Public Bill Committee

CHARITIES (PROTECTION AND SOCIAL INVESTMENT) BILL [LORDS] COMMITTEE

WRITTEN EVIDENCE

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Written evidence

Written evidence submitted by Social Enterprise UK (CHB 01)

1. Social Enterprise UK was established in 2002 as the national body for social enterprise in the UK. We are a membership organisation. We conduct research; develop policy; campaign; build networks; support individual social enterprises; share knowledge and understanding; support private business to become more socially enterprising; and raise awareness of social enterprise and what it can achieve.

2. Social enterprises are businesses driven by social or environmental objectives whose surpluses are reinvested for that purpose in the business or in the community. They operate across a wide range of industries and sectors from health and social care, to renewable energy, recycling and fair trade and at all scales, from small businesses to large international companies. They take a range of organisational forms from co-operatives and mutuals, to employee owned structures and charitable models. Our members come from across the social enterprise movement, from local grassroots organisations to multi-million pound businesses that operate across the UK.

3. We chair the Social Investment Forum, a network of social investment and finance intermediaries (SIFIs) designed to help keep money flowing around the market and ensure it reaches the social enterprises on the ground. In partnership with the Big Lottery Fund we published *Social Investment Explained* to give interested parties an overview of the UK social investment market. Our Chief Executive, Peter Holbrook, sits on the board of Big Society Trust in an ex officio capacity. We therefore have considerable experience in social investment.

Social Enterprise UK and the Charities (Protection and Social Investment) Bill

4. Social Enterprise UK's focus is on the social investment elements of the Bill. We support the aims and ambitions behind the Bill, but believe that as currently drafted it may not fully meet the Government's own previous stated aspirations for social investment.

5. Social investment is often baffling to many observers and any lack of transparency in the field jeopardises its potential. Any attempt to make social investment better understood, more transparent, and more widely used **where appropriate** by charities is welcome.

6. We are grateful that the issues we raise below received attention in the Upper House, but despite this airing we feel that the definition of social investment in the Bill is not quite right. Parliament decides many crucial—often life and death—issues and in comparison, and as pointed out in the Lords, debating a definition of social investment may seem like 'wearing an anorak whilst discussing how many angels can dance on the head of a pin'.[1] Yet the Bill is the first attempt to define social investment in statute and although there is nothing critically wrong with what is proposed, the definition does sets a precedent which will have an impact on subsequent legislative definitions. It is important to get the definition right.

7. The definition in the Bill was drafted by the Law Commission yet curiously it appears to differ from the Law Commission's own recommendations.

8. Government, at Report Stage in the Lords, made a number of amendments to the Bill, notably an acknowledgement that social investment may have other results over those on the face of the Bill and a commitment that Ministerial review must commence within 3 years after the Act is passed. Whilst welcome, we believe that Government can go further.

9. We have 3 concerns:

(a) Whether the definition in Clause 15 which was drafted by the Law Commission adequately reflects the Law Commission's own definition of social investment.

(b) Whether the Bill's definition of social investment adequately differentiates between *financially motivated* investment which also happens to be in line with a charity's social purpose; and consciously / explicitly *socially motivated* investment.

(c) That the Ministerial review of the Act does not explicitly guarantee to explore the relationship between grant-making and social investment.

(A) The Law Commission's Definitions of Social Investment

10. The Law Commission definition of social investment in its recommendations includes "avoiding financial liability at a future date".[2] The Law Commission's recommended definition, therefore, does not require a positive financial return.

11. Yet the Bill includes financial return in the definition and defines financial return in as "if its outcome is better for the charity in financial terms than expending the whole of the funds or other property in question".

[1] Both metaphors were used in the Upper Chamber in relation to the debate over the definition.
[2] Social Investment by Charities The Law Commission's Recommendations, paragraph 1.35

12. Importantly and perhaps counter-intuitively, zero or negative financial return is not uncommon within social investment or within conventional financially motivated investments! Many investments fail to deliver any financial return as an outcome and this does not preclude them from being considered investments in the first place. In this case, the intent is more significant than the outcome. For example, a charity may want to trial a number of innovative methods of addressing their objects through social investment. Given that the methods are innovative, they will be making them at risk. A prudent financial manager may quite reasonably predict a zero or negative financial return on such social investments. This is still social investment and the new legislation should not preclude this.

13. It is possible that the rationale for a definition which excludes zero or negative financial return on social investment stems from rules on permanent endowments[3] and a desire by the Law Commission to have one clear law for charitable social investments covering all charitable assets. Whilst understandable, this approach will skew the impact of the legislation and unnecessarily limits the freedom of charities to make full use of their non-permanent endowments, for example, to make potentially (financially) loss making social investments.

14. The Government says "We want more social investment opportunities to be available to citizens and the managers of our savings. In the same way that finance flowing to business start-ups is the lifeblood of our economy, so it will be with social enterprises. Change in this market will not take place overnight, but it will be transformative in allowing social ventures to scale up and take on new challenges. We will do all we can to make it happen."[4]

15. In the same document, Government also says: "We do not underestimate the degree of challenge, or the timescale required to realise our vision."[5]

16. The Bill limits social investment in such a way that it could work against the Government's policy aspiration to "do all that it can to make it [an increase in social investment] happen."[6]

17. The differences between the Law Commission's definition and the definition in the Bill, and the one we suggest are illustrated below.

A SPECTRUM OF INVESTMENT

	Social				*Financial*
Motivation	Only social intent	Primarily social intent with potential for financial return	Primarily social intent but financial return must be greater than 0	Primarily financial intent with some conscious / explicit social expectations	Only financial intent
Note	Feasibly may be incidental financial return i.e. if grant is clawed back or unspent	Financial return is possible but of secondary importance	Return must be better than granting the money away.	Social expectations in line with a charity's social purpose in this context i.e. education, the environment or Africa, for example.	May be some indirect or incidental social impact / impact in line with a charity's purpose
Example	Grant made by a foundation	Foundation underwrites Social Impact Bond at risk	Social investor makes risk capital investment in social enterprise	Investment in the developing world, in a business making useful widgets or through an ethical SRI fund	Speculation on stock exchange or investment via a hedge fund
Law Commission recommendation					
Bill definition					
Our definition					

[3] Ibid paragraph 1.61.
[4] Growing the Social Investment Market, 2011 Exec Summary https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61185/404970_SocialInvestmentMarket_acc.pdf.
[5] Ibid, paragraph 2.3.
[6] Ibid, Ministerial Foreword.

(B) The Distinction Between Social Investment and Financial Investment

18. The definition in the Bill fails to sufficiently differentiate between *financially motivated* investment which also happens to be in line with a charity's social purpose, and consciously / explicitly *socially motivated* investment.

19. All investment (including traditional financial investment) has some kind of social impact, much of which can be positive and in line with charitable purposes. It follows that social investment must be something other than traditional financial investment which happens to have a social return. One key difference between social investment and financial investment which produces social return is intention: a social investment is an investment which has significant socially-motivated element.

20. There seems to be no clear answer from Government as to how social investment is to be differentiated from a *financially* motivated investment which also happens to be in line with a charity's social purpose. Rather, the Minister offered the suggestion that the "Charity Commission and the courts would be astute to shams; they would look at the substance of a transaction and if it is a financial investment, the trustees would be expected to comply with the financial investment duties."[7]

21. Prevention is better than cure. Resolving this uncertainty in legislation would be better than leaving it to the Charity Commission and the courts.

Proposed Amendments to the Definition of Social Investment

Clause 15: The Power to make social investment

Amendment 1

292A (2) "social investment is made when a relevant act of a charity is carried out with a view to primarily –

(a) directly furthering the charity's purposes; while also

(b) achieving a financial return for the charity; and

(c) the action is intended to be a social investment."

Amendment 2

292A (5) An act mentioned in subsection (4)(a) is to be regarded as achieving a financial return if its outcome is equal or better for the charity in financial terms than expending the whole of the funds or other property in question and may include:

(i) income,

(ii) capital growth,

(iii) full or partial repayment of the investment, or

(iv) avoiding incurring financial liability at a future date."

Amendment 3

Delete 292A (6).

(C) Reviews of the Operation of this Act

22. Clause 16 specifies a number of issues the ministerial review must include. It does not currently include a commitment to review social investment, or the relationship between social investment and grant-making.

23. The aim of Clause 15 of the Bill is to clarify the existing ability of charities to make social investments, and in doing so facilitate – where appropriate – social investment. This will either be successful or it will not be successful.

24. If the aim is successful, charities will make more social investments. Government has indicated that it anticipates a doubling of the amount of social investment made by charities.[8] If this comes to pass then it is possible, even likely, that charities will make fewer grants. Whilst there is nothing necessarily controversial in this (charities may well just be using a more suitable vehicle to achieve their charitable objectives) what would appear to be apparent decline in grants by charities is an area of justifiable public concern. In this scenario it will be imperative that Government looks at the relationship between grant-making and social investment to reassure itself, the pubic, and charities that there have been no unintended consequences as a result of the Bill.

25. If there is no increase in charitable social investments, then the Bill's social investment clauses will not have succeeded and this will need looking at as part of the review, in order to establish what further measures need to be taken to achieve the Government's ambitions for social investment.

26. Given the purpose of Clause 15, it is remarkable that a commitment to review social investment, and specifically the relationship between grant-making and social investment, is not on the face of the Bill in Clause

[7] Hansard, 1 July 2015: Column GC208.
[8] Rt Hon Matthew Hancock MP, Second Reading, 3 Dec 2015: Column 564.

16. The Government is proposing what are potentially far reaching measures but not proposing to look at the effect of them.

27. We therefore propose an amendment to address this lacuna.

Proposed Amendment to the Reviews of the Operation of this Act

Clause 16: Reviews of the operation of this Act

Amendment 4

"16 (1) The Minister for the Cabinet Office must carry out reviews of the operation of this Act including, on each review, how the Act affects—

(a) public confidence in charities,

(b) the level of charitable donations,

(c) the relationship between grant-making and social investment; and

(d) people's willingness to volunteer."

December 2015

Written evidence submitted by the Institute of Fundraising and the Public Fundraising Association (CHB 02)

About the Institute of Fundraising and the Public Fundraising Association

The Institute of Fundraising (IoF) is the professional membership body for UK fundraising, with over 5,500 individual members from 2,500 different charities and around 450 organisational members.

The Public Fundraising Association (PFRA) is the membership body for charities and agencies carrying out face to face Direct Debit fundraising.

The IoF and the PFRA are in the process of merging to form a single professional membership body across the fundraising sector.

Fundraising reforms: overview

The examples of poor fundraising practice exposed over the summer shocked the charity fundraising sector. It demonstrated the urgent need for charities and the regulatory structures surrounding charity fundraising to change. Both public trust and the ability to raise funds are vital to the future of charities of all sizes and the good work they do across the county and around the world.

In September the review of charity fundraising practice and the regulatory system, chaired by Sir Stuart Etherington, published its report. The report's recommendations included the establishment of a single, universal and more powerful independent Charity Fundraising Regulator working more closely with the Charity Commission and other statutory bodies. A summary of the report's recommendations is included at the end of this paper.

