



## BRIEFING PAPER

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# *Charities (Protection and Social Investment) Bill [HL]:* in brief

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A separate Library Briefing Paper, [Charities \(Protection and Social Investment\) Bill \[HL\]: in detail](#) (Number 07208, 22 October 2015) provides detailed information about the issues summarised in this paper, together with links to relevant documents and debates.

# 1. Introduction and background

## 1.1 Charity law and regulation

The main piece of legislation governing charities is the *Charities Act 2011* (the 2011 Act), a consolidation Act which replaced much, but not all, of the earlier charities legislation.

Cabinet Office Ministers are responsible for the legal and regulatory framework for charities in England and Wales. Charity law and regulation is devolved in Scotland and Northern Ireland.

## 1.2 The Charity Commission

The Charity Commission (Commission) is a non-ministerial department accountable directly to Parliament and established by statute as a body corporate. It is responsible for registering and regulating charities in England and Wales. The Commission's objectives, general functions, general duties and incidental powers are set out in Part 2 of the 2011 Act.

Among other things, the Commission is responsible for identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action to address it. In performing its functions, the Commission must, so far as relevant, have regard to the principles of best regulatory practice. Its regulatory activities should be proportionate, accountable, consistent, transparent, and targeted only at cases in which action is needed.

The Commission's budget has fallen substantially in recent years. In 2013, the National Audit Office spoke of a reduction in the Commission's annual budget of 48 per cent in real terms between 2007-08 and 2015-16, at a time when the number of main registered charities and the annual income of the sector remained fairly stable. On 22 October 2014, the Prime Minister announced a further £8m in funding for the Charity Commission over three years "to help re-focus its regulatory activity on proactive monitoring and enforcement in the highest risk areas like abuse of charities for terrorist and other criminal purposes, such as tax avoidance and fraud". The annual budget of the Charity Commission in 2014-15 was £21.1m.

In the light of its reduced budget, the Charity Commission has published strategic plans for 2012-15 and 2015-18 which set out the Commission's focus and priorities. In September 2014, the Charity Commission Board agreed a transformation programme as a means to achieve the Commission's strategic aims. The Commission is also intending to consult on proposals for alternative funding sources, including funding from charities, to reduce dependence on taxpayer funding.

## 1.3 Recent concerns relating to charities and their regulation

### The Charity Commission

The Charity Commission's powers and its role in regulating charities have come under increased scrutiny with some high profile cases and the publication of a number of reports. The compliance and enforcement work of the Charity Commission, including its perceived reluctance to use the powers available, its perceived lack of focus on dealing with serious wrongdoing, and its use of its reduced resources, have been the subject of particular criticism.

The previous Government and the Charity Commission supported calls for the Charity Commission to focus its resources on its core regulatory functions. They pointed to the recent increase in the Commission's use of its compliance and enforcement powers, but both agreed that strengthened powers are needed. In January 2015, the NAO found that the Charity Commission had made good, early progress in addressing concerns although significant challenges remained.

The powers and performance of the Charity Commission have also been considered in the context of combatting extremism and tax avoidance.

### Fundraising

At present there is a complex system of fundraising regulation, involving a number of different bodies and a combination of self-regulation and statutory regulation.

Concerns about fundraising practices were raised earlier this year following reports of the death by suicide of an elderly charity supporter who had apparently been bombarded by requests for donations (although the family of the lady in question said that charities were not responsible for her death).

Following this, the main bodies involved in self-regulation of charitable fundraising have taken steps to raise the standards required of fundraisers.

At the request of the Minister for Civil Society, over the summer of 2015, Sir Stuart Etherington, Chief Executive of the National Council of Voluntary Organisations, led a review of the self-regulation of charity fundraising. The review considered what changes were required to rebuild public trust in fundraising by charities. The report of the review, *Regulating fundraising for the future, Trust in charities, confidence in fundraising regulation*, was published in September 2015 (after the third reading of the Bill in the House of Lords). The review recommended a new approach to fundraising regulation including the establishment of a new regulator with a more effective sanctions regime; and a 'Fundraising Preference Service' where individuals could register if they no longer wished to be contacted for fundraising purposes.

The Government has accepted all the recommendations in the Etherington Review and supports the creation of the Fundraising Preference Service.

## 1.4 Social investment

The Law Commission is examining selected technical issues in charity law. It consulted separately on social investment by charities. The Law Commission considered that the use by charities of their funds would fall somewhere along a spectrum, ranging from financial investment at one end, through to spending or grant-making at the other. It referred to any use of funds between the two extremes of the spectrum, where a charity makes an investment seeking to achieve both its charitable purpose and a financial benefit, as “social investment”.

Following consultation, the Law Commission recommended to Government that there should be a new statutory power for charities to invest in this way.

## 1.5 Proposals for change

In December 2013, the previous Government published a consultation paper which included proposals for change, requested by the Charity Commission, to extend the Commission’s powers to tackle abuse in charities. In summary, the proposals related to:

- automatic disqualification from trusteeship;
- a new power for the Charity Commission to disqualify a person from charity trusteeship;
- other provisions relating to trustee disqualification; and
- proposed changes to other Charity Commission compliance powers.

