



Analysis of consultation responses

The discretionary disqualification power: power to disqualify from being a trustee

Introduction

Thank you to everyone who took part in this consultation. All of the feedback has been helpful in developing the Charity Commission's ('the commission's') explanatory statement and supporting documents on using this power.

The Charities (Protection and Social Investment) Act 2016 gives the commission a new power to disqualify persons from being trustees, and consequently from senior management functions, for a period of 15 years or less. The commission published its consultation on 22 May 2016 seeking views on its approach to using the new power, which then came into force on 1 October.

The consultation ran for 12 weeks and we received 51 responses. Annex 1 lists the respondents, who include charity sector umbrella bodies, charities, professional bodies and advisers, individuals and 1 other regulator. Responses were received via an online survey and by email. We also held discussions with some of the key umbrella and professional bodies.

Summary

The consultation responses provided some very different views. At one end of the scale, there were some responses which were very positive in their support of the commission being given this new power to strengthen its regulatory powers. Amongst the individuals who responded, in particular, there was a view that the highest standards should be expected of trustees. At the other end of the scale there were concerns that the commission's proposed tests for using the power were described too broadly and were set too low and could adversely impact recruitment and retention of trustees. There were calls for more detail, including how the commission would assess whether the 3 statutory criteria for using this power have been met and the process for making a disqualification order. Amongst the umbrella bodies that expressed these concerns, there were a number of very constructive suggestions and offers of further input which were helpful in finalising the explanatory statement and supporting guidance.

There were a lot of detailed comments on the wording and structure of the document. However, a number of common themes emerged from the consultation and the commission has focussed on these in its response.

1. The proposed approach to the use of the power is not detailed enough and gives too much scope for the commission to make subjective judgements. In particular there needs to be greater clarity about:

- when the commission will use the power and how this power fits with the commission's existing powers
- the types of conduct falling within condition F of criterion 1 (past or continuing conduct, whether or not in relation to a charity that is, or is likely to be, damaging to public trust and confidence in a charity or charities)
- how the commission will assess whether statutory criterion 2 (unfitness) is met
- how the commission will assess the public interest test in statutory criterion 3

In response:

- the commission has reviewed and significantly revised the text in the explanatory statement. It now:
 - explicitly sets this disqualification power in the context of its statutory objectives, general functions and duties and its regulatory approach
 - provides considerably more detail on the factors the commission will take into account when assessing whether the 3 statutory criteria have been met

2. There needs to be more detail about the process the commission will follow when exercising the power

- some respondents were concerned that the consultation document was too high level and did not provide any insight into the commissions thinking on the application of the statutory requirements in relation to process, including the giving of notice, timescales and the scope for challenge
- there were also concerns that there was a lack of information about when the commission might consider disapplying the effect of disqualification from any senior management functions

In response:

- the commission has published Q and As to accompany the explanatory statement: these address many of the practical issues of the process the commission will follow for making a disqualification order and the implications for a person who is disqualified
- the commission confirmed that as with its other compliance powers it has produced the operational guidance for its staff on the process for making a disqualification order, which it will publish, again, as with guidance on its other compliance powers, on its website
- given the potentially substantial impact a disqualification order might have on a person holding employed positions, the commission has made clear in the explanatory statement that it will specifically consider in each case, whether or not the disqualification order should contain an exception in respect of senior management functions

3. The approach the commission proposes to take to deciding on the scope of the disqualification

Some respondents had concerns about the proposed approach and suggested that:

- the starting point should not be that a person is disqualified from all charities but the disqualification should be specific to one charity in the first instance
- the scope of the disqualification should be decided on a case by case basis

In response the commission has clarified in the explanatory statement that:

- the commission's decision on the scope of the disqualification will be informed by the circumstances and all the information it has in each case and its consideration of the 3 statutory criteria
- any disqualification order will apply to being a charity trustee, or trustee for any charity, registered, unregistered, exempt or excepted, subject to the scope of the disqualification provided in the order, it will also apply to trusts of money, for example holding funds raised for charity

4. The approach the commission proposes to take on deciding on the period of the disqualification

There were concerns that:

- it was not clear how the commission would ensure that it reached a decision about the period of disqualification that would be proportionate
- there should be a more adequate description of the 3 bands for disqualification and what type of cases will fall within each band

In response the commission has clarified in the explanatory statement:

- that in considering the length of the disqualification period the commission will consider the seriousness of the conduct which gave rise to the disqualification and of the risk to and its impact on a charity or charities
- that the 3 disqualification 'bands' will be used as a reference point and aid to inform decisions on the length of disqualification and set out what types of conduct will be taken into account in deciding the disqualification period
- the types of cases which are likely to fall into each of the 3 bands of disqualification and expanded the examples of aggravating and mitigating factors that might be taken into account

Detailed analysis of responses

1. Reframing and clarifying the guidance

The consultation asked:

- Do you agree that the criteria the commission intends to use to assess whether a person is unfit to be a trustee are the correct ones?
- Do you agree that the criteria the commission intends to use to assess whether the disqualification is desirable in the public interest in order to protect public trust and confidence are the correct ones?

The feedback in response to these questions was mixed, with some respondents agreeing that the criteria are correct whilst others were concerned that the criteria were too broad and imprecise and give the commission too great a discretion.

There were also concerns that there was not enough detail about when the commission would use this power.

