 11 inserts into the Charities Act 2011 new section 184A. Where a person is disqualified (either under section 178 or new section 181A of the Charities Act 2011) and is an officer of a corporate body that is a charity trustee, this provision prohibits that person from participating in decisions relating to the charity's administration. New section 184A extends the existing criminal (section 183) and civil (section 184) sanctions to apply to officers who participate in decisions relating to a charity's administration when they are disqualified from being charity trustees.

Clause 12: Reviews of the operation of this Act

40. Clause 12 makes provision for the operation of the Act to be reviewed by the Minister at least every five years, in line with Government policy on reviewing legislation that imposes a regulatory burden. It specifies the matters that must be considered in the review, and for a report of the review to be laid in Parliament.

Clause 12: Short title, extent and commencement

England and Wales

41. Clause 12 makes provision for the commencement of the draft bill, and extends its provisions to England and Wales only.

Commencement

42. Provisions of the draft bill would come into force on days appointed by the Minister for the Cabinet Office in regulations which are not subject to Parliamentary procedure.

Financial implications of the Draft Bill

43. An impact assessment has been prepared for the draft bill and is available at www.gov.uk. There will be some transitional familiarisation costs for charities estimated to be £4.5 million, but ongoing costs are estimated to be less than £100,000 per annum.
44. The draft bill is not anticipated to have any impact on public expenditure or public sector manpower.
45. Costs to the Charity Commission are not considered to be significant and will be borne by prioritisation of resources from within its existing resource allocation. However the draft bill is not anticipated to have any significant financial implications for the Commission. Gaps and weaknesses in the Charity Commission's legal powers have on occasion frustrated its efforts to tackle abuse resulting in delay and wasted costs. The measures in the draft bill have been requested by the Charity Commission and will enable the Charity Commission to utilise its existing resources more effectively.

Related documents

The following documents are relevant to the draft Bill and are available at www.gov.uk:

- Impact assessment
- Consultation on Extending the Charity Commission's Powers to Tackle Abuse in Charities
- Powers to Tackle Abuse in Charities: Summary of consultation responses and Government response

A "Proposed Version" of the Charities Act 2011 that shows how the Act would be amended by the draft Protection of Charities Bill is available on www.legislation.gov.uk/ukpga/2011/25/contents/proposed/charities-act-2011

Summary of consultation responses and Government Response

Introduction

Charities enjoy high levels of public trust and confidence. Whilst not common in the vast majority of charities, abuse does occur, and it is important in protecting public trust and confidence that the independent regulator of charities, the Charity Commission for England and Wales (“the Commission”), has the right tools to deter, identify and tackle it. There is strong public support for the regulation of charities: 91% of the public say the role of the Charity Commission is essential or very important¹.

The Commission already has powers to deal with abuse. Many can only be exercised where a statutory inquiry has been opened into a charity, and then in most cases only where there is evidence of misconduct or mismanagement and/or risk to charity property, and the Commission deems the use of the power to be appropriate and proportionate. However, the Commission itself has asked for its powers to be strengthened, and for some new powers, to better equip it to tackle abuse. These calls for improved powers have been reinforced by the National Audit Office, Extremism Task Force and Home Affairs Select Committee.

The Government had also agreed to explore widening the criminal convictions that result in automatic disqualification from charity trusteeship, in response to a recommendation made by Lord Hodgson of Astley Abbotts in his review of charity regulation². A consultation was published on 4 December 2013, which explained the background to each of the proposals.

We are very grateful to all those who took the time to respond to the consultation. Their views and detailed comments on the proposals have led us to go ahead with some of the original proposals and think again on others. Some are not being taken forward as a result, and others are being taken forward in amended form.

The Consultation

56 responses were received to the consultation from a broad range of organisations and individuals, comprising charities, bodies representing charities, charity lawyers, law enforcement, accountants, and individuals involved with charities. A list of respondents is at **Annex A**.

The consultation was open for 10 weeks from 4 December 2013 to 12 February 2014.

¹ <http://www.charitycommission.gov.uk/about-the-commission/our-research/research-reports/public-trust-and-confidence-in-charities-2012-analysis/>

² Lord Hodgson’s review: <https://www.gov.uk/government/consultations/charities-act-2006-review>
The Government’s response: <https://www.gov.uk/government/publications/government-response-to-recommendations-on-the-legal-framework-for-charities>

General feedback

Many respondents valued the role of the Charity Commission as independent civil regulator of charities. Generally respondents were very supportive for equipping the regulator with the tools it needs to do the job. Overall there was good support or qualified support from the charity sector for most of the proposals, but some raised concerns over specific proposals.

Two representative bodies of small charities had polled their members on the consultation questions, and these groups tended to be the most supportive of the proposed changes. Responses from bodies representing lawyers, a representative body of Muslim overseas development charities and charities involved in rehabilitation of offenders raised the most concerns.

The length of time to respond was criticised by some respondents who argued in favour of a 12 week consultation period. However several respondents recognised the need for a short consultation in light of the possibility of a legislative opportunity. A number of consultation respondents also recognised that the Cabinet Office had made an effort to engage with charities and their representative bodies to actively seek views.

Some consultation respondents argued that the proposals lacked sufficient level of detail to enable them to make an informed decision on whether or not to support particular proposals.

Several respondents questioned the extent to which the new powers are necessary, or whether the concerns highlighted in the consultation document can already be addressed by the Commission under its existing powers. Much of the recent criticism directed at the Commission was that it had failed to make sufficient use of its existing powers, so it was hard to see how conferring new powers would improve its regulatory performance.

A few respondents argued that the proposals should not be used as an attempt to short circuit existing ways of dealing with problems which might better be addressed through the actions of other law enforcement agencies, particularly by the Police, the CPS or HMRC.

Some respondents argued that most charities who find themselves in regulatory difficulties generally do so as a result of honest incompetence and that the Charity Commission should have a role in helping those trustees (who show a willingness and capability to do so) to get their charity back on track.

Some respondents had experience of the Commission acting or deciding not to act in particular cases.

Government response

- 1. The Government recognises the strong support from charities for an independent civil regulator of charities, and believes that the Commission is making good progress in demonstrating its regulatory effectiveness.*
- 2. The Charity Commission is not a law enforcement agency. It is an independent civil regulator whose role in investigating and tackling abuse of charity is to protect charity assets (both in a particular charity and more widely) and public trust and confidence in charities more generally. Whether or not other regulators or law enforcement agencies take action in cases of abuse of charity, the Charity Commission has a key role particularly in protecting the charity from further abuse. It should take action where it considers it appropriate and proportionate to remedy abuse and non-compliance and protect a particular charity or protect charities more widely.*
- 3. There was a need for the Commission to be more assertive in using its existing powers; but recent evidence shows that it is already doing so. The Commission opened 64 statutory inquiries in 2013-14, compared to 15 during the previous financial year, and exercised its compliance/enforcement powers on 540 occasions compared to 216 occasions. However in addition to making more use of its existing powers to tackle abuse, the Government agrees with the Charity Commission (and others) that strengthened powers are needed to enable the Commission to effectively and efficiently protect charities. Additional or strengthened powers should only be conferred where it is clear that they are necessary and proportionate and are accompanied by appropriate safeguards.*
- 4. The Charity Commission's Statement of Regulatory Approach³ draws a clear distinction between deliberate abuse and honest mistakes: "where genuine mistakes by trustees do not have serious consequences, we will work with those trustees to resolve matters and to get the charity in question back onto a secure footing." These proposed changes are primarily to assist the Commission with serious deliberate abuse of charity, as the Commission's estimates of their anticipated use shows. The new power that may be used more frequently in some cases of honest but serious mistakes is the statutory warning power. As the consultation document set out, the*

³ <http://www.charitycommission.gov.uk/media/623283/annual-report-and-resource-accounts-2013-14.pdf>

Commission is already legally required to exercise its powers in line with the principles of best regulatory practice, which include the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.

- 5. The period for consultation was limited to 10 weeks because at the time of the consultation there was a possibility of legislation in the Fourth Session. The Cabinet Office and Charity Commission did engage in a series of consultation meetings and other forms of engagement during the consultation period. In the event, the possibility of Fourth Session legislation did not come to pass. However, publishing a draft bill for pre-legislative scrutiny will offer a further opportunity for charities and others to have their say on the proposals.*

Next steps

- 6. The Draft Protection of Charities Bill has been published for pre-legislative scrutiny by a Joint Committee in Parliament. The timetable for pre-legislative scrutiny is a matter for the Joint Committee. The Government looks forward to the Joint Committee's report and, subject to that report, intends to take the legislation forward as soon as Parliamentary time allows.*

Proposal 1 – Adding to the criteria for automatic disqualification from being a charity trustee
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- 7. 36 responses were received to Question 1 on whether unspent convictions for the range of offences listed should automatically disqualify a person from charity trusteeship. 60% of respondents fully supported the proposal, with 23% partially supporting the proposal. 17% of respondents disagreed with the proposal.*
- 8. Most respondents supported the proposals to extend the range of unspent convictions which give rise to automatic disqualification from serving as a charity trustee. One respondent which surveyed its small charity members reported 94% supported extending the unspent convictions (there was only slightly less support for including terrorist asset-freezing designation as a criterion (88%)).*
- 9. Of those only partly supporting the proposal or disagreeing with it, concerns raised most often were; no people should be automatically disqualified from*

charity trusteeship on the basis of an unspent conviction⁴; that given the recent changes to rehabilitation periods, the proposal would be impractical; the proposed inclusion of public order offences; the potential breadth of terrorism offences that could be covered; and that we should have been clearer which specific offences would result in automatic disqualification.

10. Some respondents who did not support extending automatic disqualification to any new convictions were charities involved in the rehabilitation of offenders, several of which did not support the existing automatic disqualification provisions.
11. Some respondents did not support the inclusion of terrorism offences, for different reasons. In some cases opposition was based on the breadth of the offences and a concern that people could be unfairly caught by these offences where there had been no deliberate or reckless act, particularly in aid charities that operate in difficult parts of the world. The concern was that some of the offences were so broad as to make it difficult for charities to engage in international development, conflict resolution, humanitarian aid or human rights in areas where designated groups are operating.
12. Most consultation respondents supported the inclusion of designation under the UK's terrorist asset-freezing legislation for automatic disqualification from charity trusteeship. Some respondents were concerned that such designation could be based on suspicion and undisclosed evidence and closed court proceedings with Special Advocates, which set this proposed criterion apart from unspent criminal convictions.
13. Respondents generally supported a Ministerial power to add to the list of offences for which an unspent conviction would result in automatic disqualification, provided such a power was subject to affirmative Parliamentary scrutiny.
14. There was a mixed response to Question 2 (whether there should be other offences added to the proposed list which would automatically disqualify a person from charity trusteeship).
15. Views were mixed on the suggested inclusion of offences under the Public Order Act 1986 (as amended). Most who responded on this point did not support inclusion on the grounds that some of the offences may limit the freedom of expression, and in particular freedom of religious expression. There were also comments that whilst there was an apparent logic to the inclusion of the other offences, the inclusion of public order offences appeared less justifiable.

⁴ It is, however, worth pointing out that the existing automatic disqualification provisions were not the subject of consultation.

16. Some respondents suggested other offences that should result in automatic disqualification, including; sexual offences, offences related to tax evasion, and drug or people trafficking. Several respondents suggested that convicted sex offenders should be automatically disqualified from serving as a charity trustee of a charity that works with children or vulnerable adults.
17. A number of respondents commented on the importance of having a robust and effective process to enable disqualified trustees to seek a waiver from their disqualification from the Charity Commission. Two respondents argued that the Charity Commission's current waiver process is risk averse and takes insufficient account of the views of the charity concerned in supporting an individual's application for a waiver.

