



Draft *Protection of Charities Bill*

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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 recent reports. There has been particular criticism of 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. The powers and performance of the Charity Commission have also been considered in the context of combatting extremism and tax avoidance.

The Government and the Charity Commission have pointed to the recent increase in the Commission's use of its compliance and enforcement powers, but both agree that strengthened powers are needed.

In December 2013, the Government published a consultation paper which included seventeen 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 Government published the draft *Protection of Charities Bill*. The draft Bill includes provisions dealing with ten of the original seventeen consultation proposals, some of which have been modified.

The Government's Explanatory Notes published with the draft Bill state that it would:

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

The draft Bill would extend to England and Wales only. It will be subject to pre-legislative scrutiny by a joint committee of the two Houses of Parliament.

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1 Introduction and background

1.1 Current law governing charities

The [Charities Act 2006](#) (the 2006 Act) represented the culmination of a long process of policy development and consultation, proposing reform of charity law. At second reading in the House of Lords of the Bill which became the 2006 Act, Baroness Scotland of Asthal, who was then Minister of State at the Home Office,¹ set out the then Government's three aims for the Bill:

- to provide a legal and regulatory environment which will enable all charities, to realise their potential as a force for good in society;
- to encourage a vibrant and diverse sector independent of government; and
- to sustain high levels of public confidence in charities through effective regulation.²

The 2006 Act overhauled previous charity law and, among other things, it restructured the Charity Commission and set out a new framework for the regulation of charities. It also created a new Charity Tribunal. In 2009, the Charity Tribunal was transferred to the First-tier Tribunal (Charity) following reform of the Tribunal system.³

The Tribunal has jurisdiction to:

- hear appeals against certain decisions of the Charity Commission;
- hear applications for review of certain decisions of the Charity Commission;
- consider references from the Attorney General or the Charity Commission on points of law.

A Library research paper on the bill which became the 2006 Act, [The Charities Bill \[HL\]](#), sets out information about the process of policy development which preceded the Bill and the main changes it introduced.⁴ In many cases, the 2006 Act amended earlier charities legislation.

Charity law has since been consolidated into the [Charities Act 2011](#) (the 2011 Act) which is now the main piece of legislation relating to charities. The 2011 Act replaced much (but not all) of the earlier charities legislation, including much of the [Charities Act 2006](#).⁵ A Library standard note on the Bill which became the 2011 Act provides further information: [Charities Bill \[HL\]](#).⁶

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 The Home Office had responsibility for charity law at that date; now the Cabinet Office has this

² [HL Deb 7 June 2005 c783](#)

³ Provisions relating to the Tribunal are now contained in Part 17 of the [Charities Act 2011](#). The Tribunal is defined to mean: the Upper Tribunal in any case where it is determined by or under Tribunal Procedure Rules that the Upper Tribunal is to hear the appeal, application or reference; or the First-tier Tribunal, in any other case

⁴ [RP 06/18](#), 15 March 2006

⁵ For example, provisions in the 2006 Act relating to fundraising, which have not been implemented, were not included in the 2011 Act.

⁶ SN/HA/6159, last updated 9 December 2011

1.2 The Charity Commission

Statutory authority

The Charity Commission (Commission) is a non-ministerial department accountable directly to Parliament and established by statute as a body corporate. In the exercise of its functions the Commission is not subject to the direction or control of any Minister of the Crown or of another Government department.⁷

The Charity Commission is responsible for registering and regulating charities in England and Wales.⁸ There are over 164,000 registered charities with a combined annual income of £61.4bn.⁹ The Charity Commission also has powers in relation to excepted charities (which are not registered), both those with incomes below the £5000 annual income general registration threshold, and also those excepted by order. In limited circumstances, the Commission's powers may also impact on exempt charities (also unregistered).¹⁰

The Commission's objectives, general functions, general duties and incidental powers are set out in [Part 2](#) of the 2011 Act.¹¹

The Commission has five objectives:

- **the public confidence objective** - to increase public trust and confidence in charities;
- **the public benefit objective** - to promote awareness and understanding of the operation of the public benefit requirement;
- **the compliance objective** - to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities;
- **the charitable resources objective** - to promote the effective use of charitable resources; and
- **the accountability objective** - to enhance the accountability of charities to donors, beneficiaries and the general public.¹²

The Commission has six general functions, including encouraging and facilitating the better administration of charities; and identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action to address it.¹³

In addition, the Commission has six general duties. One of these is that, in performing its functions, the Commission must, so far as relevant, have regard to the principles of best

⁷ *Charities Act 2011* section 13

⁸ In Scotland, charities are regulated by the Office of the Scottish Charity Regulator and in Northern Ireland, charities are regulated by the Charity Commission for Northern Ireland

⁹ Impact Assessment, *Charity Commission powers and trustee disqualification*, IA No: CO, 2 May 2014, [Draft Protection of Charities Bill](#), Cm 8954, October 2014, p78

¹⁰ Cabinet Office, [Consultation on extending the Charity Commission's powers to tackle abuse in charities](#), 4 December 2013, p3

¹¹ Provisions relating to the Charity Commission were previously set out in [section 7](#) of the *Charities Act 2006*, which in turn inserted new sections 1B to 1E into the *Charities Act 1993*

¹² *Charities Act 2011* section 14

¹³ *Charities Act 2011* section 15

regulatory practice. Its regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.¹⁴

The Commission is specifically prohibited from exercising functions corresponding to those of a charity trustee in relation to a charity, or otherwise being directly involved in the administration of a charity.¹⁵ However, in certain circumstances it may give directions to charity trustees, appoint interim managers to displace the trustees and make remedial schemes.

Powers to deal with abuse and mismanagement

The 2011 Act includes powers for the Charity Commission to deal with a wide range of matters including powers to act for the protection of charities.¹⁶ The Commission has a number of ways it can investigate concerns about a charity, including suspected abuse or mismanagement. Some of the Commission's powers can be exercised only when the Commission has opened a statutory inquiry.

A recent Government consultation paper summarised the purpose of the compliance framework:

The compliance framework and powers available to the Commission are designed to protect charity assets, to ensure their use for the purposes for which they were intended, holding the trustees of a charity accountable for non-compliance. Generally, the Commission works with charity trustees to get a charity back on its feet and ensure they remedy the non-compliance themselves. But this may not be appropriate or possible. In some cases the charity trustees are either unwilling or incapable of taking the necessary action, and it is in these and other cases the public would expect a regulator to act, the Commission may need access to compliance powers to secure the proper application of charitable funds.¹⁷

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 and a statement of the Commission's reasons for making the order. However, this is not necessary where it would prejudice an inquiry or investigation or would not be in the interests of the charity.¹⁸

The Commission has a decision review process if trustees or other persons affected by a decision think it was mistaken. Whether or not this review process has been used, in respect of some decisions made by the Commission, there is a further option of appeal or application for review to the Tribunal.¹⁹

The Charity Commission publishes annual reports on its work to prevent, detect and tackle abuse and mismanagement in charities and promote charity law. The most recent was published in December 2013, [Tackling abuse and mismanagement Report of Charity Commission's investigations and compliance case work 2012-13](#). In a foreword to this report, William Shawcross, the Chair of the Charity Commission, set out information about the purpose of the Commission's work in this area:

¹⁴ *Charities Act 2011* section 16

¹⁵ *Charities Act 2011* section 20

¹⁶ *Charities Act 2011* sections 76 to 87

¹⁷ Cabinet Office, [Consultation on extending the Charity Commission's powers to tackle abuse in charities](#), 4 December 2013, p6

¹⁸ *Charities Act 2011* section 86

¹⁹ The decisions the Tribunal can consider and who can appeal to it are listed in *Charities Act 2011* Schedule 6

Mismanagement and abuse in charities are unacceptable. An important part of our role as regulator is to prevent, detect and tackle abuse and mismanagement in charities and to promote compliance with charity law. When we get involved in a charity whose trustees are not complying with charity law, our priority is to safeguard charity assets and take strong remedial action where necessary to stop the problems and correct the charity's management. This may result in intervening in a charity's affairs and taking steps to recover sums lost to charity.

