

THE COMMISSION'S POWERS OF INVESTIGATION AND THE USE OF THOSE POWERS TO REMOVE CHARITIES FROM THE REGISTER

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1. Introduction

In this article the Commission's powers of investigation will be examined to explore the extent to which investigations lead to the removal of charities from the register under section 3 (4) Charities Act 1993.²

The article looks specifically at the use of the Commission's powers to protect charity property under sections 18 and 19 Charities Act 1993 to see whether there is a consequential removal of governing instruments from the register.

The article illustrates, through documentary analysis of the Commission's published inquiry reports over a two year period that the Commission's powers of removal are limited and charities will only rarely be removed from the register. This article also illustrates through documentary analysis that the Commission's own interpretation of its powers of removal is unclear and inconsistent where following inquiry it removes charities which have ceased to exist or operate. This demonstrates that the Commission's powers of removal require clarification.

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² This article is an extract from "The Law of Charitable Status: Maintenance and Removal" Cambridge University Press 2008 by Robert Meakin. The book is the publication of the author's Ph.D. A debt of gratitude is owed to the author's supervisor Professor Jean Warburton, Charity Law Unit, The University of Liverpool.

2. Powers of Investigation and Protection

This part of the article looks in more detail at how the Commission uses its powers in such a way that there is a consequential removal of charities from the register. The starting point for the launch of the Commission's powers of protection is the commencement of a Commission investigation (referred to in the Charities Act 1993 as an inquiry³). The investigation can either be in relation to a particular charity or a class of charities.

The Commission has the power⁴ to publish its findings but this is at their discretion. Recently the Commission has published the findings of its inquiries on its website and the inquiries covered in this article were all sourced from there⁵.

Following the institution of an inquiry the Commission can use its powers to act for the protection of charity property. Before it does so it must be satisfied⁶:

(a) that there is evidence of misconduct or mismanagement in the administration of the charity or (but in the case of section 18 (2) "and" (see below); that it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application for the purposes of the charity of that property or of property coming to the charity;

(b) except in the case of the Commission's power to direct the application of charity property.⁷ In this case the Commission must instead be satisfied that a person or persons in possession or control of any property held by or on trust for a charity is or are unwilling to apply it properly for the purposes of the charity, and that it is necessary or desirable to make an order to secure the proper application of that property for the purposes of the charity.

These powers do not expressly include the removal of an institution from the register. They are ultimately concerned with the preservation of charitable property for charitable purposes. It will be helpful to summarise the Commission's powers under sections 18 and 19 Charities Act 1993 before looking at how they are exercised in practice. The powers may be paraphrased as follows:

3 S.8 Charities Act 1993. Except in the case of section 19 B Charities Act 1993.

4 S.8 (6) Charities Act 1993.

5 www.charity-commission.gov.uk/investigations/inquiryreports/afraad.asp

6 S.18 (1) (a) & (b) Charities Act 1993.

7 S.19 B Charities Act 1993.

2.1 Sections 18 (1) and 19 Protective Powers

These are intended as temporary powers by order to:

- (a) suspend⁸ any trustee, charity trustee, officer, agent or employee of the charity from the exercise of his office or employment pending consideration being given to his removal (under section 18 (ii) suspensions cannot be for more than 12 months) and where such persons are also members of the charity suspend⁹ their membership of the charity;
- (b) appoint¹⁰ such number of additional charity trustees as they consider necessary for the proper administration of the charity;
- (c) vest¹¹ charity property in the Official Custodian, or require the persons in whom any such property is vested to transfer it to him, or appoint and person to transfer any such property to him;
- (d) order¹² any person holding property on behalf of the charity, or any trustee for it, not to part with the property without the approval of the Commission;
- (e) order¹³ any debtor of the charity not to make any payment in or towards the discharge of his liability to the charity without the approval of the Commission;
- (f) restrict¹⁴ (notwithstanding anything in the trusts of the charity) the transactions which may be entered into, or the nature or amount of the payments which may be made without the approval of the Commission (e.g. fundraising contracts);
- (g) appoint¹⁵ (in accordance with section 19 Charities Act 1993) a Receiver and Manager in respect of the property and affairs of the charity;

8 S.18 (1) (i) Charities Act 1993.

9 S.18 A (2) Charities Act 1993.

10 S.18 (1) (ii) Charities Act 1993.

11 S.18 (1) (iii) Charities Act 1993.

12 S.18 (1) (iv) Charities Act 1993.

13 S.18 (1) (v) Charities Act 1993.

14 S.18 (1) (vi) Charities Act 1993.

15 S.18 (1) (vii) Charities Act 1993.

- (h) direct¹⁶ the charity trustees, any trustee for the charity, any officer or employee of the charity, or (if a body corporate) the charity itself to take any action specified in the order which the Commission considers expedient in the interests of the charity; and/or
- (i) direct¹⁷ a person or persons in control of charitable property who is or are unwilling to apply it properly for the purposes of the charity where the Commission is satisfied that it is necessary or desirable to secure the proper application of that property for the purposes of the charity.

