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Ben Harrison  
Office for Civil Society  
Cabinet Office  
4th Floor  
1 Horse Guards Road  
London, SW1A 2HQ.

By email: [charities.act@cabinet-office.gsi.gov.uk](mailto:charities.act@cabinet-office.gsi.gov.uk)

Dear Mr Harrison

### **Consultation on extending the Charity Commission's powers to tackle abuse in charities**

ICAEW welcomes the opportunity to comment on the *Consultation on extending the Charity Commission's powers to tackle abuse in charities* published by the Cabinet Office in December 2013, a copy of which is available from [this link](#).

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 140,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

This response reflects consultation with the ICAEW Charities Subcommittee of the Business Law Committee, which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.

ICAEW supports the proposed changes as supporting the stated objective of ensuring more effective regulation of charities by tackling malpractice and to support public trust and confidence in charities, the regulator and the regulation of the charity sector.

## Comments on proposals in the response template

We commend the development and presentation of the proposals, using actual cases to illustrate the need for extension of the Charity Commission's powers in given circumstances.

### **Proposal 1 - Extending the list of criteria that trigger automatic disqualification from trusteeship**

We agree with the proposed extension to the list of criteria that trigger automatic disqualification from trusteeship and recommend that it be made explicit that any disqualification as a trustee extends to exempt charities.

We agree with the specific proposals (a) to (i) listed under Option 1 (paragraph 64). In particular, it is sensible to align the Commission's disqualification powers with the revenue law requirement of 'fit and proper person' responsible for management of a charity for tax law purposes (Finance Act 2010, Sch 6, para 4), as proposed in paragraph 64(h). There also needs to be a clear understanding between the Commission and HMRC when one or the other has doubts about an individual's fitness to be responsible for or involved in managing a charity. However, we are very concerned that the HMRC fit and proper persons helpsheet states that a person may be judged not 'fit and proper' if they have been involved in designing and/or promoting tax avoidance schemes. This helpsheet was published by HMRC without consultation in late 2013. We deplore this lack of due process. The failure to expose the draft guidance to proper scrutiny means that the potential effects have not been thought through, for example the possibility that a partner or employee of an accountancy practice that offers tax planning advice could be declared unfit to manage a charity.

In any case, the legislation should allow a single appeal route to challenge such decisions - rather than requiring appeals under tax law and charity law. We recommend the establishment of a disciplinary process more in line with that for company directors or the Financial Conduct Authority's procedures for bank directors.

### **Proposal 2 - There are other circumstances where rather than being automatic, disqualification from charity trusteeship should be left to the Charity Commission's judgement on a case by case basis**

We consider that there should be a broad power rather than a limited power for the Charity Commission (the Commission) to disqualify persons from acting as trustees, in addition to there being circumstances in which disqualification is automatic. Whilst regulatory criteria for automatic disqualification provide clarity and certainty, there needs to be flexibility and discretion for the Commission to ensure that boundaries cannot be manipulated on the one hand, and to provide for waiver of disqualification on the other. We agree that the Commission should have the power to decide whether disqualification is in the public interest even if there is no specific provision in law, subject to the proviso - as suggested in paragraph 60 of the Consultation document - that the Commission should be able to grant waivers where appropriate. As the consultation notes, this is essential to support the rehabilitation of offenders.

Flexibility is also important because there will be cases where the Commission may wish to disqualify someone from being a trustee of certain types of charity, but not from all charities. For example, the Commission might wish to disqualify a person who has an unspent conviction for dangerous driving from a transport providing charity, but not necessarily from other charities.

It would, therefore, be best if the Commission were given a power to disqualify a person from such charities or classes of charities, and for such periods, as may be specified in the order. The circumstances suggested in paragraph 66 are reasonable examples of when the Commission might exercise judgment, the underlying principle being that the appointment of a person not automatically disqualified would nevertheless bring a risk of loss of the charity's assets or other misconduct.

However, the power must be exercised fairly. The grounds for making any disqualification order would need to be stated formally and there should be an opportunity for the person to defend themselves against disqualification if they think it is unfair before the order comes into effect. The judicial process can be very slow and expensive, so it is essential that there is both an initial opportunity to seek an internal review of the Commission's decision, and then a right of appeal to the First-tier Tribunal

(Charity). Even so, we comment that it may be very difficult to appeal successfully against disqualification after the event, so the detailed framing of these powers must be such that the Commission will only use them when absolutely necessary.

### **Proposal 3 - Removal from trustee body and notification of other trustees**

Yes: we agree that existing removal powers should be amended to enable the Commission to remove a disqualified trustee.

### **Proposal 4 - Dealing with disqualification where only one or two trustees remain**

We agree with the principle that the Charity Commission needs to be able to act quickly to resolve any situation where disqualification or removal of trustees would reduce the number of active trustees in the charity to below the minimum, but it is not clear what specific legislative change is being suggested.

### **Proposal 5 - Preventing disqualified trustees acting in another position of power in a charity**

Yes, we agree that a person who is disqualified from being a trustee should also be prevented from acting in other positions of power in a charity.

### **Proposal 6: Where a disqualified person is a director of a corporate trustee of another charity, preventing them from participating in decisions about the charity's affairs**

We agree with the proposal.