The report explains the Commission's approach to investigations and compliance case work, provides details of the volume and nature of cases dealt with in the year and includes case study examples. The reports also cover any changes in the Commission's approach to compliance case work.

The Government has pointed to the recent increase in the Commission's use of its compliance and enforcement powers, whilst agreeing that strengthened powers are needed:

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.²⁰

Funding

In 2013-14, the Commission had an annual budget of £22.7m, which had fallen from a peak of £32.6 million in 2007-08, a fall of 30 per cent in nominal terms (40 per cent in real terms). A recent National Audit Office report stated that the Commission's budget will fall further to £20.4 million by 2015-16, a reduction of 48 per cent in real terms since 2007-08.²¹ Over the same period, the number of main registered charities (around 160,000) and the annual income of the sector (around £60 billion in real terms) remained fairly stable.²² In 2012, Dame Suzi Leather, who was then the Chair of the Commission, said that the budget reduction would require the Commission of 2015 to meet the same statutory objectives and functions as in 2005, but with only half the number of staff.²³

On 22 October 2014, the day that the draft Bill was published, 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".²⁴

²⁰ [Draft Protection of Charities Bill](#), Cm 8954, October 2014, p42

²¹ National Audit Office, [The regulatory effectiveness of the Charity Commission](#), 4 December 2013, HC 813 2013-14, p17

²² *Ibid*, p6

²³ Oral evidence taken before the Public Administration Select Committee on 3 July 2012, HC 315-i 2012-2013 Q 81, cited at House of Commons Public Administration Select Committee, [The role of the Charity Commission and "public benefit": Post legislative scrutiny of the Charities Act 2006](#), 6 June 2013, HC 76 [incorporating HC 574-i-vi, Session 2012-13, p10

²⁴ Gov.UK press release from the Prime Minister's Office, 10 Downing Street, Cabinet Office and the Prime Minister, [New funding and powers to tackle abuse in the charity sector](#), 22 October 2014

Strategic review

In the light of its reduced budget, in 2011 the Charity Commission conducted a strategic review to prioritise its work. The Commission consulted with a wide range of external stakeholders including the charity sector, the Government, Parliament and the public, as well as conducting an internal consultation. This led to the publication of the Charity Commission's [Strategic Plan 2012-15](#) which sets out the focus for the Commission and its priorities for 2012-15:

A key message that emerged was that the Commission, taking into account its reduced resources, needs to focus on what only the regulator can do:

- Registration of charities;
- Generic guidance;
- Statutory advice or permissions;
- Transparency through charity annual returns; and
- Investigation of alleged wrongdoing.

Focus on these areas of activity has led us to identify two clear priorities for 2012-15:

- Developing the compliance and accountability of the sector
- Developing the self-reliance of the sector

The plan sets out how the Commission intends to deliver against these priorities and fulfil its statutory objectives.

1.3 Recent concerns and developments – an overview

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 recent reports, which have culminated in the publication of the draft Bill. 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 powers and performance of the Charity Commission have also been considered in the context of combatting extremism and tax avoidance.

The next section of this note provides further information. Some of the various documents mentioned considered wide ranging areas related to charity law and regulation, such as the definition of "public benefit", and some discussed specific cases. However, this note concentrates on the parts of the reports which deal with the Charity Commission and charity regulation.

2 Recent consideration of charity law and regulation

2.1 Lord Hodgson's review of the *Charities Act 2006*

Section 73 of the *Charities Act 2006* required the Minister for the Cabinet Office to institute a review of the operation of the Act within five years after Royal Assent. On 8 November 2011, Nick Hurd, the then Minister for Civil Society, announced that Lord Hodgson of

Astley Abbotts would lead a full review of the law relating to charities in England and Wales, and would report to Parliament by summer 2012.²⁵

On 16 July 2012, the review was published and laid before Parliament: *Trusted and independent: giving charity back to charities - review of the Charities Act 2006 Report by Lord Hodgson: a review of the Charities Act 2006*. Lord Hodgson made over 100 recommendations covering wide ranging aspects of charity law and regulation, some of which would require changes to primary legislation.

As part of his review, Lord Hodgson looked at the role of the Charity Commission. He found it to be “well-respected among the sector” and that there was little appetite to transfer its functions elsewhere. He considered the dual role of the Commission as both a regulator and a friend to the charity sector, providing advice and individual guidance as well as enforcing regulation. Although Lord Hodgson found that the Commission’s advisory work had helped to avoid some regulatory compliance problems, he did not consider it to be essential to the core work of the Charity Commission, which was to ensure that charities complied with charity law:

In a time of significantly reduced resources, the ‘friend’ side of the Commission’s work can only be seen as an extra and its regulatory role must come to the fore. The Commission itself recognises the need to focus more narrowly on its regulatory role, stating that,

“A key message that emerged [during consultation on the Commission’s strategic plan] was that the Commission, taking into account its reduced resources, needs to focus on what only the regulator can do... Focus on these areas of activity has led us to identify two clear priorities for 2012-15: developing the compliance and accountability of the sector; and developing the self-reliance of the sector.”²⁶

Lord Hodgson went on to consider whether the Commission’s objectives, functions and duties remained fit for purpose and found that, at that time, there seemed to be “little need to revisit the system put in place in the 2006 Act”.²⁷

In terms of the Charity Commission’s performance, the review stated that the prevailing view was that the Commission had “generally discharged its functions well”. Although the review had not sought to conduct an extensive analysis of the Commission’s operational efficiency, it stated that “none of the evidence gathered during the Review process has given reason to doubt that it is largely effective as a regulator in a complex and disparate field”. However, some issues had been highlighted.²⁸ One of these issues was concerns raised about the Commission’s approach to investigating and dealing with serious financial irregularities or fraud, which, Lord Hodgson said, should be a key part of the Commission’s work:

This is distinct from complaints that the Commission will not investigate matters which are either outside its scope or would fall outside its proportionality criteria; this evidence concerns genuine and serious legal issues that have the potential to undermine public confidence and the integrity of the sector. Proactively identifying and tackling fraud and abuse should be a key part of the Commission’s work and it is

²⁵ Gov.UK, *Review of charity law*, 8 November 2011 [accessed 29 October 2014]

²⁶ *Trusted and independent: giving charity back to charities - review of the Charities Act 2006 Report by Lord Hodgson: a review of the Charities Act 2006*, July 2012, p46

²⁷ *Ibid*, p49

²⁸ *Ibid* p50

unsurprising that there is an expectation of high performance in this field. While it seems likely that the increased focus on risk will help to address this, the Commission should ensure that it takes a robust approach to fraud and abuse, taking proactive as well as reactive steps to identify and deal with such behaviour.²⁹

Lord Hodgson made a number of recommendations in relation to the role of the Commission including that it should prioritise its core functions and that it should be a more proactive regulator:

2. The Commission should prioritise its core functions:
 - a. Registering charities (and maintaining an accurate register);
 - b. Identifying, deterring, and tackling misconduct and abuse of charitable status; and
 - c. Providing the public with information (in a relevant form which is easily understood by the public) about charities, and charities with information about charity law.
3. The Commission's statutory objectives are sound, but it should focus more tightly on regulation of the sector; not just reactive but proactive regulation, including checking random and risk-weighted samples of charity accounts. The Commission should be more proactive in deterring, identifying, disrupting and tackling abuse of charitable status.
4. The Charity Commission's competence is in charity law. It should not be producing guidance on issues that are not concerned with that, unless it provides clarity on an issue that directly impacts on charity law and is published jointly with another organisation that can provide authoritative advice.
5. The Commission needs to be adequately funded to properly regulate the sector. Some analysis of financial efficiency and requirements needs to be undertaken as reductions in the Charity Commission's budget take place.³⁰

Among other things, the review also recommended that 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.³¹

2.2 Public Administration Select Committee post-legislative scrutiny

On 6 June 2013, the House of Commons Public Administration Select Committee (PASC) published its report, *The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006*.³² This was another wide ranging review which included a brief history of charity regulation,³³ and made a number of recommendations, dealing, for example, with the public benefit requirement and the regulation of face-to-face fundraising. The PASC report overlapped with Lord Hodgson's review to a certain extent but although some recommendations were similar, others were not.