The recommendations from Sir Stuart Etherington's report have all been accepted by the Government, and the new structures for regulation are anticipated to be in place by April 2016. The Institute of Fundraising and Public Fundraising Association welcomed the report's recommendations and have been working together to support the establishment of the new Charity Fundraising Regulator.

The Charities (Protection and Social Investment) Bill

Fundraising amendments made in the Lords

The Charities Bill was amended during its passage through the House of Lords to strengthen the law on charity fundraising. Clause 14 requires charity trustees to set out in their annual reports their approach to fundraising, and in particular how they ensure the protection of vulnerable people and other members of the public from "unreasonable intrusion on a person's privacy", "unreasonably persistent approaches" and "placing undue pressure on a person to give".

The changes under Clause 14 also require these provisions to protect vulnerable people and the wider public to be included in the agreements between charities and fundraising agencies working on their behalf. This includes specifying measures to enable charities to monitor compliance with these requirements.

IoF and PFRA position:

The IoF and PFRA welcome these additional measures to strengthen the focus on fundraising practice and provide an even greater emphasis on the protection of vulnerable individuals and the wider public.

New reserve powers in case self-regulation fails

The Government has announced that they will bring forward amendments to strengthen and support the implementation of the changes to charity fundraising regulation outlined in the Etherington Review. During Second Reading the Government announced they will seek to amend the Bill to add 2 reserve powers. Firstly, the reserve power to compel charities to sign up to the new Charity Fundraising Regulator if necessary. Secondly to mandate the Charity Commission to take over responsibility for fundraising regulation should the charity sector fail in making the new self-regulatory structure work.

The Etherington Report was clear that an enhanced and reformed system of self-regulation was the most effective way to regulate fundraising. The government has made it clear that these powers would only be used should the new, stronger system of self-regulation currently being put into place fail.

IoF and PFRA position:

The IoF and PFRA understand the reasons for amending the Bill to introduce these reserve powers and do not object in principle to their introduction. We hope that ultimately the reserve powers being introduced will not be needed and the new self-regulatory structures will be effective. We will continue to work to support the new system of stronger self-regulation to help ensure its success, without the need for the reserve powers to be used.

Points raised at Second Reading

Street Fundraising

During the Second Reading debate a question was raised about the way agency fundraisers explain the fees they are paid by charities for recruiting donors. The law was only recently changed by the Charities Act 2006, coming into force in April 2008. This implemented additional disclosure rules on fundraisers, meaning the UK now has some of the world's most transparent rules on how charities work with agencies.

For example, all professional fundraisers working on behalf of a charity must now inform a donor of how much their organisation will be paid; how this fee was calculated; and importantly, how much the charity hopes to raise in total. We fully support this level of transparency which allows potential donors to make informed decisions. The PFRA and its local authority partners (107 councils in total) monitor compliance with these rules, conducting over 700 inspections a year, and issue financial penalties for non-compliance.

The IoF and PFRA believe that the existing requirements are effective and do not believe there is evidence that further changes would improve donor confidence or strengthen compliance.

Additional information:

The new system of fundraising regulation

The main recommendations from the charity fundraising review led by Sir Stuart Etherington and forming the basis of the new charity fundraising regulatory system are:

- A new, single independent Charity Fundraising Regulator will be established.
  - The remit of the regulator will extend to all charities who fundraise.
  - It will be paid for by a levy on charities themselves and will have stronger sanctions where organisations break the code of practice.
  - The new regulator will be independent, but will have closer links with statutory regulatory bodies including the Charity Commission, OSCR, and the Information Commissioners' Office.
  - The Charity Fundraising Regulator will take over responsibility for both setting the Code of Fundraising Practice which charity fundraisers adhere to, and it will hear and act on complaints from the public. This will happen through two committees—a Fundraising Practice Committee and Complaints Committee.
  - In November the Minister for Civil Society announced that Lord Michael Grade would be the interim chairman of the new regulator.
- The two bodies representing the charity fundraising sector—the Institute of Fundraising and the Public Fundraising Association—should merge to form a single professional membership body.
- Fundraising Preference Service is to be set up and run by the new Charity Fundraising Regulator. This will be a service where individuals can register if they no longer wish to be contacted for fundraising purposes.

The direction of travel in these recommendations have been widely supported by charities and sector bodies, including the IoF and Public Fundraising Association. The Government has said that they will be implemented in full.

A copy of the 'Regulating Fundraising for the Future' report can be downloaded from the NCVO website at www.ncvo.org.uk.

December 2015

Written evidence submitted by ACEVO, the Charities Finance Group (CFG), Directory of Social Change (DSC), Association of Charitable Foundations (ACF), Bond, and Bates Wells Braithwaite (BWB) (CHB 03)

1. This submission has been made by:

— ACEVO—the UK's largest network for Charity and Social Enterprise Leaders.

— Charities Finance Group—the charity that champions best practice in finance management in the voluntary sector.

— Directory of Social Change—has helped thousands of charities since 1974 and is the leading provider of training, publications and funding sources to the voluntary sector.

— Association of Charitable Foundations—the membership association for foundations and grant-making charities in the UK.

— Bond—The civil society network representing 450 international development organisations.

— Bates Wells Braithwaite—the leading charity solicitors.

Together we represent a range of organisations and individuals from across the charitable community in the UK.

Introduction

2. The main objective of the Bill is to confer increased regulatory powers on the Charity Commission. We are supportive of many of the provisions, while acknowledging that the Charity Commission already has a wide range of powers that it can use (we have outlined these in Appendix 1).

3. The Charity Commission seeks to act in a robust and proactive manner. We firmly believe in the importance of a well-resourced regulator which acts with appropriate powers. However, we know that actions by the Commission can have a significant impact on those affected by its decisions. Some additional powers provided by this Bill do not come with sufficient safeguards.

4. It is important that this Bill is considered in the context where the vast majority of charities and charity trustees act in the best interest of their beneficiaries, doing so without any need for the Charity Commission to use its existing powers. Cases of wrongdoing are rare.

Clause 1—Official Warning by the Commission

5. Clause 1 of the Bill introduces a new provision into the Charities Act 2011 which would allow the Charity Commission to issue official warnings when the Commission considered there had been a breach of trust or duty or other misconduct or mismanagement.

6. The Charity Commission already has significant powers, including the ability to open a statutory inquiry without notice in urgent cases. We understand that this clause would enable the Charity Commission to take a more proportionate approach to low-level misconduct and mismanagement. We have serious concerns that the provisions as currently drafted lack sufficient safeguards. As such, their disproportionate application could threaten to further undermine public trust and confidence in charities.

7. **Publication of a Warning**—The Bill provides the Charity Commission with absolute discretion to publish a warning to a wider audience. If warnings are published they could have unforeseen or unintended consequences (such as a loss of opportunity or funding, or unwarranted reputational damage) for charities. Experience suggests the publication of a complaint often creates more publicity than any findings of a compliance review, and the Commission could use the 'threat of publicity' to encourage compliance by charity trustees.

> *We would propose amending the existing wording of clause 1 to delete subsection (2) of the new section 75A and replace it with:*
>
> *"(2) The Commission may issue a warning to a charity trustee, a trustee for a charity or a charity in any way it considers appropriate but may not publish a warning to a wider audience."*

If the committee feels that lessons cold be learned by the wider charitable sector through the publication of a warning, the Commission could make details of the warning public without referencing the charity by name, or a charity trustee by name.

This would require the Bill to be amended so that the existing wording of clause 1 is changed in order to introduce a new subsection (3) into the new section 75A (and change the numbering and the cross referencing of the rest of the new section 75A):

New subsection 75A(3):

"(3) If the Commission decides to publish a warning under subsection (2) it must do so in a manner which does not identify the charity, or charity trustee, in relation to which the warning is issued."

Subsection 75A(2) would become "subject to subsection (3)".

8. **Notice of a Warning**—While the Commission must give a charity notice of intention to issue a warning there is no minimum period for this. We would propose a clear notice period for a warning before it is made public, so that charity trustees are given 'at least 28 days' notice' to make representations.

In a recent High Court case, the Lord Chief Justice referred to short time limits imposed by the Commission as "ludicrous". Given trustees are volunteers it is unreasonable that a notice could be issued within 24 hours, providing almost no time to allow trustees to assess the warning, and work with staff to reflect and respond as appropriate.

We would propose amending clause 1 of the Bill by amending proposed subsection 75A(3) to include "at least 28 days" at the end of the first line (after "give" and before "notice").

9. **Right to Appeal**—The clause provides the Commission with wide discretion to exercise its power to issue a warning. But the implications of issuing a warning for the charity concerned are significant. This includes the risk of adverse publicity and significant regulatory action could lead to resources being taken away from organisations, preventing them from achieving their mission.

Charities should have the right to appeal. The current option—judicial review—is an expensive, protracted route to challenging the Commission's decision (both for the charity involved and the Commission itself), instead any charities in receipt of a warning should be able to appeal to the Charity Tribunal.

The Tribunal was introduced with the specific purpose of allowing charities to challenge the Commission without going through the expensive and time consuming process of involving the High Court. If the warning power is to be used for low-level misconduct and mismanagement the right to appeal to the Charity Tribunal is much more proportionate, rather than through a judicial review, which is known to be a ''remedy of last resort' for public bodies.

We would propose introducing a new sub clause into clause 1 which says:

"In Schedule 6 of the Charities Act 2011 (appeals and applications to Tribunal), insert in the appropriate place –

"Decision of the Commission to issue a warning under section 75A to a charity trustee, trustee for a charity or a charity.

[vertical line]

The persons are –

(a) any of the charity trustees of the charity; and

(b) (if a body corporate) the charity itself.

[vertical line]

Power to quash the decision and (if appropriate) remit the matter to the Commission.""

Redesignate the existing wording in clause 1 as sub clause (1) and reformat that clause.

10. **Directing trustees or fettering their discretion**—The Commission has recently clarified that it has no power to require trustees to fetter the future exercise of their fiduciary powers under its general power to give advice and guidance (which appears in section 15 of the Charities Act 2011). While there are situations where the Commission may direct trustees to act, and clauses 6 and 7 of this Bill provide more situations for specific activities and, for the most part, require prior initiation of a statutory inquiry.

At present the warning power could be used at short notice and with no right of appeal. It could also enable the Commission to instruct a charity to take certain action—for example cancel an event, stop campaigning or change their governance—with no time limit or review period. It should be made absolutely clear that the warning power only allows the Charity Commission to provide advice or guidance as to how the matters raised in the warning can be remedied. It cannot be used to direct trustees; this must be clarified beyond doubt.

We would propose amending clause 1 of the Bill by deleting the existing wording of proposed subsection 75A(5)(b) and replacing it with the following:—

"Such advice or guidance that the Commission considers may assist the charity to remedy the conduct which gave rise to the warning, as referred to in (a) above."

11. **Failure to comply with a warning**—Failure by a charity or charity trustee to remedy any breach specified in a warning should not automatically be seen as evidence of misconduct or mismanagement by a charity. There may be circumstances where there is disagreement between the trustees and the Commission as to where there has been a breach of trust or duty, and therefore whether the issuing of a warning is justified.

