



The Charities (Protection and Social Investment) Act 2016: How will it affect the sector? 10mb



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Summary

The Charities (Protection and Social Investment) Act 2016 ('the Act'):

- Gives the Charity Commission ('the Commission') a new power to issue warnings to charities and trustees where it thinks, 'a breach of trust or duty or other misconduct or mismanagement has been committed' and publish these warnings more widely.
- Strengthens the Commission's existing powers to disqualify trustees and extends the circumstances under which a person may be automatically disqualified as a trustee or senior manager in a charity.
- Adds stricter requirements for charities entering into fundraising agreements with commercial organisations that fundraise on their behalf and extends the duties of charities to report on fundraising in their annual reports to the Commission.
- Extends the Commission's powers to regulate fundraising and gives trustees the power to make social investments – an investment which has the joint aims of seeking a financial and social return.

Introduction

The Act received Royal Assent on 16 March 2016 and is the culmination of a long process which began with recommendations published in July 2012, following Lord Hodgson's review of the sector.

The provisions contained within the Act fall into three broad categories:

1. Those which strengthen or add to the Commission's powers to regulate the sector and tackle abuse.
2. Those which relate to charity fundraising practices and extend the Commission's reserve powers to step in and assist the regulation of charity fundraising.
3. Those which grant powers to charities to enable them to make social investments.

The main provisions do not come into force immediately, but will do so when the Minister for Civil Society makes further 'commencement regulations'.

So how will the Act affect the sector? Each of the broad categories mentioned above will be explored in turn and summarised to demonstrate how the law has changed in each case.

Strengthening the Charity Commission's powers

These provisions have been the subject of a great deal of commentary and criticism. The principal powers are as follows:

Power to issue warnings: this is likely to be the provision that affects, directly or indirectly, most charities. The Commission may issue, and then publish, warnings when it considers there has been some misconduct. The Commission has said that the warning is intended to be a measure to deal with low-level misconduct and mismanagement. The charity will have an

opportunity to make representations but the Commission is not bound by these and there is no right to appeal the warning. The only redress available to aggrieved charities will be to apply to the High Court for a judicial review – an expensive and time-consuming remedy. Jay Kennedy, director of policy and research at the Directory of Social Change has declared that this power makes the Commission ‘judge, jury and executioner for charity trustees’.

While the warnings may serve to give the Commission a lower-level sanction which it says is needed, it remains to be seen whether the threat of a published admonition serves to effectively deter abuse or instead disproportionately fetters trustees’ decision-making in the hope of avoiding the wrath of an often hostile media.

Disqualification of charity trustees: The Commission’s existing powers to disqualify trustees has been extended. Disqualified trustees cannot act as trustees or senior managers in charities and it is a criminal offence to do so.

There are more offences that trigger automatic disqualification and the Commission has more extensive powers to disqualify a trustee by order. One of the more contentious provisions grants the Commission a power to establish grounds for disqualifying a trustee by order based on *“any other past or continuing conduct by the person, whether or not in relation to a charity, [which] is damaging or likely to be damaging to public trust and confidence in charities...”*. In evidence submitted to the Parliamentary Committee, sector bodies argued that such a broad and subjective condition effectively leaves the determination of who is fit to be a trustee up to the Commission rather than any due process.

In practice, these provisions will not affect most charities, but it underlines the importance of charities requiring trustees to declare their eligibility and conducting appropriate checks before recruiting new trustees.

The Commission has published draft guidance to clarify how it wishes to exercise its new powers and has promised to consult further on this guidance before the relevant provisions come into force. In particular, the government has indicated that it will not bring the new disqualification provisions into force for at least 12 months to allow the necessary discussions to take place.

These conversations will be crucial for charities who, for example, help and support offenders, and therefore have trustees and senior managers who are ex-offenders themselves who will be caught by the new automatic disqualification provisions. The Commission has indicated that it would be open to discussing waivers for individuals under such circumstances.

Stricter requirements for fundraising

Following the torrid period of negative media coverage relating to charity fundraising, the Commission is cracking down. The Act requires charities that enter into fundraising agreements with commercial organisations, which fundraise on their behalf, to include various provisions in their agreements to ensure that the vulnerable are protected and that any agreed framework for behaviour is noted in writing and used by the charity to monitor compliance.