In addition respondents also had the following comments on various wider issues:

- there is too much focus on considering factors relating to fraud and financial crime and not enough focus on considering factors relating to safeguarding vulnerable beneficiaries
- credibility should not be used as a factor in deciding whether a person is unfit to be a trustee
- the commission needs to make clear that in using the power it will have regard to the duties that may arise under the Equality Act 2010, the Human Rights Act 1998 and the Rehabilitation of Offenders Act 1974

The consultation responses have significantly informed the development of the commission's approach to using this power and the revised explanatory statement sets out how the commission will make a decision to use this power in more detail, including:

- the context in which the commission will use this power
- the safeguards built into the use of the power
- the factors the commission is likely to take into account when deciding whether criterion 2 and criterion 3 are met

On criterion 2, the commission considers honesty, integrity or competence are key aspects of fitness to be a trustee but these are not the only reasons there may be to conclude unfitness. There will be examples of conduct that may otherwise be sufficiently serious to call into question a person's fitness to be a trustee because it impacts or is likely to impact on public trust and confidence. It still considers evidence that a person's credibility to be a trustee may affect fitness where it is sufficiently serious that it calls into question a person's fitness to be a trustee because it impacts or is likely to impact on public trust and confidence but this is one of a number of examples, so credibility is no longer a standalone category.

2. Providing more detail about the process for making a disqualification order

Some respondents commented that there was insufficient detail about the process for making a disqualification order, which they felt needs to be as clear and transparent as possible and needs to include information on the power to suspend a person from trusteeship pending the making of a disqualification order.

The commission agrees that the process for deciding to make an order should be open and transparent. In discussions with stakeholders, it realised that they were not aware of some of our existing guidance on other powers which explain the processes followed. This may have been because those stakeholders would not have previously been involved in situations where we have used other existing compliance powers. However, in response, the commission has also published complementary questions and answers which address many of the practical issues of how the disqualification process works, including:

- what the power is and when the commission will use it
- the process for making the order including when the commission will let the person know that it is proposing to disqualify them and the reasons for disqualifying them; whether it is suspending them pending disqualification; their right to make representations to the commission and their right to appeal to the Tribunal
- if the person being disqualified is a trustee, the process for letting the other trustees of the charity know about the proposed disqualification of a fellow trustee; the process for letting the wider public know of the disqualification and the right for the public to make representations
- the effects of disqualification
- how to check whether someone is disqualified

The commission also confirms that as with other compliance powers it has produced operational guidance for its staff on the process for making a disqualification order, which it will publish as it has done with guidance on other compliance powers, on its website.

3. Deciding on the scope of the disqualification

The consultation asked:

- Do you agree with the commission's approach to deciding whether the disqualification should be in respect of all charities, a group of charities or a specified charity?

The commission proposed that the starting point for using this power would be that it would disqualify a person from being a trustee in relation to all charities, unless the person can demonstrate why they should only be disqualified in relation to a particular charity or class of charities.

Whilst some respondents were in favour of this approach others felt that the commission should take the opposite approach and the starting point should be that the disqualification should be in respect of a particular charity and should be decided on a case by case basis.

The commission has decided to revise its approach on this point, which is set out in the explanatory statement. The commission will not have a starting point for deciding on the scope of the disqualification one way or the other but will determine each case individually, based on all the information and its consideration of the 3 statutory criteria.

4. Deciding on the period of disqualification

The consultation asked:

- Do you agree with the examples of aggravating and mitigating factors that the commission will take into account when deciding on the length of the disqualification?
- Are there any situations which as a matter of policy should result in the maximum disqualification period of 15 years?

Whilst there was support from a number of respondents for the examples given of aggravating and mitigating factors, some respondents disagreed about some of them and provided more detailed comments on factors as well as suggestion for additional factors. In the light of these comments the commission has developed the examples of aggravating and mitigating factors it will take into account in the explanatory statement.

Of those respondents who expressed a view on whether there are any situations which, as a matter of policy, would result in the maximum disqualification period of 15 years, the majority were of the view that there were not any such situations.

Some of the respondents highlighted that the commission should not limit its discretion by setting out situations which should result in the maximum disqualification period but should retain flexibility and consider each situation on a case by case basis.

The commission accepts this view which is set out in the explanatory statement. The commission will decide on the period of disqualification by considering the seriousness of the conduct which gives rise to the disqualification and of the risk to and its impact on a charity or charities. To determine this, the commission will look at all relevant information received, the facts of each case that led to the criteria for disqualification being met, as well as any aggravating or mitigating factors, and the consequences to the charity in question. It has however, retained 3 bandings, as an aid to inform its decision on the length of disqualification and give an indication to those involved of its approach to what type of conduct might fall into which banding. This is an important aspect of the process and the commission's approach to being open and transparent.

Annex 1

Consultation: list of respondents

We are grateful to the individuals and organisations who responded to this consultation. The following is a list of those respondents who did not ask for their details to be withheld.

ACEVO
Arsalan Ghani
Arts Council England
Association of Taxation Technicians
Bates Wells Braithwaite
Bircham Dyson Bell
Charity Finance Group
Charity Law and Policy Unit, School of Law & Social Justice, University of Liverpool
Charity Law Association working party
Chartered Institute of Taxation
Clinks
Cumbria Amenity Trust (CATMHS)
David Brook
David Taylor
Directory of Social Change
Evangelical Alliance UK
Family Action
HEFCE
ICSA
J Hubbard
Julie Goucher
K Kelleher
Karen Jeffreys
Liam Byrne
Moira Andrews
National Federation of Music Societies (Making Music)
National Trading Standards Scams Team
NCVO
Newcastle CVS

NSPCC
Open University Students Union
PEPE
Prison Reform Trust
R Ebley
Saddleworth Historical Society
Scott Clayton
Seeds
Shree Prajapati Association Birmingham
Sir Ian Andrews
Small Charities Coalition
Stephen McGann
Sudanese Community of South Wales
The M&H Maunsell Charitable Trust
The Worshipful Company of Glass Sellers Charity Fund
Tree of Hope
Unlock
Uttam Das
Voluntary Action Swindon
WCVA
Wilson Cotton

Responses were made using the online survey and by email.