



## Policy paper

# Power to disqualify from acting as a trustee

How the Charity Commission proposes to make decisions about the use of the statutory power in the Charities (Protection and Social Investment) Act 2016 to disqualify individuals from acting as trustees and from senior management positions at charities.

## Background

The Charities (Protection and Social Investment) Act 2016 ('the Act') gives the commission power to make orders disqualifying individuals from acting as trustees<sup>1</sup> under certain circumstances. While a person is disqualified under this power they are also disqualified from holding senior management positions within the charity or charities concerned.

This is a power for which the commission has long argued and the commission welcomes its inclusion in the Act. The power will enable the commission to disqualify, for a proportionate period, individuals who are unfit to be a trustee in order to protect a charity or charities generally, other trustees and the public.

The commission recognises, however, that this is a significant new power. It is important that the commission provides reassurance that it will only use it when there is a clear case for doing so and that the commission clearly explain what it will take into account before using the power. This paper gives details of the commission's approach to using this power.

There are important safeguards built into the use of this power. Before an order is made there will be a notice period in which the individual will be able to make representations to the commission and, in some cases, representations can be made by the public. An individual will also have the right to appeal to the First-tier Tribunal (Charity) ('the Tribunal') if an order is made and to apply to the commission for an order to vary or discharge the disqualification order.

The commission's policy on applying to discharge a disqualification order will be informed by its policy on applying for waivers for automatic disqualification.

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<sup>1</sup> The existing disqualification regime and this new power cover both charity trustees and trustees for a charity. Rather than repeatedly referring to both types of trustee and other positions, for ease of reference this paper simply refers to 'trustees'.

## How the commission has developed its policy

In May 2015 the commission published a [policy paper](#) which set out its initial thinking on how it would use this power. This paper is a development of that paper to reflect its proposed approach to using this power. The commission has built on its approach to take account of the minor technical changes made to the power, the commission's experience as a regulator and the principles that inform other bodies with similar powers of disqualification or sanction. The commission has also developed its approach to deciding on the period of disqualification under this power (the maximum period of disqualification is 15 years).

Following the consultation (which closes at 5pm on Monday 22 August) the commission will consider all comments received and whether or not its proposed approach should be amended accordingly. The commission will continue to develop its approach in the light of its experience of using this power.

## When the commission will use this power

The commission has a range of powers that it already uses in inquiry cases to protect charities which can impact on trusteeship, employment or positions as officers or agents. The Charities (Protection and Social Investment) Act 2016 provides additional powers to help strengthen the commission's ability to protect beneficiaries and the public. The commission will use this new power to disqualify when it is satisfied that it is the most appropriate power to protect charities generally or specifically from being run by individuals who are clearly not fit to do so.

## The 3 tests that have to be met for the commission to use the power

The Act provides that the commission will only be able to make a disqualification order when it is satisfied that each of the following tests is met:

1. At least 1 of 6 'conditions' applies
2. The person is unfit to be a trustee<sup>2</sup>
3. The order is desirable in the public interest in order to protect public trust and confidence in charities<sup>3</sup>

The relevant principles of good regulation and the human rights and equalities protections will apply to the decision to disqualify, as they do to all of the commission's decisions.

## Test 1: at least 1 of 6 'conditions' must apply

The following table includes the 6 conditions and some examples and comments on what they would mean in practice. The commission would emphasise that the conditions are only 1 of 3 tests that have to be met. It cannot exercise the power simply because 1 of these conditions applies - rather, their existence may act as a trigger to consider if disqualification is appropriate, subject to the other two tests being met.

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<sup>2</sup> This may be generally or in relation to a charity or class of charity.

<sup>3</sup> This may be generally or in relation to a charity or class of charity.