PASC called for the Commission to concentrate on regulation, noting the Commission's complaint about limitations on its powers to deregister suspect charities:

²⁹ *Ibid* p51

³⁰ *Ibid* p58

³¹ *Ibid* p43

³² House of Commons Public Administration Select Committee, *The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006*, 6 June 2013, HC 76 [incorporating HC 574-i-vi, Session 2012-13]

³³ *Ibid* p8

20. The core role of the Charity Commission must be the regulation of the charitable sector. The exposé of the scandal of the Cup Trust demonstrates that there are shortcomings in the regime for regulating tax evasion involving charities.^[34] The Charity Commission was obliged to register the Cup Trust when it was established, but it does not have the means of investigating potential tax fraud, which must be the role of HMRC. Furthermore, the Commission has complained about limitations on its powers to deregister suspect charities.

PASC criticised the nature of the Commission's statutory objectives and spoke of the impact of the Commission having reduced resources:

22. The objectives of the Charity Commission, as set out in the 2006 Act, are far too vague and aspirational in character (an all too frequent shortcoming of modern legislative drafting) to determine what the Charity Commission should do, given the limitations on its resources, to fulfil its statutory objectives. The 2006 Act represented an ambition which the Commission could never fulfil, even before the budget cuts were initiated.

23. The Commission's reduced budget means extra tasks, outside of its statutory objectives, are an unaffordable luxury, particularly as it has to use its precious resources to combat lobbying and legal pressure from some well-resourced organisations. Furthermore, by seeking to be an advice service to charities, the Commission also risks a conflict of interest: it cannot simultaneously maintain public trust in the charitable sector while also acting as a champion of charities and the charitable sector. The latter should be, as the Commission and Lord Hodgson have recommended, a role for the sector's umbrella bodies and not its regulator.

Among other things, PASC called for Ministers to consider how to prioritise what is expected of the Commission to allow it to focus its limited resources on regulating the sector:

24. The Cabinet Office must consider how to prioritise what is expected of the Charity Commission, so that it can function with its reduced budget. This must enable it to renew its focus on regulation as its core task. The Commission is not resourced, for example, "to promote the effective use of charitable resources", or for that matter, to oversee a reappraisal of what is meant by "public benefit", nor is it ever likely to be.

25. Abuse of charitable status to obtain tax relief is intolerable and should be uncovered by HMRC and the Charity Commission working more closely together. We recommend that the Commission should prioritise the investigation of potential "sham" charities but the obligation to investigate and report tax fraud rests with HMRC, recognising that the Commission's financial position will limit their own investigation. Ministers must decide whether they think it is necessary to have a proactive regulator of the charitable sector, and if so, the Government must increase the Commission's budget and ask Parliament to clarify their powers. If funding cannot be found for the Commission to carry out such a role, ministers should be explicit that they accept that the regulatory role of the Commission will, by necessity, be limited.³⁵

³⁴ Information about the investigation of the Cup Trust is provided in the next section of this note

³⁵ House of Commons Public Administration Select Committee, *The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006*, 6 June 2013, HC 76 [incorporating HC 574-i-vi, Session 2012-13], pp12-13

2.3 Government response to the reviews by Lord Hodgson and PASC

In September 2013, the Government published its [response](#) to both the PASC report and Lord Hodgson's review.³⁶ The response acknowledged the need for the Charity Commission "to have a sharper focus on its core responsibilities".³⁷ It also indicated that the Government was already working with the Commission to consider whether any changes were needed to its compliance powers to enable it to identify and tackle abuse more effectively.³⁸

The Government supported calls made in both reports for the Charity Commission to focus its resources on its core objectives, suggesting that legislation would not be necessary to enable this:

The Government ... welcomes the Charity Commission's approach following its 2011 strategic review which has focussed its resources on its core regulatory functions of registering charities, maintaining the public register of charities, promoting compliance through guidance, and identifying and tackling the abuse of charity. Legislative change to the Charity Commission's objectives is not needed to support this and would be a distraction from the Charity Commission's focus on its priorities. We welcome the Charity Commission's work to develop more effective partnerships with charity sector umbrella bodies as a means of supporting and improving compliance. The Cabinet Office will work with the Charity Commission to identify statutory functions that add little value to the regulation of the charity sector but are resource intensive for the Charity Commission, and investigate the options for removing or reducing them. And the Law Commission, in its charity project will also investigate some areas where powers could be transferred from the Charity Commission to charity trustees, along with appropriate safeguards.³⁹

The Government accepted that, by necessity with limited resources, the Charity Commission's regulatory role would be limited and said that the challenge for the Charity Commission was to ensure that its limited resources were put to maximum effect.⁴⁰

The Government also accepted Lord Hodgson's recommendation about considering if and how to widen the types of criminal offences disqualifying individuals from charity trusteeship. The response stated that there was also a need to consider whether there were loopholes in the way the current suspension and removal powers operated, and that the Law Commission had been asked to consider this recommendation. The Government indicated, however, that "if an early legislative opportunity arises the Government may take this recommendation forward outside of the Law Commission project".⁴¹

The Government welcomed Lord Hodgson's recommendation that the Commission should be more proactive in deterring, identifying, disrupting and tackling abuse of charitable status, indicating that it would work with the Commission to consider options for strengthening the Commission's powers:

The Charity Commission already explores and implements ways of proactively identifying and tackling abuse and will continue to do so, including checking a sample

³⁶ Cm 8700, [Government Responses to: 1\) The Public Administration Select Committee's Third Report of 2013-14: The role of the Charity Commission and "public benefit": Post-legislative scrutiny of the Charities Act 2006 2\) Lord Hodgson's statutory review of the Charities Act 2006: Trusted and Independent, Giving charity back to charities](#), September 2013

³⁷ *Ibid* p4

³⁸ *Ibid*

³⁹ *Ibid* p7

⁴⁰ *Ibid* p8

⁴¹ *Ibid* p25

of charity accounts on a random and risk basis. The Government welcomes this recommendation and is working with the Charity Commission to consider options for strengthening its proactive monitoring and risk assessment functions and practices. We will also consider whether any changes are needed to the Charity Commission's compliance powers to improve the efficiency or effectiveness of its compliance and enforcement work.⁴²

The Government expressed its belief that the Charity Commission had sufficient resources to regulate charities effectively, provided it focussed on its core regulatory functions.⁴³

2.4 Public Accounts Committee reports

Charity Commission: the Cup Trust and tax avoidance

On 4 June 2013, the House of Commons Public Accounts Committee (PAC) published its report, [*Charity Commission: the Cup Trust and tax avoidance*](#).⁴⁴ The report considered the specific case of the Cup Trust, a registered charity. PAC said that, despite its declared charitable aims, it was "clear that the Trust was set up as a tax avoidance scheme by people known to be in the business of tax avoidance".⁴⁵ It found that the Trust did not meet the public expectations of a charity and that it was "unacceptable" that the Commission had not been able "to put a stop to this abuse of charitable status".

