

Via email

22 August 2016

Dear Sir,

Power to disqualify from acting as a trustee consultation

I am pleased to submit the Institute's response to the above consultation and trust the comments are useful to your deliberations.

About ICSA

ICSA: The Governance Institute is the professional body for governance. We have members in all sectors and are required by our Royal Charter to lead 'effective governance and efficient administration of commerce, industry and public affairs'. With 125 years' experience, we work with regulators and policy makers to champion high standards of governance and provide qualifications, training and guidance.

We are the professional body qualifying and supporting Chartered Secretaries, corporate governance, risk and compliance professionals in all sectors of the UK economy. Members are educated in a range of topics including finance, company law, administration and governance, which enables them to add value to any organisation.

ICSA has an extensive pedigree in the governance arena, advising governments and regulators on company law, charity law and corporate governance. The breadth and experience of our membership enables ICSA to access a variety of applied experience in order to provide pragmatic insights into effective practices across a range of organisations. Our members' wealth of expertise and experience of charities, together with their detailed understanding of charity and company legislation and regulation, has informed our submission.

General comments

As noted in the policy paper, this new power acquired by the Commission is significant: in both its range and potential impact on volunteering. Consequently, any guidance to trustees, and those working with them, should demonstrate a thorough understanding of the real life circumstances in which trustees volunteer their time, expertise and good will.

The criteria supporting the use of the new power are not wholly dissimilar from those contained in the Small Business, Enterprise and Employment Act 2015 (amending the Insolvency Act and the Company Directors Disqualification Act). However, the power to disqualify a director in this Act is implemented via a court order. The criteria for establishing the fitness of an individual to serve as a director is also accompanied by a whole schedule of matters that should be taken into account when determining 'unfitness'. There is no equivalent safeguards within the guidance, even though trustees are generally unpaid volunteers.



Most trustees do their best for the charity, and charitable objects, that they serve, unfortunately sometimes they struggle and fall short of minimum regulatory and legal expectations. Given the varied nature of the sector and the fact that a large proportion of registered charities have no staff and few resources, the approach to applying the new power should be duly nuanced and staggered to reflect each individual situation. The policy paper, in its current form, does not sufficiently balance the Commission's duties to protect charity assets and to promote public trust and confidence.

Furthermore, the policy paper makes no reference to the practical application of the power given the limited resources facing the Commission. How often does the Commission envisage using this power, and in what circumstances? It is unlikely the Commission will be able to take action against every transgression captured under the criteria listed in the document (even if it becomes aware of them), although trustees of smaller resourced charities may be frightened by the tone and scope of the document, especially if some aspects can be applied retrospectively. At a time when the sector needs more, and an increasingly diverse range of, trustees it is concerning that such guidance could be seen to undermine initiatives to promote the value of trusteeship. Those that are public minded may be more inclined to serve in positions that are not subject to such sanctions detailed in the draft guidance.

The policy paper presents an opportunity to reassure trustees trying to do their utmost that their best endeavours, performed with honest and good intentions will not necessarily see them subject to this new power. By tightening the definitions and examples in which a trustee could fall foul of the new power, the document may provide clearer expectations of acceptable and unacceptable behaviours by trustees and may be able to demonstrate a certain amount of flexibility in instances of innocent mistakes or oversight. While a softly-softy approach may not have considerably improved the standards of trusteeship in England and Wales, there is currently no evidence-base to suggest that a more robust and stringent approach will raise trustee standards either. A more cautious approach may be more appropriate.

Response to consultation questions

Q.1 Criteria relating to fitness to be a trustee:

Do you agree that the criteria we have set out are the correct ones?

What additional or other criteria, if any, should we take into account when considering whether or not a person is unfit to be a trustee?

While the majority of the criteria are not unfamiliar to those who work with or act as trustees, there are included in the list some examples that cause an eyebrow to be raised. In short, therefore the criteria are not the right ones.

The revised six conditions do not adequately address issues raised in previous iterations. In particular, some continue to be so broad and vague as to be of little practical use to trustees. More definitions and clearer practical examples of the power's application could provide greater assurance to trustees who may be worried about fulfilling their legal duties, but are overwhelmed by the sheer complexity of guidance aimed at them and the potential risks to their name and reputation when they fall short.