Government response

18. *The Government proposes that convictions in the UK for the following offences should result in automatic disqualification from being a charity trustee in England and Wales for so long as the conviction remains unspent, but subject to the waiver regime to promote rehabilitation and ensure that in appropriate circumstances charities don't miss out on people with unspent convictions that may have much to contribute as a charity trustee:*
 - a. *Terrorism and terrorism-connected offences: an offence listed in section 41 of the Counter-Terrorism Act 2008 (offences relating to proscribed organisations, offences relating to terrorist property, failure to disclose information about acts of terrorism, weapons training, directing terrorism, possessing things and collecting information for the purposes of terrorism, inciting terrorism outside the United Kingdom, extra-territorial jurisdiction in respect of certain offences committed outside the United Kingdom for the purposes of terrorism etc, use of noxious substances or things, encouragement of terrorism, preparation and training for terrorism, offences relating to radioactive devices and material and nuclear facilities, ancillary offences to the above offences). Offences under section 13 (wearing of uniform etc.) or section 19 (failure to disclose information) of the Terrorism Act 2000 would also be covered.*
 - b. *A money laundering offence within the meaning of section 415 of the Proceeds of Crime Act 2002 (which captures offences under ss. 327-9 of the same Act, and relevant ancillary or inchoate offences).*

- c. *Offences under sections 1,2, 6 and 7 of the Bribery Act 2010 (offences of bribing another person, offences relating to being bribed, bribery of foreign public officials, failure of commercial organisations to prevent bribery).*
- d. *An offence misconduct in public office, perjury, perverting the course of justice (these are common law offences).*

19. *Under some of the above offences, persons with unspent convictions may already be automatically disqualified under the existing "deception or dishonesty" criteria. The Government considers that in most cases an unspent conviction for one of the above offences makes a person unfit to serve as a charity trustee, but recognises that there will be some cases where such persons may be fit to serve as a trustee in which the waiver process will be required.*

20. *Some respondents had argued that there should be no blanket ban on charity trusteeship purely on the basis of an unspent conviction for a particular offence, and that disqualification should be reviewed on a case by case basis by the Charity Commission. Charity trusteeship is based on trust that the individual is able to act responsibly on behalf of others – a fraud or dishonesty conviction means that this is clearly not the case. It would also be impractical for the Charity Commission, with limited resources, to consider disqualification of people holding such convictions on a case by case basis. The Government believes that a renewed focus on the Charity Commission's waiver process is a far more practical, cost-effective and proportionate alternative.*

21. *On 10th March 2014, changes to the Rehabilitation of Offenders Act 1974 came into force made by the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Ministry of Justice guidance explains the impact of these changes⁵. The changes mean that, for most people with unspent convictions, the length of time it takes for the convictions to become spent ("the rehabilitation period") is reduced. It also means that some convictions that were previously never spent will now be able to be spent. The rehabilitation period is decided by using the sentence imposed at court. Previously, custodial sentences over 2½ years were never spent, that has now been revised to custodial sentences over 4 years. Custodial*

⁵ <https://www.gov.uk/government/publications/new-guidance-on-the-rehabilitation-of-offenders-act-1974>

sentences of between six months and 2½ years previously had a rehabilitation period of 10 years from the date of conviction, which has now been reduced to the length of the sentence plus 4 years (so a maximum of 6½ years from the date of conviction). Many other rehabilitation periods have also been reduced. The changes are estimated to benefit 1.5 million people, and will reduce the number of people who are disqualified from acting as a charity trustee by virtue of an unspent criminal conviction.

22. *In relation to terrorism offences, Home Office statistics⁶ show that between 2001 and 2013 there were 220 convictions for terrorism-related charges under terrorism legislation (offences caught under s.41 of the Counter-Terrorism Act 2008).*
23. *For those persons charged under terrorism legislation between 2001 and 2013 (375) the main charges were related to possession of an article for terrorist purposes (20%), preparation for terrorist acts (17%), collection of information useful for an act of terrorism (12%), fundraising (11%), membership of a proscribed organisation (9%).*
24. *Around half of the 220 convictions involved sentences of less than five years (sentences of less than four years would become spent under the Rehabilitation of Offenders Act 1974 as amended).*
25. *The Government believes that individuals with such serious convictions as those listed above should not be able to hold the position of charity trustee and have control over charitable funds and fundraising activities until those convictions are spent or a waiver from disqualification is obtained from the Commission.*
26. *There are a number of other cases involving terrorism-related offences resulting in charge and conviction under non-terrorism legislation. Unspent convictions for such offences would also result in automatic disqualification under the Government's proposals. Between 2001 and 2013 there have been 110 convictions in this category, most commonly for causing or conspiring to cause an explosion under the Explosive Substances Act 1883 (19%), conspiracy to murder (13%), offences under the Forgery and*

⁶ <https://www.gov.uk/government/publications/operation-of-police-powers-under-the-terrorism-act-2000-2012-to-2013/operation-of-police-powers-under-the-terrorism-act-2000-and-subsequent-legislation-arrests-outcomes-and-stop-and-searches-great-britain-2012-to-20>

Counterfeiting Act 1981 (12%), and Firearms Act 1968 offences (9%). Given the seriousness of these offences, the Government believes that it is clear that a conviction suggests an individual does not merit the trust required to act in a position of public trust with custody of the proper use of charity funds. Persons with unspent convictions for these offences would therefore also be automatically disqualified until the conviction is spent or a waiver obtained.

27. The Government takes the view that individuals and organisations who are considered unsuitable to manage their own finances should be prohibited from involvement in the management of charity finances until such time as their designation order is lifted. The list of persons or bodies designated under the Terrorist Asset-Freezing Act 2010 is regularly updated and is available here⁷. There are currently (16 June 2014) 23 individuals and 27 organisations listed as designated under the Terrorist Asset-Freezing Act 2010. Some of the individuals listed would also be automatically disqualified under other existing or proposed criteria.

28. It had originally been proposed that convictions for inciting racial hatred, religious hatred, or hatred on the grounds of sexual orientation (offences under Part 3 or 3A Public Order Act 1986) should result in automatic disqualification. In response to mixed consultation feedback we no longer propose to include this as a criterion for automatic disqualification. The Commission may instead be able to rely on its proposed disqualification power in relation to a person who had been convicted of such an offence as unfit to serve as a charity trustee where their conduct was damaging or likely to be damaging to public trust and confidence in charity.

29. We carefully considered whether or not an unspent conviction for sexual offences should result in automatic disqualification from charity trusteeship for charities primarily involved with children or vulnerable adults. In such circumstances primary responsibility rests with the charity to have its own safeguarding policy and processes in place, which may include undertaking checks of the trustees before they take up their post. The Charity Commission would also be able to exercise its discretionary disqualification power (see below) in such cases if the person had exhibited conduct damaging to public trust and confidence in charity (or a particular

⁷ <https://www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets>

class of charity – in this case charity working with children or vulnerable adults) on grounds of unfitness to serve as a charity trustee (for that class of charity).

Proposal 2 - There are other circumstances where rather than being automatic, disqualification from charity trusteeship should be left to the Charity Commission's judgement on a case by case basis.

30. In question 4 the consultation asked “Do you agree that the Charity Commission should have a new power to disqualify someone whose behaviour means they are unsuitable to act as a charity trustee?”
31. 28 responses were received to this question. 82% of respondents to this question either unconditionally or conditionally supported equipping the Charity Commission with a disqualification power (61% gave unconditional support, and 21% gave conditional support). 19% of respondents to this question opposed this proposed power.
32. Opinion was more divided in response to question 5: whether such a disqualification power should be a power that could only be exercised in certain circumstances – a limited power (option 1) or a broad power (option 2). Of the 25 respondents to this question, 56% favoured the broad power (option 2) whilst 44% favoured the limited power (option 1).
33. Question 6 invited comment on the criteria for exercise of the limited disqualification power, and in particular whether any additional criteria should be considered. Contempt for the authority of the Charity Commission was one suggestion. Others included serious violent offences against the person, or sexual offences against children or vulnerable adults. There were no significant suggestions.
34. Question 7 asked for comment on the proposals for extending waiver of disqualification, that they should follow the current arrangements that apply. 21 responses were received to this question. 91% of respondents agreed that the existing waiver regime should be extended to apply to the proposed disqualification orders. 9% of respondents did not support such an extension, principally because they lacked confidence in the efficacy of the existing waiver regime. Several of the respondents who expressed support for the waiver process said the process needs to be transparent, simple and quick for trustees, with a right of appeal to the Charity Tribunal where a waiver is refused.
35. Of those whose support was conditional for a new disqualification power, ensuring adequate safeguards are provided was considered particularly

important. Some respondents argued that the discretionary power should operate in the same way as the Company Directors Disqualifications regime, under which in the absence of that person making a voluntary undertaking not to serve as a company director an application must be made to the court to disqualify a person. Others supported the extension of existing safeguards including a right of appeal to the Charity Tribunal against a decision to refuse to grant a waiver.

Government response

36. The Government proposes a multi-stage process whereby the Commission would give notice of its intention to disqualify, at which time it could suspend the person from existing charity trusteeships and ban the person from taking up a new one without first seeking the Commission's permission. Following a period for representations, the Commission would make the disqualification order; however the disqualification order would not be final until a period of time had elapsed during which the person could appeal to the Tribunal. Once the order was final, the person would be removed from any existing trusteeships (see proposal 3 below). A disqualification order could disqualify a person for a period of up to 15 years⁸ (although the person could apply to the Charity Commission for the disqualification order to be varied or discharged at any time).

37. The proposed disqualification power will incorporate two tests: first there would be criteria which would have to be met relating to the person's past or present conduct, and second, the Commission would have to consider the person unfit to serve as a charity trustee.

38. The proposed conditions are:

- a. The person has accepted a caution for a disqualifying offence;*
- b. The person has an overseas conviction for an offence which if it had been in the UK would result in automatic disqualification;*
- c. The person has been found by HMRC not to be a fit and proper person under the definition of charity for tax purposes.*
- d. The person, as a trustee, employee or officer was responsible for or privy to misconduct or mismanagement in a charity, or they contributed to or facilitated it;*

⁸ This is the same maximum period as provided in relation to disqualification of company directors, under the Company Directors Disqualification Act 1986

- e. *The person, as an officer or employee of a corporate trustee was responsible for or privy to misconduct or mismanagement in a charity, or they contributed to or facilitated it;*
- f. *The person's past, present or continuing conduct has been, is or is likely to damage public trust and confidence in charities, or a particular charity or class of charities.*

39. *The test of fitness would in effect be an assessment of the risk of any (mis)conduct or mismanagement causing future damage to a charity or charities.*

40. *Where there is a suspicion of misconduct/mismanagement, and risk to charity property in the context of a specific charity, the existing option of suspension (s.76 Charities Act 2011) seems to be more appropriate as an immediate, temporary protective act. The Commission requested that the existing suspension power be strengthened, in particular to extend the maximum period of suspension to up to two years – for example to take account of criminal cases during which the Commission may not be able to act.*

41. *Despite some concerns from rehabilitation charities, the existing waiver regime appears to be generally well-supported, and offers a proportionate means to take changed circumstances into account. Evidence from the Charity Commission is that in 2013, the Commission received 3 waiver applications, all of which were granted. In 2012, the Commission received 5 waiver applications, all of which were granted. In 2011 the Commission received 22 applications for waiver, of which 19 were granted, as a result of its taking proactive steps to identify trustees who were disqualified as a consequence of insolvency. Given increased reliance on waiver the Commission should revisit its guidance on the waiver process and ensure it is easy to use for individuals.*

42. *There would be a power to amend (including to add to) the list of conditions in Secondary legislation although subject to affirmative Parliamentary approval.*

43. *The provision in the draft Protection of Charities Bill is currently limited to disqualification from charity trusteeship. However, the Charity Commission has concerns about disqualified individuals taking up other positions of responsibility in a charity from which they would not be disqualified, and that this may represent a loophole. The Government may therefore consider extending the disqualification power to cover other positions of responsibility in a charity.*

Proposal 3 - Removal from trustee body and notification of other trustees.

44. Question 8 asked whether existing removal powers should be amended to enable the Commission to remove a disqualified trustee?
45. There were 26 responses to this question. 96% of respondents supported closing this loophole, 4% (one respondent) did not support the proposal.
46. The respondent that did not support the proposal considered that it did not go far enough and that the Commission should have the power to remove any trustee, not just disqualified trustees, and on much broader grounds.