The link between failure to comply with a warning and misconduct or mismanagement was not in the original draft Charities Bill; it was introduced following a suggestion from the Joint Committee which examined the draft Bill. However the Joint Committee made this suggestion "assuming the Government agrees to include the further details in the Charity Commission's warning power for which we have called."[9]

Not all of those suggestions were incorporated into the warning power, particularly the suggestion that the warning power should be restricted to circumstances where there had been a failure to comply with a requirement of the 2011 Act, or an order or direction from the Commission, and a reasonable minimum notice period to make representations on a draft warning before it was issued.

We would propose amending sub clause 2(2) of the Bill by deleting ", a failure to remedy any breach specified in a warning under section 75A,".

Clause 11—Power to disqualify from being a trustee

12. Clause 11 provides the Commission with a power to disqualify a person from being a charity trustee if it is satisfied that one of the specified conditions is met in relation to the person. If the Charity Commission is to be provided with discretionary powers to disqualify someone who is unsuitable any tests of unfitness should be robustly and clearly defined. Safeguards should be provided to prevent it being used inappropriately.

The inclusion of Condition F which allows the Charity Commission to disqualify a trustee on the grounds '*that any other past or continuing conduct by the person, whether or not in relation to a charity, is damaging or likely to be damaging to public trust and confidence in charities generally or in the charities or classes of charity specified or described in the order'* is far too broad and subjective—effectively leaving the determination of who can be a charity trustee up to the opinion of the Charity Commission's board and management, rather than any due process.

It opens up the power to be used in relation to any past or continuing conduct, whether or not in relation to a charity. It seems unlikely that there is any conduct which would meet the other alternative Conditions A to E which would not also meet Condition F. In light of the other Conditions in the Bill it seems unnecessary and open to subject interpretation.

We would propose amending sub clause 11(2) of the Bill by amending proposed subsection 181A(7) of the 2011 Act by deleting condition F.

Annex 1

Summary of the Charity Commission's key existing powers

1. Section 15 Charities Act (CA) 2011 sets out the Commission's general functions. Under section 15(2) CA 2011, the Charity Commission has power 'to give such advice or guidance with respect to the administration of charities as it considers appropriate' to encourage and facilitate the better administration of charities. This advice may be given in relation to charities in general or to any class of charity or particular charity (section 15(3) CA 2011).

2. Later sections of the Act set out the powers of the Commission to institute formal statutory inquiries; the additional statutory powers which flow from having done so; and the procedural safeguards which surround the institution of such inquiries. Section 46 CA 2011 permits the Charity Commission to institute formal statutory inquiries into charities, though the decision to do so is subject to appeal by the Charity Tribunal (the First Tier Tribunal) (s319, s322(2)(a) and Schedule 6 CA 2011).

3. Section 76(3)(d) CA 2011 permits the Charity Commission to prevent a charity from parting with property without its approval, after institution of a statutory inquiry.

4. Sections 76-83 provide powers for the Charity Commission to suspend, remove or appoint trustees in particular circumstances, again after institution of an inquiry, and again subject to appeal to the First Tier Tribunal.

5. The Charity Commission's powers of direction are set out in sections 84 and 85 CA 2011.

6. Section 84 powers can be exercised only in the context of a statutory inquiry under section 46 CA 2011. Section 84 CA 2011 permits the Charity Commission, in the context of such inquiry, to direct charities, their trustees or employees, to take specific actions if these are necessary to prevent misconduct or mismanagement or to protect property.

7. Section 85 CA 2011 permits the Commission to direct where necessary or desirable that charity property be applied in a particular way, if it is satisfied that the persons responsible are unwilling to apply it properly for the charity's purposes.

8. These powers of direction are also subject to appeal to the First Tier Tribunal.

[9] Report of Joint Committee on the Draft Protection of Charities Bill—http://www.publications.parliament.uk/pa/jt201415/jtselect/jtcharity/108/10802.htm

9. Neither section 84 nor section 85 CA 2011 permits the Commission to direct trustees or to require absolute undertakings as to future exercises of fiduciary duty from trustees.

December 2015

Written evidence submitted by John Weth (CHB 04)

SUMMARY

This submission concentrates on drawing MPs' attention to the importance of fair, effective and readily accessible appeal arrangements for charities and trustees, given evidence of the Commission's use and misuse of regulatory powers over the past 20 years.

1. *The Charity Commission as Regulator 1993-2015*

1.1 MPs' attention is drawn to successive National Audit Office (NAO) (5 in 26 years) and Public Accounts Committee (PAC) reviews and reports (1990s–2014), noting the Commission's failings and failures as regulator—and the Commission's apparent inability to learn from these. The admission by the Commission Chairman and Chief Executive at a PAC hearing in 2014 that they had not even read the PAC's previous 2002 report, perhaps speaks for itself.

1.2 By the early 2000s Parliament's and the Government's concerns about the role, functions and performance of the Commission as regulator, led to a Strategy Unit report and recommendations in 2002, and the preparation of a Draft Bill published in 2004 for consideration by a Joint Parliamentary Committee. The Association for Charities prepared and submitted a report to the Joint Parliamentary Committee in June 2004, titled ***'Power Without Accountability: the Charity Commission as Regulator.'***[10] This report—available upon request via e-mail from the respondent—included 13 case studies from different charities, where the Commission failed to act either at all, or appropriately upon requests by trustees for help. This report was recommended to Parliament by spokespersons for the three major political parties and leading charity lawyers, and was extensively quoted from in debates in both Houses during the passage of the Bill.

1.3 MPs' attention is drawn to a number of reports produced by the Commission's Independent Complaints Reviewer (see for example a 2006 report) and certain cases heard by the Charity Appeal Tribunal (see for example the first Tribunal report CA2008/001 Nagendrum Seevaratnam) following its establishment in 2008—reports which provide evidence of the Commission's failure to act appropriately or effectively as regulator. Particular attention is drawn below to two published cases demonstrating Commission regulatory conduct.

1.4 In 2008, a Commission Senior Compliance Officer reported to Commission management evidence of fraud in the African Aids Action charity. The Commission management's response to this turned out to be a payment to the founder trustee, whose fraudulent activity had been reported by the case officer. Some five years later, however, following an investigation by HMRC, that trustee was found guilty of fraud of the nature which had been reported to the Commission in 2008. The Commission's treatment of their former Senior Case Officer, David Orbison, both during and after his service, does no credit to the Commission (see for example **'Third Sector'** Editorial 17 October 2014).

1.5 The Commission's handling of the Cup Trust case (2013/14), revealed initially by the Times newspaper, once again revealed major regulator failings, leading to critical reports by the NAO and PAC (see the NAO report ***'The Regulatory Effectiveness of the Charity Commission'*** 21 November 2013).

1.6 Articles and editorials in the charity press over the past 20 years (Third Sector magazine and Civil Society) have drawn attention to regulatory performance issues, which serve to contradict repeated Commission press and public relation claims of sustained regulatory excellence.

1.7 Claims that poor regulatory conduct and performance are the result of inadequate Commission financial resources may perhaps be weighed against the fact that reductions of funding have been a feature only of more recent years. Together with others, this respondent has argued and campaigned for better and fairer funding for a regulator who now has greater responsibilities within the sector than in the past. MPs may wish to consider whether Commission top management weaknesses and a failure to apply regulatory principles of fairness, proportionality and transparency may be more closely connected to regulatory failures over the past 20 years.

2. *Weaknesses in Appeals Arrangments 1993-2015*

2.1 MPs' attention is drawn to the evidence over this period of inadequate, unfair and difficult-to-access arrangements under which appeals against Commission regulatory conduct or Orders can be brought by trustees/charities; together with the widespread criticisms by leading charity lawyers, sector umbrella organisations and others with a concern for natural justice, and the damage to charity inherent within the present appeal arrangements.

2.2 One possible reason for this situation is that the Commission is able, under present legislation to act as judge, jury and executioner (by removing charities, and trustee status from individuals)—a situation which the

[10] Power Without Accountability: the Charity Commission as Regulator, 2004.

evidence shows has led to severe damage to charity beneficiaries, charities, trustees, volunteers and the practice of charity.

2.3 The Charity Commissioners, prior to the Charities Act 2006, and the Commission, now as a 'body corporate', have enjoyed powers of the High Court in their dealings with charities and trustees.

2.4 Many charity lawyers have, over the past 20 years, drawn attention to the absence of a level playing field when charities and trustees have sought to appeal against Commission conduct or Orders. Amongst these, Robert Meakin, a former Commission lawyer observed ***'charities do not have effective access to justice, because the appeal process is unsatisfactory. When it comes to an appeal, the Commission is in a position of strength.'*** He argues that ***'Currently natural justice does not offer any relief to appellants feeling aggrieved by the Commission acting as both judge and jury'*** and concludes ***'Due to problems with the appeals system, charities do not have effective access to justice'.***[11]

2.5 Given the considerable practical and financial obstacles in the way of charity/trustee appeals, applications for judicial review, or common-law actions to challenge the Commission—together with the uncertainty of outcome—and the likelihood that the Courts might ***'expect the Charity Commission not to be wrong'*** (an argument advanced by Counsel for the Attorney-General, standing in the shoes of the Commission in a trustee appeal against Commission Orders), it is not surprising that Court appeals are rare. Even so, judicial unease at the Commission's regulatory approach and possible motives in removing a trustee, have, on occasion, surfaced in the High Court and Court of Appeal proceedings—despite the Court's decision not to consider the Commission's conduct by means of review.[12]

3. *Conclusion*

3.1 Members will have before them proposals for strengthened appeals safeguards in respect of individual Bill provisions from a number of sources, submitted by those with knowledge and experience of current appeals arrangements. This respondent's hope and prayer is that Parliament will use this opportunity to consider and act upon the lack of fair appeals systems. Charity, charity beneficiaries, trustees and volunteers deserve better, fairer and more accessible access to justice.

3.2 Nearly 100 years ago, Lord Hewart observed ***'It is not merely of some importance, but of fundamental importance that justice should not only be done, but should be seen to be done.'***[13] Sadly, in 2015, justice cannot be seen to be done under existing appeals arrangements. Can Parliament help?

A Personal Note

This submission arises from a strong and sustained professional and personal interest over a 20 year period on the role, functions and conduct of the Charity Commission as regulator, initially sparked by service as a charity trustee for a small, entirely voluntary charity which sought the Commission's help as regulator, upon discovering serious financial and other irregularities in the conduct of the affairs of that charity, prior to the appointment of a new Trust Management Board.

Following on from this approach and Commission reaction, together with concerns developed by a number of trustees of different charities who attended various High Court and Court of Appeal hearings brought by the trustees against Commission Orders, these trustees came together as a group (**The Association for Charities**) to alert Parliament and the sector to problems experienced by a number of mainly smaller charities who had sought the Commission's help, only to be disappointed by the Commission's response. The Association for Charities role in helping to alert Parliament and the sector to deficiencies in Charity Law and the role, functions and conduct of the Commission as regulator, in the lead up to the Charities Act was recognised by a House of Commons Research Library report.

The respondent, a former public sector organisation Chief Executive in Local Government and the NHS, and former Research Fellow at Nuffield College, Oxford (Corporate Management in Government) has operated as an independent management and human resources consultant for Government and private sector organisations in the UK and abroad, with a special interest and involvement in organisational change and the improvement of organisational performance.