2.2 Section 18 (2) Protective Powers

These powers are intended as more permanent action by the Commission. They include:

- (a) removal¹⁸ of a trustee, employee, agent or employee who has been responsible for or privy to the misconduct or mismanagement or has by his conduct contributed to it or facilitated it; and/or
- (b) power by order¹⁹ to establish a scheme for the administration of the charity.

Each of these powers should be examined to see how they lead to the removal of charities from the register.

2.3 Appointment of Additional Trustees

The Commission has been known to use its power under section 18 Charities Act 1993 to appoint additional trustees to form a majority. This can indirectly lead to the removal of charities from the register.

For example, in *The Alzheimer's Foundation for Research into Alzheimer's Disease inquiry*²⁰ the Commission used this power to appoint four additional trustees to act for a charity which had three existing trustees. The additional trustees formed a majority and could out vote the existing trustees. Following the conclusion of the inquiry, *The Alzheimer's Foundation for Research into Alzheimer's Disease* was wound-up.

¹⁶ S.19 A Charities Act 1993.

¹⁷ S.19 B Charities Act 1993.

¹⁸ S.18 (2) (i) Charities Act 1993.

¹⁹ S.18 (2) (ii) Charities Act 1993.

²⁰ See Third Sector 18th August 2004. There is no record of this charity on the register of charities nor a record of it being removed from the register.

If the Commission appoint additional trustees to form a majority of the trustees, particularly where those trustees are representatives or even former representatives of a rival charity then this could lead to the transfer of property from the failing charity to another more successful existing charity including the rival charity.

2.4 Appointment of an Interim Manager

Similarly the Commission can use its power to appoint an interim manager²¹ and as in the case of the appointment of additional trustees this can lead to the transfer of a charity's property and the removal of its governing instrument from the register.

For example, in the Tracheotomy Patients Aid Fund Inquiry²² the charity had objects to help tracheotomy patients and to promote research into the prevention of the condition giving rise to tracheotomies. Of the four trustees reported as acting when the inquiry began one had died, one could not be traced, one had not attended any meetings but had been asked to sign minutes which recorded his attendance. That left the remaining trustee who was the wife of the founder trustee.

The Commission's main conclusion was that there was no effective independent trustee body and that the running of the charity had been left to the Chief Executive. The founder had resigned his position as a trustee in order to take on a paid position as Chief Executive. He was accountable for the remuneration received²³. The founder's wife had acted as a trustee even though there was a conflict of interests. Furthermore, the level of fundraising costs and the level of expenses were high and insufficient steps had been taken to apply the income of the charity.

In the absence of an effective and independent trustee body, the accounts of the charity were frozen, the Chief Executive suspended from employment, the assets of the charity were vested in the Official Custodian and a Receiver and Manager was appointed. The Receiver and Manager concluded that, in the absence of a sound administrative base, and in the absence of a long-standing name and reputation for its charitable work, the charity's assets should be distributed to established charities with similar objects. Before the charity could be wound up a settlement was reached with the Chief Executive in respect of a claim by the charity for unlawful remuneration and by the Chief Executive for loss of earnings and expenses. The Charity was then removed from the register on the ground that it had ceased to exist.

21 The term Receiver and Manager has now been replaced by interim manager. See section 112 Charities Act 2006.

22 See www.Charity-Commission.gov.uk/investigations/inquiryreports/afraid/aspl

23 Under the general equitable principle that a trustee must not acquire remuneration or benefits by virtue of his position *per* Cohen J in *Re Macadam* [1946] Ch 73 at 82.

The appointment of an interim manager can therefore lead to the removal of a charity from the register without the need for the Commission to have immediate recourse to its power of removal under section 3 (4) Charities Act 1993.

2.5 Making Schemes

There are several reported investigation cases where the Commission has used its scheme making powers to either dissolve a charity and pass its assets to a newly formed charity or to amalgamate charities into a newly formed charity. Either of these courses of action involve removal from the register.

In the case of Iran Aid²⁴ the charity was investigated by the Commission because there were allegations that the charity was being used as a terrorist organisation, the Mujaheddin el khalq (MKO), to raise funds. Under the Terrorism Act 2001 the MKO is a proscribed organisation.

The Commission froze the charity's bank account and appointed a Receiver and Manager to take on the management of the charity and report back to the Commission on the running of the charity. The Commission came to the following conclusions:

(A) Fund-raising

The Commission found that some donors were misled into believing that they were personally sponsoring individual children when this was not in fact the case. The Commission also found evidence of misleading promotional literature and complaints by donors about high pressure "selling" techniques.