Government response

47. *Having given this provision some more detailed consideration, the Government's preference is to provide the Commission with a power to remove a disqualified trustee. We did explore whether removal could follow automatically, by operation of law, when a trustee is disqualified (either under the Commission's existing removal power or under the proposed disqualification power). We concluded that automatic removal by operation of law was not feasible, and so will make provision for the Commission to have a specific power to remove a disqualified trustee. The rationale is that the Commission has cases where a trustee knows he is disqualified, but does not commit a criminal offence unless he "acts" as a trustee, so remains on the charity's books as a trustee but does not act as one.*

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

48. Question 9 of the consultation paper asked whether the existing s.80 and s.81 powers should be amended to enable the Commission to act swiftly to deal with disqualifications which would otherwise result in an insufficient number of trustees for the charity to continue to operate?
49. 25 Responses were received to this question. 92% supported the proposal. 8% did not support the proposal. A common theme among those who did not support the proposal was that the problem may be a practical one rather than due to limitations of the Commission's powers. One respondent suggested that a limited extension to enable the Commission to appoint new trustees whilst action to remove existing trustees was underway, could offer a solution. These could even be interim professional trustees, who could be paid for acting as such.

Government response

50. *Whilst it was generally well-supported on consultation, after further detailed consideration we do not plan to take this proposal forward. We accept the consultation feedback put forward by some that this may be a rare practical problem which cannot be resolved by legislation alone. The Commission accepts this view and will deal with these cases using its existing powers.*

Proposal 5 - Preventing disqualified trustees acting in another position of power in a charity.
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51. Question 10 of the consultation paper asked whether disqualified trustees should also be prevented from acting in other positions of power in a charity?

52. There were 24 responses to this question. 73% of respondents agreed that disqualified trustees should also be disqualified from taking up any other responsible role in a charity, although in 8% of responses support was qualified. 27% of respondents disagreed. Some of those who disagreed with this proposal or offered qualified support were concerned about the practicalities of the proposal. Of those disagreeing, most were concerned that if disqualification were to apply to employed staff roles, this would raise human rights concerns necessitating stronger safeguards. The term “position of power” would also need to be carefully defined. Some respondents argued that if disqualification were to impact on a person’s ability to earn a livelihood then decision to disqualify should rest with the court or tribunal and not the Commission.

Government response

53. *The Government accepts that if disqualification were to automatically prevent a person from taking on an employed role, it could impact on their ability to earn a livelihood. The Charity Commission considers that the omission of this power may leave a loophole that could be exploited by those seeking to abuse charity. Whilst provision has not been included in the draft bill at this stage, the Government may introduce such provision at a later date.*

54. *Without such provision responsibility will continue to rest with charity trustees to undertake appropriate due diligence on new employees as part of their recruitment processes, and to ensure that proper financial and other controls are in place to mitigate any risk of abuse by the charity’s employees.*

55. *The Charity Commission would only be able to act in reaction to any abuse committed by a disqualified person acting in an employed role although the extent of the Commission’s involvement would depend on the circumstances of the case.*

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

56. Question 11 of the consultation paper invited comment on the proposal to prevent disqualified persons from participating in decisions about the charity's affairs as a director of a sole corporate trustee.
57. There were 23 responses to this question. 74% of respondents supported the proposal, or offered qualified support. 26% of respondents did not support the proposal.
58. One respondent pointed out that there are two types of circumstances which are relevant: (i) where a disqualified person is acting as a director or equivalent of a corporate trustee (as above), and (ii) where a director of a corporate trustee is responsible for the misconduct or mismanagement.

Government response

59. *In the case of a director of a corporate trustee, there may be an element of doubt as to whether he is caught within the definition of "charity trustee" (s.177 Charities Act 2011). To remove any doubt, the Government considers that specific provision should be made to prohibit a disqualified individual from taking part in the decisions made by a corporate trustee (whatever the legal form of the charity of which it is trustee). This should not be limited to a "sole" corporate trustee, but to any corporate trustee.*
60. *Where a director of a corporate trustee (or other position similar to director) is considered to have been instrumental in misconduct or mismanagement in a charity, it would then be open to the Commission to consider using the proposed new disqualification power.*

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.

61. Question 12 of the consultation paper invited comment on the proposal to amend the Charity Commission's existing power to remove a trustee (or other office holder) so that it could be exercised where there is misconduct / mismanagement **or** a need to protect charity property. Currently both limbs of the test must be met for the Commission to exercise the power.

62. There were 26 responses to this question. 65% of respondents supported the proposal. 35% of respondents did not support the proposal. Of those who did not support the proposal, a common reason cited was that they considered that there should always be an element of misconduct / mismanagement in order for the Commission to remove a charity trustee (or other officer), and that it would not be appropriate to do so solely on the basis of risk to charity property (in the absence of any misconduct/mismanagement). One respondent, whilst recognising some of the deficiencies in the existing power felt that amending it as proposed risked unintended consequences and instead recommended referral to the Law Commission for further scrutiny and consideration.

Government response

63. The Government does not plan to take the original proposal forward in light of consultation feedback and further detailed consideration in relation to the removal of charity trustees. After further discussion with the Commission, the Government has concluded that the test should remain as currently drafted for the removal of charity trustees, requiring the Commission to be satisfied of both misconduct or mismanagement AND risk to charity property.

64. In relation to the power to make a remedial scheme the Government considers the test should be amended as proposed to require the Commission to be satisfied of misconduct or mismanagement OR risk to charity property.

65. A remedial scheme is different in nature to removal being an action to provide a more permanent solution to the charity's difficulties. It also lacks the personal impact on individuals that was behind the concerns that misconduct or mismanagement must always be present in relation to removals. We believe it is clear that there are circumstances in which either limb should be enough to permit a scheme to be made.

Proposal 8 - Preventing trustee resignation as a means to avoid disqualification.
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66. Question 13 of the consultation paper invited comment on the proposal to close a known loophole where the Charity Commission commences removal proceedings against a trustee (or other officer) and that person resigns their position thus avoiding removal and consequential disqualification from charity trusteeship.

67. There were 29 responses to this question. All respondents supported the proposal (86%) or offered qualified support (14%). All agreed that this was a loophole which needs to be addressed. Of those who offered qualified support, a number of practical concerns were raised, such as whether the right to make representations under s.89 would be preserved, or whether resignation would actually be prevented which could give rise to difficulties for the other trustees in managing the charity effectively.

Government response

68. The Government intends to proceed to close this loophole. It would be possible not to make specific provision and instead to rely on the proposed new disqualification power. However we do not want to give trustees involved in misconduct or mismanagement an incentive to resign before they are removed, or to oblige the Commission to take additional steps and add delay and cost to the process if it has to switch regimes from removal to disqualification.

69. The simplest course would be to allow the removal to go ahead, even if the trustee resigns. This would have the advantage for the Commission of enabling it to follow through on what is an established path. In 2013/14, for example, the Commission issued four trustees with notices of intent to remove but three escaped sanction simply by resigning on receipt of the notice. This left the Commission unable to act against them and the individuals able to become trustees of another charity. The Commission would still have to consider any representations made by the trustee (and the person would have to be warned that if he did not make representations, but simply resigned, the Commission could proceed anyway, and that removal would lead to disqualification).

Proposal 9 - Misconduct or mismanagement in any charity can be used as evidence.

70. Question 14 of the consultation paper invited comment on the proposal that the Charity Commission should be able to rely on evidence of misconduct / mismanagement in any charity in order to exercise its existing s.79 power to remove a trustee (or other officer) or make a scheme.

71. There were 27 responses to this question. 93% of respondents either fully supported or gave qualified support to this proposal. 7% of respondents did not support the proposal. Some of those who did not support the proposal were concerned about the fairness of allowing evidence to be aggregated

across organisations and potentially across different periods of time. Another respondent was unclear how conduct taken on its own in several individual charities that failed to convince the Charity Commission that misconduct / mismanagement had occurred, could do so when taken together. Two respondents suggested that defining or clarifying the meaning of “misconduct” and “mismanagement” might be a more helpful approach.

Government response

72. In order to remove a person for misconduct/mismanagement under s.79 Charities Act 2011, there currently has to be evidence of misconduct or mismanagement in relation to the charity that is the subject of the inquiry. The Government accepts that it would not be appropriate for the Commission to remove a person from charity A, in the context of an inquiry into charity A, solely on the basis of evidence of misconduct/ mismanagement in relation to charity B.

73. However, we think the Commission ought to be allowed to take into account other evidence, for example evidence of misconduct/mismanagement in relation to another charity, or evidence of wider conduct likely to damage public trust and confidence in charities, when determining what action would be proportionate in the circumstances. We intend to broaden the test in the context of all the powers triggered by misconduct/mismanagement, to put beyond doubt that in addition to misconduct/mismanagement in the particular charity, the Commission may consider other evidence of misconduct/mismanagement in determining what action, if any, would be reasonable and proportionate in the circumstances.

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.

74. Question 15 asked for comments on the proposal for the Commission to be able to exercise this existing power without the need for a statutory inquiry. The Commission argued that there were some cases where it did not need to gather any further information prior to exercising the power, and that in such cases opening a statutory inquiry would be unnecessarily bureaucratic.

75. There were 27 responses to this question. 63% of respondents either fully or partly supported this proposal (59% offered full support, 4% offered qualified support). 37% of respondents did not support the proposal.

76. For those who supported the proposal, comments included that current system is unnecessarily bureaucratic and costly particularly at a time of diminishing Commission resources, or that existing safeguards including the ability to appeal continue to offer adequate protection against potential improper use of this power.

77. For those who did not support the proposal, most argued that this proposal crossed a line into enabling the Commission to make use of its “inquiry powers” without actually opening an inquiry, giving rise to concerns about the balance of the Commission’s powers. Some questioned whether opening a statutory inquiry really is as bureaucratic as had been suggested. One respondent pointed out that this direction power should be reserved for the most serious cases, where intervention can be clearly justified.

Government response

78. The Government accepts the arguments put forward by consultation respondents that the Commission’s significant compliance powers should only be exercisable in the context of a statutory inquiry, and therefore we do not intend to pursue this proposal.

<p>Proposal 11 - Extend existing powers to enable direction to prevent acts of misconduct/mismanagement or acts in breach of fiduciary duty taking place.</p>
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79. Question 16 asked for comments on the proposal to give the Commission the power to make a direction to prevent (further) acts of misconduct or mismanagement or breach of fiduciary duty taking place.

80. There were 24 responses to this question, with responses split between those in favour of the proposal (54%) and those opposed to it (46%).

81. Many of those in favour claimed that the power would help the Commission to be more proactive in addressing misconduct and mismanagement. Of those against this proposal, several raised concerns about proportionality and in particular its potential impact on freedom of speech or human rights. One respondent was concerned that this proposal could lead to inquiries being closed prematurely, without addressing the underlying problems of the charity, whilst another respondent was concerned about the evidential burden that would be required to use this power fairly.

Government response

82. *The Government has carefully considered the concerns expressed by a significant minority of consultation respondents about this proposed power, and does not intend to pursue this proposal any further at this time.*

Proposal 12 - Power to direct application of charity money to another charity when individuals are unable to apply money properly (currently the power can only be exercised if they are “unwilling”).

83. Question 17 asked for comments on the proposal to amend the Commission’s power so that it could direct the application of charity money where those holding it are unable to do so.

84. There were 23 responses to this question. Most (65%) were in favour of the proposal or gave it qualified support (13%). 22% did not support the proposal.

85. Most of those who supported the proposal and offered comments suggested that the Commission should have the power to secure the proper application of charity funds in such circumstances. Several of those who did not support this proposal argued that the Commission’s existing powers were sufficient in such circumstances and there was no need for this change.

Government response

86. *The Government intends to implement this proposal, to ensure that the Commission has the right tools to ensure the proper application of charitable funds in specific limited circumstances, removing any doubt over the Commission’s power to do so.*

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.

87. Question 18 invited comments on the proposal for the Commission to prevent or restrict actions which in the Commission’s view would amount to misconduct or mismanagement if they were allowed to proceed.