PAC also criticised the Charity Commission more generally, particularly on its sparing use of its statutory powers relating to investigation and enforcement:

In the last 25 years, the Committee and the NAO have repeatedly found severe shortcomings in the Commission's performance, particularly in relation to investigation and enforcement. In 2001 we called on it to make more use of its statutory powers. Yet still the Commission hardly uses these powers at all. In the last four years it has only removed one trustee, only suspended four trustees or officers of charities, and only appointed interim managers of charities on five occasions. We were shocked to hear the admission by both the Chair and Chief Executive of the Commission that they had neither read the NAO's reports, nor were aware of the Committee's earlier findings. While recognising the financial constraints the Commission shares with the rest of the public sector, we are not convinced that the Commission is targeting its available resources to best effect.⁴⁶

PAC asked the National Audit Office to review the Commission's effectiveness as a regulator and report back to Parliament.⁴⁷

The Charity Commission

In February 2014, PAC published a further report, [*The Charity Commission*](#),⁴⁸ in which it criticised the Charity Commission once again, finding it to be a reactive regulator which did not use its powers properly:

We are therefore dismayed to report yet again that the Commission continues to perform poorly and is still failing to regulate charities effectively. The Commission is a

⁴² *Ibid* p26

⁴³ *Ibid*

⁴⁴ House of Commons Committee of Public Accounts, [*Charity Commission: the Cup Trust and tax avoidance*](#), 4 June 2013, HC 138 [Incorporating HC 1027 of Session 2012-13]

⁴⁵ *Ibid* p3

⁴⁶ *Ibid*

⁴⁷ Cabinet Office, [*Consultation on extending the Charity Commission's powers to tackle abuse in charities*](#), 4 December 2013, p12

⁴⁸ House of Commons Committee of Public Accounts, [*The Charity Commission*](#), 5 February 2014, HC 792

reactive rather than proactive regulator, and has yet to use its powers properly in registering, monitoring, or intervening in charities. It has not always been clear whether the Commission sees its primary purpose as supporting the voluntary sector or protecting the public interest. The Commission is seeking to change its culture and approach, but we are not convinced it has the leadership capability to tackle its significant failings and transform its culture.⁴⁹

PAC made a number of recommendations, the Government's response to which (setting out the Commission's reply) was published in the form of [Treasury Minutes](#).⁵⁰ The recommendations and response are set out below:

- Having concluded that the Commission had “no coherent strategy for delivering clearly defined priorities within its broad remit”, PAC recommended that it should develop a clear strategy detailing how it would deliver its responsibilities as a regulator effectively and set out how it would use its budget to implement that strategy. PAC added that, if the Commission was being asked “to do too much with too little”, it should clearly set out its case for additional resources to Government. The Commission agreed with the Committee's recommendation.
- Having found that the Commission had not regulated the charity sector effectively, PAC recommended that the Commission should use its statutory powers more effectively, including making better use of the intelligence it held already on charities to identify risks, improving how it prioritised the use of its resources, and responding more quickly to serious concerns in individual charities. The Commission agreed with the Committee's recommendation.
- Having criticised the Commission's leadership, PAC recommended that it needed to introduce “a determined and focused new leadership to radically transform the Commission's culture and operations” and that the Board “needs to have sufficient grip on the Commission's performance and operations to hold the executive effectively to account”. The Commission agreed with the Committee's recommendation.
- PAC said that it had “little confidence in the Commission's ability to put right its problems and failings” and recommended the Commission needed to “act decisively to finalise and put into action a robust change management plan to tackle effectively its enduring failings”.⁵¹ The Commission disagreed with this recommendation:

6.2 The Commission rejects the charge that its record is one of “enduring failings”. It notes that since the Committee's last scrutiny, in 2002, there have been considerable changes not only in the Commission's statutory responsibilities, under the 2006 Act, but also in Parliamentary and public expectations, as well as massive funding reductions in real terms. Nonetheless under the new Board a robust change management plan has already been developed to tackle the problem areas, which were correctly identified by the NAO. The Commission will also ensure that the range of its statutory responsibilities is kept under constant review and matched by requests for adequate resources whenever necessary.⁵²

⁴⁹ *Ibid* p3

⁵⁰ HM Treasury, [Treasury Minutes](#), Cm 8847, April 2014, pp30-31. The background resources for the response were stated to be the two PAC reports referred to in the previous section of this note and the two National Audit Office reports discussed in the next section below.

⁵¹ House of Commons Committee of Public Accounts, [The Charity Commission](#), 5 February 2014, HC 792, p6

⁵² HM Treasury, [Treasury Minutes](#), Cm 8847, April 2014, p31

The Treasury Minutes included information about the implementation of the recommendations which had been agreed. The Commission said that it would continue to press the Government for new, stronger enforcement powers.

On the same day as the Treasury Minutes were published, the Charity Commission issued a press release in which its Chair accepted that the Commission had to strengthen its approach to tackling the most serious cases of abuse and mismanagement in charities, and said that it had already made significant improvements in this area. He called for adequate funding and stronger legal powers for the Commission to meet Parliament's expectations:

...Parliament has granted us a broad regulatory remit. If we are to fulfil all the expectations placed on us while at the same time increasing our serious case work, we must be adequately funded. Our current funding position is simply unsustainable.

We have long argued that our powers are inadequate. It is absurd, for example, that the Commission has no general power to disqualify individuals who have demonstrated that they are unsuitable to serve as charity trustees. Earlier this year, the Cabinet Office consulted on proposals to strengthen our powers, which we fully supported. I urge the Government to deliver on those proposals. I have written to the Prime Minister asking him to find time to include the extension of our powers in the legislative programme of the next Parliament."⁵³

2.5 National Audit Office reports

On 4 December 2013, the National Audit Office (NAO) published two reports. One examined the Commission's investigation of The Cup Trust case.⁵⁴ The other was more wide ranging and dealt with the [regulatory effectiveness of the Charity Commission](#).⁵⁵ In this latter report, the NAO found that the Commission:

- was not regulating charities effectively;
- was not doing enough to identify and tackle abuse of charitable status;
- used its information poorly to assess risk often relying solely on assurances by trustees; and
- made little use of its powers and failed to take "tough action" in some of the most serious cases.

The NAO said that this undermined the Commission's objective to increase public trust and confidence in charities. Overall, the NAO concluded that the Commission was not delivering value for money. The NAO also considered that the Commission was too passive in pursuing its objectives. Whilst acknowledging that the Commission had tried to adapt to its reduced resources, the NAO felt that in doing so it had not put sufficient emphasis on the rigour of its registration process and its investigation of wrongdoing in charities. The NAO also concluded that the Commission's restructuring had not been informed by an assessment of the costs, benefits and risk of different models for regulating charities, and

⁵³ Charity Commission press release, [Commission Chairman calls for adequate funding and stronger powers](#), 10 April 2014

⁵⁴ Report by the Comptroller and Auditor General, [Charity Commission The Cup Trust](#), 4 December 2013, HC 814 2013-14

⁵⁵ Report by the Comptroller and Auditor General, [Charity Commission The regulatory effectiveness of the Charity Commission](#), 4 December 2013, HC 813 2013-14

that the Commission had not identified the resources it needed to meet its statutory objectives.

The NAO made a number of recommendations including that the Commission should make greater use of its statutory powers in line with its objective of maintaining confidence in the sector. It added that “Where its powers are difficult to exercise, or inadequate, it should set out the regulatory impact of these barriers to make a persuasive case for legislative change”.⁵⁶ The NAO also recommended that the Cabinet Office should:

- prioritise its planned work to help the Commission focus on its core regulatory functions by removing or reducing those activities that add little regulatory value; and
- assist the Commission in securing legislative changes to address gaps and deficiencies in the Commission’s powers.⁵⁷

The Commission had identified a number of deficiencies in their powers and barriers to their use, which are set out in the NAO report.⁵⁸

2.6 Charity Commission evidence to the Public Administration Select Committee

On 4 February 2014, PASC held its annual scrutiny session with the Charity Commission and heard oral evidence from William Shawcross, Chair of the Charity Commission and Sam Younger, who was then Chief Executive of the Charity Commission.⁵⁹

Referring to the NAO report, Sam Younger accepted that the Charity Commission needed to improve its performance “at the toughest end of the regulatory spectrum”, and said that the Commission was already working on that. He said that the criticism from the NAO and others related to “a very narrow element of what the Commission does” and spoke of the other work of the Commission:

We do a huge amount of consents, of working with trustees when they get things wrong, rather than moving to use of powers and formal inquiries, in the provision of generic guidance and the public register. If you look across the totality, the Commission regulates well within the context of very limited resources.

Sam Younger also set out the context for the Commission’s perceived weakness as a regulator:

If you go back a little way and you look at the period after the passage of the 2006 Act, there was a very strong emphasis in what the Commission was being asked to do on the enabling, working with trustees and improving charities element, rather than on the regulation. I was also quite struck—this was before I came to this post—that there was a Hampton report under BIS on the Charity Commission, which said that the Charity Commission was regulating proportionately, and needed to focus in future on public benefit, improving guidance and helping charities to be more effective. There was a sense there that the role was an enabling one, and that has begun to turn around.

