

# People with convictions as trustees

## Written evidence to the Joint Committee on the Draft Protection of Charities Bill

This evidence was written by Christopher Stacey, Director (Services), who also gave oral evidence to the Committee on Tuesday 9<sup>th</sup> December 2014. This written evidence supplements the oral evidence given, as well as our response to the Government consultation in February 2014. Any questions about this evidence should be directed to [christopher.stacey@unlock.org.uk](mailto:christopher.stacey@unlock.org.uk).

### Context

1. Nearly 10 million people in England and Wales have a criminal record.
2. Between 750,000 and 1 million are 'unspent', although it's not clear how many are for 'dishonesty/deception' related offences.
3. Our interest in this issue is in the role of Government, and the Commission, on a particular aim of this work – "Tackle people whose conduct makes them unfit to fulfil the role of Trustee".
4. The broad problem is that otherwise suitable people with unspent convictions are being prevented from becoming trustees, either directly as a result of the process, or indirectly because of the perception and operation of the process.
5. Many individuals and organisations contact Unlock. Usually, they're put off by the process, the lack of clear guidance, and the lack of ownership that they have of the process

### Problems with Bill

6. The overriding problem with the Bill is that the existing provisions unnecessarily prevent suitable people with convictions from becoming trustees, and the Bill simply widens the net of who would be 'disqualified', without addressing the fundamental issues relating to:
  - a. The importance of 'user involvement'
  - b. The role of charities to make informed decisions
  - c. The way the list of offences works
  - d. The waiver process
  - e. Targeted awareness raising and clear guidance that gives confidence to people that they'll be treated fairly.
7. The Bill simply creates a wider net regarding convictions, without looking at how the current list of offences, and how the process of disqualification, works.
8. The role that cautions could play in affecting the ability of somebody to perform the role of trustee is also a concern.

9. The Bill doesn't address how the Commission uses current (or future) powers which is where the majority of issues lie in relation to convictions. For example, there remains an assumption that if you have an unspent offence identified in the legislation, you are automatically disqualified.

## Summary of recommendations to the Committee

We believe that the Committee should recommend:

10. In relation to convictions specifically, that the Charity Commission sets its policies and processes so that it can act as an enabling body which allows charities the freedom to make informed decisions.
11. A more sophisticated way of determining 'relevant' offences.
12. Removing the use of cautions as a measure which determines whether an individual should be disqualified.
13. Shifting the presumption away from 'disqualification' and 'waivers' towards a position that supports charities to go through a process which requires Charity Commission approval.
14. Requiring statutory guidance to be issued, both to charities and individuals with convictions, on the way that the list of offences will operate in practice, and how the Charity Commission will deal with these through an improved waiver process
15. Giving more confidence on the process by
  - a. Working in partnership with those affected by these provisions (i.e. people with convictions, and organisations that wish to recruit them), to ensure that guidance can be collaborative and communicated widely
  - b. Making figures available relating to the number of people approved to work as trustees with unspent convictions
16. Improving the waiver process to encourage more people to put themselves forward, and to deal fairly with the 30-50 individuals expected to be directly impacted if the further offences are brought into law.

## Responses to specific questions

### **Does the Commission need new powers, or simply better guidance and communications and better use of its existing powers?**

17. The Commission should focus on better use of its existing powers given their current resourcing. For example, in one case that was highlighted to us, a charity stated *"We've had a trustee serving for many years, and only recently discovered that their previous prison sentence (which we were aware of) automatically disqualifies them for life."* They've since raised this with the Commission, and reported that they *"find the Charity Commission a very difficult organisation to communicate with. They are very slow to answer online queries, if at all, and it is next to impossible to speak with someone who can give you a satisfactory answer. I suspect this will run for a while to come I don't have the time to regularly chase them."*
18. Investment of time in guidance, communications, advice to individuals/organisations and improving the waiver process would be a more effective use of the Commissions limited resources.