88. There were 26 responses to this question. Opinion was divided with 42% supporting the proposal and 12% giving it qualified support. However 44% did not support the proposal.
89. A common response from those who supported the proposal was that if a charity is under a statutory inquiry then the Commission should have powers to prevent activities that it believes would constitute misconduct or mismanagement. Those who gave qualified support for this proposal were concerned about its breadth, for example suggesting that the wording of the power could be crucial, with the focus being on preventing unlawful activity and protecting assets. Most of those who did not support the proposal were also concerned with the breadth of the power. Several respondents felt the proposal would afford the Commission an unacceptable level of discretion, for example if the Commission could make judgements over what might constitute a breach of trustees' duties rather than any specific and identifiable legal obligation. Some argued that it may go beyond the Charity Commission's remit and have further consequences if use of the power is deemed to impact on freedom of speech or other rights.

Government response

90. *In light of consultation feedback this proposal has not been included in the draft Protection of Charities Bill at this stage. However, with appropriate safeguards, this power could help prevent misconduct or mismanagement taking place in a charity during the course of a statutory inquiry. The Government may revisit this proposal for inclusion in the bill at a later date, and would be interested in any conclusions from pre-legislative scrutiny on this power.*

<p>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.</p>

91. Question 19 invited comments on the proposal to amend the Commission's existing power to request information on bank account transactions, to make it more of an account monitoring power in line with the existing power available to the police and other enforcement agencies in the Proceeds of Crime Act 2002 (POCA).
92. There were 26 responses to this question, of which just over half (54%) were supportive, some (12%) gave qualified support, and a significant minority (35%) did not support the proposal.

93. Of those who gave qualified support, two respondents suggested that account monitoring powers should only be available to the Commission in the context of a statutory inquiry. Several respondents who did not support the proposal argued that the Commission should be subject to the same requirements to apply to the court for such an order as the police and other bodies who currently have access to this type of power. The main concern raised was that in relation to the POCA power the decision to make the account monitoring order is taken by a judge following an application to the court and that other important safeguards apply in relation to the order – such as the requirement to follow a code of practice, and a time limit of 90 days. Some respondents said that they would support the proposal if the Commission were to apply to the Charity Tribunal for an account monitoring order, and provided it was in the context of a statutory inquiry.

Government response

94. After carefully considering the consultation feedback, the Government has decided not to pursue this proposal at this time. Following the consultation it became clear that the Commission would be unlikely to make use of this power if it were to be accompanied by the same safeguards that apply under the Proceeds of Crime Act 2002, in particular the requirement to apply to the court to make the account monitoring order.

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.

95. Question 20 asked for comments on the proposal to clarify in statute that a breach of a Commission order or direction constitutes misconduct or mismanagement, giving the Commission access to its compliance powers.

96. There were 21 responses to this question. Most respondents supported (66%) or gave qualified support (10%) to this proposal. Several respondents (24%) did not support the proposal.

97. Of those who supported the proposal, one respondent argued that this would make sound administrative sense and avoid needless and expensive appeals to the Tribunal. Others supported this logic. One respondent who gave qualified support to the proposal questioned whether a change was actually needed in statute, questioning whether such a breach would already constitute mismanagement or misconduct. Another respondent who gave qualified support suggested that there should not be an automatic conclusion of misconduct for non-compliance during the period when an appeal is pending

or in which an appeal might be made. That respondent also suggested that it would ideally like to see a new statutory definition of misconduct, but that in the absence of one it could support a “for the avoidance of doubt” provision in relation to breach of a Commission order or direction. Of those opposed to this proposal, some argued that it represented unnecessary “gold plating”, whilst others felt that it should be for the court or Tribunal to decide in individual cases whether breach of a Commission order amounts to misconduct.

Government response

98. The Government intends to implement this proposal to put beyond doubt that a failure to comply with, or breach of, a Commission order or direction constitutes misconduct.

99. Given that the sanctions set out in the Charities Act 2011 in relation to non-compliance with a Commission order or direction can be onerous and/or difficult to implement, the Commission is increasingly interpreting such non-compliance as an act of misconduct, which may trigger the use of one or more protective or remedial powers. The Commission has been challenged in the past about its decision to remove a trustee, where one of the grounds relied upon was non-compliance with a Commission order. The Tribunal upheld that aspect of its decision, so the Commission’s approach is tried and tested. However, it remains open to challenge, because as matters stand the Commission must interpret non-compliance as misconduct in each case. This proposal will bring clarity for the future (and save Commission resources).

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

100. Question 21 asked for comments on a proposed new power for the Commission to issue an official warning for non-compliance with the provisions of the Act and/or fiduciary duties (appealable to the Tribunal), accompanied by a power of direction that the trustees take corrective action if the non-compliance has not already stopped or if it has, being officially warned not to do it or allow it to occur again.

101. There were 26 responses to this question. Half of respondents supported (50%) the proposal whilst 23% gave their qualified support. Several respondents (27%) did not support the proposal.

102. Those who supported the power suggested that it would be more proportionate in cases where it would not be appropriate for the Commission to open a statutory inquiry. One respondent argued that this is probably the single most important proposal in this consultation, better equipping the Commission to deal with less serious mismanagement or misconduct. Several respondents who rejected the proposal, or gave only qualified support suggested that, as one respondent put it, the Commission does not require a statutory underpinning to enable it to give warnings, and that to issue warnings is part of its function as a regulator. Several respondents agreed that the Commission could be more assertive in its warnings to charities under its existing powers. One respondent argued against a warning power that could be used to intervene in trustee action before it happens, or that dealt with non-compliance with fiduciary duties, where there could be considerable uncertainty over what might constitute non-compliance.

Government response

103. *The Government considers that the Commission's current enforcement regime is limited, and in practice is reserved only for the most serious breaches and defaults. The power to issue an official warning would bridge the gap, giving the Commission the ability to apply a more proportionate sanction in less serious cases. It is a modern standard tool of regulators.*

104. *The Commission should be able to publish details of official warnings, or withhold them from publication. Any published details of warnings would have to be removed after a period of time. The Commission will need to set out its policy on when it intends to use warnings and in what circumstances it would consider issuing a warning appropriate. A warning could be taken into account when considering whether there had been misconduct or mismanagement on the part of the charity or any of its trustees (although, as the warning would not itself constitute an order, it would not be automatically deemed to be misconduct under proposal 15).*

105. *It was originally proposed that a warning should be appealable to the First Tier Tribunal. However, on further reflection we consider this would be disproportionate and could be used to frustrate or delay legitimate regulatory action. Currently there would be no right of appeal against the Charity Commission issuing a non-statutory warning. The Charity Commission expects to deal with representations about warnings as it deals with decision reviews.*

That process currently allows 3 months for representations to be made. Warnings would also be subject to Judicial Review.

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.

106. Question 22 invited comments on a proposed new power for the Commission to direct a charity's trustees to wind up the charity. The power would only be available in certain circumstances to effectively force the charity's winding up where there are concerns that the trustee body as a whole are not capable of remedying the non compliance or abuse.
107. There were 28 responses to this question. Half of respondents supported (50%) the proposal whilst a further 25% gave their qualified support. The remaining 25% of those who responded did not support the proposal.
108. Of those supporting the proposal, several respondents were surprised that the Commission did not already have the power to close down a charity following an inquiry. One respondent suggested that this was a significant power but one that may be necessary in a small number of extreme cases – for example, where there is no realistic prospect of the charity being restored to a sustainable position. Of those giving qualified support there were concerns about the circumstances in which the power would be exercised, the need for safeguards such as effective communication of the use of the power with the charity's members and beneficiaries. Some respondents whilst supportive of the new power argued that the threshold for the Charity Commission to be able to require a charity to wind up should be set extremely high. Several of those who objected to this proposal argued that it was too close to the Commission acting in the administration of a charity. Some questioned the need for the power, suggesting that the Commission could already undertake much of the process, including removal from the register (but not directing winding up) without it.

Government response

109. *The Government recognises that there is much the Commission can already do in these circumstances under its existing powers, however it cannot go as far as to "close down" a charity in the small number of cases where that would be the best outcome following a statutory inquiry. The proposal is that the Commission should be able to direct the charity trustees to wind up the charity.*

110. *The new power to direct the charity to wind up could be exercised only following a statutory inquiry where there has been misconduct or mismanagement and where the charity does not operate or where use of the power would be in the interests of promoting the charity's purposes more effectively. A direction to the trustees to wind up the charity will not of itself always be effective. In some cases it will need to allow the members' interests to be overridden by giving the charity trustees the power to wind up the charity and to transfer any surplus assets to another charity for similar charitable purposes. The trustees and the members of the charity would have a right to appeal to the Tribunal against such a direction.*

Impact

111. Respondents were invited to comment on the impacts of the proposed changes on charities, the Commission, the Tribunal, or on public trust and confidence in charities.
112. 22 respondents offered comments in response to this question.
113. Almost all respondents were supportive of the Commission and its role as independent civil regulator, and several pointed out that public trust and confidence in charities is high.
114. Many respondents argued that the proposed measures would make an important contribution to maintaining public trust and confidence in charities, and their effective regulation. However several respondents argued that a less risk-averse approach by the Commission could have a more significant impact than the strengthening of its powers.
115. Most of those commenting on the impact of the proposals accepted that they would have little, if any, impact on the vast majority of legitimate charities and trustees, other than potentially the positive long term impact of preserving public trust and confidence.
116. Some respondents raised concerns that giving the Commission more powers would lead to unrealistic expectations of what it could achieve in regulating over 160,000 charities. Others were concerned that the Commission lacked the resources to regulate charities effectively, and that conferring new powers would make little difference unless additional resources were made available.

117. Some respondents involved in the rehabilitation of offenders were concerned that the proposals would result in more people being disqualified from charity trusteeship, and were not convinced that the existing safeguard of waiver was effective.
118. Several correspondents were concerned about the impact of these proposals on charities providing overseas aid, particularly in countries where there is a heightened risk of charity funds being diverted from their intended charitable use. In particular there was a concern that individuals could be criminalised and barred from trusteeship even when they had acted in good faith and within the law. One respondent, representing Muslim overseas aid charities, was concerned that the powers could be used, or could be perceived to be used, disproportionately or unfairly against such charities.
119. A specific concern raised by several respondents was about the proposed pre-emptive compliance powers, and that they could be used inappropriately by the regulator to muzzle free speech. Another concern expressed by a minority of respondents related to a shift in the Commission's focus from supporting charities with help and guidance, to policing charities and enforcing compliance.
120. Some respondents suggested that we should consider whether the proposals would have any long term impact on trustee recruitment and retention. They were concerned not to put people off putting themselves forward to volunteer as charity trustees if there were a perception of a tough regulatory enforcement regime.
121. One respondent expressed doubts about the reliability of the Charity Commission's estimates on how often it would expect to use the new or strengthened powers. Whilst several respondents argued that the Commission shouldn't be judged on the number of times it exercises its powers.

Government response

122. *The Government welcomes the consultation feedback the majority of which supported our view that these measures should have little impact on the almost all charities, and that they should in the long term support continued high levels of public trust and confidence in charities.*
123. *We have prepared an impact assessment to be published alongside the draft Bill.*
124. *There will be some transitional familiarisation costs to charities – in relation to the changes to the automatic*

disqualification criteria, and disqualification power. Charity trustees will need to update their self-declaration processes (both ongoing and for recruiting new trustees). This should take each charity no more than 30 minutes, and the Commission will update its guidance to help charities manage the process as simply as possible.