Secondly, there has been, and it is part of the same thing, a sense that these are volunteers running charities—nearly a million of them across the piece—and that the

⁵⁶ *Ibid* p10

⁵⁷ *Ibid* p11

⁵⁸ *Ibid* Figure 22, p40

⁵⁹ Public Administration Select Committee, *Oral evidence: The Work of the Charity Commission*, 4 February 2014, HC 823,

Commission's approach ought to be to work with trustees as far as possible if things go wrong, in order to put them right again. As the Chairman said, there are only a small minority of cases where it is appropriate to move to powers.

The third element was that in the early days of the Charity Tribunal there was one particular decision—where the Charity Commission had removed a trustee—where the Tribunal said, “You should not have removed the trustee. You should have engaged more with the trustees and worked with them.” That had a bit of a chilling effect. We have recognised that all needs to be turned around and that we need to be ready to cut trustees less slack when we do identify potentially serious wrongdoing. We are beginning to do that now, but there is still further to go.

William Shawcross did not agree that dealing with deliberate wrongdoing was the Commission's weakest function, speaking of recent improvements:

I said that we had stepped it up. I do not want to bore you with statistics, but in the six months from April 2013, we opened 26 statutory inquiries. In the previous year, we had opened 15 inquiries, so you can see that in the last 12 to 14 months we have stepped up our engagement quite considerably.

The evidence session covered wide ranging matters including, for example, the range of the Commission's duties; the powers of the Charity Commission; and its funding and use of resources.

2.7 Prime Minister's Task Force Report on Tackling Radicalisation and Extremism

The Prime Minister's Extremism Task Force was set up in the wake of the killing of Drummer Lee Rigby in Woolwich to look at whether the Government was doing all it could to confront extremism and radicalisation. On 4 December 2013, the Task Force published a report of its conclusions, *Tackling extremism in the UK*.⁶⁰ The report noted that some extremist groups target charities and seek to exploit and benefit from charitable status and said that the Government would consult 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.⁶¹

2.8 Home Affairs Committee report on counter-terrorism

After taking evidence on a wide range of issues, the Home Affairs Select Committee published its report, *Counter-terrorism*, on 9 May 2014.⁶² This considered charities in the context of countering terrorist financing.

The Charity Commission told the Committee that a small minority of charities might be at risk from their funding being diverted for terrorist purposes, or for charity personnel using the charity as a cover for travelling overseas or raising funds.⁶³

The Home Affairs Committee said that it was “deeply concerned” about the potential for ‘bogus’ charities to dupe members of the public into raising funds which were eventually used to support terrorist activity. It recommended that the Charity Commission be granted extra resources and stronger legal powers to counter the abuse of charities by terrorists; and

⁶⁰ HM Government, *Tackling extremism in the UK*, December 2013

⁶¹ *Ibid* pp2-3

⁶² Home Affairs Committee, *Counter-terrorism*, 9 May 2014, HC 231 2013-14

⁶³ *Ibid* paragraph 130

also that the Charity Commission should be able to undertake unannounced inspections in order to audit charity accounts.⁶⁴

The Committee welcomed the Independent Reviewer of Terrorism Legislation's intention to examine the impact of counter-terrorism legislation on charities. It recommended that this inquiry be expanded to look at the scale of abuse of charitable status to support terrorist actions, and that the Independent Reviewer should assess the response to such abuse and suggest changes which would improve the ability of the authorities to tackle terrorist financing, whilst ensuring that law-abiding charities could continue their vital work.⁶⁵

2.9 Other developments

Law Commission project

The Law Commission is engaged in a project examining selected issues relating to the legal framework within which charities operate, in order to recommend reforms with a positive impact on charity law in practice. It is particularly concerned with technical problems which currently cause uncertainty or impose disproportionate burdens on those involved in the administration of charities.⁶⁶

The project comprises issues arising from Lord Hodgson's review of the *Charities Act 2006* which were agreed to be suitable for investigation by an independent law reform body and other previously identified issues.

The first accelerated part of the project was social investment by charities, on which the Law Commission has now consulted and made recommendations to the Government. The Law Commission anticipates publishing a further consultation paper on all other aspects of the project in February 2015.

Further consultations/reviews

Other consultations and reviews related to the Charity Commission and/or the charity sector are also underway, including:

- In June 2014, the Labour party launched its own consultation seeking views on a number of matters related to the voluntary sector, which included two specific questions on the Charity Commission:
 - Given the limited resources of the Charity Commission, where should it prioritise its efforts?
 - The current definition of a charity seeks to reflect the diversity of the sector while providing clarity and reassurance for the public. Does it strike the right balance?⁶⁷

The consultation closed in September 2014 and is designed to feed into the party's manifesto policies for the general election.

- Acevo (the Association of Chief Executives of Voluntary Organisations), has set up a commission on the sector's regulation by the Charity Commission and other regulators, provisionally named the *Commission on Regulating a 21st Century Social Sector*.⁶⁸

⁶⁴ *Ibid* paragraph 134

⁶⁵ *Ibid* paragraph 135

⁶⁶ Law Commission, *Charity Law - selected issues* [accessed 30 October 2014]

⁶⁷ Your Britain website, *One Nation Labour: renewing our bond with the third sector*, June 2014

- The National Council for Voluntary Organisations (NCVO) has launched a review of the Charity Commission’s governance arrangements, saying it wants to ensure the regulator "can never again be accused of political bias in its work".⁶⁹

3 Government consultation

On 4 December 2014, the same day as the publication of the two NAO reports, the Cabinet Office published a consultation paper, *Consultation on extending the Charity Commission’s powers to tackle abuse in charities*. The aim was stated to be “to ensure more effective regulation of charities by tackling malpractice and to support public trust and confidence in charities, the regulator and the regulation of the charity sector”.⁷⁰ The consultation sought views on seventeen proposals for change requested by the Charity Commission. These proposals are intended to close loopholes and extend the Charity Commission’s existing powers to investigate and remedy non-compliance in relation to charities in England and Wales, including the provisions that disqualify someone from acting as a charity trustee. The consultation paper includes a number of case studies, mostly based on actual cases, designed to highlight the gaps in the Charity Commission’s existing powers which would be addressed through the proposals.

3.1 Weaknesses in the Charity Commission’s existing powers

The consultation paper identified four areas of weakness in the Charity Commission’s powers:

- **Automatic disqualification of trustees:** there was concern that the existing criteria for automatic disqualification from acting as a charity trustee are too narrow (for example, conviction of serious terrorism or money-laundering offences would not result in automatic disqualification).
- **Charity Commission disqualification of trustees:** the Charity Commission does not have power to disqualify a person from acting as a charity trustee where their conduct means they are not fit to act. In addition, the consultation paper spelt out an existing loophole which sometimes allows a trustee to escape disqualification:

There are limited circumstances in which the Commission can remove someone from their position as a trustee, and the effect of doing so is that they are then disqualified and cannot act as a trustee for that charity or another charity. Under the current regime there are loopholes that have been exploited. An individual can avoid removal – and the consequent disqualification – by resigning before the Commission has time to act. The Commission must give the individual at least one month’s notice that it intends to remove them, enabling the individual to resign to avoid removal. Having avoided removal the individual can then become a trustee of another charity. The Commission cannot remove them from that position because their previous behaviour related to a different charity.

- **The Charity Commission cannot currently close down charities that have been involved in abuse:** this stems from the prohibition on the Commission interfering in or running a charity. The consultation paper said that, in some cases, instead of the charity

⁶⁸ Sam Burne James, “[Lord Low to chair Acevo commission on sector regulation](#)”, *Third Sector*, 29 October 2014 [accessed 4 November 2014]

⁶⁹ Sam Burne James, “[Sir Stuart Etherington announces NCVO review of Charity Commission governance arrangements](#)” *Third Sector*, 28 October 2014 [accessed 4 November 2014]

⁷⁰ Cabinet Office, *Consultation on extending the Charity Commission’s powers to tackle abuse in charities*, 4 December 2013, p3

continuing after the Commission has dealt with the misconduct or mismanagement, it might be more appropriate for the Charity Commission to direct that the trustees transfer any assets to another existing charity with similar purposes, to ensure that assets continue to be used for the charitable purposes intended, and then wind up the charity.