December 2015

Written evidence submitted by Unlock, Clinks and the Prison Reform Trust (CHB 05)

Ex-offenders, charity trustees and managers Charities (Protection and Social Investment) Bill 2015-16

This written submission to the bill committee of the Charities (Protection and Social Investment) Bill 2015-16 is a joint submission by the charities Unlock, Clinks and the Prison Reform Trust.

[11] The Law of Charitable Status: Maintenance and Removal, Robert Meakin, Cambridge University Press 2008 Chapter 8 'Grounds for appeal' pages 171–193.
[12] Weth v AG, 1997–2001 Various proceedings in the High Court and Court of Appeal.
[13] Rex v Sussex Justices, 9 November 1923 (King's Bench Reports, 1924, vol I, p 259).

— **Unlock** is an independent award-winning charity that supports ex-offenders (a group which we refer to as "people with criminal records") and seeks to remove the barriers that result from criminal records. Unlock is a peer-led charity—this means that we recruit staff, volunteers and trustees that have criminal records. At a board level, we aim to have at least 50% of our trustees who have personal experience of living with a criminal record.

— **Clinks** is the national infrastructure organisation supporting voluntary sector organisations working with offenders and their families. Our aim is to ensure the sector and those with whom it works are informed and engaged in order to transform the lives of offenders and their communities. We do this by providing specialist information and support, with a particular focus on smaller voluntary sector organisations, to inform them about changes in policy and commissioning, to help them build effective partnerships and provide innovative services that respond directly to the needs of their users. We are a membership organisation with over 600 members including the sector's largest providers as well as its smallest, and our wider national network reaches 4,000 voluntary sector contacts.

— The **Prison Reform Trust (PRT)** is an independent UK charity working to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, national and local government and officials towards reform. PRT provides the secretariat to the All Party Parliamentary Group on Penal Affairs.

The submission raises concerns that have been raised in an earlier briefing, which had the support of a number of other charities. It also builds on a consultation response published by Unlock in February 2014. The concerns were featured in an article in *Third Sector* on Wednesday 25th November, titled *Extension of disqualifications in charities bill 'unnecessary'*.[14] Concerns were also raised by the former Solicitor General, Sir Edward Garnier MP, in the second reading debate on the bill.

Summary

A number of the proposals in the Bill represent a direct threat to charities that work to rehabilitate people with criminal records, many of whom employ former offenders either as trustees or in senior management positions. At the heart of the voluntary sector is the principle of working with our service users, rather than doing things *to* them. This is no less important with people in the criminal justice system than with any other group. Any unnecessary barriers to the recruitment of people with convictions as trustees and in senior positions is a threat to the core mission of our sector.

As the Secretary of State for Justice himself has stated, we should not judge individuals by the worst moments in their lives. Instead of seeking to narrow opportunities for ex-offenders to reintegrate and contribute to society, we should be supporting efforts to contribute to civil society through paid employment in the voluntary sector or as volunteers.

The provisions of the Bill, which extends the disqualification framework to a broader range of offences and roles within charities, will undermine the ability of people with criminal records to participate actively in society through legitimate voluntary and paid work. The automatic barring of people on the sex offenders register from becoming charity trustees is a crude and ineffective means of safeguarding children and vulnerable adults.

The Government acknowledges the potential for waivers to be issued in cases where an individual seeks to be a trustee of, or senior manager in, an "ex-offender" charity. It has said it will ask the Charity Commission to review the waiver process and to consult with charities. Unlock's own direct experience, and the support we've provided to other organisations, shows the waiver process is woefully inadequate and not workable in a way that allows charities like Unlock to fulfil their charitable purposes. The extension of the disqualification framework to cover senior management positions will place additional burdens on the waiver process. However, the government has not provided any estimate of how many people will be affected or what additional resources will be provided to the Charity Commission to meet these demands.

This submission seeks to address these concerns as well as others that we have about the Bill. It proposes amendments to clauses 10 and 11 which seek to mitigate the negative impact of the bill's provisions.

Senior management positions

An amendment to ensure that disqualification does not automatically apply to senior management positions

Clause 10, page 7, leave out lines 37 to 40

Clause 10, page 8, leave out lines 1 to 8

Purpose

This amendment removes the automatic application of the disqualification criteria to senior management positions. The Charity Commission would still have the discretion to impose disqualification on senior managers where necessary by imposing a disqualification order under the provisions of clause 11.

[14] Available at http://www.thirdsector.co.uk/extension-disqualifications-charities-bill-unnecessary/policy-and-politics/article/1374365

Summary

Clause 10 of the Bill significantly extends the remit of the current (and proposed) disqualification framework to cover a number of additional roles within charities, beyond the role of Trustee. Currently, those individuals with an unspent conviction[15] for an offence relating to dishonesty or deception are automatically disqualified from acting as a Trustee. The Bill would extend this power so that those in senior management positions in charities would also be disqualified. This raises the prospect of an unknown but potentially significant number of existing charity employees being legally prevented from doing their job. It also risks having a long-standing impact on the potential career prospects of ex-offenders working within charities and a wider negative impact on the ability of ex-offenders to establish their own charities to help others.

Background

The existing disqualification framework has to date not applied to senior management positions and senior management positions were not in scope of the original draft charities bill. The provision will have a significant impact on the 1,750 voluntary sector organisations whose main client group are people in the criminal justice system, as well as the additional 4,900 organisations that support them as part of their work'.[16] The proposals would create unnecessary additional obstacles in the way of recruiting senior staff with criminal convictions. Many of these charities are contracted to deliver justice services under the government's Transforming Rehabilitation programme. The government has acknowledged the value of former offenders working in criminal justice charities, for instance in the role of mentor to prison leavers. However, the proposals will discourage service-user involvement in charities which work with, or are led by, former offenders.

The provisions could impact on a significant number of people employed in the charitable sector. In England and Wales, one-third of the adult male general population, and nearly one-tenth of adult women, is likely to have at least one criminal conviction.[17] However, as far as we are aware, the government has not conducted an impact assessment of the new provision and has not provided an estimate of how many people currently employed in the charitable sector it is likely to effect.

The proposal in the Bill to extend the criteria by which people must be excluded from serving charities is at odds with the Ministry of Justice's own research. A NOMS (2010) briefing, 'Understanding Desistance From Crime'[18] shows how the proposed legislation could increase the risk of re-offending. This shows that working as an employee or contributing as a trustee facilitates:

— Opportunities to contribute to society.

— Networks that provide social capital.

— A sense of belonging that is inconsistent with crime.

'Understanding Desistance From Crime' highlights the following as important factors in promoting desistance:

— Something to give. People who feel and show concern and empathy for others are more likely to desist from crime. Offenders who find ways to contribute to society, their community, or their families, appear to be more successful at giving up crime.

— Having a place within a social group. Those who feel connected to others in a (non-criminal) community of some sort are more likely to stay away from crime. Criminologists call this "social capital"—the amount of social support that someone has "in the bank" to draw upon.

— Work with and support communities. Individuals who feel like they are a welcomed part of society are less likely to offend than those who feel stigmatised. The voluntary sector, faith-based and other community groups, and local employers, are all key components in reintegration. Their influence can last far beyond the criminal justice agencies… Without community reintegration, the only place where an offender can find a warm welcome and social acceptance will be the criminal community.

We hope MPs will support an amendment to clause 10 to exclude senior management positions from the disqualification framework. We also hope MPs will use the opportunity of the committee stage debate to probe the government on:

— How many people employed in the charitable sector will be affected by the extension of the disqualification framework to senior management positions?

— What assessment has been made of the impact of the new disqualification framework on former offenders employed in the charitable sector, including their career prospects and long-term rehabilitation and resettlement?

— What assessment has been made of the impact of the legislation on charities which work with former offenders and who are employed by Community Rehabilitation Companies (CRCs) as part of the government's Transforming Rehabilitation reforms?

[15] As determined by the Rehabilitation of Offenders Act 1974.
[16] TSRC working paper 34: http://www.birmingham.ac.uk/generic/tsrc/publications/index.aspx
[17] Ministry of Justice (2010) Conviction histories of Offenders between the ages of 10 and 52.
[18] Maruna, S (2010) "Understanding desistance from crime", Ministry of Justice/Professor Shadd Maruna.

An effective waiver process

New Clause XX

A new clause to lower the test for a waiver to be granted to individuals who are disqualified due to offences involving dishonesty/deception, where the charity is concerned with relieving the disadvantage faced by people with criminal records and the individual has the support of the charity trustees.

After Clause 10 insert the following new clause—

(1) The Charities Act 2011 is amended as follows

(2) Section 181, subsection (6), at end insert—

()If—

(a) P is disqualified under Case A and makes an application under subsection (2) in relation to a particular charity,

(b) the particular charity is concerned with relieving the disadvantage faced by people with criminal records, and

(c) a majority of not less than two thirds of the charity trustees support an application made by P under subsection (2)

the Commission must grant the application unless it is satisfied that, because of any special circumstances, it should be refused.

Purpose

This amendment lowers the test for a waiver to be granted to an individual who is disqualified due to unspent dishonest/deception offences, where the charity is concerned with relieving the disadvantage faced by people with criminal records, and where a majority of not less than two thirds of trustees support the application for a waiver, unless there are special circumstances that mean it should be refused.

New Clause XX

A new clause to lower the test for a waiver to be granted to individuals who are disqualified due to sexual offences, where the charity is concerned with relieving the disadvantage faced by people with criminal records and the individual has the support of the charity trustees.

After Clause 10 insert the following new clause—

(1) The Charities Act 2011 is amended as follows

(2) Section 181, subsection (6), at end insert—

() If—

(a) P is disqualified under Case K and makes an application under subsection (2) in relation to a particular charity,

(b) the particular charity is concerned with relieving the disadvantage faced by people with criminal records, and

(c) a majority of not less than two thirds of the charity trustees support an application made by P under subsection (2)

the Commission must grant the application unless satisfied that, because of any special circumstances, it should be refused.

Purpose

This amendment lowers the test for a waiver to be granted to an individual who is disqualified due to sexual offences, where the charity is concerned with relieving the disadvantage faced by people with criminal records, and where a majority of not less than two thirds of trustees support the application for a waiver, unless there are special circumstances that mean it should be refused.

New Clause XX

An amendment to strengthen the Charity Commission's waiver process for people with convictions.

Clause 10

After 10(13), insert

(1) The Charities Act 2011 is amended as follows.

"Amend 181 of Charities Act –

After (3) Insert

If P is disqualified under Case A or K and makes an application under subsection (2),

the Commission must grant the application unless it is satisfied in all the circumstances that to do so would increase the risk of criminal activity or malpractice on the part of P or the charity.

Purpose

This amendment strengthens the waiver process that enables people with convictions to be granted a waiver by the Charity Commission.

Summary

These set of amendments present options for improving the Charity Commission's waiver process to enable people with criminal records to be employed by charities as trustees or senior managers. The Charities Act 2011 provides a framework for how the Charity Commission should grant waivers for people previously removed due to mismanagement (s.181(3)(a) states that

If—

(a) P is disqualified under Case D or E and makes an application under subsection (2) 5 years or more after the date on which the disqualification took effect, and

(b) the Commission is not prevented from granting the application by subsection (5),

the Commission must grant the application unless satisfied that, because of any special circumstances, it should be refused.