125. *There may also be some costs to a very small number of charities (or individuals) where the Commission exercises its new or updated powers and this is overturned on decision review or appeal to the Tribunal, but such circumstances are considered likely to be very rare. The costs are quantified in the Impact Assessment.*

126. *We recognise that the proposals to extend automatic disqualification will result in more people (with unspent convictions for those offences) being prevented from being charity trustees, unless a waiver is granted. The Government takes the view that this is proportionate to the risk of abuse, and that the waiver regime does provide an effective means for people who have turned over a new leaf but continue to have a relevant unspent conviction to participate in the administration of charities.*

127. *We are not convinced that the proposed changes will have a significant impact on charity trustee recruitment and retention. The Commission is already under a general duty to act, so far as is possible, in a way that is compatible with encouraging volunteering in charities. Should the draft Bill become law, we would work closely with the Commission to ensure that implementation of the changes is done in a way that would not put people off charity trusteeship.*

128. *We note the specific concern from one consultation respondent that these proposals may have a disproportionate impact on Muslim international aid charities. The Government neither intends nor expects these measures to have a disproportionate impact on any particular type or class of charity. These measures are designed to protect individual charities, and the charity sector as a whole from a wide range of different types of misconduct and mismanagement. These measures will be used to target serious abuse of charity and are not targeted at any particular class of charity, or charities with any particular characteristics. The impact assessment includes an assessment of compliance with equalities duties.*

129. *The Government has listened carefully to consultation feedback and has decided not to pursue several proposals where feedback indicated serious concerns about their potential impact. These notably included the proposals to give the Commission pre-emptive powers to prevent abuse, and new powers to act outside of a statutory inquiry.*

Next steps: Draft Protection of Charities Bill

130. *The Government proposes to publish a draft Protection of Charities Bill that will take forward the measures identified in the Government response. The draft Bill will be published for pre-legislative scrutiny in Parliament. The intention remains to legislate when Parliamentary time allows.*

List of consultation respondents

Association of Charitable Foundations
Association of Chief Executives of Voluntary Organisations
Association of Church Accountants and Treasurers
Big Lottery Fund
Bircham Dyson Bell
Bond
Bournemouth Council for Voluntary Service
Charity Finance Group
Charity Law Association
Charity Tax Group
Charities Trust
Christina Walstow
Churches' Legislation Advisory Service
Countryside Alliance
Dave Orbison
Derek Watson
Directory of Social Change
Douglas Cracknell
Foundation for Social Improvement
Fraud Advisory Panel
Gareth Cook
Geoffrey A Shindler
Gordon Smith
Graham M Phillips
Iain Stowe
Institute of Chartered Accountants of England and Wales
Jane Whitworth
Jim Walker
Joe Isaac
Ken Edwards
Kim Greensmith
Louisa Hutchinson
Maggie Beirne

Martin Sugarman
Mat Witts
Michelle Eden
Muslim Charities Forum
NACRO
National Council of Voluntary Organisations
National Association of Voluntary and Community Agencies
National Terrorist Finance Investigation Unit in the Metropolitan Police
Old Barn Action Group
Prisoners' Advice Service
PTA-UK
Rita Melkon
Shannon Trust
Society of Trusts and Estates Practitioners
Stone King
Thalidomide Trust
The Christian Institute
Unlock
Wales Council for Voluntary Action

Updated list of proposals to be taken forward in Draft Protection of Charities Bill following consultation

Proposals included in the Draft Protection of Charities Bill	
Proposal number	Description
1	<p>Automatic disqualification from charity trusteeship</p> <p>Extending the criteria for automatic disqualification from charity trusteeship to include unspent convictions for: Terrorism and terrorism-connected offences; Money laundering; Bribery; perjury; perverting the course of justice; misconduct in public office.</p> <p>Adding another new criterion for automatic disqualification: designation under Part 1 of the Terrorist Asset-Freezing Act 2010: the disqualification to remain in place for as long as the designation.</p>
2	<p>Disqualification by the Charity Commission</p> <p>New power for the Charity Commission to disqualify a person from charity trusteeship where</p> <ol style="list-style-type: none"> 1) The person has: <ol style="list-style-type: none"> a) They have accepted a caution for a disqualifying offence; b) They have an unspent overseas conviction for an offence that were it in the UK would automatically disqualify them; c) They have been found by HMRC not to be a fit and proper person (for the purposes of charity tax reliefs); d) They committed or were privy to past misconduct or mismanagement in a charity; e) They committed or were privy to past misconduct or mismanagement in a charity as an officer or trustee of a corporate body that is a charity trustee. f) Their conduct has or is likely to diminish public trust and confidence in charity (a particular charity, a class of charities or charities generally). <p>and</p> <ol style="list-style-type: none"> 2) the Commission considers their behaviour makes them unfit to serve as a charity trustee (for any charity or a class of charities).

	Strengthened suspension power to ensure no loopholes prior to disqualification. Procedure to enable an appeal to the Tribunal before the Disqualification Order takes effect.
3	Removal of disqualified trustees from trustee body. The original intention was to pursue removal automatically by operation of law. This has not proved feasible. Instead the draft Bill gives the Commission a power to remove a disqualified trustee by order.
6	Preventing disqualified trustees from participating in decisions as a director of a corporate body that is a corporate trustee of another charity.
8	Steps to prevent trustee resignation to avoid removal Enabling the Commission to continue the removal process (leading to disqualification) if a person resigns from their position once the process has begun.
9	Evidence of misconduct or mismanagement from <u>any</u> charity can be used by the Commission in determining whether to remove a trustee or exercise other compliance powers. There must be evidence of misconduct or mismanagement from the charity which is subject to statutory inquiry, but evidence from other charities could be used by the Commission in determining whether the exercise of a particular power is a proportionate response.
12	New power to direct application of charity money where the third party holding it is unable to do so
15	Breach of a Charity Commission order is to be treated as misconduct (giving the Commission access to its compliance powers)
16	New statutory warning power A provision for official warnings, triggered in circumstances where it is, or may become, appropriate for the Commission to exercise its

	powers under the Act.
17	<p>New power to direct a charity to wind up – effectively a power to close down a charity</p> <p>The Commission must be satisfied that the continued operation of the charity would require action by the Commission that would be disproportionate, or would for any other reason not be appropriate.</p>

Title: Charity Commission powers and trustee disqualification IA No: CO Lead department or agency: Cabinet Office Other departments or agencies: Charity Commission for England and Wales	Impact Assessment (IA)			
	Date: 02/05/2014			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Secondary legislation			
Contact for enquiries: Ben Harrison, Cabinet Office Charities-act@cabinetoffice.gov.uk				
Summary: Intervention and Options			RPC Opinion: GREEN	

Cost of Preferred (or more likely) Option			
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANCB on 2009 prices)	In scope of One-In, Two-Out? Measure qualifies as
-£4.57m	-£4.57m	£0.42m	Yes IN

What is the problem under consideration? Why is government intervention necessary?
Various weaknesses and loopholes have been identified in the powers of the Charity Commission to tackle abuse or mismanagement in charities. These are preventing the Charity Commission from effectively and efficiently tackling abuse in charities. The Charity Commission itself has requested these new or enhanced powers. The National Audit Office recommended (December 2013) that Cabinet Office support the Charity Commission in seeking legislation to make these changes. The Prime Minister's Extremism Task Force (December 2013) also recognised the need for more effective Charity Commission powers to contribute to the fight against extremism and terrorism.

What are the policy objectives and the intended effects?
The intended effects of these proposals are:

- More effective and efficient compliance and enforcement by the Charity Commission where there is serious misconduct or mismanagement or risk to charity property.
- Preventing unsuitable people from being involved in running charities (with safeguards to facilitate rehabilitation of offenders).
- No significant regulatory impacts on compliant charities / individuals.
- To support public trust and confidence in charities and their regulation

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
Option 1 – Do nothing / Alternatives to regulation
Alternatives to regulation have already been attempted by the Charity Commission, for example agreeing action plans on a non-statutory basis. However, these have proved ineffective and have resulted in an inefficient use of limited resources

Option 2 – Implement selected proposals
This is the preferred option as it will deliver the policy objective in a way that provides the least disruption and is supported by the majority of consultation respondents.

Will the policy be reviewed? It will be reviewed. If applicable, set review date: 2018					
Does implementation go beyond minimum EU requirements?			N/A		
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.	Micro Yes	< 20 Yes	Small Yes	Medium Yes	Large Yes
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs.

Signed by the responsible Minister:

Nick Howard

Date: 06/05/2014

Summary: Analysis & Evidence

Policy Option 1

Description: No nothing

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0	0	0

Description and scale of key monetised costs by 'main affected groups'

In line with impact assessment guidance the do nothing option has zero costs or benefits as impacts are assessed as marginal changes against the do nothing baseline

Other key non-monetised costs by 'main affected groups'

In line with impact assessment guidance the do nothing option has zero costs or benefits as impacts are assessed as marginal changes against the do nothing baseline

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	0	0	0

Description and scale of key monetised benefits by 'main affected groups'

In line with impact assessment guidance the do nothing option has zero costs or benefits as impacts are assessed as marginal changes against the do nothing baseline

Other key non-monetised benefits by 'main affected groups'

In line with impact assessment guidance the do nothing option has zero costs or benefits as impacts are assessed as marginal changes against the do nothing baseline

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs:	Benefits:	Net:	Yes/No	NA

Summary: Analysis & Evidence

Policy Option 2

Description: Implement Selected Proposals

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2014	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low: Optional	High: Optional	Best Estimate: -4.57

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate	4.5	<0.1	4.6

Description and scale of key monetised costs by 'main affected groups'

Each charity is conservatively estimated to incur a transitional administrative cost burden of £22 in trustee time for familiarisation with changes in regulations on trustee disqualification, and disseminating this information. Furthermore, a small number of compliant charities may incur an investigation cost burden where the Charity Commission investigates possible wrong-doing in error. These investigation costs are estimated at £300 per decision review and £10,600 per Charity Tribunal appeal.

Other key non-monetised costs by 'main affected groups'

Additional revisions in the regulations could lead to further costs to charities associated with familiarisation and interpreting the legislation and disseminating information. We expect these costs to be minimal. Further non-monetised costs include costs to the Charity Commission of familiarising itself with an implementing the new regulations. We expect these costs to be minimal and offset by the efficiency benefits of new powers (see below).

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	Optional
High	Optional	Optional	Optional
Best Estimate			

Description and scale of key monetised benefits by 'main affected groups'

Benefits cannot be reliably monetised.

Other key non-monetised benefits by 'main affected groups'

The new and amended regulations will put in place additional proportionate measures to protect charity funds from potential abuse. Furthermore, they will enable the Charity Commission to take more robust, efficient action against charities and individuals where abuse of charity is detected. This will create the benefit of protecting the levels of public trust and confidence in the effective regulation of charities, and play a factor in protecting the levels of voluntary contributions which form a significant part of charities' income (£19bn in 2013).

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
<p>1. the amount of time a trustee needs to familiarise themselves with the changes to automatic disqualification criteria, and to brief the other trustees.</p> <p>2. the number of cases where the Charity Commission uses its new or amended powers in error (where the decision is overturned on decision review or appeal) and the costs involved in bringing such a decision review or appeal.</p>		

BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:				In scope of OITO?	Measure qualifies as		
Costs:	0.4	Benefits:	0	Net:	-0.4	Yes	IN

Evidence Base (for summary sheets)

The policy problem and rationale for Government intervention

There are over 164,000 registered charities in England and Wales with a combined annual income of £61.4bn¹. The charity sector generates its income in a number of ways; trading, contracts for service delivery, investments, and through public donations. Voluntary income accounted for £19bn (30%) of sector income in 2013². Public trust and confidence in charities is high, 2012 IPSOS-MORI research found that charities are in the top three trusted groups, with only the police and doctors seen as more trusted. That research also found that, once explained, people's appreciation of the Charity Commission's role is very high, with 98% believing its role is essential, very or fairly important³.

The overwhelming majority of charities continue to deliver important benefits to society, acting in the best interest of their charities and their beneficiaries. However, whilst relatively rare, abuse of charity does take place, and the Charity Commission – often working with other regulators and law enforcement agencies – has an important role in deterring, detecting and investigating mismanagement or misconduct in charities, safeguarding charity assets and taking strong remedial action where necessary to stop the problems and correct the charity's management. In 2012-13 the Charity Commission opened over 1,500 operational compliance cases, and 15 statutory inquiries. It exercised its legal powers 216 times in its investigations and enforcement case work. The Charity Commission prioritises three areas in particular: fraud and financial crime, safeguarding issues and concerns about the terrorist abuse of charities.

A number of weaknesses and loopholes have been identified in the regime for tackling misconduct and mismanagement in charities, and preventing inappropriate people from acting as charity trustees. These have manifested themselves in real cases where individuals involved in misconduct or mismanagement have been able to circumvent or thwart regulatory enforcement action. For example, in some cases trustees have resigned before the Charity Commission can remove them, which means they are not disqualified and can return as a trustee at a later date or in another charity.