### **The Charity Commission has begun to respond to criticism of its regulatory work by starting to make much greater use of its existing powers. Do you support this more proactive approach and what impact have you seen from it thus far?**

19. We've not seen a proactive approach in relation to criminal convictions, and until structural changes take place in the way that the Commission deals with people with convictions, we would be concerned by a proactive approach both in terms of what they might find and how they would deal with these cases.
20. We would like to see transparency on number of waivers sought and granted in relation to criminal convictions specifically.

### **Are the current rules on disqualification working adequately?**

21. The existing 'dishonesty and deception' definition is a very broad and rather confusing one, which gives rise to a significant list of offences that is difficult to give clarity to. Statutory guidance should be issued on this.
22. There should be a more sophisticated way identifying particular offences.
23. The current list of offences is not very well understood, and guidance is poor.
24. Current advice on the GOV.UK site states that *"Some people can't be a charity trustee, for example because they: have an unspent criminal conviction involving dishonesty or deception"* – this is clearly misleading.
25. The waiver process deals with very few cases, which questions whether this system is working adequately.

26. Anecdotal evidence suggests that many individuals and organisations have little faith in the waiver process giving them the opportunity to be successfully granted a waiver.

**Where should the balance lie between the rehabilitation of offenders on the one hand and protecting public trust and confidence in charities on the other?**

27. We don't see this as a balance – it would assume that one is a trade off against the other.
28. There is a problem in the way that the Commission looks at the 'rehabilitation of offenders'; they use a strict legal matrix, that being the Rehabilitation of Offenders Act 1974. However, despite reforms in early 2014, there remain many cases where unfortunately convictions still never become 'spent' (or are not yet spent). However, this doesn't mean that a person isn't 'rehabilitated' in a practical sense or that they wouldn't be a suitable person to serve as a trustee.
29. Automatic disqualification = presumption of risk/unsuitability
30. Looking at the facts, on a conservative estimate, assuming that a quarter of all convictions involve dishonesty or deception, we would expect there to be just over 4,000 trustees with unspent convictions for dishonesty/deception. The numbers of waivers processed each year (though not exclusively relating to convictions) is under-representative, and anecdotal cases suggest that people are being put off.
31. It would be better to enable charities themselves to have more ownership for making positive proactive decisions (that might be subject to regulator approval)

**What are your views on the provisions in the draft Bill for disqualifying trustees on the basis of past convictions? Is the list of offences appropriate? And is it appropriate to disqualify individuals on the basis of cautions?**

32. As the Charity Commission acknowledged in their own evidence to the Committee, the current list of 'dishonesty and deception' doesn't cover all of the offences that might be relevant, although this logic should reach backwards and result in a more sophisticated and targeted way of looking at offences that are particularly pertinent to the role of trustee, not the existing (and very broad) 'dishonesty and deception' definition.
33. We have concerns about indications by the Commission to use 'disqualifying orders' as a way to test the use of further offences as reason to disqualify, with the potential for the list of offences to be added to.
34. Without structural changes to the waiver process, we are concerned about the retrospective impact of a broader list of offences and the impact this will have on the 30-50 individuals estimated to be covered by this.
35. Regarding disqualification orders:
- It is unclear what the legal power is that allows Charity Commission to use a caution as a justification for a disqualifying order, given that simple cautions become spent under the Rehabilitation of Offenders Act immediately and so cannot be legally considered.

- b. There are many reasons why somebody might accept a caution and are unlikely to be made aware of the impact at that time.
- c. Convictions from overseas should be judged by the law that applies here. Reference is made to not taking into account convictions regarded as spent under the law of the country concerned. So long as the role of Trustee operates within England & Wales, the fact that a conviction is spent under the ROA is the presiding factor.
- d. Length of disqualification orders imposed on the basis of an unspent conviction should be framed so that they end when the conviction becomes spent.