The credibility criteria hinges on public confidence. This presents the possibility of being a hostage to fortune as social mores, acceptable behaviour and trustworthiness can change quickly and radically. Furthermore, creative, innovative and courageous charities will act in a way that is in advance of public awareness or understanding, because they have evaluated the situation and agreed that the course of action will have a positive impact in achieving its charitable objects. An ill-informed public, could therefore, influence the Commission to judge the trustees are lacking credibility. That scenario could lead trustees to be unduly risk averse and see them retreat to activities that are uncontroversial but less effective.

Some of the credibility criteria appear to be influenced by matters that have attracted recent media criticism: namely fundraising practices. For the use of such a significant power to be influenced so openly by public opinion that is not always fully aware of the facts will not reassure trustees that the regulator is using its powers proportionately.

In the competency criteria, the misapplication of their own or others' funds and a failure to discharge similar duties in their personal or business affairs could be accompanied by a range of circumstances that do not wholly translate to the charity setting. There is no accompanying definition of 'misapplication'. A definition within the final document would be most helpful, especially where it evidences a legal root. The inability to discharge their personal affairs criteria does not appear to provide any allowance for individual trustees who may be supported by others to help manage their affairs, support that could also be provided by a charity. This could present challenges to those charities that seek such individuals to inform their decisions to provide support and services to individuals in similar situations.

A history of persistent insolvency or business administration does not provide much room for explanation and manoeuvre in the application of the sanctions available. There may be some instances where the insolvency was not solely down to the individual under review, and in fact voluntary insolvency might have presented the most appropriate action in terms of fulfilling their legal duties. While such criteria may be one indicator of a poor judge of character or business acumen, it does not necessarily present the full story behind the various failures. The current draft of the paper does not provide sufficient balance to demonstrate how such an individual will be able to present the full scenario giving rise to the insolvencies or administrative arrangements.

Finally, 'conduct which shows a material risk of harm to the work of charities in general' could be argued as being too nebulous for an average person to understand and may put off many from serving as a trustee.

Q2. Criteria relating to public interest:

Do you agree that the criteria we have set out are the correct ones?

What additional or other criteria, if any, should we take into account when considering whether or not the disqualification is desirable in the public interest in order to protect public trust and confidence?

While the criteria set out are reasonable, again there is a concerning over-reliance on the public's trust and confidence in the sector. This is worrying as there is not always universal understanding within the general public as to what charities are, and how modern charities are run. This can be challenging for trustees seeking to act in a manner that addresses the needs of the charity with one eye on the mood of the general public. In some instances, that balance could be unduly and inappropriately skewed in favour of public opinion rather than what needs to be done to achieve the charitable objects, legally and ethically.

That is not to say the Commission should disregard the opinions of the public, but it also should not place undue confidence in the public's trust in the sector. After all, surveys indicate that public trust and confidence in the sector has slipped, yet total donations have not decreased. This suggests that the public's stated beliefs and their actions do not necessarily tally, and caution would be advisable.

As mentioned previously, equivalent powers cover company directors but are subject to the public interest test being applied by the Secretary of State and a court order. Thereby, there is an additional layer of due process and protection surrounding the correct application of the power. It seems a little incongruent that volunteers will be subject to a harsher regime with fewer built-in mechanisms to ensure a fair hearing is offered before the disqualification takes place.

In the paper we have set out examples of aggravating and mitigating factors we will take into account in deciding the length of disqualification.

Q3. Do you agree with these factors?

What other factors, if any, should we take into account?

Are there any situations which should result as a matter of policy in the maximum disqualification period of 15 years? If yes, please explain.

Given that the Commission will draw on a trustee's conduct in relation to their performance of another public office, it would be fair and advantageous for good conduct in a similar role to be included in the

mitigating factors – not just the testimonials of fellow trustees. Furthermore, an example that covers a civil rather than criminal incidence might be useful to include.

In the paper we have set out our approach to deciding on whether the disqualification should be in respect of all charities, a group of charities or a specified charity.

**Q4. Do you agree with this approach?
What alternative approach should we take to deciding on the scope of the disqualification?**

This section is very brief (two paragraphs) and states that a disqualification will apply to all charities, unless an individual can demonstrate why it should only apply to a sub-group or particular charity. As such, this section would benefit from further explanation.

It is hoped that the above comments are useful to you in your deliberations relating to the implementation of the Commission's new power to disqualify individuals from acting as trustees. Should you wish to discuss any points in further detail, or how ICSA may be able to assist you in your endeavours on this topic, please do not hesitate to contact me.

Yours faithfully,

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