The Charity Commission for England and Wales has been criticised by the National Audit Office (NAO) and Public Accounts Committee (PAC) for failing to regulate charities effectively. The NAO has identified several Charity Commission powers where there are weaknesses that need addressing, and recommended that Cabinet Office support changes to statutory powers to enable the Commission to regulate more effectively. The Charity Commission has accepted and is already implementing many of the recommendations. It is making visible progress, for example opening more statutory inquiries into charities and using its legal enforcement powers more. So, for example between April 2013 and February 2014 the Commission opened 48 statutory inquiries and exercised its legal compliance and enforcement powers on 657 occasions.

Charities depend on high levels of public trust and confidence. An effective legal and regulatory framework for charities helps to support that public trust and confidence in charities. Weaknesses in that framework have the potential, over time, to undermine public trust and confidence leading to reduced support to charities.

The Government is responsible for the legal framework for charities, and ensuring that the Charity Commission has right tools to effectively and efficiently regulate charities in England and Wales protecting both individual charities and their assets and high levels of public trust and confidence in the charity sector. At the same time we must be careful not to overstate the scale of abuse or mismanagement in charities, as that could have the counter-productive effect of reducing public trust and confidence. Abuse and mismanagement remains limited to a tiny minority.

Policy objectives and intended effects

The objectives of these changes are to protect charities and preserve high levels of public trust and confidence in charities, and the regulation of charities, by:

¹ Charity Commission, 2013 (<http://www.charitycommission.gov.uk/about-charities/sector-facts-and-figures/>)

² Charity Commission, 2013 <http://www.charitycommission.gov.uk/find-charities/> (under "Sector Overview")

³ IPSOS MORI, "Public Perceptions of Charity" 2012:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79276/Charities-Act-Review-2006-Public-Perceptions-of-charity.pdf

- equipping the Charity Commission with appropriate and proportionate powers to effectively and efficiently tackle abuse of charities;
- preventing people who are clearly unsuitable from being involved in running charities (with safeguards to allow rehabilitation of offenders); and
- doing so in a way that has a minimal regulatory impact on the vast majority of legitimate charities and individuals who are legitimately involved in charities.

Public consultation concluded on 12 February 2014. This included proactive engagement with charity sector representative bodies, charity lawyers and law enforcement agencies. Respondents broadly supported strengthening the powers of the Charity Commission to tackle abuse in charities, but did not support all of the specific proposals included in the consultation stage. To reflect this, Option 2 (preferred option) takes forward those consultation measures where there was majority support from charities, rejecting or modifying several original proposals on the basis of consultation feedback (Annex 1 sets out which proposals are being taken forward and which have not been included at this stage).

Policy options considered, including alternatives to regulation

Option 1 – Do nothing (alternatives to regulation)

The Charity Commission has already attempted to use alternatives to regulation – such as written warnings or agreement of “Action Plans” with non-compliant charities but this approach has proved ineffective. In some cases, it has significantly delayed regulatory action and has made it difficult for the Charity Commission to quickly assess whether the issues relate to deliberate abuse or honest incompetence.

Some have suggested that the real issue is not a question of powers but is actually about the Charity Commission’s willingness to use its existing powers or encourage more robust action by the police in tackling criminal abuse of charities. There are already signs that in 2013-14 the Charity Commission is taking a less risk-averse approach to using its existing powers more proactively and widely.

The Charity Commission has had limited success in persuading other enforcement agencies to take robust enforcement action. Whilst the police generally do pursue cases of the most serious abuse in charities, and work well with the Charity Commission, they sometimes do not prioritise less serious cases of abuse for action, instead expecting the Charity Commission to act.

Doing nothing would not close the existing legal loopholes that have been identified by the Charity Commission and the NAO. So, for example:

- Trustees under investigation would continue to be able to resign before they are removed by the regulator – enabling them to avoid disqualification and return to charity trusteeship
- Individuals convicted in the courts of serious money laundering or terrorist offences would be able to become charity trustees, responsible for charitable resources.
- In some cases, a caution rather than a prosecution (and potential conviction) may be pursued, which does not result in disqualification from trusteeship or give the Commission the option to disqualify. Yet the individual is clearly unsuitable to serve as a charity trustee.

Option 2 – implement a balanced package of changes taking into account consultation feedback

This option would take forward most of the key measures for extending the Charity Commission’s powers as proposed in the Consultation⁴. These measures are set out below.

Two of the proposed measures will apply to all charity trustees, for which familiarisation costs will be incurred.

⁴ Consultation: “Extending Charity Commission’s powers to tackle abuse in charities” <https://www.gov.uk/government/consultations/extending-charity-commissions-powers-to-tackle-abuse-in-charities>

- ***Extending automatic disqualification of trustees to additional unspent convictions for listed offences (Proposal 1)***

The existing criteria for disqualification of charity trustees includes: when the court or the Commission removes an individual using its legal powers because of misconduct or mismanagement in a charity, on personal insolvency and voluntary arrangements, undischarged bankruptcy, disqualified company directors, and any unspent convictions for criminal offences involving an element of “dishonesty or deception”.

This measure would add to the criteria that automatically disqualify a person from charity trusteeship the existence of an unspent conviction for certain serious terrorism offences, money laundering, misconduct in a public office, bribery, perjury, or perverting the course of justice. Persons designated under the Terrorist Asset Freezing Act would also be automatically disqualified. This measure will protect charities from people who are unsuitable acting as charity trustees.

Currently the onus is on the trustees to self-declare when they are disqualified from acting, as there is no other way for trustee boards to routinely check against the relevant criminal convictions. Self-declaration is done on appointment and approved by trustee boards. Some charities build it into their annual review process. If a trustee is disqualified during their term of service, they would be expected to resign their trustee position immediately (as there are existing criminal and civil penalties for serving whilst disqualified). These proposals make no change to the current process of self-declaration.

- ***Introducing a power for the Charity Commission to disqualify a person from being a charity trustee (Proposal 2)***

There are circumstances where, rather than being automatic, disqualification from charity trusteeship should be considered on a case by case basis. Currently the Charity Commission has the power to remove a person from serving as a charity trustee and once removed that person is disqualified. But the Charity Commission has no general power to disqualify a person from becoming a charity trustee – meaning that unless they are automatically disqualified there is nothing the regulator can do to protect the charity sector from someone whose conduct makes them unfit to serve as a charity trustee. This has also led to the perverse situation where trustees under investigation often resign before the Charity Commission can remove them, leaving them free to become a trustee of another charity. We consulted on two options; a power to disqualify that could only be used in specific listed circumstances, and a more broad power based on fitness.

Over the last five years, the Charity Commission used its existing power to remove trustees on 7 occasions. However, given real cases that have arisen where the Charity Commission believes it would have used this new disqualification power, it estimates that the new power may be used up to 8-10 times a year (so affecting 8-10 individuals each year). The exercise of this power will protect the charity sector from individuals who are considered unfit to serve as charity trustees, and where it is in the public interest for them to be disqualified from acting as a charity trustee.

The power would be subject to the usual optional internal decision review process and right of appeal to the Charity Tribunal. In addition, those disqualified would be able to apply for a waiver if their circumstances change over time once disqualified.

This measure will help the Charity Commission protect the charity sector from individuals whose conduct makes them unsuitable to serve as charity trustees. Circumstances could include individuals who may have accepted a caution for an offence where conviction would have automatically disqualified them, been convicted overseas for an offence which would have disqualified them had it been in the UK, been refused access to charity tax reliefs by HMRC for failing their fit and proper persons test. The usual safeguards (internal decision review and Charity Tribunal) would apply in the case of discretionary disqualification.

The remaining proposed measures (outlined below) will only result in investigation costs where the Charity Commission wrongly investigates a charity or trustee and the decision is overturned on decision review or appeal.

- ***Removal from trustee body (Proposal 3)***

It is already a criminal offence to act whilst disqualified as a charity trustee (there is also potential civil liability). However the effect of disqualification does not automatically take the person out of the position they hold. This new power would enable the Charity Commission to effect removal and notify the other trustees where a disqualified trustee refused to step down.

- **Technical changes to support disqualification (Proposals 6, 7 and 8).**

In rare cases where a disqualified person is a director of a corporate body and that corporate body is a charity trustee, a new power to prevent the person from participating in decisions about the charity's affairs (proposal 4).

Amend the criteria for the exercise of the Charity Commission's existing power to remove a serving charity trustee (proposal 7). Currently there must be misconduct or mismanagement and the need to protect charitable property. The original proposal was to change the criteria so that misconduct or mismanagement or risk to charity property, however this was not supported on consultation – as many felt that there should always be an element of misconduct or mismanagement for the Charity Commission to remove a trustee. As such the proposal being taken forward is to only require misconduct or mismanagement in order for the Charity Commission to remove a trustee.

Close a loophole by preventing trustee resignation as a means of avoiding removal and disqualification (proposal 8). This does not in fact need any specific change, as the Charity Commission would rely on its new discretionary disqualification power (proposal 2) in order to disqualify a person who resigns in an attempt to avoid regulatory action (in this case removal and consequent disqualification).

- **Misconduct/mismanagement in any charity can be used as evidence (Proposal 9)**

A provision which would enable the Charity Commission (and Tribunal) to rely on evidence of misconduct/mismanagement by a person(s) in additional charities to the one under an inquiry when considering whether or not to remove trustees would be proportionate.

- **New official warning power (Proposal 16)**

This new power would be a more proportionate sanction for mid-level mismanagement or misconduct or where charity resources are put at serious risk, where the Commission's more severe protective powers could be used but it is not likely to be considered proportionate to do so.

- **New power to direct a charity to wind up (Proposal 17)**

This would be a new power to direct a charity and its trustees to wind up, and where necessary apply all of its net assets to similar charitable purposes by direction or scheme. It would only be available to the Charity Commission in the context of a statutory inquiry and where there is evidence of misconduct or mismanagement or the need to protect charity property. In addition the Commission would have to consider it proportionate in the circumstances.

- **Other technical changes (Proposals 12, 15)**

These are minor technical changes that will assist the Charity Commission in tackling misconduct or mismanagement in charities. One is a power to direct application of charity money to another charity when those holding it are unable to apply money properly (currently the power can only be exercised if they are "unwilling"). There are circumstances where those holding the funds for the charity are willing to transfer it but lack the necessary legal power. The second technical change is an express provision making it clear that 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. This would be made clear on any order or direction of the Commission (along with the required statement of reasons for the making of the order or direction).

Under this option, the following measures originally proposed (see Annex 1) would not be taken forward:

- a) New power to direct specific action outside of a statutory inquiry – most consultation respondents argued that this was a significant power and that therefore it should only be available to the Charity Commission in the context of a Statutory Inquiry (as is the case for most of the Commission's other significant compliance powers) (proposal 10).
- b) New powers to prevent misconduct or mismanagement. Concerns were raised that these would be very broad powers enabling the Charity Commission to act before any misconduct or mismanagement had taken place. Most respondents felt that the Commission could warn the trustees of the consequences of taking certain actions, but that unless there was a serious risk of loss of charity property the Commission should only act after the misconduct or mismanagement had taken place (proposals 11 and 13).
- c) New account monitoring power (proposal 14). This would give Charity Commission compliance staff access to the Proceeds of Crime Act 2002 Account Monitoring Order provisions – where a

statutory inquiry is open into the relevant charity. This new power would be in addition to the Commission's existing own (but more limited) power to freeze an account or require details of any financial transactions on an account at a specific point in time (but not reporting on an ongoing basis for up to 90 days).

Other changes would be introduced with additional safeguards following consultation feedback. For example the Charity Commission's new power to disqualify a person from serving as a charity trustee would be subject to several safeguards to reflect consultation feedback.

Under option 2, the Charity Commission estimates that it would expect to use its new/strengthened powers as set out in table 1 below (this doesn't include the extended criteria for automatic disqualification as these are not reliant on the exercise of a Commission power unless the individual fails to step down in which case the Commission would exercise its removal powers caught under proposal 3).