These amendments would introduce a similar framework for people disqualified under Case A or Case K. Please note that the first two amendments should be tabled together. The third amendment would negate the need for the previous two.

Background

Although it is welcome that the Government acknowledges the potential for waivers to be issued in cases where an individual seeks to be a trustee of, or employed in a senior management position by, an "ex-offender" charity, we know that the Charity Commission's waiver process is woefully inadequate and is not fit to relying on as an adequate safeguard. The minister for civil society, Robert Wilson MP, has assured us that the Charity Commission will consult with the criminal justice voluntary sector on the waiver process prior to the introduction of the new disqualification framework, with a view to issuing improved guidance. We hope that MPs will use the opportunity of the committee stage debate to clarify the scope of the proposed review and that charities will be consulted.

Since 1993, the Commission estimates that it has granted approximately 10 waivers relating to unspent convictions, which is incredibly low given the numbers of people with unspent convictions. From the numbers of those seeking waivers (which again is very low), it could be inferred that the requirement to seek a waiver is creating a chilling effect, leading to fewer expressions of interest in such positions from those who have relevant convictions. The Charity Commission's starting position is that if disqualified by the legislation, it is Parliaments' intention for that individual to be disqualified, and therefore the Charity Commission currently grant waivers in 'exceptional circumstances only', which is a high threshold.

The concern is that suitable individuals, who could well contribute a great deal to the governance of charities, may simply not come forward. A significant proportion of voluntary sector organisations begin as self-help groups, founded by lived experience of the issues they are working to resolve. The widening of the disqualification framework therefore represents a real danger to the future diversity and vibrancy of the voluntary sector working in criminal justice. The disqualification framework and waiver process conflicts with the charitable purposes of those charities promoting the rehabilitation and social integration of people with criminal records.

Furthermore, the widening of the disqualification framework to include senior management positions will mean that many former offenders currently employed by charities will have to seek a waiver in order to continue in employment. The government has not provided any estimate of how many people this is likely to affect or what additional resources will be provided to the Charity Commission to enable it to deal with the likely increase in waiver applications.

We hope that MPs will support amendments to ensure that the waiver process does not unfairly discriminate against charities, particularly those who work with or on behalf of people with criminal records, who wish to appoint people with criminal convictions as a trustee or to a senior management position. At the very least, we hope MPs will seek assurances that the waiver process will be reviewed with a view to producing improved Charity Commission guidance, and that charities will be consulted as part of the review. We hope MPs will use the opportunity of the committee stage debate to probe the government on:

— What is the projected increase in the number of people applying for a waiver as a result of the extension of the disqualification framework?

— What additional resources will be provided to the Charity Commission to enable it to deal with the likely increase in waiver applications?

Sexual offences

An amendment to ensure that sexual offences do not result in automatic disqualification

Clause 10, Page 7, leave out lines 34 to 36.

Purpose

This amendment ensures that people who are subject to the notification requirements under part 2 of the Sexual Offences Act 2003 do not become automatically disqualified from becoming a trustee or hold a senior manager position in a charity.

Background

Clause 10 significantly extends the types of offences which, if unspent under the Rehabilitation of Offenders Act 1974 (ROA), would disqualify an individual from becoming a Trustee or a senior manager. In particular, Clause 10 extends the disqualification criteria to include disqualifying any individual currently subject to the notification requirements under the Sexual Offences Act 2003, even once the conviction is spent under the Rehabilitation of Offenders Act 1974. The presumption by Government is that being subject to the notification requirements (i.e. a "registered sex offender") makes an individual unfit to be in a position of trustee or employed as a senior manager, even once the conviction becomes spent. The idea of an automatic disqualification in this situation is troubling and would raise the prospect of people with old spent sexual convictions being barred from serving as trustees or senior managers of a whole range of charities where safeguarding of children or vulnerable beneficiaries is not an issue.

Consider this example:

> *David has been a trustee of a charity in his local community for 6 years. He has a spent conviction for sexual assault which he obtained 12 years ago for which he was sent to prison for 3 years. None of his fellow trustees are aware of this as he didn't need to disclose it. The charity is involved in policy and campaigning on environmental issues and doesn't deliver front-line work.*
>
> *As it stands, David would become automatically disqualified from his role because he remains on the sexual offences register for life. He will have to either agree to disclose his convictions to his fellow trustees, so that they can decide whether to support a waiver application, or he might decide to resign his position due to fear of the reaction and the potential risk to his personal safety and relationships in the local community.*

The proposal to extend disqualification to those subject to the notification requirements of Part 2 of the Sexual Offences Act 2003 would mean over 46,000 people would be automatically disqualified from trustee positions and senior management posts. [19] An unknown number of existing trustees and senior staff would become automatically disqualified in their roles. There are currently in excess of 1,000,000 trustee positions in England and Wales. An unknown number of existing trustees would become automatically disqualified in their roles. An unknown number of senior managers in charities would become disqualified from their roles.

There are existing safeguards in place for charities that appoint trustees and recruit staff that work with children or vulnerable adults. This additional legislation is unnecessary from a safeguarding perspective, yet creates additional burdens on charities who work with and/or employ ex-offenders. It was not the Governments' original intention to introduce legislation to disqualify those subject to the notification requirements and the provision was not included in the original draft bill. Indeed, the Government rejected this proposal in their consultation response in October 2014 due to existing safeguards:

> *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 … 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).*[20]

Trustees working in charities that work with children or vulnerable adults conduct DBS checks—guidance from the Charity Commission ('Finding new trustees') states:

[19] In 2013/14, 46,102 individuals were subject to the notification requirements (see here).

[20] Para 29 of Government response to the Consultation on Extending the Charity Commission's Powers https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/365710/43820_Cm_8954_web_accessible_Draft_protection_of_charities_bill.pdf (page 48-9).

> *The appointment of a new trustee to a charity is an important matter. Before appointing a new trustee the trustee board must make sure it is acting within the law, in accordance with the charity's governing document, and that the prospective trustee is not disqualified from being a trustee. The commission recommends that DBS checks should be obtained for trustees of charities which work with children or vulnerable adults. Charities should also ensure that a prospective trustee understands the responsibilities they are taking on and can be relied on to carry them out responsibly.*

Those individuals subject to the notification requirements are monitored by the Police. Any moves to increase the disclosure of information relating to these individuals should be done via the Police, rather than through self-disclosure by the individual. The disqualification criteria rely on self-disclosure by individual trustees as a trigger for the disqualification and/or waiver process. However, those most likely to be a risk are those who are least likely to self-disclose.

We hope MPs will support an amendment to ensure that people who are subject to the notification requirements under part 2 of the Sexual Offences Act 2003 do not become automatically disqualified from becoming a trustee or holding a senior manager position in a charity. Without the provision, the Bill still provides for a discretionary power to disqualify people with unspent convictions for sexual offences under the remit of Clause 11(7)F. Clause 11 sets out the framework for disqualification orders, and the reasons why the Charity Commission may impose one. Clause 11(7) sets out the conditions, and condition F is:

> *"that any other past or continuing conduct by the person, whether or not in relation to a charity, is* ***damaging or likely to be damaging to public trust and confidence*** *in charities generally or in the charities or classes of charity specified or described in the order."*

Clause 11(7)F has sufficient scope to enable the Charity Commission to impose a disqualification order against those individuals which they believe are unfit to be a trustee or senior manager.

Inconsistencies with the Rehabilitation of Offenders Act

An amendment to ensure spent criminal convictions do not disqualify an individual from becoming a trustee or senior manager of a charity

Clause 10, Page 7, line 36, at end insert –

( ) Case K does not apply where the offence is spent under the Rehabilitation of Offenders Act 1974

Purpose

This amendment ensures that that where an individual has become legally rehabilitated under the Rehabilitation of Offenders Act 1974, they are able to stand as a trustee (or hold a senior manager position in a charity) without needing to obtain a waiver from the Charity Commission.

Background

Clause 10 would apply to individuals subject to the notification requirements even once their conviction becomes spent. It is unclear how the disqualification criteria would be legally permissible under criminal record disclosure legislation. The proposals widen the automatic disqualification criteria to all individuals subject to notification requirements. This, by consequence, would apply to sexual convictions that are legally 'spent' under the Rehabilitation of Offenders Act 1974. Since the Rehabilitation of Offenders Act 1974 was reformed in 2014, most convictions become spent much earlier. However, an individual may remain subject to the notification requirements for longer.

Take, for example:

> *An individual convicted of a sexual assault and sentenced to 3 years in prison. Assuming the individual doesn't re-offend, the conviction will become spent 7 years after the end of the sentence. However, they will remain subject to the notification requirements indefinitely, with a right to review after 15 years.*

In the example above, under the proposals of the Bill the individual would be automatically disqualified from being a trustee for *at least* 15 years, and potentially for the rest of their life. Under the Rehabilitation of Offenders Act 1974 (ROA), once an individual has been convicted, if they remain conviction-free for a defined period of time (based on the sentence they receive) they are legally recognised as being 'rehabilitated'. The periods of time that apply were significantly altered in 2014 as a result of amendments contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, supported by the Coalition Government. These periods are significantly different to the periods which apply to the notification requirements under Part 2 of Sexual Offences Act 2003, which Clause 10 would otherwise extend the disqualification framework to cover. For example, a 4 month prison sentence for a sexual offence becomes spent 2 years after the full sentence but results in a 7 year notification period on the sexual offences register.

We hope MPs will support an amendment to ensure spent criminal convictions do not disqualify an individual from becoming a trustee or senior manager of a charity. This would ensure that where an individual has become legally rehabilitated under the Rehabilitation of Offenders Act 1974, they are able to stand as a trustee (or

hold a senior manager position in a charity) without needing to obtain a waiver from the Charity Commission. Without the amendment, the legislation would be inconsistent with the provisions of the ROA and could be open to legal challenge.

An amendment to ensure that convictions that are spent under the Rehabilitation of Offenders Act, but that were obtained overseas, do not result in disqualification

Clause 11

Clause 11(2)(11), Page 11, line 45, leave out "which is spent under the law of the country or territory concerned" and insert "which would be spent under the Rehabilitation of Offenders Act 1974 if it had occurred in England and Wales"

Purpose

This amendment ensures that the disqualification frameworks uses rehabilitation legislation as it applies in England & Wales.

Background

It is common practice for employment and charity law to apply the laws that cover the jurisdiction that the activity operates in. However, Clause 11(2)(11) appears to suggest that the legislation used to determine whether a conviction is spent is the laws in "the country or territory concerned". If this is the intention, it would erode the protections afforded by the Rehabilitation of Offenders Act 1974 and open citizens of this country to be subjected to the harsh treatment that might apply in other countries in other parts of the world. It is not clear whether this would be legally permissible or indeed workable. Official determination of whether overseas offences are spent is carried out by Disclosure Scotland, which applies the laws as they apply in either England or Wales, or Scotland, depending on the address of the applicant. We hope MPs will support this amendment to ensure that the disqualification framework uses rehabilitation legislation as it applies in England and Wales.