Condition	Example/comment
A: a person has been cautioned for an offence against a charity or in the administration of a charity for which a conviction would bring automatic disqualification	The person accepted a caution for stealing charity funds
B: a person has been convicted of an offence in another country that: <ul style="list-style-type: none"> <li>• is against, or involves the administration of, a charity or similar body<sup>4</sup></li> <li>• if committed here would bring automatic disqualification from acting as a trustee</li> </ul>	A conviction abroad for bribery or terrorist financing in connection with a charity or similar body  When considering an overseas conviction the commission will take account of any concerns raised about any court or other legal processes, their compliance with right to a fair trial (including evidence submitted) and whether the standards of evidence and justice would not be accepted in a UK or European court
C: a person has been found by HMRC not to be a 'fit and proper person' to be a manager of a body or trust <sup>5</sup>	This is a decision taken by HMRC
D: a trustee, officer, agent or employee of a charity was responsible for, contributed to or facilitated misconduct or mismanagement in a charity or the person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it	This is the same test that applies when using the commission's existing compliance powers  Examples of misconduct or mismanagement include: <ul style="list-style-type: none"> <li>(i) providing false or deliberately misleading information to the commission</li> <li>(ii) an individual, by virtue of their conduct, has received unauthorised private benefit and this has caused loss to the charity's assets (including its reputation)</li> <li>(iii) repeated failure to meet reporting requirements</li> <li>(iv) a breach of a commission order or direction</li> </ul>
E: an officer or employee of a corporate trustee was responsible for, contributed to or facilitated misconduct or mismanagement in a charity or the person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it	This covers the same ground as condition D but will capture individuals responsible for decisions taken by a corporate trustee

4 This will cover any body that is a charity in the UK and those set up under the law of another country 'established ... principally for charitable, benevolent or philanthropic purposes'.

5 For the purposes of paragraph 4 of Schedule 6 to the Finance Act 2010 (which deals with taxation issues and charity).

Condition	Example/comment
<p>F: other 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</p> <p>NB: the commission will consider this condition in the light of existing definitions. If it takes any action on the basis of the condition being met the commission will provide an explanation identifying the conduct in question and why it thinks the conduct meets this condition</p>	<p>This is a widely expressed condition and relevant factors will include, but are not limited to:</p> <p>(a) if the conduct had been by a trustee of a charity, would it:</p> <ul style="list-style-type: none"> <li>• be considered misconduct or mismanagement in the administration of the charity</li> <li>• put the property or reputation of the charity property at undue risk</li> </ul> <p>(b) whether there was misconduct in another position of trust and responsibility</p> <p>Conduct the commission is of the view might damage public trust and confidence includes:</p> <p>(i) some convictions that do not mean automatic disqualification, including:</p> <ul style="list-style-type: none"> <li>• for serious sexual offences by a trustee of a charity working with children or vulnerable adults</li> <li>• for animal cruelty by a trustee of an animal welfare charity</li> </ul> <p>(ii) regulatory breaches that have been penalised by another authority, for example legal requirements on tax matters</p> <p>(iii) a finding of misconduct by a professional body or regulator</p> <p>(iv) an adverse finding by a charity self-regulatory body or umbrella body</p> <p>(v) dismissal from employment or from another fiduciary or public appointment</p>

## Test 2: the person is unfit to be a trustee

If someone meets 1 or more of the conditions in test 1 the commission will then consider whether the conduct in question makes them unfit to be a trustee. In doing so the commission proposes to base its assessment on:

- the general legal obligations and good practice requirements for trustees
- the inherent duty of the Court, Tribunal and the commission to ensure that the trusts of a charity are properly executed by the trustees

In practice the commission believes that unfitness is likely to be a result of a failure in 1 or more of the following categories:

- honesty and integrity
- competence
- credibility

### Honesty and integrity

The commission is likely to have concerns about someone's honesty or integrity if it finds evidence they have abused a position in which they were trusted to hold and properly use charity or public funds or any funds not belonging to them. Conduct of that type or that abuses the trust of others more generally will also call into question their fitness to act.