Table 1: Option 2 - Additional use of powers

Proposal number	Description	Est. number of occasions power is to be used (per year)
2	discretionary disqualification	9
3	removal from trustee body	60
4	disqualification where only 1 or 2 trustees	2
6	corporate trustees	2
7	removal where misconduct but no risk to property	2
8	preventing resignation to avoid removal	2
9	evidence from any charity	2
12	direct application of charity money where unable	3
15	breach of order is misconduct	3
16	New warning power	25
17	New winding up power	2
Total		109

Expected level of impact on charities

Public consultation concluded on 12 February 2014. This included proactive engagement with charity sector representative bodies, charity lawyers and law enforcement agencies. Respondents broadly supported strengthening the powers of the Charity Commission to tackle abuse in charities, but did not support all of the specific proposals. As mentioned above, Option 2 (preferred) currently takes forward only those measures where there was majority support from charities.

Regulatory action would only ever be directed at non-compliant charities or individuals with unspent convictions for specified criminal offences or whose behaviour has made them unsuitable to serve as a charity trustee. The proposals will only affect charities where there is mismanagement or misconduct, or risk to charity assets, and where the Charity Commission considers that use of the relevant power is a proportionate response in the circumstances.

These proposals would not have any significant impact on or create any significant additional obligations for legitimate charities or trustees.

The proposals will support public trust and confidence in the effective regulation of charities, which has been undermined by lack of action in the past by the Charity Commission (in some part because the Commission lacked sufficiently robust and effective powers). They will enable the Commission to act more effectively to protect both individual charities and the charity sector as a whole.

The Charity Commission has provided estimates (based on its experience of compliance casework) of the number of times per year that it would expect to exercise each of the proposed new / amended compliance powers. Costs to the Charity Commission itself will be borne by prioritisation of resources

from within its budget settlement. The Commission has limited resources and its lack of strong powers has on occasion frustrated its efforts to tackle abuse resulting in delay and wasted costs.

Existing safeguards will apply to the strengthened powers of the Charity Commission and to cases of automatic disqualification. These safeguards are detailed in Annex 2 and include the right to apply for a decision review procedure where trustees or other persons affected by a decision think the Charity Commission's decision was mistaken, to bring this case to the Charity Tribunal, or for trustees to apply for a waiver if automatically disqualified due to an unspent conviction.

Costs and Benefits – Option 2: Implement selected provisions

Costs

Under option 2, all charities and their trustee boards will bear the cost of familiarisation with the new regulations on trustee disqualification (Proposal 1). Charities will not need to familiarise themselves with all of the other changes to Charity Commission powers which will only apply in cases of misconduct or mismanagement or where charity assets are at serious risk of loss. A small number of legitimate charities will face the costs of bringing a decision review or appeal to the tribunal where the Charity Commission wrongly exercises its compliance powers.

Familiarisation costs: Incumbent charity trustees should check that newly recruited trustees have not declared any disqualifying unspent convictions, and as a matter of best practice should declare their own continued ability to serve each year. All 200,000⁵ charities' trustee boards will therefore need to become familiar with the changes to the existing criteria for disqualification of trustees.

The list of additional criteria (unspent convictions) for disqualification, as set out in the description of Proposal 1, is short and straightforward. We have conservatively estimated that it would take one trustee one hour to read and feed back the updated guidance on trustee disqualification to the trustee board at a board meeting. Trustees undertake their duties on a voluntary basis, but for the purposes of this impact assessment we have valued their trustee time at £22.3 per hour. This is based on data from the Annual Survey of Hours and Earnings (ASHE) 2012, on the median gross hourly wage for 'Other managers'⁶, including 30% non-wage costs and expressed in 2014/15 price terms.

The total transitional familiarisation costs with the new criteria are therefore estimated to be 200,000 x (£22.3 x 1) = £4.5m. This figure does not represent actual expenditure rather it represents monetised voluntary effort.

We do not expect any additional compliance burden caused by the change to regulations. Trustee boards already check applicants' self-declarations for a range of unspent convictions, and the inclusion of additional offences will only have a negligible impact on the length of the self-declaration process.

Review costs: There will also be ongoing costs incurred by charities or individual trustees in bringing a decision review or appeal in a case where the Charity Commission's initial decision is overturned on decision review or appeal. These can be regarded as regulatory costs unlike the similar costs incurred in bringing a decision review or appeal where the Charity Commission's initial decision is upheld.

The number of times the Charity Commission exercised its compliance powers in the last 3 years and the number of consequent decision reviews and appeals is set out in table 2 below:

Table 2 – Decisions, Decision Review and Appeals

Year	Times compliance powers used	Decision Reviews	Tribunal appeals
2012-13	216	13 (6%)	0 (0%)

⁵ There are approximately 160,000 registered charities, plus an estimated further 40,000 charities that are not registered but are regulated by the Charity Commission.

⁶ Occupational category as used in Administrative Burdens Measurement Exercise Technical Summary: <http://www.dti.gov.uk/files/file35995.pdf>.

2011-12	188	4 (2%)	1 (<1%)
2010-11	208	4 (2%)	0 (0%)

As can be seen from table 2 above, comparatively very few of the Charity Commission's compliance decisions are decision-reviewed or appealed to the Charity Tribunal. On average, 3% of decisions were decision-reviewed, whilst less than 1% of decisions were appealed to the Charity Tribunal.

However, the Commission is already taking a tougher, more proactive approach to dealing with abuse and using its compliance powers. The early signs are that this may lead to a higher rate of decision reviews and appeals to the tribunal. For the purposes of this assessment, therefore, we assume that there will be higher rates of decision-reviews (15%) and tribunal appeals (5%) relating to the use of the new and strengthened powers. The Charity Commission has confirmed that this seems a reasonable estimate in the circumstances.

The success rate for Tribunal appeals and decision reviews against Charity Commission compliance decisions has been 10%. For the purposes of these calculations we have, again, prudently assumed a higher success rate (20%) relating to the use of new and strengthened powers. The Charity Commission estimates that it would use the powers in Option 2 on between 79 and 138 times more than it exercises its existing powers, with a best estimate of 109 times.

On the basis of additional exercise of powers on 109 occasions, the above figures would lead to 16 extra decision reviews (15%) each year and 5 extra Tribunal appeals (5%). Of those 16 decision reviews, three could be expected to be overturned (20%). Of the 5 Tribunal appeals, one could be expected to be overturned (20%).

These three overturned decision reviews and the one overturned Tribunal appeal will have regulatory costs for the charities / individuals involved.

Our assumption (supported by the Charity Commission) is that two days' trustee time (14 hours) is used in preparation for a decision review, and that four days' trustee time (28 hours) is used for a Tribunal appeal (three days' preparation and one day for the hearing). In addition for the Tribunal appeal we have conservatively estimated legal costs of £10,000. Charities are not required to obtain legal advice and representation in front of the Charity Tribunal – it was designed to enable appellants to appear unrepresented – but in practice the majority of charities / individuals appealing to the Tribunal have chosen to pay for legal representation.

Table 4 – Option 1: Error rate decision review and appeal costs

	Additional decisions (per annum)	Overtured decisions (20%; per annum)	Trustee time (hrs per case)	Trustee rate (£ per hour)	Legal costs per appeal	Total costs (per annum)
Decision Reviews	16	3	14	22.3		£937
Tribunal Appeals	5	1	28	22.3	£10,000	£10,624
Total	21	4				£11,561

Costs to the Charity Commission: The Charity Commission will also incur some transitional familiarisation costs with the new powers. We estimate that any familiarisation costs will be low as the Charity Commission itself has requested these new powers.

Furthermore, the Charity Commission will also incur the costs of additional investigations where it exercises its new powers. This is estimated to happen on 109 occasions per annum. The Charity Commission has, however, indicated that this will be offset by the benefits of making all investigations more efficient in terms of both the administrative burden and the time investigations take. Costs to the Charity Commission are therefore not monetised.

Table 5 – Summary of costs and net present value

Annual profile of monetised costs and benefits (£'000s, constant prices)											
	Y0	Y1	Y2	Y3	Y4	Y5	Y6	Y7	Y8	Y9	Total
Description of cost	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	
Transitional cost (familiarisation) - Charities	4,468	-	-	-	-	-	-	-	-	-	
Annual recurring cost (review) - Charities	12	12	12	12	12	12	12	12	12	12	
Total cost (undiscounted)	4,480	12	12	12	12	12	12	12	12	12	
Discount adjustment	1.0000	0.9662	0.9335	0.9019	0.8714	0.8420	0.8135	0.7860	0.7594	0.7337	
Total present cost	4,480	11	11	10	10	10	9	9	9	8	
Transitional benefit	UNQUANTIFIED										
Annual recurring benefit	UNQUANTIFIED										
Total present benefit	UNQUANTIFIED										
Total net present value	-4,480	-11	-11	-10	-10	-10	-9	-9	-9	-8	-4,570

Benefits

The benefits are not readily quantifiable and cannot be reliably monetised. The principal benefit is in relation to public trust and confidence in the regulation of charities, and charitable funds of individual charities that are protected from abuse or mismanagement. Many charities depend on public support through donations: in 2012-13 charities' voluntary income exceeded £19bn, including tax reliefs to charities of over £3bn. Since the turn of the millennium, the number of registered charities has remained relatively static at around 160,000, but their total income has grown from £24bn to £61bn⁷.

Research evidence shows that public trust and confidence in charities remains high, but that the public have concerns over the use of charitable funds (including on high administration costs) and high pressure fundraising techniques⁸.

2012 research on public trust and confidence in charities and the Charity Commission shows that whilst unprompted just over 50% of people are aware of the Charity Commission's role, when the Charity Commission's role is explained, 98% of people say that role is essential, very or fairly important.⁹

Many factors affect public trust and confidence in charities, and donations to charities. It would be unreasonable to make any assumptions in this impact assessment about how a decline in public trust and confidence could affect the level of public donations. But a reduction of just 1% in sector voluntary income would equate to almost £200 million.

Wider impacts

Annex 2 provides an assessment of the policy against the general equality duty. In particular it assesses whether the proposed changes could have a negative impact, or perceived negative impact, on charities or individuals of any particular protected characteristics.

We have considered the potential impact of these proposals on small and micro sized charities. Whilst the proposed measures could impact on small and micro sized charities the evidence from consultation is that they strongly support the proposals – Annex 3 provides a Small & Micro-Business Assessment (SMBA).

⁷ Charity Commission, 2013 (<http://www.charitycommission.gov.uk/about-charities/sector-facts-and-figures/>)

⁸ IPSOS MORI, "Public Perceptions of Charity" 2012: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/79276/Charities-Act-Review-2006-Public-Perceptions-of-charity.pdf

⁹ https://www.charity-commission.gov.uk/About_us/Contacting_us/pb_brief_survey_public_trust.aspx

Summary and preferred option with description of implementation plan

The preferred option is to implement a balanced package of measures (option 1) to take into account consultation feedback. The measures will require Primary legislation to implement and will be subject to the availability of Parliamentary time.

Of the 200,000 charities, the trustee disqualification proposals are expected to impact 40 - 65 trustees (and their charities) each year. The proposals are expected to impact between 30 and 55 charities each year.

All charities will need to familiarise themselves with the new provisions relating to automatic disqualification of trustees. This will be a one-off cost associated with implementation of these proposals.

Other than familiarisation costs, the number of charities impacted could be between 70 and 115, although in all cases this will be because either the charity has been involved in misconduct or mismanagement, or one of its trustees has or has demonstrated other behaviour that warrants their disqualification.

These measures are in scope of one in; two out.

If Parliament approves the changes, then we will work with the Charity Commission to prepare and publish an implementation plan. New powers would only be implemented once updated guidance is available and disseminated to charities.

The changes will be reviewed three years after implementation, which will consider the extent to which the new powers have been used, and their effectiveness in tackling abuse in charities. The views of the Charity Commission and of charities and their representative bodies will be sought in the review. The impact of the changes may also come under Parliamentary scrutiny before the formal review as part of Parliament's interest in the effectiveness of the Charity Commission.