December 2015

Written evidence submitted by the Directory of Social Change (CHB 06)

1. Summary

Despite the consultation process extending back nearly two years, DSC believes that this Bill contains a number of flaws which could seriously damage charity independence, which have not been adequately grasped or addressed by the Government. DSC is most concerned with:

Clause 1—Official warnings by the Commission. We believe the process of redress needs to be significantly reinforced and the risk of unwarranted reputational damage to a charity needs to be reduced in relation to this power. DSC supports amendments drafted by Bates Wells Braithwaite solicitors, jointly put forward together with ACF, CFG, Bond, and Acevo.

Clause 10—Automatic disqualification from being a trustee. The increasing list of criminal offences in the Bill which would automatically disqualify people from serving as trustees runs counter to the rehabilitation of offenders and even the very objects of many charities which work in that area. Also, the Bill now extends the effect of disqualification to senior management positions, which impinges on employment rights. DSC supports amendments drafted by Unlock, Clinks and the Prison Reform Trust that would remove the effect of disqualification to senior management positions.

Clause 11—Power to disqualify from being a trustee. The overly broad and subjective drafting of this clause would give the Commission power to disqualify anybody for virtually any reason from being a charity trustee. This represents a vast and undesirable shift in power between the state (in the form of the regulator) and civil society. DSC supports the amendment drafted by Bates Wells Braithwaite solicitors, jointly put forward with ACF, CFG, Bond, and Acevo, to remove 'condition F', which is arguably the most open-ended part of the disqualification test, relating to 'damaging public trust and confidence in charity'.

2. Issues and Proposed Amendments

2.1 *Issue: Official warnings by the Commission*

Clause 1 of the Bill would allow the Commission to issue an official warning to a charity when it considered there had been a breach of trust or duty or other misconduct or mismanagement. The Commission wants a way to publicly warn (or name and shame) charities and charity trustees without the full process of opening a statutory enquiry under Section 46 of the Charities Act 2011. DSC believes the process of redress for these warnings needs to be significantly reinforced (by a right of appeal to the Charity Tribunal) and the risk of unwarranted reputational damage needs to be reduced in relation to this power. Giving the Commission power to potentially damage the public reputation of a charity without fully investigating the facts or on the basis of little evidence is not proportionate.

Amendments:

DSC supports amendments drafted by Bates Wells Braithwaite solicitors, jointly put forward together with ACF, CFG, Bond, and Acevo. Precise drafting is not repeated below but the amendments cover the following areas:

- **Publication of a warning**—the amendment would restrict the Commission's power to publish the warning to a wider audience.
- **Notice of a warning**—the amendment would require a minimum notice period of 28 days to the charity's trustees before a warning could be published, allowing them time to make representations.
- **Right to appeal a warning**—the amendment would enable charities to appeal an official warning to the Charity Tribunal.
- **Directing Trustees or fettering their discretion**—the amendment would clarify that issuance of an official warning does not confer on the Charity Commission power to direct trustees or fetter their future discretion.
- **Failure to comply with a warning**—the amendment would ensure that that failure to comply with a warning does not, of itself, trigger the ability for the Commission to take more significant protective action in relation to a charity.

2.2 *Issue: Automatic disqualification from being a trustee*

There are a number of principled and practical problems with the increasingly specified lists of criminal offences in the Bill that would automatically disqualify people from charity trusteeship, and also from employment in senior management positions within a charity.

Many charities, particularly working in the offender rehabilitation area, rely on contributions from people with criminal records—for example by founding a charity to reduce offending or serving as a trustee for such a charity. The provisions in the Bill would make those kinds of vital contributions (which can be effective for individual offenders and in the services provided by those charities) far more difficult.

If passed, these powers would automatically disqualify potentially thousands of serving trustees with unspent criminal records, who until now have been performing their duties satisfactorily. The total number is uncertain but could be in the thousands—this could result in a significant caseload of waiver requests to the Charity Commission, and the potential loss of many qualified trustees. It would also extend the effects of disqualification to senior employees in the charity—effectively curtailing the employment rights of people with criminal records.

The Charity Commission and the Government point to waivers from disqualification as a safeguard—but we doubt this will be a priority given the Commission's past record in granting them and other pressures on the regulator. The net effect will be to push anyone with a criminal record away from involvement with a charity, despite the fact that precisely because of their experience they may be able to make highly effective contributions.

Amendments:

DSC supports the amendment proposed by the charities Unlock, Clinks and the Prison Reform Trust to revise Clause 10, so that automatic disqualification from trusteeship for specified criminal offences does not extend to that person's employment in senior management positions in a charity. Specifically, to amend Clause 10 as follows:

- ***Clause 10, page 7, leave out lines 37 to 40***
- ***Clause 10, page 8, leave out lines 1 to 8***

We would also urge the Bill Committee to consider the robustness of the Charity Commission's waiver system for disqualified trustees in the context of other proposed amendments to Clause 10.

2.3 *Issue: Power to disqualify from being a trustee*

The proposed discretionary power to disqualify trustees based on extremely broad tests including 'unfitness' and 'damaging public trust and confidence in charity' is DSC's biggest concern with this Bill. DSC has consistently opposed this power since it was first proposed in the February 2014 consultation by the Office for Civil Society and the Charity Commission.

This is not a minor detail in the Bill—it actually represents a tectonic shift in power between the state (in the form of the regulator) and civil society. The discretion afforded by the language is so wide it essentially means the Commission could disqualify anybody for practically any reason from being a trustee, regardless of whether that person had been convicted of any crime or found guilty of wrongdoing. It is fundamentally a deeply illiberal power, granting huge authority to a government agency—making the Commission judge, jury and executioner regarding any citizen's ability to engage in voluntary action.

If enacted, this clause would mean that the judgment about who can volunteer to be a trustee of a charity could be made based on the subjective views and opinions of whomever is running the Charity Commission—

which might be unduly influenced by media or political pressure—as opposed to an objective consideration of the facts and legal due process.

We understand the reasons the Commission wants this power—to deal with a handful of tricky enforcement cases— but ultimately the enactment of Clause 11 would not be in the interest of a free and liberal society or the charity sector at large. The Commission has plenty of other powers to deal with bad trustees, including a raft of new measures in the current Bill. We may or may not have faith in the Charity Commission of 2015 to use this power proportionately and judiciously, but what about in five or ten years' time?

Amendment:

DSC would therefore prefer to see Clause 11 scrapped completely. Given that is unlikely, DSC supports the amendment drafted by Bates Wells Braithwaite solicitors, jointly put forward with ACF, CFG, Bond, and Acevo, to remove 'condition F'. This is arguably the most open-ended part of the disqualification test, relating to 'damaging public trust and confidence in charity'. Removing Condition F would still leave the Commission with very wide discretion to disqualify trustees based on 'unfitness' and the other specified conditions. DSC urges the Committee to amend the Bill as follows:

— ***Clause 11, page 11, leave out lines 34-38. This would amend subclause 11(2) of the Bill by deleting condition F.***

3. About DSC and our role

The Directory of Social Change has a vision of an independent voluntary sector at the heart of social change. We believe that the activities of charities and other voluntary organisations are crucial to the health of our society.

Through our publications, courses and conferences, we come in contact with thousands of organisations each year. The majority are small to medium-sized, rely on volunteers and are constantly struggling to maintain and improve the services they provide.

We are not a membership body. Our public commentary and the policy positions we take are based on clear principles, and are informed by the contact we have with these organisations. We also undertake campaigns on issues that affect them or which evolve out of our research.

We view our role as that of a 'concerned citizen', acting as a champion on behalf of the voluntary sector in its widest sense. We ask critical questions, challenge the prevailing view, and try to promote debate on issues we consider to be important.

DSC has a long-standing interest in charity law and the Charity Commission.

4. DSC's principle of Responsible Regulation

DSC believes that voluntary activity should be regulated responsibly. Some regulation is necessary to safeguard and maintain the interests of the general public, the beneficiary, and of the organisations and individuals being regulated. However, it should have a demonstrable benefit and should aim to empower and strengthen voluntary activity rather than control it unnecessarily.

We believe that:

(a) Regulation should be **proportionate—**it must strike a balance between perceived risk and intended benefit. It should recognise the diversity of voluntary sector activity and be developed and applied in a proportionate way.

(b) Regulation should be **appropriate—**it must be informed by the characteristics, capacity, and needs of the organisations and individuals that are being regulated. Insofar as is possible it should be focussed, rather than acting as a blunt instrument that has unintended effects.

(c) Regulation should be **enabling—**it should seek to empower rather than control voluntary activity. The reasons for the regulation and the regulation itself must be properly understood by those institutions which are applying it. It should be accessible and intelligible to those being regulated. It should seek as far as possible to encourage self-regulation rather than focus simply on enforcement.

December 2015

Written evidence submitted by Professor Gareth G Morgan (CHB 07)

1. About myself

I have some 26 years experience of research concerning charities and voluntary organisations. At Sheffield Hallam University I led the inter-faculty Centre for Voluntary Sector Research from 1998-2015. Since 2007 I have held a personal chair in the University as Professor of Charity Studies. I also lead a postgraduate course for charity professionals and I supervise doctoral students in this field.

I was one of two academic witnesses invited to give oral evidence in November 2014 to the Joint Committee on the Draft Protection of Charities Bill—the precursor to the present Bill. My evidence (both oral and written) appears in the Evidence Volume published by the Joint Committee.[21] In its report, making recommendations to Government, the Committee refers to my evidence (or that of Professor Debra Morris who appeared alongside me) on approximately 15 occasions.[22]

I have recently presented an open lecture at Sheffield Hallam University entitled "The End of Charity?" in which I highlight eight major threats to charitable status in England and Wales[23]—the majority of the issues relates to failures in the current system of charity regulation.

2. The Context of Charity Regulation in England and Wales

I repeat what I said to the Joint Committee that the state of charity regulation in England and Wales is currently in a *state of crisis*. Broadly speaking, I remain of the view that the Charities (Protection and Social Investment) Bill is simply "tinkering round the edges".

The details of my concerns are mentioned out in my 2014 evidence,[24] and developed in the detailed analysis I published for the open lecture mentioned,[25] so I will not repeat the full arguments here.

However, in summary my principal concerns regarding charity regulation are as follows:

(1) INADEQUATE RESOURCING OF THE CHARITY COMMISSION.

(2) CONSTANT CRITICISM OF THE CHARITY COMMISSION.

(3) A REGISTER OF CHARITIES WHICH OMITS VAST SWATHES OF CHARITIES. Many charities are exempt or excepted from charity registration under s.30 of the Charities Act 2011. The Commission estimates that there could well be 90,000 charities in these categories—more than half of the number of registered charities.

(4) FAILURE TO IMPLEMENT EXISTING LEGISLATION. Successive Ministers for the Cabinet Office have omitted to use a number of *existing* powers already enacted that would greatly strengthen charity regulation so it seems odd to devoted resources to a new Bill.

