

Power to disqualify from acting as trustee

Consultation response

About Unlock

Unlock is an independent, award-winning charity for people with convictions which exists for two simple reasons. Firstly, we assist people to move on positively with their lives by empowering them with information, advice and support to overcome the stigma of their previous convictions. Secondly, we seek to promote a fairer and more inclusive society by challenging discriminatory practices and promoting socially just alternatives.

Background to this response

Unlock has worked with government, the Charity Commission, and partners such as the Prison Reform Trust (PRT) and Clinks, to ensure that the new powers granted to the commission under the Charities (Protection and Social Investment) Act 2016ⁱ do not deter or prevent suitable people with criminal records from being employed as senior managers or acting as trustees of charities. We informed the development of the legislation as it passed through Parliament, including producing a widely supported briefing.ⁱⁱ

The Charities (Protection and Social Investment) Act 2016 gives the Charity Commission “a power to disqualify individuals from acting as trustees. While a person is disqualified under this power they are also disqualified from holding senior management positions in the charity or charities concerned”. Full details of the consultation documentation on this power can be found on the Charity Commission website.ⁱⁱⁱ

We welcome the commission’s consultation on its proposed approach to using this new power. Unlock has worked closely with PRT and Clinks to highlight concerns about the Act and their potential impact on people with criminal records and charities which work with or employ them. Unlock believes that people with criminal records can make a significant contribution to the charitable sector, especially those charities focused on rehabilitation and resettlement. We want to ensure that this new power does not adversely affect the ability of people with criminal records to provide leadership, governance or guidance to charities, nor affect the ability of individuals to start new charities. Our response to the main points of the consultation is below.

Test 2 – How the commission assesses whether the person is unfit to be a trustee

How the Charities Act 2016 complies with the Rehabilitation of Offenders Act 1974

Our overarching concern, shared by PRT and Clinks, is the legality of the commission using spent convictions/cautions as a basis for deciding whether a person is unfit to be a trustee as part of its discretionary disqualification power. We recommend that spent convictions are excluded from the scope of the commission's discretionary powers of disqualification.

- Condition F of test 1 includes scope to take account of *“some convictions that do not mean automatic disqualification”*.
- Test 2 includes scope to take account of *“conduct which indicates or relates to a risk to a charity and those it is meant to help - for example a person with convictions for offences against children being involved in a charity working with children or vulnerable adults”*.

In exercising its powers of discretionary disqualification, the commission needs to clarify:

- Whether it intends to take account of spent/convictions of charity trustees and how it will lawfully do so? It is unclear how spent convictions could be taken into account without putting the commission or charities in breach of the provisions of the Rehabilitation of Offenders Act 1974 (ROA). Our concern is that charities may interpret this power to mean that they must begin to collect details of spent convictions and cautions from trustees and senior managers. The commission needs to provide clear guidance that makes clear this is not the case, ensuring that charities are not illegally collecting information that people are not required to declare under the ROA.
- What convictions will fall within the scope of its discretionary disqualification power? Condition F of test 1 power could potentially mean any type of criminal conviction, not just those listed as offences that result in automatic disqualification, could result in discretionary disqualification. The policy paper refers to two examples (serious sexual offences and animal cruelty). We recommend that the commission specifies what types of offences it categorises as likely to damage public and trust and confidence, and which offences would be out of scope of this power.

Responsibility for safeguarding

We support PRT's position that there is potential for the blurring of accountability and responsibility for safeguarding under the new provisions. There is a danger that the new policy sets the commission up in a position of responsibility in relation to the safeguarding of children and vulnerable adults, which it is not

qualified to meet. For similar reasons, we did not support the inclusion of sexual offences as a criteria for automatic disqualification in the legislation, as a wholly separate regime exists in relation to the safeguarding of children and vulnerable persons.

The commission's own risk assessment framework, to which the policy paper refers, requires that the commission's role is *"limited to ensuring that charities have appropriate safeguarding policies in place and comply with them and to liaise with other agencies and authorities which have primary responsibility for safeguarding."* The new policy is a clear step beyond this limited role, and means that the commission's position in relation to safeguarding is now worryingly confused. It is vital that the commission clarifies its position on safeguarding, and how it will work with other agencies and organisations that have primary responsibility and expertise in this area, to ensure that the welfare of children and vulnerable adults is not put at risk.