There are also more onerous reporting requirements for large charities that will have to submit a statement in their annual report to the Commission, setting out the following:

1. the fundraising strategy employed
2. details of the standards any outsourced fundraising is held to
3. any failure to comply with agreed standards
4. details of how the charity has monitored any outsourced fundraising
5. the number of complaints received by the charity or those fundraising on its behalf
6. measures taken to protect vulnerable.

The Act also extends the Commission's powers to regulate fundraising in the event that the current regime of self-regulation by the sector fails. These powers include the power to require registration and compliance with a fundraising regulator.

New social investment powers for charities

The Act grants charities a general power to make social investments. A social investment is one with the joint aims of furthering the objects of the charity and achieving a financial return. This is a long-awaited clarification of the law in this area and will be welcome by charities who wish to make use of this power by making or seeking such investments.

What's next?

There is much in the spirit of the Act that the sector will welcome but the devil is in the detail and the Commission has been given powers with few safeguards to fetter its discretion. Only time will tell whether the concerns raised by the sector prove justified.

While the debate will, and should, continue, my personal hunch (and it is no more than that) is that, for the time being whilst the Commission is under pressure to get tough on the sector, it will not risk a disproportionate exercise of its powers that could lead to negative media and further reviews of its powers that would be a drain on its already stretched resources.

The Act does not significantly change the duties of trustees or the day-to-day running of the vast majority of charities which are well governed by trustees who comply with their duties and responsibilities. However, I would recommend that as a matter of good practice, charity trustees should:

- Review their recruitment procedures for trustees and senior managers – and read the Commission's guidance relating to the exercise of its disqualification powers when it is published.
- Review any existing and proposed fundraising agreements with commercial organisations to ensure they comply with the new Act.
- If their charity has a gross income over £1m (or gross income of over £250,000 and assets with over £3.26m value) ensure that they will be ready to submit an annual report containing the detail relating to fundraising activities required by the Act.
- Discuss whether their charity can benefit from the new powers relating to social investments.

Staff handout - The Charities (Protection and Social Investment) Act 2016: How will it affect the sector?

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The main provisions do not come into force immediately, but will do so when the Minister for Civil Society makes further "commencement regulations".

1. Strengthening the Charity Commission's powers

The principal powers are as follows:

Power to issue warnings: the Act gives the Charity Commission ('the Commission') a new power to issue warnings to charities and trustees where it thinks "a breach of trust or duty or other misconduct or mismanagement has been committed" and publish these warnings more widely. The Commission has said that the warnings are intended to be a measure to deal with low-level misconduct and mismanagement.

Disqualification of charity trustees: the Act strengthens the Commission's existing powers to disqualify trustees and extends the circumstances under which a person may be automatically disqualified as a trustee or senior manager in a charity. Disqualified trustees cannot act as trustees or senior managers in charities and it is a criminal offence to do so.

2. Stricter requirements for fundraising

The Act adds stricter requirements for charities entering into fundraising agreements with commercial organisations that fundraise on their behalf and extends the duties of charities to report on fundraising in their annual reports to the Commission. Large charities will have to include details of their fundraising standards, strategy, and monitoring policies in their annual report. It also extends the Commission's powers to regulate fundraising in the event that the current regime of self-regulation by the sector fails. These powers include the power to require registration and compliance with a fundraising regulator.

3. New social investment powers for charities

The Act grants charities a general power to make social investments – an investment which has the joint aims of furthering the objects of the charity and achieving a financial return.

Further reading

- *News Release: Charities Bill would make Charity Commission 'judge, jury and executioner'*, DSC, December 2015: <https://www.dsc.org.uk/content/60878/>
- *Charities (Protection and Social Investment) Bill*, Public Bill Committee, Parliament: <http://www.publications.parliament.uk/pa/cm201516/cmpublic/charities/memo/chb03.htm>
- *People with convictions as trustees: Written evidence to the Joint Committee on the Draft Protection of Charities Bill*, Unlock: <http://www.unlock.org.uk/wp-content/uploads/Written-Evidence-Joint-Committee1.pdf>

About the author



Kenji is an Associate in Barlow Robbins' Schools & Charities Team and advises on a wide range of charity law-related matters including charity formations, registration, governance and constitutional issues, restructures, property matters and trustees' duties and responsibilities.

He acts for a wide range of organisations in different sectors – education, religion, animal welfare, environment, arts, disability, mental health, sport and military – from small local charities to those with a national and international scope.

He is also a governor of an independent school and trustee of a local arts charity.

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