In particular, the failure to implement a straightforward update to existing regulations to allow for the 2015 Charities SORPs[26] is causing chaos in terms of the charity accounting requirements for thousands of law-abiding charities. So many charities will get to year ends at 31 December 2015 with the regulations still referring to SORP 2005.[27]

Similarly, a simple commencement order would have a huge deregulatory benefit in enabling charities constituted as charity companies to convert to the much simpler structure of charitable incorporated organisations (CIOs). The relevant statutory framework is all there in the 2011 Act.[28]

Both of these changes have been implemented under the equivalent legislation in Scotland[29] [30]—so England and Wales is suffering with an outdated regulatory framework.

(5) FUNDRAISING ABUSES. Although I welcome clause 14 in the present Bill, I remain concern more generally about fundraising abuses by a small number of charities. I think the Etherington report[31] raised many useful points, but it is worth noting that the Minister already has extensive powers to regulate fundraising.[32]

(6) PERCEPTION OF COUNTER-TERRORISM RISKS AND THE IMPACT ON CHARITY REGULATION. I am concerned that the agenda for the present Bill is unduly motivated by discussion of terrorism abuses. There is very little evidence of UK charities being directly abused for terrorist purposes, but this focus is having a chilling effect on the sector.

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[21] Draft Protection of Charities Bill—Evidence Volume, pp 300-306. www.parliament.uk/documents/joint-committees/draft-protection-of-charities/evidence-volume-protection-of-charities.pdf.

[22] Draft Protection of Charities Bill—Presented to Parliament by the Minister for the Cabinet Office (Cm 8954) www.gov.uk/government/publications/draft-protection-of-charities-bill—see in particular, 21, 24, 25, 34, 35, 43, 44, 49, 52, 63, 64, 67, 69, 74, 75.

[23] Morgan, GG (2015). *The End of Charity* (Valedictory lecture at Sheffield Hallam University, 9 December 2015) http://www.shu.ac.uk/_assets/pdf/the-end-of-charity-morgan.pdf

[24] See note 1.

[25] See note 3.

[26] Statement of Recommended Practice on Accounting and Reporting by Charities. The SORP is the primary standard for charity accounting in the UK, and is in effect compulsory for many charities—either by virtue of regulations under the Charities Act 2011 s.123(1), or, in the case of charitable companies, because of the requirements of company law for company accounts to give a 'true and fair view' taking account of relevant standards. At present, most charity accounts are prepared under SORP 2005 (Charity Commission 2005), but now SORPs are taken effect for financial years beginning on or after 1 January 2015 (Charity Commission & OSCR 2014a & 2014b).

[27] The Charities (Accounts and Reports) Regulations 2008 (SI 2008/629). 2 and 8(5).

[28] Charities Act 2011, ss.228-234.

[29] The start date of conversion of charitable companies to SCIOs was set at 1 January 2012 under the Charities and Trustee Investment (Scotland) Act 2005 Commencement No 5 Order 2011 (SSI 2011/20). For further discussion, see Morgan (2013b, pp243 & 268-71) and Morgan (2015a).

[30] The Charities Accounts (Scotland) Amendment (No. 2) Regulations 2014 (SSI 2014/335).

[31] Etherington, S., Leigh, Pitkeathley & Wallace (2015).

[32] I am surprised at the Minister's reluctance to use powers which are already on the statute book in the Charities Act 2006 (s.69) to allow the regulation of fundraising more generally.

3. Specific Comments on the Bill

Many of the provisions in the Bill make sense and for the most part will strengthen the Commission's powers in logical ways—although, as I comment above, this Bill will do little to solve the fundamental problems of charity regulation in England and Wales.

However, I have two specific comments to make which would improve the Bill both in fairness and effectiveness.

3.1 *Clause 1—Official warnings by the Commission.*

I agree it makes sense for the Commission to issue warnings to charities where appropriate. However, as I argued in my evidence to the Joint Committee in relation to the Draft Bill, if the Commission is given the power as proposed to publicise these warnings there must be a right of appeal to the Tribunal. A charity's reputation could be seriously harmed if the Commission issued a warning incorrectly.

Although the Cabinet Office has improved the Bill slightly by requiring the Commission to give advance notice of such warnings in order to allow representations to be made, in my experience there are cases where the Commission digs its heals in and ignores representations either through lack of resources or sheer unwillingness to change its mind.

The warning is clearly an exercise of the Commission's formal powers under the 2011 Act and must therefore have a right of appeal to the Tribunal.

I welcome the amendments to the Bill which Hon. Members have tabled to implement such a right of appeal and strongly encourage the Committee to accept them.

3.2 New clause—time limitation on excepted charities and exempt charities with no principal regulator

The Joint Committee strongly recommended[33] that the Government should find ways to remove the systems of excepted charities and exempt charities (see my evidence above).

In its response to the Committee, the Government agreed to keep the matter under review, but felt the proposed Bill was not the place to address this.

However, now that the scope of the Bill has been broadened to including social investment, regulation of fundraising and other issues, it cannot be argued that the status of excepted and exempt charities fall outside the Bill. This is likely to be the only Bill for many years dealing with regulatory issues in the Charities Act 2011. A simple amendment to insert a new clause would ensure the Minister's existing powers to phase out such unregistered charities could not be delayed indefinitely.

The registration of formerly excepted charities over £100,000 income commenced from 31 January 2009 (using the powers enacted in the Charities Act 2006), but the Minister has not so far used his powers to lower that limit to £5,000 in line with the registration requirement for other charities. I suggest a 10 year limit from that date should be imposed for completion of that process, which could be achieved with a simple amendment as follows.

Likewise, the process of bringing formerly exempt charities under principal regulators—or alternatively, removing their exempt status so that they are required to register—seems to have halted, so again a time limit would be helpful to prevent indefinite postponement of the issue.

The following amendment to add a new clause to the Bill would address both issues.

After clause 13 insert the following new clause

"x. **Time limit with regard to excepted and exempt charities**

In section 31 of the Charities 2011 insert:

(6) The Minister shall ensure that an order or series of orders is made to amend the amount specified in section 30(2)(b) and section 30(2)(c) bringing them into alignment with the amount in section 30(2)(d) to take effect not later than 31 January 2019.

(7) The Minister shall makes orders under section 23(1)(b) or under section 25 to ensure that no later than 31 January 2019 every institution which remains an exempt charity at that date is subject to a principal regulator.

I trust these comments are helpful to the Committee.

December 2015

[33] DPOCB Report, pp.20-22, paras.38-44.

Written evidence submitted by the Charity Law Association Working Party (CHB 08)

About the CLA

1. The Charity Law Association (**CLA**) has approximately 950 members, mostly lawyers but also accountants and other professionals. It is concerned with all aspects of the law relating to charities and social enterprises.

2. The CLA convened a Working Party in December 2013 to respond to the Government's consultation. This Working Party provided evidence to the Joint Committee at the pre-legislative scrutiny stage and has continued to review the Bill as amended at Report Stage in the House of Lords and as it now passes through the House of Commons.

3. The members of the Working Party (listed in the Appendix) serve in a personal capacity and the views expressed should not be taken as the formal views of the organisations for which they work, nor of the CLA or its membership as a whole. A separate working party has considered the social investment provisions.

Why are we still concerned?

4. The Charity Commission is the regulator of 163,000 registered charities, which are governed by around 943,000 charity trustees. The most common mistakes that the Commission encounter are "honest mistakes" and "poor management" (eg late filing of accounts). Deliberate abuse of charities has been found to be very rare indeed. The new extended powers of the Commission will not apply only in the cases of rare abuse, but they will apply to all charities and its many hundreds of thousands of well-meaning volunteer trustees. These new powers must be viewed in this context.

5. We support the extensions of the Commission's powers where there is a genuine demonstrable need to close a loophole or to enable the Commission to act. However, these powers should be balanced by appropriate and proportionate safeguards. We have set out below our views on why this balance has not yet been achieved.

6. We have also highlighted a number of provisions, where it appears to us that they may be drafting irregularities which could helpfully be amended by the Committee.

Additional safeguards are needed in Clause 1 (Official Warning by the Commission)

Include an effective right of appeal

7. There is no right to appeal an official warning to the Charity Tribunal. Supporters of this Clause note that a charity would have a right to judicially review the decision to issue a warning. Judicial review is not an 'appeal' by a complex resource-intensive yet limited review process, beyond the means of all but the wealthiest charities. The inadequacy of Judicial Review as an effective remedy for charities is demonstrated by the need to introduce the ability to appeal decisions, orders and directions of the Charity Commission to the Charity Tribunal in the 2006 Act. Without this right being included in the Bill, very few charities will have the ability or the means to challenge a warning.

8. It has been suggested that including a right of appeal would "tie the Commission up in red tape and stop it using the power". We are unaware of evidence to support this assertion and, in any event, an abuse of process could be struck out by the Tribunal. Further, if Judicial Review was, in fact, an adequate remedy, the same concern would arise.

Limit the damage that might be caused by publication of a warning

9. The Commission has indicated that warnings will be used in less serious cases and are something beyond regulatory advice but less serious than the opening of an inquiry. However, official warnings published by other regulators indicate a serious and high level of concern. It is not clear to us that a published warning by the Commission would be correctly perceived by the public as indicative of less serious cases. It looks and sounds very serious and is likely to have reputational consequences for any charity subject to such a warning, with serious consequences for its ability to fundraise and which is out of proportion to the alleged breach. Publication of an official warning has the potential to mislead the public thereby negating the stated desire for transparency. We urge the Committee to limit the unintended consequences and potential damage, by preventing the warning from being published, instead it could be issued to the relevant charity trustees and selected stakeholders.

Include time limits for making representations on the face of the Bill

10. With no effective right of appeal, and the potential negative impact which will follow the issuing of a warning, in our view it is essential that the representation process should be clear. The Bill makes no provision for a minimum notice period in which to make representations. Voluntary trustees need sufficient time to be able to respond properly to notice of a warning and to take relevant corrective action. We recommend a minimum period of 28 days be included on the face of the Bill.

Make it clear that an Official Warning is not a de facto power of direction

11. New Section 75A(5)(b) (in Clause 1) provides that a notice of a warning should specify "*any action that the Commission considers should be taken, or that the Commission is considering taking, to rectify the misconduct or mismanagement referred to*" in the warning. Currently the Commission cannot direct charity

trustees to take a specific course of action unless they have opened a statutory inquiry (which provides them with a suite of additional and extensive powers). The Commission has confirmed that they do not regard this power as providing them with power to direct; yet certain of the examples which they have provided suggest that the official warning power could be used by them in this way. We suggest that the wording of Section 75A(5)(b) be amended to state "*such advice or guidance as the Commission considers may assist in remedying the breach specified in the grounds in (a) above*". This would make it clear to charity trustees that the *action* set out by the Charity Commission in its official warning is not a de facto direction.

12. The importance of removing the risk of misinterpretation was demonstrated by the recent judicial review case involving Cage. The case brought to light the high pressure circumstances which can arise and the risks which go along with such pressure situations of a blurring of the lines between "advice" and a "requirement". In court, the Commission submitted that it was providing robust guidance, whereas the charity had understood (supported by the Commission's subsequent press release) that it was being "required" to make a statement which the charity considered it could not make because to do so would improperly fetter its discretion. If the wording in Section 75A(5)(b) is not clarified, there is a risk of misinterpretation, leading to further costs for the Commission and charities.