In October 2014, the previous Government published the draft *Protection of Charities Bill*. The draft Bill included provisions dealing with ten of the original seventeen consultation proposals, some of which had been modified. The Bill was scrutinised by a Joint Committee of the two Houses of Parliament. The Committee expressed itself to be satisfied that legislation was necessary even though the Charity Commission had increased the use of its existing powers. However, it made a number of recommendations, including for the inclusion of effective safeguards to ensure fair treatment of charities and their trustees by the Commission. The previous Government accepted many, but not all, of the recommendations.

## 2. The Bill

The *Charities (Protection and Social Investment) Bill [HL]* had its first reading in the House of Commons on 15 September 2015 as Bill 69 of 2015-16, having completed its passage through the House of Lords. The Government also published revised Explanatory Notes.

The Bill would extend to England and Wales. It includes provisions intended to:

- provide stronger protection for charities in England and Wales from individuals who are unfit to be charity trustees;
- equip the Charity Commission with new or strengthened powers to tackle abuse of charity more effectively and efficiently;
- give charities a new power to make social investments; and
- require the inclusion of certain additional matters in commercial fundraising agreements.

A number of the clauses have been modified since the draft Bill was published as a consequence of recommendations from the Joint Committee, and following amendments made in the House of Lords. In summary, the clauses of the Bill are as follows (in most cases the Bill would amend other legislation to achieve the effect stated):

- **Clause 1** would enable the Charity Commission to issue official warnings to any charity or charity trustee when the Commission considered there had been a breach of trust or duty or other misconduct or mismanagement. The purpose of this power is to enable the Charity Commission to take a more proportionate approach to low-level misconduct and mismanagement.
- **Clause 2** would clarify that a failure to comply with an order of the Commission, or failure to remedy a breach specified in an official warning, would constitute misconduct or mismanagement. **Clause 2** would also enable the Charity Commission to extend a suspension pending removal by up to one year, subject to a two year overall limit.
- **Clause 3** would operate where the Commission had instituted a statutory inquiry into a charity, and was satisfied that there had been misconduct or mismanagement in the administration of that charity linked to a particular person. This “link” would be established if the Commission was satisfied:
  - that a particular person had been responsible for the misconduct or mismanagement, or
  - that a particular person knew of the misconduct or mismanagement and failed to take any reasonable step to oppose it, or
  - that a particular person’s conduct had contributed to it or facilitated it.

When considering the use of its protective powers in those circumstances, the new provision would enable the Commission to take into account evidence of that person’s conduct in

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relation to any other charity, or any other conduct of that person, outside of charities, which the Commission considered might damage public trust and confidence in charities generally, or in particular charities or classes of charities.

- **Clause 4** would enable the Commission to make a scheme in relation to a charity when it had opened a statutory inquiry and the Commission was satisfied that there was either misconduct/mismanagement **or** risk to charity property (meaning that, in this context, it would no longer be necessary to establish both elements). The Commission would still need to be satisfied of both misconduct/mismanagement **and** the need to protect charity property in order to exercise its power to remove a charity trustee, or other office holder. The substitute provision inserted by **Clause 4** would also allow the Commission to continue to remove a trustee (with consequent automatic disqualification) where the person had stepped down after the Commission had given notice of its intention to remove the trustee.
- **Clause 5** would enable the Commission to remove a disqualified charity trustee if they remained in their position once disqualified.
- **Clause 6** would enable the Charity Commission, after it had instituted an inquiry, to make an order directing a charity not to take or continue certain actions which the Commission considered would constitute misconduct or mismanagement in the administration of the charity.
- **Clause 7** would provide a new power for the Charity Commission to direct the trustees (or other persons in the charity) to take the necessary steps to wind up the charity and transfer its resources elsewhere. The Explanatory Notes anticipate that the power would be used in “rare cases” and state that the Charity Commission’s usual practice is “to attempt to restore a charity to health following a statutory inquiry”.
- **Clause 8** would enable the Commission to direct the application of charity property where satisfied that a person is “unable” to apply it properly, as an alternative to being “unwilling” as at present. Compliance with the order would not result in a breach of contractual obligations to the charity – the Explanatory Notes provide as an example, banks who act on client instruction.
- **Clause 9** would require the Charity Commission to ensure that independent charities could not be compelled to use or dispose of their assets in a way which would be inconsistent with their charitable purposes. This Clause was inserted into the Bill by way of an Opposition amendment agreed on division at Report stage. The context for the amendment was the potential extension of the right-to-buy to certain tenants of housing associations.