(B) The Charity's Records

The Commission found that the trustees had not met their obligation to maintain proper accounting records as required by the charity's governing instrument, the common law and statute. The Commission and the Receiver and Manager failed to gain access to the charity's records because according to the Commission the trustees failed to co-operate and occupied the charity's premises with the expressed intention of denying access to the records.²⁵ The occupation ended with the destruction of all records which might have been expected to show how the charity distributed its funds.

²⁴ See www.Charity-Commission.gov.uk/investigations/inquiryreports/afraid/aspl

²⁵ Provided he is acting within the powers set out in the order the receiver is entitled to possession of all the property and to exercise all the powers previously exercised by the trustees. See *Rezafard v. Runacres* unreported, 4th November 1998, Ferris J.

(C) Transmission of funds to Iran and their Application

Neither the Commission nor the Receiver and Manager found any evidence to show how the charity spent its funds in Iran. The Commission concluded that, at least, there had been mismanagement in the affairs of the charity.

A remedial scheme was established directing the Receiver and Manager to dissolve the charity and pass its assets to a new independent charity – The Iran Aid Foundation. Following dissolution the charity was removed from the register. Removal was therefore achieved indirectly as a consequence of the Commission using its powers to protect charitable property.²⁶

Another example of the Commission using its power to make a scheme to dissolve a charity is The Royal Masonic Hospital Association inquiry.²⁷ The Receiver and Manager applied for a scheme of the Commission under section 16 of the Charities Act 1993 to acquire the power to dissolve the charity and pass its assets to other Masonic charities whose objects provided for the relief of the sick or the infirm, as he thought fit. This followed the closure of the Royal Masonic Hospital which was the subject of a separate inquiry.²⁸ Once the assets had been distributed and the charity dissolved it was removed from the register.

2.6 Removal of Trustees

When the Commission has removed trustees it has led to several high profile appeals.²⁹ One such appeal *Jones v AG*³⁰ demonstrates the primary concern of the Court to protect property. In that case the Court removed the trustee and appointed the NSPCC in his place.

The removal of a trustee can indirectly lead to removal. For example, in the *Charitable Assets and Activities of Mr and Mrs Dove* in connection with Reading

²⁶ For criticism of this inquiry see Lords Hansard 7th June 2005: Col. 813 *per* Lord Swinfen.

²⁷ Registered charity number 265152.

²⁸ [1994] Ch. Com. A.R. p.16. The hospital was sold by the appointed Receiver and Manager because this charity was in financial crisis and the Commission made a scheme to provide for the proceeds of sale.

²⁹ When the Commission removes trustees there is no need for the charity or any of its trustees to obtain a certificate of leave to appeal from the Commission or a High Court judge. See section 18 (9) (b) Charities Act 1993.

³⁰ *Jones v. AG* [1974] Ch 148. See also *Weth v. AG* [1999] 1 WLR 686 (CA) and *Scargill v. AG* unreported 4th September 1998 Neuberger J; [1998] Ch. Com.A.R. p.22. These decisions are reviewed in Phillips A “Retirement and Removal of Trustees” *Trusts & Estates Law Journal* July/August 1999.

Medical and Rescue Unit inquiry³¹ Mr and Mrs Dove were removed as trustees of the charity because they were found to have supplied misleading information and failed to act properly in their capacity as trustees of charitable funds. The remaining trustees then decided to wind-up the charity and it was then removed from the register.

2.7 The Institution of the Inquiry leads the Trustees to Conclude that they should Dissolve the Charity

Sometimes trustees conclude that they no longer wish to continue the work of the charity. This could be because of a variety of reasons ranging from other charities carrying out similar work through to the trustees realising that they find the duties and responsibilities of being a charity trustee too much.

In the 46115 (Scots Guardsman) Steam Locomotive Trust Limited Inquiry³² the issues involved an internal dispute between the trustees about the validity of trustee appointments. Due to a lack of funding there was an overall disagreement between the trustees about the locomotive's future. The Commission indicated that, although not a finding of the inquiry, winding up the charity might not only be the most pragmatic solution to the constitutional problems but would also probably be the most effective way to achieve restoration of the locomotive. The trustees accepted the Commission's advice, transferred the locomotive to another charity with similar objects, wound up the charity and the Commission duly removed it from the register.

2.8 New Powers under the Charities Act 2006

A couple of the new powers to protect charity which have been conferred on the Commission by the Charities Act 2006 could when exercised lead indirectly to removal from the register.

First, the Commission has a new power to give specific directions for the protection of charity³³ which the Commission considers to be expedient in the interests of the charity. The purpose of this power is to allow the Commission to have access to intermediate powers short of using its powers to suspend or remove persons from their positions in a charity. Although it would be open to the Commission to direct the trustees to transfer the property to another charity or expend it until it is exhausted and then apply for the charity to be removed it is submitted that this will

³¹ Registered charity number 1039826.