Examples of such conduct will include (but not be limited to):

- exploiting a position of trust for personal gain
- dishonesty, deception or cheating
- breach of a trust or confidence
- misleading the public
- misleading a public body or failing to tell the whole truth
- hiding any personal interests or conflicts of interest

### Competence

Concerns about someone's competence would be raised by evidence that they are incapable of, or unwilling to, fulfil the duties and responsibilities of a trustee. In [The essential trustee \(CC3\)](#), the commission describes the main duties as follows:

- carrying out the charity's purposes for the public benefit
- acting in compliance with the governing document and rules of the charity
- acting in the best interests of the charity - this includes ensuring that conflicts of interest do not interfere with a trustee's ability to make a decision only in the best interests of the charity and not putting themselves in a position where this appears to be the case
- managing the charity's resources responsibly
- acting with reasonable care and skill - this means acting responsibly and honestly in a way a prudent person would in managing their own affairs

Examples of the type of conduct that would suggest a lack of competence to an extent that might make a person unfit include, but are not limited to:

- failure to comply with trustee duties - this would cover persistent failure to comply with specific charity law requirements including those around the submission of accounts and returns, or keeping financial records
- misapplication of their own or others' funds or irresponsible management of others' finances
- failure to discharge similar duties in their personal or business affairs
- exploitation of a position of trust
- failure to act in the best interests of a charity
- failure to set aside obligations to others - financial or otherwise - who might seek to influence them in the performance of their duties
- a wilful disregard for management of conflicts of interests
- the person would not be able to comply with charity law requirements for trustees

The commission will not consider a person is unfit simply because they took a trustee role or applied for one without any prior knowledge or experience of acting as a trustee or the regulatory requirements for charities.

### **Credibility**

A person's conduct can damage their personal credibility and reputation in a way that affects the confidence beneficiaries, donors and the public have in their ability to properly carry out the work of a charity trustee. Sometimes this is so severe that it calls into question their fitness to act in the role of trustee.

Examples of how this could happen are when conduct indicates or relates to:

- a risk to a charity and those it is meant to help - for example a person with convictions for offences against children being involved in a charity working with children or vulnerable adults
- negligent and/or repeated failure to comply with legal requirements on tax matters that has been penalised by HMRC
- support for and participation in discredited tax avoidance schemes
- actions in fundraising that gave them high personal benefits to the detriment of the charity or in which they used high pressure selling or other discredited methods
- other poor standards in charity fundraising
- repeated or persistent insolvency or administration of their businesses
- failure to comply with immigration laws that has been penalised by the relevant authority by a person who works, or wants to work, in an immigration charity
- conduct which shows a material risk of harm to the work of charities in general
- carrying out duties in a position similar to trustee or a position of public office to produce significant financial/other benefits for themselves, their family or their friends

### Test 3: the disqualification must be desirable in the public interest in order to protect public trust and confidence

The third test is only relevant if the others 2 tests are met.

Charities are publicly accountable for the funds they receive and the privileges they enjoy because of their charitable status. The trustees are responsible for the administration and management of individual charities. In considering whether this test has been met the commission believes it should consider whether disqualification will protect charities from those who would not carry out the role of trustee with integrity, honesty, capability or credibility in the interests of the charity and its beneficiaries, and ultimately be trusted by the public to do so.

This test will, for example, allow the commission the flexibility to take account of circumstances in which the risk of (further) damage to charity is minimal and it would not be in the public interest to act against the individual. This could cover cases involving infirmity due to age or illness. It will also act as a filter for claims that the commission should act against individuals who have never had any relevant relationship with charity and it has no reason to suspect that this will change.

The commission will use the knowledge it gains from the surveys it undertakes into public trust and confidence to inform it of matters which drive the underlying trust and confidence the public has in charities. Previous surveys have indicated that charities are in the top 3 trusted groups by the public, with in the past only the police and doctors seen as more trusted. That trust extends to trust in those that are responsible for running a charity: the trustees. The commission will continue to explore this in future surveys.