- **Some of the Charity Commission's compliance and enforcement powers are limited to circumstances where there is both misconduct or mismanagement and risk to charity property.** The consultation paper points out that there are some cases where because of the misconduct or mismanagement there is no longer any charity property immediately at risk, or where there has been no misconduct or mismanagement at that point in time but where the Charity Commission has reliable information indicating that there is serious risk to the charity's property.⁷¹

3.2 Proposals for change

The consultation paper made seventeen proposals for change on which it asked for views, to address the weaknesses which had been identified. 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.

The consultation paper spoke of the existing provisions under which a trustee might be disqualified, suspended or removed and of why the Charity Commission's powers in this area were rarely used:

Currently certain people are automatically disqualified from charity trusteeship under s.178 Charities Act 2011. The Charity Commission also has a power to suspend (s.76 Charities Act 2011) or remove (s.79 Charities Act 2011) a charity trustee (or other office holder) from their position, but only where it has opened a statutory inquiry and certain criteria are met – namely that there is misconduct or mismanagement and risk to charity property, and the trustee (or other office holder) has been responsible for or privy to the misconduct or mismanagement or whose conduct facilitated it. In practice the high legal hurdles mean that it is rarely used despite there being concerns about a person's suitability and fitness to hold office. Anyone removed as a trustee by the Commission is disqualified from acting.⁷²

Part VI of the consultation considered the impact of the proposals and summarised the safeguards that would apply in the exercise of the proposed new and extended powers:

102. The Charity Commission's proposed new or extended powers will only affect charities or their trustees where there is misconduct or mismanagement or risk to charity property, and the Commission considers that the exercise of the power is a proportionate and appropriate response.

103. As has already been stated, there are important safeguards that would apply in the exercise of the proposed new and extended powers. Waiver provisions would apply in relation to the disqualification provisions, supporting the rehabilitation of

⁷¹ *Ibid* pp13-14

⁷² *Ibid* p16

offenders. The exercise of the Commission's powers would be subject to its duty to follow best regulatory practice (incorporating, for example, proportionality). The Commission would also have to issue a statement of reasons in exercising its new or extended powers. They would also be subject to the Commission's decision review process, or appeal to the Charity Tribunal.⁷³

The consultation closed on 12 February 2014.

4 The draft Bill and response to the consultation

On 22 October 2014, the Cabinet Office published a command paper incorporating the draft *Protection of Charities Bill* (the draft Bill) together with Explanatory Notes; a summary of consultation responses and the Government's response; and an impact assessment.⁷⁴ The draft Bill has 13 clauses and would amend the *Charities Act 2011*.

The Government also published [a version of the Charities Act 2011](#) as amended by the provisions of the draft Bill.

The draft Bill includes provisions dealing with ten of the original seventeen consultation proposals. Some of the proposals have been modified. The Government has indicated that it will reconsider some of the proposals not included in the draft Bill with a view to possibly introducing them at a later stage.

Announcing publication of the draft Bill in a written Ministerial statement, Rob Wilson, Minister for Civil Society, said that the changes proposed would support charities and trustees and provide powers for effective regulation:

The proposed changes in the draft Protection of Charities Bill will support the overwhelming majority of charities and the hundreds of thousands of people who volunteer as charity trustees, by protecting public trust and confidence in charities and their effective regulation by the Charity Commission. While the vast majority of charities are doing vital and often inspirational work, there is a very small minority who seek to abuse charity. It is important that the regulator has the right tools to ensure effective regulation.

The draft Bill contains provisions that would extend the powers of the Charity Commission to effectively regulate the charity sector. It follows a public consultation on a range of measures, proposed by the Charity Commission itself, the majority of which have been taken forward in the draft Bill. Consultation feedback has helped refine the proposals and a summary of consultation feedback has been published alongside the draft Bill...⁷⁵

The Government's Explanatory Notes included in the command paper state that the draft Bill would:

- provide stronger protection for charities in England and Wales from individuals who are unfit to be charity trustees, and
- equip the Charity Commission with new or strengthened powers to tackle abuse of charity more effectively and efficiently.⁷⁶

⁷³ *Ibid* p38

⁷⁴ *Draft Protection of Charities Bill*, Cm 8954, October 2014

⁷⁵ [HC Deb 22 October 2014 c71WS](#)

⁷⁶ *Draft Protection of Charities Bill*, Cm 8954, October 2014, p23

In its response to the consultation, the Government stated that, overall there had been good support or qualified support from the charity sector for most of the proposals.⁷⁷ It also acknowledged that not all of the proposals attracted support from the majority of respondents.⁷⁸

Some respondents had questioned whether the new powers were necessary or whether the concerns highlighted in the consultation document could be addressed by the Commission using its existing powers. The Commission had been criticised for not making sufficient use of the powers it already had and some respondents questioned whether conferring new powers would improve its regulatory performance. In response, the Government pointed to recent evidence which showed that the Commission was already being more assertive in using its existing powers. The Government also said that it agreed with the Charity Commission, and others, that strengthened powers were necessary to enable the Commission to protect charities effectively and efficiently, adding that additional or strengthened powers should only be conferred where it was clear that they were necessary and proportionate and were accompanied by appropriate safeguards.

The draft Bill would extend to England and Wales only. It will be subject to pre-legislative scrutiny by a joint committee of the two Houses of Parliament.

4.1 What is in the draft Bill?

This section of this paper sets out a brief summary of the draft Bill. It also incorporates information about the consultation proposals, response to the consultation and the Government's own response to the feedback received. Further information is provided in the Government's Explanatory Notes and in the response to the consultation (both included in the command paper with the draft Bill).

Clause 1: Official warnings by the Commission

Clause 1 would enable the Charity Commission to issue official warnings to any charity or charity trustee in connection with the Commission's general functions of encouraging and facilitating the better administration of charities; and identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in connection with that misconduct or mismanagement. The Commission would be able, but not required, to publish official warnings.

The Explanatory Notes state that there would be 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) but that an official warning could be challenged through judicial review.⁷⁹ The Explanatory Notes also provide information about when an official warning might be used.

This provision would take forward **Proposal 16** in the consultation paper, although in a modified form (it was originally proposed that a warning should be appealable to the First-tier Tribunal). In its response to the consultation, the Government set out why this power was being introduced:

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.

⁷⁷ *Ibid* p41

⁷⁸ *Ibid* p25

⁷⁹ *Ibid* p28

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.⁸⁰

Clause 2: Investigations and power to suspend

Clause 2 would amend section 76 of the *Charities Act 2011* which deals with the Charity Commission's powers to suspend trustees and appoint interim managers (the Commission's temporary protective powers). It would effectively provide that a failure to comply with an order or direction of the Commission constitutes misconduct or mismanagement which could justify the use of the Commission's other compliance powers (for example, opening an inquiry). This was the subject of **Proposal 15** in the consultation paper. The Government has indicated that, although the Tribunal has upheld the Commission's interpretation of non-compliance as an act of misconduct, it remains open to challenge because, at present, the Commission must interpret non-compliance as misconduct in each case. The Government said that the proposal would bring clarity for the future (and save Commission resources).⁸¹

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. The Explanatory Notes note that the Commission had 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.⁸²

Clause 3: Range of conduct to be considered when exercising powers

Clause 3 would insert a new provision into the 2011 Act which 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 has been responsible for or privy to the misconduct or mismanagement, or
- that a particular person's conduct contributed to it or facilitated it.

The new provision would enable the Commission, when considering the use of its protective powers in those circumstances, to take into account evidence of that person's conduct in relation to any other charity, or any other conduct which might damage public trust and confidence in charities generally or in particular charities or classes of charities.

