

August 2016



CLINKS
RESPONSE

Clinks' response to the Charity Commission's consultation on the power to disqualify from acting as a trustee

The Charity Commission's use of the new statutory power to disqualify individuals from acting as trustees and in senior management positions at charities

About Clinks

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 500 members including the voluntary sector's largest providers as well as its smallest, and our wider national network reaches 4,000 voluntary sector contacts. Overall, through our weekly e-bulletin Light Lunch and our social media activity, we have a network of over 15,000 contacts, which includes individuals and agencies with an interest in the Criminal Justice System (CJS) and the role of the voluntary sector in the resettlement and rehabilitation of offenders.

Background to this submission

Clinks has worked alongside partners, such as Unlock and the Prison Reform Trust, to raise concerns on behalf of the voluntary sector about new powers granted to the Charity Commission under the Charities (Protection and Social Investment) Act 2016 to disqualify people with certain convictions or cautions from acting as trustees or being employed as senior managers in charities.¹ We have previously supported Unlock, as a leading organisation that represents people with convictions, in a number of ways to inform the development of the Act as it passed through parliament, including a widely supported briefing.²

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". This disqualification can relate to the previous convictions of either a serving and potential trustee, or senior manager in a charity. Full details of the consultation documentation can be found on the Charity Commission website.³

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We welcome the Commission's call for evidence on its proposed approach to using this new power. Clinks believes that the involvement of people with lived experience of the Criminal Justice System can contribute significantly to the management and running of charities, especially those focussed on rehabilitation and resettlement. We want to ensure that this new power does not adversely affect the ability of these individuals to start new charities or provide leadership and guidance to existing ones.

The consultation document asks respondents to give feedback on a number of tests that will be applied to applicants, in order to assess whether or not they should be disqualified from being a trustee or senior manager in a charity. Clinks has worked with Unlock, the Prison Reform Trust and our members to compile the following short response.

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

Clinks' primary concern, as shared by the Prison Reform Trust and Unlock, is the legality of the Charity Commission using spent convictions/cautions as a basis for deciding whether a person is fit to be a trustee as part of its discretionary disqualification power. The following two points (one referenced in Test 1 and the other in Test 2) have provided cause for concern:

- 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".

The Commission should clarify urgently whether it intends to collect information about the convictions and cautions of charity trustees and senior managers that are considered spent under the Rehabilitation of Offenders Act 1974.⁴ If it intends to collect this information, then it must show how this is done without being in breach of the aforementioned Act. Clinks does not think that this information should be available to the Charity Commission. We hope that the Commission will confirm that it will not collect information about spent convictions and cautions.

We are also concerned that charities may interpret these new powers to mean that they must begin to collect details of spent convictions and cautions from trustees and senior managers. The Charity Commission needs to provide guidance to make clear this is not the case, ensuring that charities are not illegally collecting information that people are not required to declare under the Rehabilitation of Offenders Act 1974.

A further concern, which we share with Unlock and the Prison Reform Trust, is that condition F of Test 1 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 trust and confidence and which offences would be out of scope of this power.



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Responsibility and accountability for the safeguarding of children and vulnerable persons

We are concerned about the 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. 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. It 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. The guidance produced should be easily accessible. It should be available in easy read format and take into consideration the well documented low levels of literacy and numeracy amongst people who have been in prison, as well as the prevalence of people with learning disabilities. The production of guidance should be done in close and regular consultation with the voluntary sector and people with criminal records. We all welcome the efforts made so far by the Commission to consult with charities such as Clinks, the Prison Reform Trust and Unlock on the implementation of the new legislation.

Given that the Charities Act comes into full force in April 2017, Clinks and others are eager to see guidance published at least six months before that date to enable charities and those with previous convictions to fully understand how they can comply with it. If this guidance is not in place before then we recommend that the implementation of the Act be delayed.

Conducting an equality impact assessment

We also urge the Charity Commission to consider the impact of this new power on the diversity of charity trustees and people holding senior management position. For example, 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. The Young Review, an independent review into the disproportionate outcomes faced by young black and/or Muslim men in the justice system, most recently highlighted this.⁵

The new powers granted to the Charity Commission under the Charities Act are likely to disproportionately affect groups who are given protected characteristics under the Equalities Act 2010 because of their over-representation in the Criminal Justice System. We recommend that the Charity Commission consider the impact of these new powers on groups with protected characteristics and act accordingly to ensure that it does not disproportionately impact certain groups of people.



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

We endorse Unlock's view that, 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 one relevant caution or conviction".

As mentioned above, 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 that impose statutory obligations on individuals, public and private bodies. Merely taking account of the principles of rehabilitation is not sufficient for the Commission to be compliant with the Act. If the Commission is referring to something other than the Rehabilitation of Offenders Act when referencing these principles, then it must set out what these are and how they relate to the legal requirements in the Act.

Scope of the disqualification

Clinks has always acted as a supporter of the voluntary sector working in the Criminal Justice System, many of whom employ staff and recruit trustees who are experts by experience. These individuals add value to the charities by contributing their unique perspective of having been through the court, prison and probation system. When the reason for disqualification relates to criminal records, the Charity Commission should give due consideration as to whether the disqualification order should also apply to charities that work with ex-offenders, whose primary purpose is the rehabilitation and resettlement of people in the Criminal Justice System and their families.

Involving people with previous convictions

Clinks has over 500 voluntary sector members that work in the Criminal Justice System (CJS), but we know there to be at least 1,750 charities whose main client group are people in the CJS, as well as the additional 4,900 organisations that support this client group as part of their work. Many of these organisations have staff with criminal records, or involve volunteers with lived experience of the CJS, as trustees or in senior management positions. The voluntary sector works on the principles of desistance, working alongside service users, rather than doing things to them. This often means involving people with previous convictions in the design and delivery of services.



Clinks supports, represents and campaigns for the voluntary sector working with offenders. Clinks aims to ensure the sector and all those with whom they work, are informed and engaged in order to transform the lives of offenders.

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People with convictions often face discrimination from employers. The Charity 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 the Prison Reform Trust'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

Clinks is concerned that the period of disqualification of up to 15 years from being a trustee may relate to a specific charity or activity, but that the same individual may be appropriate for a different role. The Charity Commission has already helpfully engaged much of the sector in discussion around the waiver process. However, it remains vitally important that the Charity Commission consider how it communicates, both to potential trustees and/or senior managers, about the ability to apply for waivers, the process of doing so and in what circumstances they could be considered fit for an alternative role and/or charity. This could help to manage the expectations of individual applicants.

We would reiterate that if published guidance about the waiver process is not available for charities and people with previous convictions within six months of the full implementation of the new disqualification powers (April 2017), then Clinks recommends delaying its implementation.

Notes

1. Charities (Protection and Social Investment) Act 2016, <http://services.parliament.uk/bills/2015-16/charitiesprotectionandsocialinvestment.html> [last accessed 12.08.2016]
2. 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 12.08.2016]
3. *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 12.08.2016]
4. Rehabilitation of Offenders Act 1974, www.legislation.gov.uk/ukpga/1974/53 [last accessed 12.08.2016]
5. *The Young review: Improving outcomes for young black and/or Muslim men in the Criminal Justice System* (Clinks & BTEG, 2014), www.youngreview.org.uk/reports [last accessed 12.08.2016]