**Is a list of offences the best way to achieve the objective of preventing undesirable people from becoming trustees? Are there alternatives options, such as character references or some form of due diligence procedure, which would meet this need?**

- 36. The Government consultation was aimed at 'strengthening the Charity Commission's powers to act where there is abuse of a charity' and plans to broaden the groups disqualified due to their convictions – this assumes that people with unspent convictions are more likely to abuse a charity. There is no statistically reliable evidence to suggest that this is the case, with the examples given in the consultation being little more than anecdotal examples.
- 37. Many charities (particularly in the criminal justice sector) understand people with convictions. It is common practice for charities to have policies in place for managing risks related to this group.
- 38. In terms of its approach, we believe that the Charity Commission should hand power back to charities to self-regulate its board, with the Commission instead focusing its limited resources on ensuring that charities can demonstrate that they have taken appropriate steps to safeguard the organisation. For example, this may involve the organisation having processes around the disclosure of relevant unspent convictions, and a risk assessment process which considers any relevance to the particular organisation, and steps that the organisation decided to take to mitigate against any risks. This would enable responsible charities to achieve the right balance between involving people with convictions and protecting the interests of the charity.
- 39. The example given by Stuart Etherington of NCVO regarding the RSPCA and somebody with a conviction for animal cruelty illustrates this well. The RSPCA is unlikely to need regulation by the Commission for the charity to make a decision for itself based on its values and integrity.

**Should charities be able to self-regulate in this area, subject to appropriate transparency and disclosure arrangements?**

- 40. Yes, the Commission should be an 'enabling body' which supports charities to make informed decisions.
- 41. In relation to convictions, charities are in the best position to make decisions
- 42. Given the statistics, it is clear that the current system regarding convictions simply deters people that might be perfectly suitable as a trustee.

**Unlock's submission to the Cabinet Office consultation raised issues with how the Charity Commission engages in discussions with people who have unspent convictions and the waiver process. Could you explain what your concerns are and what you think needs to change?**

43. The process battles against the positive attempts of organisations for 'user involvement'.
44. The term "automatic disqualification" translates into a practical sense that there is a presumption of risk; this makes it difficult for organisations in terms of their relationship with the individual.
45. The balance is too far towards 'disqualification' then seeking a waiver.
46. The perception (and this may be a bigger problem for the perception rather than the reality) is that charities themselves, and those prospective trustees, are not given a fair opportunity as the result of a strict 'regulatory' process, rather than one which is designed to support charities.
47. There is a lack of clarity of process / guidance.
48. We regularly receive reports from individuals and organisations that they find the Charity Commission unapproachable, and often receive conflicting advice.
49. There is a lack of transparency around the number of waiver applications processed and waivers granted, in relation to criminal convictions specifically, or by seeing 'examples' of how the Commission has dealt with cases in the past.
50. There was an issue with the way that the Charity Commission was interpreting the Governing Documents of organisations, but we're pleased to report that this has been clarified and resolved.
51. The Commission should be more willing and able to provide support for organisations in dealing proactively with individual cases – e.g. sample internal disclosure processes, risk assessments etc – that would also help the Commission when they're dealing with the case.
52. The reliance on written statements is also problematic, and one particular experience suggested that the investigation by the Commission would have been disproportionately intrusive.

**The consultation suggested a power to prevent disqualified trustees acting in another position of power in a charity (proposal 5), which has not been included in the Bill. What are your views on this proposal? What safeguards do you think would be necessary if it were to be included?**

53. We would be against this power – it would have a wide-reaching impact on organisations known to be proactive in employing people with convictions, and would demonstrate a significant extensions of the Commissions power to regulate beyond the Board level of charities.

## About Unlock

We are an independent award-winning charity, providing trusted information, advice and advocacy services for people with criminal convictions. Our staff and volunteers combine professional training with personal experience to help others overcome the long-term problems that having a conviction can cause. Our expertise, knowledge and insight helps us work with government, employers and others to change policies and practices so that together we can create a fairer and more inclusive society.

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