Making it clear why decisions have been taken: Clause 3 (Misconduct/mismanagement outside of a charity)

13. We can see the rationale for being able, in cases of abuse, to take into account previous conduct etc. However, in order for charity trustees to be able to defend themselves, they must be able to know what factors have influenced the Commission's decision-making. In the Working Party's view it would be helpful if it was made clear in Section 86(2) that the statement of reasons should include the consideration given to "other matters" pursuant to Clause 3.

Can the Commission close a statutory inquiry but leave an Order in place preventing the trustees from taking certain action?

14. Clause 6 introduces new section 84A which is the power (after opening of an inquiry) to direct the trustees not to take certain action or to continue with that action. This Order must be reviewed every 6 months but what is not clear is whether or not the Order can remain in place once a statutory inquiry has been closed.

15. The Commission has a number of powers which relate to the protection of charity property. This new power gives the Commission the ability to direct the actions of trustees. It is an important principle, enshrined in law, that the Commission cannot, save in exceptional defined (and confined) circumstances, exercise the functions of charity trustees or be directly involved in the administration of a charity. If this power to direct the trustees not to take certain action can extend beyond the life of a statutory inquiry, then this important principle will be eroded. We would want to avoid the creation of a class of hybrid charity, where the trustees' duties to act are fettered by ongoing Commission direction, notwithstanding that the Commission has closed its inquiry.

16. The Bill should make clear that the Order will terminate on the closing of the statutory inquiry to which it relates.

There should be further guidance provided as to what "expedient in the public interest" means in Clause 7 (Power to direct winding up)

17. Clause 7 refers to the power being used where it is "expedient in the public interest". This appears to borrow the language of the Insolvency Act 1986 where the Secretary of State can apply for a company to be wound up on the grounds that its activities are against the public interest. In such cases the court must be satisfied that the public needs protecting from the company and so it is just and equitable that it be wound up. However, in the examples provided by the Commission in support of this power, it does not appear to us that such a need to protect the public from such charities would arise. It would be helpful if the Government would provide clarity as to the intended meaning of this phrase in this context.

18. It may be more effective to mirror the cy-près wording from Section 67 Charities Act 2011, such that exercising the power is expedient "given the desirability of securing that the property is applied for charitable purposes".

19. We also note that the proposed Clause 84B(2) ought to refer to a transfer to a charity with the same "or similar" purposes. Otherwise the ability to use this new power may be severely restricted. This may be an omission.

We agree that Clause 9 (Conduct of Charities: Disposal of Assets) should be removed

20. We consider that if this Clause remains in the Bill it would have a number of serious unintended consequences. We would also respectfully note that reference in legislation to "independent charities" is a misnomer—an organisation cannot be a charity unless it is independent.

EXTENSION OF THE OFFENCES GIVING RISE TO CLAUSE 10 (AUTOMATIC DISQUALIFICATION FROM BEING A TRUSTEE) AND THE NEED TO REVIEW THE WAIVER PROCESS

21. We are concerned that the power available to the Minister to amend this section to add or remove an offence could be used to add a further list of offences without full and proper consultation with the sector.

22. Automatic disqualification will prevent any person who is disqualified from charity trusteeship under section 178 from holding positions with senior management functions. There appears to us to be an issue with the way in which sub-clause (6) has been drafted. Would new sub-clause (4)(b) serve to prevent a disqualified trustee from holding a senior finance executive post in a charity? For example, if a Finance Director reports directly to the Chief Executive of a charity, and the Chief Executive has oversight for the day to day running of the charity (which generally includes finance), would the Finance Director be considered to be holding a senior management function or not?

23. We also have concerns about the inclusion of new **Case K**. We did not support the inclusion of sexual offences at the consultation stage, as a wholly separate regime exists in relation to the safeguarding of children and vulnerable persons. We support the extension of the list to offences which go to the honesty of a trustee and their ability to manage safely charity assets, criteria directly relevant to the role of charity trustee. Why should Case K offenders be unfit, whereas, say, others found guilty of murder or arson would not be automatically disqualified? It is also not clear to us how trustees would establish that a fellow trustee fell within Case K.

24. We are aware of the concerns raised by Unlock (registered charity 1079046) that the current formulation of Case K means that individuals whose convictions are spent but who remain subject to the notification requirements of Part 2 Sexual Offence Act 2003 will remain automatically disqualified, even where they wish to hold office in a charity wholly unrelated to children or vulnerable adults. This appears to us to be disproportionate and illogical. It may also have a damaging impact on the ability of charities working in the criminal justice sector to recruit the range of trustees they consider appropriate.

25. The Commission waiver process (which is the mechanism for eliminating any unfairness caused by this Clause) is little understood and seldom used and should be reviewed so that it can work as an effective safeguard..

THE DISCRETIONARY POWER TO DISQUALIFY IN CLAUSE 11 (POWER TO DISQUALIFY FROM BEING A TRUSTEE) DOES NOT CONTAIN SUFFICIENT SAFEGUARDS. THE COMMISSION WILL ACT AS PROSECUTOR, JUDGE AND JURY.

26. The Joint Committee in its report expressed its concern at the lack of safeguards which accompany this power and considered that there should be a review of the way other disqualification regimes work.

27. In the Bill, a disqualification order can be made if three tests are met:-

— One of the listed Conditions.

— The person is "unfit" to be a charity trustee.

— Making the order is desirable in the public interest in order to protect public trust and confidence in charities generally or in the charities or classes of charity specified in the order.

Although this three stage test appears superficially to be robust, it is in fact insufficiently defined and lacks clarity and adequate safeguards.

28. Our significant and material concerns relating to each of the six first-limb conditions have been set out in our Written Evidence to the Joint Committee (paras 43 to 49) which can be found [HERE]. Condition F remains of greatest concern. This Condition is extraordinarily broad. In effect, Conditions A to E are made redundant by Condition F, which enables this power to be used in relation to any past or continuing conduct, whether or not in relation to a charity. If this Condition is needed, as a minimum it should require an element of misconduct and the opening of a statutory inquiry.

29. We also consider that charity trustees would benefit if the criteria for "unfitness" are included on the face of the Bill. It is our view that there should be a list of matters to be taken into account (as in the Company Directors Disqualification Act (**CDDA**)) which include concepts of materiality, responsibility for the breach, frequency of conduct, the nature and extent of loss or harm caused as criteria by which to assess unfitness. With no definition on the face of the Bill, and the Commission seeking to define unfitness in the widest possible terms in its Policy Paper, the test of unfitness will lack any objective criteria by which to measure the reasonableness of the Commission's decision on fitness. The Working Party would urge the Committee to consider a more certain and precise definition of unfitness. We have read with concern certain newspaper reports which have revealed how this new power could be used, which appear to support the case for any new test to be more precisely defined. (http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/11877560/Extremists-to-be-purged-from-charity-boards-under-new-law.html).

30. We are not clear what the phrase "in the public interest" would mean in context. It is essential that this is clarified.

31. The Working Party has advocated for the discretionary power to disqualify to be exercised by the Charity Tribunal, on hearing evidence from the Commission and the individual (akin to the process in the CDDA). We think this would be a better approach to take.

32. The Working Party does not support the inclusion of the power in its current form.

33. On a technical note, the right of appeal against a section 181A Order may need to be extended to include the charity trustees of the charity to which the order relates, the charity itself, or any other person who is affected by the Order. It seems to us that these other categories of persons may well have a substantial interest in the making of such Orders (particularly as they apply to senior staff members of a charity).

Consideration needs to be given to transitional provisions for Clause 14 (Fund-raising)

34. It would be helpful if the transitional provisions make clear that the new additional requirements are to apply only to agreements entered into on or after the date the clause comes into force. There are great many commercial participation agreements in place between companies and charities which benefit charities, and we would not want the companies to withdraw or terminate those agreements because they are concerned that the existing agreements will breach the new law. Likewise, it would be expensive for charities and professional fundraisers to have to amend and renegotiate pre-existing professional fundraising contracts.

35. Since fundraising is currently such a fast developing area, it might be better if the additional requirements were introduced by way of regulation (so that they can be changed and strengthened more easily), which the Minister has the necessary power to do.

December 2015

APPENDIX

List of Working Party Members

Paul Bater	Wellcome Trust
Jo Coleman	IBB Solicitors
Richard Corden	Director, Southampton Hospital Charity
Lindsay Driscoll	Bates Wells Braithwaite LLP
Nicola Evans	Bircham Dyson Bell LLP
Mark Honeywell	Bond Dickinson LLP
Reema Mathur	Stone King LLP
Rosamund McCarthy	Bates Wells Braithwaite LLP
Anne-Marie Piper	Farrer & Co
Timothy Rutherford	Stone King LLP
Geoffrey Trobridge	Lester Aldridge

Written evidence submitted by the Quaker Housing Trust (CHB 09)

1. Quaker Housing Trust welcomes Clause 9: 'conduct of charities disposal of assets[34]' which would protect charities from being compelled to use or dispose of assets in a way that is inconsistent with their charitable purposes. We urge government to retain this clause and continue to both protect charitable housing and honour the intentions of those who fund it.

2. It is a real concern to Quakers that the donations channelled through us into charitable housing projects should continue to provide the stable and affordable homes for which they were given. We strongly oppose the benefit of that money passing into private hands and becoming individual housing profit.

3. From our funding experience, we question the legitimacy of requiring the sale of assets owned by charitable housing providers which is being mooted under other legislation outlined in the Housing and Planning Bill. In particular, we believe the forced disposal of a charity's housing should not be permissible where that goes against the trust deed of the charity.

4. Quaker Housing Trust works with mostly small projects meeting real housing need. This may be helping individuals who are vulnerable at points of transition in their lives or will always need some support. The housing projects are often contributing to well-balanced and sustainable communities, perhaps meeting a small but locally significant housing need.

5. We turn Quaker vision, energy and money into help for charitable social housing projects. These can transform the lives of vulnerable people by giving them a safe and appropriate place to live. We fund practical elements of actual housing through grants and interest free loans. We also offer grants relating to four specific areas of good practice and development in housing provision.

6. Housing should always been adequate, appropriate and affordable, whatever that might mean at each stage in our lives. Home ownership is not always right for everyone, nor at every stage of our lives. Social housing for rent is an important option for secure housing in the choices available for everyone.

[34] Clause 9: Conduct of charities: disposal of assets: "The Charity Commission shall ensure that independent charities are not compelled to use or dispose of their assets in a way which is inconsistent with their charitable purposes."

7. Quakers in Britain[35] have been actively engaged in promoting social housing for over a hundred years. Since 1967 Quakers have been putting their own money into the provision of social housing through their national charity, Quaker Housing Trust (QHT)[36]. We are a very practical expression of the Quaker concern about the needs of badly housed and otherwise homeless people in Britain.

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[35] The Religious Society of Friends (Quakers) in Britain. Registered charity number 1127633. Around 23,000 people attend 478 Quaker meetings in Britain.

[36] Quaker Housing Trust is the housing charity of Quakers in Britain, funded by donations, loans and legacies from Friends (Quakers). A unique national channel for practical Quaker witness in social housing since 1967. Supporting local projects through advice, interest-free loans and grants. Registered company number 00924311. Registered charity number 254704. www.qht.org.uk