

## **Charities (Protection and Social Investment) Act 2016**

### **Francesca Quint**

A number of amendments to the Charities Acts 1992 and 2011 were made by the Charities (Protection and Social Investment) Act 2016, which received Royal Assent on 16 March. The amendments can be grouped as follows: (i) additional powers for the Charity Commission to deal with the abuse of charities, (ii) the further regulation of fundraising and (iii) clarification and amendment of the law relating to social investment by charities. None of the reforms to substantive charity law are yet in force but it is already the law that, as specified by s 16, there should be a report to Parliament on public confidence in charities, the level of charity donations and people's willingness to volunteer following regular five-yearly reviews, the first of which is to start within 3 years of the passing of the Act.

#### (i) Additional powers

In terms of the Commission's additional powers, the following new or amended sections have been inserted into the 2011 Act.

#### *Sections 75 to 80*

The new s.75A empowers the Charity Commission to give formal warnings to trustees or charities when it considers that a breach of duty has taken place. Notice must be given and the warning may be published. Section 76 is amended to enable the Commission to extend an existing period of suspension of a trustee or officer by up to 12 months to a maximum of two years. The new s.76A enables the Commission, when considering for any purpose whether misconduct or mismanagement has taken place, to take account of an individual's conduct in relation to another charity or any other conduct it considers

likely to damage public confidence in charities or any type of charity. Section 79 is replaced by a new s 79 which enables the Commission to exercise its power to remove a trustee (and thereby disqualify him or her) even if the trustee resigns before being removed. The new s.79A enables the Commission to remove a trustee who is disqualified.

## *Sections 84 to 85*

Section 84 enables the Commission after instituting an inquiry to direct trustees to take specified action. The new s.84A empowers the Commission to direct trustees not to take a specified action if it considers that the action would amount to misconduct or mismanagement. Such a direction must be reviewed after 6 months. The new s.84B enables the Commission to direct the winding up of a charity, and the transfer of any remaining assets to another charity with the same purposes, where the Commission considers this expedient because the charity does not operate or its purposes could be carried out more effectively if it ceased to exist. The direction applies even if the trustees have no power to do what is directed so long as it does not involve contravention of an Act of Parliament. Prior public notice is required and the Commission is bound to take account of any representations received. Section 85, which enables the Commission to direct a particular application of charity property without the need for an inquiry is amended to apply to circumstances where the trustees are unable, rather than unwilling, to do so voluntarily. The saving for contractual rights in the context of any direction under s 75 is disapplied in relation to the contractual rights of the charity or a trustee (acting as such), which are therefore modified as necessary.

## *Section 178*

Section 178 is amended to extend the scope of disqualification of trustees to include acting as officers, agents or employees of charities and the occasions for disqualification

to include contempt of court through making certain false declarations, a High Court finding of disobedience to an order or direction of the Commission, being 'designated' for the purposes of certain enactments relating to terrorism and having a 'notification' requirement relating to certain sex offences. In addition the new s.178A adds to the list of occasions which bring about disqualification (i) conviction for a number of other offences under Acts relating to terrorism, the use of proceeds of crime, money laundering and bribery, (ii) contravention of an order of the Commission made in the context of an inquiry, and (iii) conviction for misconduct in public affairs, perjury or perverting the course of justice. In addition the occasions are extended to cover attempts or conspiracy to commit, and aiding and abetting the commission of such offences and 'encouraging or assisting' the commission of certain offences under the Serious Crimes Act 2007.

## *Sections 181 to 182*

The new s.181A empowers the Commission by order to disqualify a person from being a trustee in relation to all charities or specified charities or types of charity and specifies the occasions on which such order may be made. They include being cautioned for a relevant offence, convicted abroad of an equivalent offence, found by HRMC not to be a fit and proper person to manage a charitable body or trust, responsible for misconduct or mismanagement or for any other conduct likely to damage public confidence in charities, or certain types of charities. The new s.181B sets the maximum disqualification period at 15 years, starting when the time for appealing to the Tribunal expires and permits the Commission to suspend a person (for up to two years) from being a trustee for any charity without the Commission's approval after it has given notice of its intention to make a disqualification order, and requires the Commission to keep the order under review once made. The new s.181C deals with procedure. It provides for at least one month's notice to be given to the person affected, notice to the other trustees, public notice (unless considered unnecessary) and the requirement to take account of representations received. A copy of the order must be sent to the person affected and to the charity (if

corporate) or the other trustees (if not). The new s.181D enables the person affected to apply to the Commission for the disqualification order to be varied or revoked. Section 182, dealing with the Commission's register of all those it has removed from office is amended to include those disqualified by order of the Commission and those removed by the Commission as disqualified.