The Government had consulted on introducing this provision (**Proposal 9**). The response document sets out the Government's reasons for proceeding with the proposal:

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

⁸⁰ *Ibid* p63

⁸¹ *Ibid* p62

⁸² *Ibid* p29

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.⁸³

Clause 4: Power to remove trustees etc following an inquiry

Clause 4 would insert a substitute provision into the 2011 Act to deal with the Commission's power to remove charity trustees following an inquiry.

The Commission would have power 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 (ie, in this context, it would no longer be necessary to establish both elements).⁸⁴

The Commission would still need to be satisfied of both misconduct/mismanagement and risk to charity property in order to exercise its power to remove a charity trustee, or other office holder. The Government had originally proposed that the either/or test should also apply to the removal of an individual from their position as trustee, officer or agent in a charity (**Proposal 7**) to make it easier for the Charity Commission to exercise this power. However, in the light of consultation responses, the Government has decided not to proceed with this proposal. The response document sets out why the Government decided to treat the power to make a scheme differently:

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.⁸⁵

The substitute provision inserted by **Clause 4** would also enable the Commission to continue the process to remove a trustee (with consequent automatic disqualification) where the person had ceased to hold office after the Commission had given notice of its intention to remove that person. The Explanatory notes comment that "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".⁸⁶ This was the subject of **Proposal 8** which all respondents either supported fully or offered qualified support. 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).⁸⁷

Clause 5: Power to remove disqualified trustee

Clause 5 would insert a new power into the 2011 Act which would enable the Commission to remove a disqualified charity trustee if they continued to remain in their position once disqualified. This was covered by **Proposal 3** in the consultation paper which had almost

⁸³ *Ibid* p57

⁸⁴ A scheme is a legal document by which the Charity Commission may amend, replace or amplify a charity's governing document

⁸⁵ *Draft Protection of Charities Bill*, Cm 8954, October 2014, p55

⁸⁶ *Draft Protection of Charities Bill*, Cm 8954, October 2014, p30

⁸⁷ *Ibid* p56

unanimous support from respondents. The Government's response to the consultation set out the reason for this provision:

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.⁸⁸

Clause 6: Power to direct winding up

Clause 6 would insert a provision into the 2011 Act which would provide a new power for the Charity Commission to direct winding up of a charity. The Explanatory Notes set out when this power might be used:

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)).

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)).⁸⁹

The new provision would enable the making of an order to require action to be taken by someone who would not usually have the power to take that action, in particular powers that normally only the members of the charity would be able to exercise in the context of winding up the charity.

There would be 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.

This provision would take forward **Proposal 17** in the consultation paper.

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

Clause 7 would enable the Commission to direct charity property to be applied to another charity where the person holding the property is "unable" (as an alternative to being "unwilling" as the current provision provides) to transfer the charity property, and the Commission is satisfied that it is necessary or desirable to make an order for the purpose of securing a proper application of that property for the purposes of the charity. The Explanatory Notes state that 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.⁹⁰

⁸⁸ *Ibid* p52

⁸⁹ *Ibid* p31

⁹⁰ *Ibid* p32

This power was the subject of **Proposal 12**. In its response to the consultation, the Government said that it intended to proceed with 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”.⁹¹

Clause 8: Automatic disqualification from being a trustee

Clause 8 would extend the criteria for automatic disqualification from acting as a charity trustee by amending section 178 of the 2011 Act. In addition to the existing criteria, there would be a range of further unspent criminal offences which would give rise to automatic disqualification, including, for example, money laundering, bribery and corruption and terrorism related offences. There would be a ministerial power to add or remove an offence from the list.

There would also be some criteria for automatic disqualification which are not criminal offences:

- where a person is found guilty of contempt of court in civil proceedings where a false statement or disclosure has been made;
- where a person is found guilty in the High Court of disobedience to a Commission order or direction;
- where a person is designated under terrorist asset-freezing legislation.

Currently disqualified trustees may apply to the Charity Commission for a waiver from disqualification.⁹² A person who has been automatically disqualified under the new criteria would also be able to apply for their disqualification to be waived and in specified circumstances there would be a presumption of waiver after five years.

Extending the list of criteria that trigger automatic disqualification from trusteeship had originally been **Proposal 1** in the consultation paper. The Government initially asked the Law Commission to consider this area as part of its charity law project, but later decided that automatic disqualification should be considered as part of the consultation on extending the Charity Commission’s powers to tackle abuse in charities.⁹³

The Government stated that there had been a mixed response to questions relating to automatic disqualification.⁹⁴ In its own response, the Government indicated that it had modified its proposal and certain public order offences would no longer be included in the extended criteria for automatic disqualification:

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.

⁹¹ *Ibid* p59

⁹² *Charities Act 2011* section 181

⁹³ Cabinet Office, [Consultation on extending the Charity Commission’s powers to tackle abuse in charities](#), 4 December 2013, p17

⁹⁴ [Draft Protection of Charities Bill](#), Cm 8954, October 2014, p44

The Government had also decided against including unspent convictions for sexual offences:

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 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).⁹⁵

Clause 9: Power to disqualify from being a trustee

At present, the Charity Commission has no general power to disqualify a person from being a charity trustee on the basis of their unsuitable conduct. They can only remove a trustee when they have instituted a statutory inquiry into the charity and the Charity Commission is satisfied of both misconduct/mismanagement in relation to that charity and that there is a need to protect the charity's property or secure its proper application. In those circumstances the trustee removed is automatically disqualified.

The issue of whether there are other circumstances where, rather than being automatic, disqualification from charity trusteeship should be left to the Charity Commission's discretion was the subject of **Proposal 2** of the consultation. The consultation paper cited as examples where such a power might be used: where a caution is accepted, and conviction of an offence that does not trigger automatic disqualification.

The Government consulted on two options – one to provide a limited power to disqualify that could be used only in certain circumstances; and the other to provide a broad discretionary power.

In its response to the consultation the Government said that it proposed proceeding with a "multi-stage process" (detailed in the response document),⁹⁶ which would incorporate two tests:

- criteria which would have to be met relating to the person's past or present conduct; and
- the Commission would have to consider the person unfit to serve as a charity trustee.

The Government's response comments that 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".⁹⁷

Clause 9 would insert new provisions into the 2011 Act which would provide the Charity Commission with a new power to disqualify a person from charity trusteeship. The new provisions would deal with:

- the criteria that must be met for the Commission to make a disqualification order;
- the duration of disqualification and of suspension pending disqualification;

⁹⁵ *Ibid* pp48-9

⁹⁶ *Ibid* pp50-51

⁹⁷ *Ibid* p51

- the procedure for making a disqualification order; and
- variation, revocation and appeals.

The Explanatory Notes provide further information including a flowchart which sets out how the disqualification process would operate.⁹⁸

Clause 10: Records of disqualification and removal

Clause 10 would deal with duties connected with records of disqualification and removal.

Clause 11: Participation in corporate decisions while disqualified

Where a person who has been disqualified as a charity trustee is an officer of a corporate body that is a charity trustee, a new provision inserted into the 2011 Act by **Clause 11** would prohibit that person from participating in decisions relating to the charity's administration. This was the subject of **Proposal 6**.

Clause 12: Reviews of the operation of this Act

Clause 12 would require the Minister for the Cabinet Office to carry out a review of the Act at least every five years 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
- people's willingness to volunteer.

4.2 Which consultation proposals are not included in the draft Bill?

Annex B to the command paper sets out an updated list of proposals to be taken forward in the draft Bill following consultation.⁹⁹ The Government is not proceeding with the following proposals.

Proposal 4

Dealing with disqualification where only one or two trustees remain

The Government consulted on whether the Commission needed strengthened powers in order to be able to deal swiftly with the situation where, as a consequence of the disqualification of a trustee, a charity had too few trustees to continue to operate (**Proposal 4**).

In its response to the consultation, the Government stated that, although consultation responses had been generally supportive, it no longer intended to proceed with this proposal:

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.¹⁰⁰

⁹⁸ *Ibid* p35

⁹⁹ *Ibid* pp71-3

¹⁰⁰ *Ibid* p53

Proposal 5

Preventing disqualified trustees acting in another position of power in a charity

The Government sought views on whether a disqualified trustee should also be prevented from acting in another position of power in a charity (**Proposal 5**). The Charity Commission had expressed concerns that, otherwise, disqualified trustees might exploit a loophole as they would not be disqualified from taking up another position in the charity and could still abuse their position.