Making guidance available and accessible

The commission will need to produce clear guidance to enable charities and people with criminal convictions/cautions to understand the legislation and their responsibilities under its provisions. This should be done in close and regular consultation with the voluntary sector and people with criminal records. We welcome the efforts made so far by the commission to consult with charities such as Unlock, PRT and Clinks on the implementation of the new legislation.

We also urge the commission to consider the impact of this new power on the diversity of charity trustees and people holding senior management positions. It is well documented that people from black, Asian and minority ethnic communities face discrimination in the justice system and as a result are over-represented all parts of the system. This is likely to have consequences of disproportionately affecting groups with protected characteristics under the Equalities Act 2010.

Test 3: How the commission assesses whether the disqualification is desirable in the public interest in order to protect public trust and confidence

Where it relates to criminal records, the commission should make an addition to the list of factors to take into account. This should include the length of time passed since the conviction/caution, with particular emphasis on whether the offence is now spent under the Rehabilitation of Offenders Act 1974.

Deciding on the period of disqualification

The policy paper includes the following aggravating factor:

- where the relevant conduct relates to a caution or conviction, an individual has more than 1 relevant caution or conviction

It is unclear whether the commission intends for spent cautions or convictions to be in scope of the policy. We believe it is contrary to the provisions of the Rehabilitation of Offenders Act 1974 to allow a spent conviction or caution to count against an individual as an aggravating factor. It is also counter to the commission's own commitment in the policy paper to take account of "the principles of rehabilitation". Furthermore, we note that the provisions of the Rehabilitation of Offenders Act 1974 are not "principles"; they are legal requirements which impose statutory rights and obligations on individuals, public and private bodies. Merely taking account of the "principles of rehabilitation" is not sufficient for the commission to be compliant. The period of disqualification should be no longer than the time it takes for a conviction to become spent under the Rehabilitation of Offenders Act 1974.

Scope of the disqualification

Where the reason for disqualification relates to criminal records, the commission should give due consideration as to whether the disqualification order should also apply to so-called "ex-offender" charities whose primary purpose is the rehabilitation and resettlement of people in the criminal justice system and their families.

There are over 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. Many of these organisations have staff or volunteers with criminal records, both as trustees or in senior management positions. We know that the voluntary sector works on the principles of desistance, working alongside service users, rather than doing things to them.

People with convictions often face discrimination from employers, and the commission should remove any unnecessary barriers to the recruitment of people with convictions as trustees and in senior positions. Not to do so would be a threat to the core mission and values of our sector.

For the above reasons, we endorse PRT's recommendation that the policy paper is amended as follows:

The starting point for using this power will be that the commission will disqualify an individual from being a trustee in relation to all charities, unless the individual can demonstrate why they

should only be disqualified in relation to a particular charity or class of charities, **or there are circumstances which mean the individual should not be disqualified in relation to a particular charity or class of charities.**

Communicating the waiver process

Given the potentially lengthy period of disqualification (of up to 15 years) from being a trustee may relate to a specific charity or activity, the commission should consider how it communicates, to potential trustees and/or senior managers, the ability to apply for waivers, the process of doing so, and in what circumstances they could be considered fit for a role in alternative roles and/or charities. This could help to manage the expectations of both individual applicants and charities.

What we do

We help

- We support people with convictions by providing information, advice and support through our [websites](#) and [helpline](#)
- We help practitioners who support people with convictions by [providing criminal record disclosure training](#) and useful resources
- We [recruit and train people with convictions as volunteers](#) to help support the information and advice we provide
- We [support employers](#) in the fair treatment of people with criminal records

We listen and learn

- Our [helpline](#) and [forum](#) provide an ear to ground on the problems that people face as a result of their criminal record
- We [collect evidence and undertake research](#) into the barriers caused by criminal convictions

We take action

- We [challenge bad practice by employers and push for improvements to the way that criminal record checks operate](#)
- We advocate for a fairer and more inclusive society by [working at a policy level](#) with Government, employers and others

More information

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ⁱ Charities (Protection and Social Investment) Act 2016, services.parliament.uk/bills/2015-16/charitiesprotectionandsocialinvestment.html [last accessed 15/08/2016]

ⁱⁱ Unlock, Ex-offenders, charity trustees & managers -Briefing – Charities (Protection and Social Investment) Bill 2015-16 Second reading, House of Commons (2015), www.unlock.org.uk/charities-bill/ [last accessed 15/08/2016]

ⁱⁱⁱ Consultation on power to disqualify from acting as a trustee, www.gov.uk/government/consultations/consultation-on-power-to-disqualify-from-acting-as-a-trustee [last accessed 15/08/2016]