## *Sections 183 to 184*

Section 184A extends the criminal and civil consequences of acting whilst disqualified to the officers of corporate trustees who have taken part in a decision relating to the administration of the charity.

### (ii) Fund-raising

As to the regulation of fund-raising by charities, the following amendments are made to the 1992 and 2011 Acts.

#### *1992 Act, s 59*

Section 59 is amended to provide that a charity's agreement with a professional fundraiser or commercial participator must contain additional safeguards. It must specify the voluntary scheme for regulating fund-raising, or the fund-raising standards, by which the other party is to be bound, say how the other party is to protect vulnerable people and the public from unreasonable intrusions into their privacy, unreasonably persistent approaches for money or property and undue pressure to give money or property, and set out how compliance will be monitored.

## *1992 Act, s 64*

The new s.64B enables regulations to be made under the existing s 64A, which reserves power to Government to control fund-raising by charities and similar institutions. The regulations may impose requirements on charities and similar institutions to comply with the requirements of a specified, non-publicly funded regulator, take account of the regulator's guidance, pay its fees and register with the regulator. The new s 64C goes on to enable such regulations to confer specified functions on the Charity Commission (or a person appointed by the Commission) and envisages that some of the relevant functions may be taken from the 2011 Act. In addition, fees chargeable to charities under s 19 of the 2011 Act, which empowers the Minister to make regulations to enable the Commission to charge for performing specified functions, the inspection of the register of charities or for providing copies of document are extended to similar, non-charitable institutions which engage in fund-raising.

## *2011 Act, s 162*

The new s.162A requires larger charities to include in their annual report a number of statements about fund-raising. These should set out:

- the charity's approach to fund-raising, in particular whether it uses external professional help;
- whether the charity or any agent of the charity's is bound by a voluntary scheme for regulating fund-raising or any voluntary standard, and if so which;
- whether there has been any failure to comply;
- whether and if so how the charity monitored fund-raising activities by its agents;
- the number of complaints about fundraising received in the financial year in question;

- steps taken by the charity to protect vulnerable people and the public from unreasonable intrusions into their privacy, unreasonably persistent approaches for money or property and undue pressure to give money or property,

(iii) Social investment

*2011 Act, s 292*

'Social investment' by charities is provided for in the new Part 14A of the Charities Act 2011, which contains the following three new sections.

The new s.292A defines the term social investment as an application or use of funds or property made by a charity, or taking on a commitment relating to another's liability which puts the charity's funds at risk (e.g. a guarantee), with a view to both directly furthering the charity's purposes and achieving a financial return for the charity. Any outcome for the charity which is 'better' for it than simply expending the whole of the relevant funds counts as a financial return, and in relation to a commitment on behalf of another, a financial return is treated as having been achieved if the commitment is not called upon, or is called upon only in part. Additional outcomes do not prevent the action from amounting to a social investment if both intentions are present.

The new s.292B confers on all charities, whenever established, a new statutory power to make social investments except where

- the charity is governed by statute, subordinate legislation or Royal Charter,
- there is an express prohibition in its trusts, or
- the social investment will involve the use or application of, or risk to, permanent endowment (unless the trustees expect that the expenditure or potential expenditure involved will be otherwise permitted by the trusts of the charity).

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The new s.292C sets out the relevant duties of trustees. In relation to social investments made after s 292B comes into force. These cannot be excluded or restricted by the trusts of the charity. The trustees must first consider whether they require advice, and if so obtain and consider it and be satisfied that the social investment is in the interests of the charity having regard to the expected benefits before proceeding. They must also review all their social investments from time to time, and again consider whether advice is required (and if so obtain and consider it). Sections 4 and 5 of the Trustee Act 2000 are disapplied in relation to social investments by unincorporated charities which are also 'investments' within the 2000 Act.

It will be interesting to see to what extent the new Act helps to encourage confidence in charities, whether the number of complaints about fund-raising diminishes, how broadly the Commission will interpret its new powers and how frequently it will use them and whether there will now be a flowering of social investment among charities.

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