The Government's response to the consultation indicates that although the draft Bill would provide the Charity Commission with a power of disqualification only from charity trusteeship, the Government might, at a later date, introduce a provision covering other positions of responsibility in a charity.

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.

The Government had originally proposed that the Commission should be able to remove a trustee where there is either misconduct/mismanagement or a need to protect charity property) to make it easier for the Charity Commission to exercise this power. However, in the light of consultation responses the Government has decided not to proceed with this proposal.

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

The Government proposed amending the test in section 84 of the 2011 Act (power to direct specified action to be taken) so that in cases where there was clear evidence of misconduct/mismanagement or a risk to property the Commission could direct specific action without having to open a statutory inquiry first (as it must do at present).

The Government accepted arguments put forward by some respondents to the consultation "that the Commission's significant compliance powers should only be exercisable in the context of a statutory inquiry", and said that it did not intend to pursue this proposal.¹⁰¹

Proposal 11

Extend existing powers to enable direction to prevent acts of misconduct/mismanagement or acts in breach of fiduciary duty taking place

The Government asked for views on a proposal to enable the Charity Commission to make a direction to prevent further acts of misconduct or mismanagement or breach of fiduciary duty taking place, after a statutory enquiry has been opened. The consultation paper commented that the Commission is currently able to do this only by restricting, while the inquiry is

¹⁰¹ *Ibid* p58

ongoing, the transactions which may be entered into without the Charity Commission's authority.¹⁰²

The response to the consultation indicated that there had been a mixed response to this proposal:

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.¹⁰³

The Government said that it had considered the responses and did not intend to pursue this proposal any further at this time.

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

The Government asked for comments on a proposal for the Commission to be able to act proactively to restrict or prevent actions which, in the Commission's view, would amount to misconduct or mismanagement if they were allowed to proceed. Opinion on this issue was divided and the Government decided not to proceed with the proposal. However, the Government said it might still proceed at a later date and asked for any comments from pre-legislative scrutiny:

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.¹⁰⁴

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

The Government decided not to proceed with a proposal to enable the Commission to direct a bank to notify the Commission of certain movements on a bank account:

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

¹⁰² *Charities Act 2011* section 76(3)(f), see Cabinet Office, [Consultation on extending the Charity Commission's powers to tackle abuse in charities](#), 4 December 2013, p30

¹⁰³ *Draft Protection of Charities Bill*, Cm 8954, October 2014, p58

¹⁰⁴ *Ibid* p60

apply under the Proceeds of Crime Act 2002, in particular the requirement to apply to the court to make the account monitoring order.¹⁰⁵

5 Comment on the draft Bill

This section sets out a selection of early views on the draft Bill.

5.1 Charity Commission

The Charity Commission has welcomed the publication of the draft Bill and also the announcement of an additional £8 million funding, saying that it will make it “a more efficient, effective and agile regulator”. In a press release issued on the same day, the Commission said that it would use the new funding to invest in technology and frontline operations, allowing it to streamline lower risk work and redeploy its resources further to improve and strengthen its work to identify abuse and mismanagement in charities. The press release states that the Commission is also being granted an additional £1 million in general funding for 2015-16, also to fund immediate resource needs in investigations, monitoring and enforcement.

The Charity Commission said that it was pleased with the draft Bill although concerned that not all of its proposals had been included:

...the regulator has long argued that there are underlying weaknesses in its enforcement powers and is pleased that the Draft Bill announced today includes many of its proposals.

The Draft Bill makes significant changes to the ways individuals can be disqualified from acting as a charity trustee. The powers in the Draft Bill will also enable the commission to issue an official warning to charities about which it has concerns. The regulator says that this power, which many other regulators have, will allow it to take swift and proportionate action in situations where more forceful intervention would not be appropriate.

Not all of the measures the commission had proposed are included in the draft legislation. In particular, the regulator is concerned that the Draft Bill does not include its proposal that people who are disqualified from trusteeship should also be banned from taking up other key roles in charities, such as treasurer or finance director. It had also pressed for powers to prevent mismanagement or misconduct or other breaches before they occur, by directing trustees not to take specific actions.

The commission says it remains hopeful that these measures may be included in the draft legislation as it passes through pre-legislative scrutiny.¹⁰⁶

5.2 Acevo

ACEVO (Association of Chief Executives of Voluntary Organisations) has welcomed the draft Bill and new Charity Commission funding. However, CEO, Sir Stephen Bubb, warned the Commission not to ‘lose focus’:

“We welcome extra funding for the Charity Commission and the strengthening of its enforcement powers. ACEVO called for both and in a lean time for charities this shows that the Treasury can be made to listen.

¹⁰⁵ *Ibid* p61

¹⁰⁶ Gov.UK, Charity Commission press release, [Charity regulator welcomes new funding and legislation to strengthen its powers](#), 22 October 2014 [accessed 4 November 2014]

“Charities deserve a properly equipped regulator, but packaging these measures as counter-terrorism is counter-productive. The Charity Commission exists first to monitor and support the day to day work of charities helping some of the most vulnerable people in our country. They should not use this funding and these new powers as an excuse to lose focus.

“We will study the draft Bill very carefully. From within the charity sector there remain doubts over the Commission’s ability to deliver. The quality of their services is under scrutiny. It’s time for them to step up.”¹⁰⁷

5.3 NCVO

Karl Wilding, director of public policy at NCVO, welcomed the announcement of new funding and legislation to strengthen the Charity Commission:

'It's been clear for some time that the Charity Commission's enforcement work has not been as strong as it could be. We also know that it has struggled to deal with routine queries from charities in a prompt manner. This investment and its plans to revamp its work are very welcome and we believe they have the potential to make a significant difference. It's crucial we have an effective regulator that deals quickly with any poor practice to help ensure the public can continue to trust charities.

'We supported the Commission's call for additional powers to help it deal with poor practice. We'll examine the legislative proposals to make sure they strike the right balance between giving the Commission the powers it needs to deal with serious problems, while respecting individual charities' right to make their own decisions about how best to run themselves.'¹⁰⁸

The NCVO had not welcomed all of the consultation proposals. In a blog post on the NCVO’s response to the Government’s consultation, Elizabeth Chamberlain from the NCVO’s policy team argued that some of the proposals went too far:

Some of the proposals go too far, with the risk of ignoring the fundamental principle of charity regulation: that the Commission must not act in the administration of a charity. So we have raised concerns about the number of cases where the proposal is to decouple powers from the opening of a statutory inquiry. The opening of an inquiry should still be the first step before other powers are exercised. Establishing an inquiry effectively changes the relationship between the charity in question and the Commission, and is an important safeguard against the use of excessively extensive powers.

We are also not convinced that all the case studies cited in the consultation provide a convincing explanation for the need for a particular new power: some of the scenarios described as examples where the proposed new powers would be necessary are rather extreme, but the powers as drafted could be used a lot more broadly, raising concerns about possible abuse.

Notwithstanding these concerns, this was a timely consultation, and in particular it is an appropriate time to equip the Commission with better powers where needed: following the changes made by the Charities Act 2006 the Charity Commission is a more accountable body, so any additional powers will have to comply with a range of high standards (such as principles of best regulatory practice, judicial review parameters, human rights provisions).

¹⁰⁷ Acevo, [Sir Stephen Bubb welcomes new Charity Commission funding and powers](#), 22 October 2014 [accessed 4 November 2014]

¹⁰⁸ NCVO, [Charity Commission powers and funding announcement](#), 22 October 2014

We now have a short time frame to see what the outcome of the consultation will be, but our message to the Commission is this: with greater power comes greater responsibility.¹⁰⁹

¹⁰⁹ NCVO blog, [The Charity Commission: Power and responsibility](#), posted on 14 February 2014 by Elizabeth Chamberlain [accessed 4 November 2014]