If a person is already a trustee, the commission will consider any evidence that their contribution was essential for the continued success of the charity and that they should be allowed to continue as trustee or in another senior position. The commission would balance such evidence against the need to protect trustees, charities, their beneficiaries and the public from people whose conduct has damaged or will damage the charity or public trust and confidence in charities generally.

In deciding whether it is in the public interest to act, the commission will have regard to a number of factors including:

- the nature and seriousness of the conduct
- the extent of the unfitness and whether it might be temporary or time specific
- any adverse or positive public reaction to the impact in relation to the conduct if it is publicly known, or on charity if their involvement with charity is public
- if the misconduct or act involves a charity, the impact on the standing of the charity and the integrity of charity generally if the person is free to become, or continue as a trustee of this charity
- if the misconduct involves a charity whether it is reasonable to conclude that the person has acted in a way that they knew or should have known was likely to discredit them, the charity or the charity sector more widely
- any adverse impact the conduct and unfitness has on the charity including risk to charity property - for example, would it affect the charity's ability to obtain funding from donors, obtain financial services, would it create risks to safe travel in conflict zones for its staff and their ability to carry out work for the charity?

- any adverse impact the conduct and unfitness may have in the future if the person continues to be involved, or becomes involved, in a charity - for example, the conduct suggests that their involvement would present a high risk of abuse or damage to the charity or its reputation and public support or the capability of that person to retain the confidence of the public in their ability to be a trustee of a charity generally or of a charity or class of charities

## Overall limitations and considerations in exercising discretion

In considering the use of this power the commission will also be bound by the general requirements in the Charities Act 2011 that any action it takes must:

- further the commission's statutory objectives and functions
- have regard to the principles of best regulatory practice<sup>6</sup> and be proportionate, accountable, consistent, transparent, and targeted only at cases where action is needed

The commission will therefore also consider whether a person should be disqualified in the context of its published [risk framework](#) and other regulatory guidance, such as [The essential trustee \(CC3\)](#). This makes it clear that the commission will be more likely to take action where there is negligent, reckless or deliberate misconduct.

In every case the commission will consider the following before making an order and, if it does make an order, the length of a disqualification:

- are the disqualification and any proposed disqualification period proportionate in the circumstances (it can be for up to 15 years)?
- the commission's obligations as a public authority with regard to human rights and equality and the impact any order might have on the person's rights

The commission applies the principle of proportionality and its human rights and equality obligations when using its existing powers to remove trustees in an inquiry. You can find more information about the commission's obligations with regard to human rights and equality in its [operational guidance](#)<sup>7</sup>.

## Scope of the disqualification

This power provides that the commission can disqualify a person from being a trustee in relation to all charities, or in relation to such charities or classes of charities as it specifies in the disqualification order.

The starting point for using this power will be that the commission will disqualify an individual from being a trustee in relation to all charities, unless the individual can demonstrate why they should only be disqualified in relation to a particular charity or class of charities. By all charities the commission means registered charities, charities that are exempt or excepted from registering with the commission, as well as trusts of money, ie holding funds raised for a charity.

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<sup>6</sup> Under s16 of the Charities Act 2011.

<sup>7</sup> This will include the rights to respect for private and family life, (Article 8 ECHR), freedom of expression and association (Articles 10 and 11 ECHR) and property rights (Article 1, Protocol 1 ECHR).

## Deciding on the period of disqualification

In cases where all 3 of the tests have been met and the commission decide to make an order, it will need to decide on the appropriate length of the disqualification, up to a maximum of 15 years. The overriding policy objective will be to protect charities generally or specifically from being run by individuals who are clearly unfit to do so.