### **Proposal 7: Extend the existing power to remove a trustee (or other officer holder) so that it can be exercised where there is misconduct or mismanagement OR a need to protect charity property**

We support this proposal but point out that in Scotland, the only test required is that there has been misconduct.

### **Proposal 8 - Preventing trustee resignation as a means to avoid disqualification**

We agree that the loophole should be closed but suggest that a more general power to disqualify someone from being a trustee (Proposal 2) should address the issue, especially if it refers to the 'fit and proper' requirement, rather than just to specific offences. The general provision in s.89(5) Charities Act 2011 requiring the Commission to give notice and allowing the person to make representations is an important right and should not be removed - for example there could be simple errors where a trustee needs to say "You've got the wrong trustee - it's X you need to remove!" If someone resigns following such notice, a sufficiently broad power under Proposal 2 should allow the Commission to prevent the person acting a trustee of other charities.

We note that charity law in Scotland was amended by the Public Services Reform (Scotland) Act 2010 to extend the powers of OSCR to include petitioning the Court of Session for an order which would essentially disqualify a person who had previously been a charity trustee from acting in that capacity again.

### **Proposal 9 - Misconduct or mismanagement in any charity can be used as evidence**

We support the proposal. We also suggest that the concept of 'misconduct in any charity' should be defined by reference to the definition of charity in the Finance Act 2010 - not just the definition in the Charities Act 2011. This would mean that misconduct in a Scottish or Northern Irish charity, or a body established elsewhere in the EEA and recognised as a charity for tax purposes could be used as evidence.

**Proposal 10 - Amend the existing power to direct specific action when an inquiry is open and there is misconduct/mismanagement OR there is a risk to property so that the Commission can exercise it without opening an inquiry**

We consider that the requirement to open an inquiry is a useful protection in such cases. The grounds for opening inquiries under s.46 Charities Act 2011 are well established, and trigger the important provisions of ss47-49 of the Act. In urgent cases, an inquiry can be opened and directions given to take specific actions on the same day. We are not persuaded that it is appropriate for the Commission to have the power to direct major actions without opening an inquiry.

**Proposal 11 - Extend existing powers to enable direction to prevent acts of misconduct/mismanagement or acts in breach of fiduciary duty taking place**

We support this proposal in principle, but we feel it should be implemented by extending the s.84 direction provisions, rather than by making further changes to s.79 of the 2011 Act. We support the proposal that directions restricting transactions while an inquiry is ongoing under s.84 should require 12-monthly review by the Commission.

**Proposal 12 - Power to direct application of charity money to another charity when individuals are unable to apply money properly (currently the power can only be exercised if they are “unwilling”)**

We support this proposal. It will address the common difficulty where trustees cannot properly instruct banks or others.

**Proposal 13 - Where an inquiry has been instigated, the Commission can restrict/prevent actions (for example preventing the use of premises for unlawful purposes) as well as financial/land transactions and enable the Commission to direct, for example, that a speaker does not speak at a charity event or on charity premises where to do so would amount to the trustees committing misconduct or mismanagement**

We are not convinced that an additional power is needed. It would appear that the provisions of s.84(2) could be used in the sort of cases described in the consultation document. For example, if the trustees knowingly invite a speaker who is expected to incite hatred, the mismanagement has already occurred at the time of the trustees' decision to make the invitation. This is also subject to the useful conditions in s.84(3).

**Proposal 14 – Extend an existing power to enable the Commission to direct a bank to notify the Commission of certain movements on a bank account**

We support this proposal.

**Proposal 15 - Breach of a Commission order or direction is in itself an act of misconduct which can result in use of Commission’s other compliance powers including disqualification**

We support this proposal.

**Proposal 16 - Ability to issue official warnings, which if not heeded could result in the Commission using its other powers**

We agree a proposal to give official warnings of this kind could be very useful - but it is not quite clear from the consultation document what kind of statutory provision is proposed. Surely the Commission can **already** write to trustees warning them that the Commission is minded to use certain powers if they do not take certain actions. If the warning is simply intended to encourage compliance rather than trigger the force of ss.335/336 it is not clear why legislative change is needed. However in serious cases, the Commission needs the resources to work with prosecuting authorities to bring prosecutions. Simply amending the legislation will not help the Commission regulate effectively if it lacks the necessary resources.

**Proposal 17 - A new power for the Charity Commission to direct a charity to wind up and apply all of its net assets for charitable purposes by direction or scheme where necessary**

We support this proposal.

**General comments**

On a general point, we recommend that the powers of all charity regulators in the United Kingdom be as closely aligned as possible, to ensure a consistent approach and avoid confusion in relation to cross-border charities. There are instances where the powers of the Charity Commission differ from those of the Office of the Scottish Charity Regulator (OSCR). For example, in relation to Proposal 1, we note that in Scotland unspent convictions must be for crimes involving dishonesty (deception is not included) or offences under charity law in Scotland. Paragraph 55 in the consultation document refers to deception as well as dishonesty. However, we accept that this and other differences may be due to underlying differences between English and Scottish law, such as changes made by the Fraud Act 2006.

Yours sincerely

Felicity Banks  
Head of Business Law

T +44 (0)7920 8413

E [Felicity.banks@icaew.com](mailto:Felicity.banks@icaew.com)