A scheme is a legal document by which the Commission may amend, replace or amplify a charity's governing document

- **Clause 10** would extend the criteria for automatic disqualification from acting as a charity trustee. It would add a range of unspent criminal offences to those which lead to automatic disqualification, including, for example, money laundering, bribery and terrorism related offences. There would be a ministerial power to add or remove an offence from the list, subject to the affirmative resolution procedure. As a result of an amendment agreed on Report, being on the sex offenders register would also trigger automatic disqualification. There would also be some criteria for automatic disqualification which are not criminal offences. The automatic disqualification would extend to senior management positions in charities.
- **Clause 11** would provide the Charity Commission with a new power to disqualify a person from charity trusteeship in relation to all charities, specified charities or classes of charity. While disqualified as a trustee as a consequence of an order under this provision, the person would also be disqualified from holding a senior management position in the charity, unless the order specified otherwise.

The Explanatory Notes provide further detailed information including a flowchart which sets out how the disqualification process would operate.

The Charity Commission would have power to make an order only if satisfied of three requirements, namely that:

- one of the specified conditions was met in relation to the person
- the person was unfit to be a charity trustee, either generally or in relation to the charities or classes of charities specified or described in the order and
- making the order was desirable in the public interest in order to protect public trust and confidence in charities generally or in the charities or classes of charities specified or described in the order.

The Charity Commission has published a policy paper, *Proposed disqualification power* which sets out the Commission's initial thinking about how it would use this power.

- **Clause 12** would deal with the requirement for the Charity Commission to maintain records of disqualification and removal.
- Where a person who has been disqualified as a charity trustee is an officer of a corporate body that is a charity trustee, **Clause 13** would prohibit that person from participating in decisions relating to the charity's administration.
- **Clause 14** would require the inclusion of the following further matters in a fundraising agreement between a commercial fundraiser and a charitable institution:
  - any voluntary scheme for regulating fund-raising, or any voluntary standard of fund-raising, that the professional fundraiser or commercial participator undertakes to be bound by for the purposes of the agreement;

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- how the professional fund-raiser or commercial participator is to protect vulnerable people and other members of the public from specified behaviour in the course of, or in connection with, the activities to which the agreement relates;
- how the charity will monitor how standards are met.

The specified behaviour is:

- unreasonable intrusion on a person's privacy;
- unreasonably persistent approaches for the purpose of soliciting or otherwise procuring money or other property;
- placing undue pressure on a person to give money or other property.

**Clause 14** would also require charities whose accounts have to be audited (currently, those with a gross annual income over £1m; or with a gross annual income over £250,000 and assets with an aggregate value exceeding £3.26 million) to include various matters in their annual reports including:

- their approach to fundraising, including, in particular, whether they use commercial fundraisers;
- how they protect vulnerable people from undue pressure in their fundraising.

**Clause 14** was inserted by way of Government amendment agreed at Report stage.

- **Clause 15** would give charities a new power to make social investments and deals with the meaning of "social investment"; the general power to make social investments; and charity trustees' duties in relation to social investments, whether made pursuant to the statutory power or otherwise.
- **Clause 16** would require the Minister for the Cabinet Office to carry out a review of the Act and to lay a report of the review before Parliament. The review would have to consider how the Act affects:
  - public confidence in charities;
  - the level of charitable donations; and
  - the willingness of people to volunteer.

The reports would have to be published at least every five years. As a consequence of a Government amendment agreed on Report, the first review would have to begin within three years of the Act being passed and the report of that review published within four years of the Act being passed.

### 3. Debate in the House of Lords

The Bill had its second reading in the House of Lords on 10 June 2015 when it received broad cross party and crossbench support. The Bill was considered by Grand Committee in four sittings between 23 June 2015 and 6 July 2015. Report stage in the Lords was on 20 July 2015 and third reading on 14 September 2015. The Bill was amended both in Grand Committee and on Report.

Peers debated wide-ranging issues and many proposed amendments, seeking, in many cases, to amend the wording of particular provisions. Significant areas of debate included:

- Issues related to the position in charities of people on the sex offenders register; failure by trustees to protect children and vulnerable adults; and the reporting of misdemeanours. As a result of a Government amendment made on Report, being on the sex offenders register would now trigger automatic disqualification from acting as a charity trustee or holding a position in senior management.
- The width of the Commission's discretion to take into account a person's conduct when considering exercising its protective powers or whether to disqualify someone from being a trustee, and concerns about legal uncertainty.
- The criteria which would trigger automatic disqualification from being a trustee, including the position of charities working overseas to deliver humanitarian aid.
- The disposal of assets by trustees of charities – this was raised in the context of the potential extension of the right-to-buy to certain housing association tenants.
- The regulation of fundraising – including whether there should be a requirement for fundraising charities to be members of the Fundraising Standards Board and abide by their Code of Practice.
- The right of a charities to campaign and make representations in the light of the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014*.
- The right to claim damages from unincorporated charities.
- The Charity Commission's funding arrangements.
- Technical issues associated with the power to make social investments and the marketing of them.
- Appeals and applications to the Charity Appeal Tribunal.

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- Whether independent schools should have to share their sporting and other facilities in order to fulfil the public benefit requirement.
- Which matters should be included in the reviews of the Act and when the first one should take place

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