Annex 1 - Table of proposals / options

Original Proposals consulted on (proposal number) ✓ = a proposal implemented ✗ = a proposal not included in the draft Bill	Option 2 – balanced package
Automatic disqualification – extending the criteria (1)	✓
Charity Commission new power to disqualify based on fitness in specific cases (2,3,5)	✓ - taking on board some consultation feedback. Government may consider extending to other positions in a charity.
Technical changes to support disqualification (4,6,8)	✓
Trustee removal or schemes where there is misconduct / mismanagement <u>OR</u> risk to charity property (7)	✗ - instead proceeding with schemes only, based on consultation feedback
Misconduct/mismanagement in any charity can be used as evidence (9)	✓
New power to direct specific action outside of a Statutory Inquiry (10)	✗
New power to <i>prevent</i> misconduct/mismanagement (11)	✗
New power to prevent future misconduct/mismanagement in the context of an inquiry. (13)	✗ - Government may reconsider including this provision
Other technical changes (12, 15)	✓
New Account monitoring powers (14)	✗
New official warning power (16)	✓
New power to direct a charity to wind up (17)	✓

Annex 2 – Safeguards

Safeguards: Proportionality and promoting volunteering

The Charity Commission is under a statutory duty to have regard to the principles of best regulatory practice (s.16 Charities Act 2011). In relation to most of its compliance powers the Commission must send a copy of the order to the charity concerned or to each of the charity's trustees (s.86 Charities Act 2011). It must also send a statement of the Commission's reasons for making the order. There is a temporary exception to this where providing the statement of reasons would prejudice an inquiry or investigation or would not be in the interests of the charity.

The Charity Commission is also under statutory duty to perform its functions in a way that is compatible with encouraging voluntary participation in charity work. The Commission will not want to exercise its powers (existing and new) in a way that could discourage people from coming forward to serve voluntarily as charity trustees.

Safeguards: decision review

The Charity Commission has procedures to review a decision if trustees or other persons affected by it think it was mistaken. The aim of a review is to ensure that the decision was a proper exercise of the Commission's powers and consistent with its statutory objectives. The review also checks that the reasons for decisions were adequately expressed.

The existing rate of decision review relating to compliance orders or directions is 6% (13 out of 216). However it would be prudent to anticipate that with more effective powers the rate of decision reviews or appeals could increase. We therefore estimate a 10%-20% range for the purposes of this assessment, which would lead to an additional 12-24 decision review cases each year as a result of the proposed powers.

Safeguards: Charity Tribunal

There have been only 10 cases before the Charity Tribunal (the First Tier Tribunal (Charity) of the General Regulatory Chamber) relating to the use of the Charity Commission's compliance powers since the Tribunal was established in April 2009 (out of a total of 39 appeals/reviews lodged with the Tribunal), only once have Charity Commission's compliance decisions been overturned on appeal (a turnover rate of 10%). We estimate that the extended / new powers in this consultation would add three to five new cases to the Tribunal's case-load each year.

The Tribunal was designed to be a swift and low cost means of challenging the Charity Commission's legal decisions. It provides support for, and is designed to accommodate, unrepresented appellants, although perhaps because of the matters at stake for charities and individuals, experience has shown that most appellants choose to incur the expense of legal representation.

Safeguards: Waiver

The Charity Commission estimates the proposed extension to automatic disqualification will affect 30-50 people who are currently serving as charity trustees. They would have to resign their positions (or face removal by the Charity Commission). Some of the estimated 30-50 individuals affected by this change may choose to apply to the Charity Commission for a waiver (usually for a specific charity), which if granted, would enable them to continue serving as a trustee.

The waiver process already provides an important safeguard to enable rehabilitation of individuals with unspent convictions who are disqualified under the current law (any offences involving dishonesty or deception) from acting as a charity trustee.

In 2013, the Commission received 3 waiver applications, all of which were granted. In 2012, the Commission received 5 waiver applications, all of which were granted. In 2011 the Commission undertook a specific exercise to match its information on trustees to that on the Insolvency Register. It followed up by contacting individuals some of which were unaware that they were disqualified, and this prompted 22 applications for waiver in 2011, of which 19 were granted. Almost all the waiver applications were for specific charities (in four cases for more than one specific charity).

In the last ten years, with the exception of the spike of applications in 2011 due to the matching with insolvency records, the Commission has received no more than 6 waiver applications each year. 90% of waiver applications over the last 10 years were successful.

The proposed extension to new offences does not change the current position whereby it is for the trustees of a charity to satisfy themselves, when recruiting to their number, that the prospective candidate is not disqualified from acting as a trustee. This is usually accomplished by asking prospective trustees to complete a self-declaration that they are not disqualified (by any of the disqualification criteria).

Annex 3 – Equalities

Public authorities are required to have due regard to the aims of the general equality duty when making decisions and when setting policies. This means that we have to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Equality Act 2010;
- Advance equality of opportunity between people who share a protected characteristic and those who do not;
- Foster good relations between people who share a protected characteristic and those who do not.

The policy has relevance to the general equality duty, specifically the elimination of unlawful discrimination and fostering good relations.

The Charity Commission is the body that will implement these measures. As a public body, it is bound by equalities duties, and in 2012 published its Equality and Diversity Strategy.

The Charity Commission is committed to being a fair employer and a fair regulator. The Commission's diversity vision is: *"We should act inclusively, upholding equality law, treating everyone fairly, and seeking to provide and promote a culture which delivers the best outcomes for the diverse society in which and for whom we work."*

We have seen no evidence of any unlawful discrimination in the exercise of the Charity Commission's existing compliance powers. However, consultation feedback from a civil society organisation representing Muslim charities was that *"there is a perception among many in the Muslim community that Charity Commission actions unfairly target Muslim organisations"*. This respondent was concerned about the breadth of powers proposed for the Charity Commission, and that they would reinforce this perception (whether or not the perception was justified). No other respondents to the consultation specifically raised this as an issue.

The very low number of successful decision reviews and appeals against Charity Commission compliance and enforcement decisions supports the view that the Commission gets most of its compliance decisions right.

We have taken on board consultation feedback from a number of civil society organisations that some of the proposed powers for the Charity Commission would give them too much discretionary power, with the potential for it to be used in future more widely than originally intended. We believe that important safeguards would mitigate against any risk of that occurring, including the legal requirement for the Charity Commission's to comply with the general equalities duties, and for the Commission to act proportionately. In addition the new powers would be subject to the Commission's internal decision review process and to independent judicial oversight through appeal to the Charity Tribunal.

Particular concerns were expressed on consultation about the proposed pre-emptive compliance powers, and that they could be used inappropriately by the regulator to muzzle free speech. We do not accept that the powers would be used in any other way than preventing trustees from breaching their duties under charity law.

Some consultation respondents objected to the proposed criteria for automatic disqualification from trusteeship for terrorism offences saying that it was too broad, and needed to be clarified. Some also objected to the inclusion of persons designated under terrorist asset freezing legislation, on the grounds that persons designated may not have the opportunity to see all of the evidence against them. We have carefully considered these concerns. There is no intention for these provisions to catch people who have made honest mistakes – they target individuals who have been convicted in a UK court of a serious criminal offence, and whose conviction is unspent. The rules relating to the period of time within which a conviction has been spent have been relaxed (on 10 March 2014) under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

In relation to designation under asset freezing legislation, HM Treasury is responsible for the implementation and administration of international (i.e. UN and EU) financial sanctions in effect in the UK as well as domestic designations under the Terrorist Asset-Freezing etc. Act 2010. There is already a right of appeal to the High Court against the imposition of financial sanctions, and according to the Independent Reviewer of Terrorism Legislation, David Anderson QC, *“four individuals who have brought appeals over the past two years has been de-designated”*¹⁰. According to his December 2013 report, *“Of the 31 UK-listed individuals at the end of the period under review..... (f) 17 had been convicted in the UK of terrorist offences, all of them committed during the peak period of al-Qaida related terrorism in the middle of the last decade and many of them at the most serious end of the scale.... (g) 14 were in custody in the UK; 13 were overseas; and four were at liberty in the UK.”* We continue to believe that being designated under EU or UK terrorist asset-freezing legislation indicates a lack of fitness to serve as a charity trustee.

The draft Protection of Charities Bill contains a review clause requiring it to be reviewed at least every five years after implementation. Prior to that, the use of the new powers will be reported annually by the Charity Commission as part of its annual compliance reporting. As part of the formal review process we would consider whether the amended and new powers have been exercised in line with the general equalities duty.

¹⁰ <https://terrorismlegislationreviewer.independent.gov.uk/terrorist-asset-freezing/>

Annex 4 - Small & Micro-Business Assessment (SMBA)

Small businesses (up to 49 FTE employees) - including micro-businesses (up to 10 employees) are disproportionately affected by the burden of regulation. Most charities are small or micro sized businesses. There is an assumption that there will be a legislative exemption for small and micro businesses where a large part of the intended benefits of the measure can be achieved without including them.

However in this case, exempting small and micro businesses (charities) from the proposals would not be viable in delivering the policy, which is to protect individual charities and the charity sector as a whole from abuse. Some of the strongest support for the proposed measures on consultation came from small and micro sized charities and their trustees.

Most charities are small (see table A4.1 below). According to the Charity Commission around 75% of registered charities have an annual income below £100,000 (and are therefore could be considered likely to fall into the micro entity category).

Table A4.1: Registered charities by income

Annual income bracket	Number of charities	%	Annual income £bn	%
£0 to £10,000	68,658	41.9	0.228	0.4
£10,001 to £100,000	54,593	33.3	1.926	3.1
£100,001 to £500,000	20,625	12.6	4.578	7.4
£500,001 to £5,000,000	8,146	5	12.326	20.1
£5,000,000 plus	1,918	1.2	42.373	69
SUB-TOTAL	153,940	94	61.431	100
Not yet known	9,769	6	0	0
TOTAL	163,709	100	61.431	100

<http://www.charitycommission.gov.uk/about-charities/sector-facts-and-figures/>

It is harder to estimate which charities would qualify as small entities, as the dividing line between small and medium could fall somewhere within the £500k - £5m income bracket. But on the basis of the above figures it would not be unreasonable to assume that over 85% of registered charities would be considered micro or small businesses, and therefore we need to consider whether the policy could be delivered with an exemption for small and micro businesses, and the likely impact of the policy on small and micro businesses.

On consultation we had helpful feedback from two organisations specifically representing small charities:

The FSI works with small charities with an annual turnover of less than £1.5 million, and has a membership of over 3,000. It surveyed its members and received 65 responses. 77% of its small charity respondents agreed with the proposals to extend the list of criteria that trigger automatic disqualification from trusteeship, but some felt there needed to be mechanisms in place to help those who'd turned their lives around. 75% of respondents either agreed or strongly agreed that the existing powers of the Charity Commission should be amended to enable disqualification of trustees.

Bournemouth Council for Voluntary Service (BCVS) surveyed its members, mostly small charities, and received 40 responses. BCVS respondents were overwhelming in support (at least 94%) of the proposed list of offences for automatic disqualification other than those covered by the Terrorism Asset Freezing Act (88% support). 70% of BCVS respondents supported a power for the Charity Commission to disqualify an individual from trusteeship, with 6% disagreeing and 24% undecided. An appeal process needs to be simple, quick and cheap (so as not to exclude those who are unable to pay for 'expert' representation). Generally the proposals would help strengthen public confidence that there can be swift consequences for the minority of people who do not treat being a trustee as a responsible position. Most charities are responsible and follow charity law and so for the vast majority these proposals will not impact on them.

In terms of impact, the main costs are familiarisation costs. We do not consider there is a disproportionate impact on small and micro charities. All charities are run by their charity trustees who are almost always volunteers (regardless of the charity's size). It will be for the trustees to familiarise themselves with the new rules on trustee disqualification, and this process should be no different for trustees in a large, medium, small or micro charity.

In this case a full exemption is not compatible with the relevant policy objectives, as once disqualified from trusteeship, a person is prohibited from being a trustee of any charity (regardless of size). It would be impractical and confusing to create different categories of trustee based on different sizes of charity, to which different rules and exemptions apply.

Despite the fact that we do not believe there is a disproportionate impact on small and micro charities, we recognise the importance of making the process of familiarisation as simple as possible. The Charity Commission is committed to making its guidance as clear and simple as possible. Its online guidance is generally well regarded, and it is now also providing guidance via podcasts for trustees. We will work with the Commission to support the preparation of guidance on the new provisions. The Charity Commission will also work with representative bodies of small charities to ensure its guidance works for them.

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