In reaching its decision on the length of the disqualification period, the commission will take into account:

- the nature of the circumstances which led to the 3 tests for disqualification being met
- seriousness of the risk to the charity or charities generally
- whether the risk to the charity is sustained and ongoing
- whether the risks are likely to be permanent or, due to the reason an individual is considered to be unfit, temporary in the circumstances
- the principles of rehabilitation

based on an assessment of the information obtained during the course of its engagement and the particular facts of the case. Each case will be considered on its own merits and facts.

The nature and level of the risk and how serious it is will help inform the decision the commission makes on the period of disqualification. It will use the assessment of information obtained during the course of its engagement and the facts of the case to identify aggravating and mitigating factors that will either raise or lower the level of risk and thus the period of disqualification. The greater the level of risk, the longer the period of disqualification is likely to be.

To help guide the commission's decision on the length of disqualification, cases are likely to fall within 3 disqualification periods:

- 10-15 years
- 5-9 years
- less than 5 years

The following are some examples of aggravating and mitigating factors the commission will take into account. This is not an exhaustive list and the factors are not listed in any order of priority.

### Aggravating factors

- actual significant financial loss arising from the conduct
- the relevant conduct making the person unfit was over a sustained period of time
- where the relevant conduct relates to a caution or conviction, an individual has more than 1 relevant caution or conviction
- the relevant conduct has resulted in significant loss of public trust and confidence in the charity or in charity generally
- serious reputational damage to the charity or to the wider charity sector
- persistent disregard of the provisions of the charity's governing document or of charity law

- an individual meets more than 1 of the conditions in test 1
- evidence of misconduct or mismanagement by the individual concerned in relation to the charity or another charity

### Mitigating factors

- genuine attempts to remedy the breach have been made by the individual
- no or minimal financial or reputational loss has been caused to the charity
- the individual concerned brought the issue proactively to the attention of the commission
- the individual concerned has co-operated willingly with the commission
- evidence of previous good conduct in relation to managing the charity
- the length of any conviction and at what point (if any) it becomes spent
- support from the charity they are involved with, eg testimonials from the trustees
- if disqualified by another regulator the period of disqualification is short

The following 2 fictitious examples involving a similar trigger event (unauthorised remuneration) give an indication of how the presence of aggravating and mitigating factors can influence the length of disqualification.

#### Example A

The commission has identified that a trustee has without authority paid herself a salary from the charity's funds.

The commission considered that this fell within condition D of Test 1 and that Tests 2 and 3 were met. In the course of fact gathering we found that the amount she had paid herself was £100,000 a year for 3 years and that she had done it without the knowledge of her co-trustees. The charity relies heavily on public fundraising and it saw a 50% drop in its income and the closure of some of its services as a result of this coming to light. The trustee concerned failed to co-operate with the commission and actively sought to cover up the evidence.

In this case, involving unauthorised enrichment at the expense of the charity, there are many aggravating factors that mean that the individual presents a considerable risk to charities, having appeared to use the charity as a vehicle for personal gain and without any regard for its reputation or her duties to ensure the charity operates for public benefit in accordance with the law. In view of the circumstances of the case, including the number of aggravating factors, the commission is likely to conclude that disqualification in the range of 10-15 years is justified.

### Example B

The commission has identified that a trustee has without authority paid herself a salary from the charity's funds.

The commission considered that this fell within condition D of Test 1 and that Tests 2 and 3 were met. In the course of fact gathering, the commission found that the amount she had paid herself was £10,000 a year for 2 years. She had done it without the knowledge of her co-trustees. The charity relies heavily on public fundraising but there was little if any impact on its ability to maintain its fundraising income or provide its services, although coverage in the local media was very critical of the individual. The trustee concerned co-operated with the commission's inquiry, offered to repay the funds and tendered her resignation as a trustee.

In this case, there would be some risk to charities if the individual were permitted to serve as a trustee in the immediate future, although her willingness to repay and resign indicated that lessons would be learned and the risk may soon disappear. In view of the circumstances of the case and the number of mitigating factors, the commission is likely to conclude that a starting point of up to 5 years for the period of disqualification would be appropriate.