³² Registered charity number 107794.

³³ S.19 A Charities Act 1993.

rarely happen because the intention behind the section was to provide intermediate powers concerned with correcting poor governance.³⁴

Second, the Commission has a new power³⁵ to direct the application of charity property where it is satisfied that it is necessary or desirable to make an order for the purpose of securing the proper application of that property for the purposes of the charity. Theoretically, this power could be used to transfer property from one charity to another leaving the decanted charity to be removed from the register but this is unlikely as the Commission has gone on record as saying it will not force charities to merge.³⁶

Although the Commission's position has been strengthened by these new powers, the rights of charities have also been improved by a combination of the Commission's general duty³⁷ to have regard to the principles of best regulatory practice (being proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed) and the right of charities to appeal to the Charity Tribunal.³⁸ It is too early to say how these powers will be exercised but they are not likely to disturb the findings in this article that indirect removals are rare.

3. Documentary Analysis

Documentary analysis has been conducted on 513 reported inquiries between 2003 and 2004. The purpose of this research is to give an objective analysis of how many charities were removed by the Commission as a result of an inquiry and on what grounds.

In many cases it was the trustees who decided to dissolve the charity and apply for it to be removed from the register rather than the Commission. The result was the same but the decision was the trustees rather than the Commission. In these cases, of the 513 reported inquiries, in 49 cases the trustees decided themselves to dissolve and apply for removal, or in percentage terms 9.5 %.

Of the 513 reported inquiries the Commission removed 31 charities from the register (fewer than the number of trustees deciding to apply for removal). Of the charities removed by the Commission 20 were removed on the ground that they did not

34 Charities Bill [Lords] Standing Committee A 11th July 2006 Col. 192 *per* Edward Miliband.

35 S.19 B Charities Act 1993.

36 See RS4 a-*Collaborative Working and Mergers: Summary* (March 2003). See Article 9, pp 3-6.

37 S.1 D (2) 4. Charities Act 1993.

38 Sched 4 3 (1) & (2) Charities Act 2006.

operate, 9 because they had ceased to exist, 1 because of a change in purposes or trusts and 1 because the Commission no longer regarded the institution as charitable. The grounds for removal merit further attention.

3.1 Does not operate

Of the 31 charities removed from the register by the Commission 20 were removed because they did not operate. Expressed in percentage terms 64.5 % of the charities removed were removed on this ground. Of the 513 reported inquiries the percentage of charities removed because they did not operate was 3.9 %.

The theme of the inquiry reports was that there had been a failure of governance, either through mismanagement or misconduct or because there are no trustees or no trustees that can be found, leading to a cessation in charitable activities.³⁹

Some of the reports involve no charitable activity⁴⁰ others indicate that not only was there no charitable activity but there was non-charitable activity.⁴¹ In cases where there were breaches of trust the Commission decided not to seek restitution on behalf of the charities. In one case this was because of the amount involved and because the charity was no longer operating⁴² and in another case this was because there would be no advantage to the charity.⁴³ There was no explanation why these decisions were taken.⁴⁴

As a general comment, there is no consistent guidance arising from the inquiry reports as to when a charity does not operate. There is even some confusion in the reports about whether a charity was removed because it did not operate or had ceased to exist.⁴⁵

39 For examples see *Signpost Phab* registered charity number 292023 (no current trustees and no charitable activity) and *Ebony Housing Project* registered charity number 1062349 (unauthorised benefits and conflicts of interest and no charitable activity).

40 For example *International Redevelopment Foundation* registered charity number 1052950.

41 For example see *Life Builders International Network* registered number 1061941.

42 *Ebony Housing Project*, *ibid.*

43 *Tower Hill Community Trust* date of inquiry 7th March 2003.

44 The Commission can take a proportionate approach to regulation when performing its general function of investigating charities under section 1 C (2) 3. Charities Act 1993. Under section 1 D (2) 4. Charities Act 1993 the Commission, when performing its general functions, have a general duty to “be proportionate.....and targeted only at cases in which action is needed.”

45 See *R.W. Bailey Memorial Trust* registered charity number 1046422 where the inquiry report says it was removed because it did not operate and the registered charity details says it was removed because it had ceased to exist. The same occurs in *Signpost Phab*, *ibid.* In *Phab Harwich* registered number 1041823 the inquiry report says that this charity was removed because it had ceased to operate and had ceased to exist.

In some inquiry reports non-charitable activity was equated with the charity not operating and the charity was removed from the register. For example, in Yes! Positive Thinking Foundation⁴⁶ the Commission described a charity which had the hallmarks of being “captive” because its professional fundraisers were related to, or close business associates of the trustees. The professional fundraisers did not have contracts as required by the Charities Act 1992. Staff were appointed without open and fair recruitment and salaries being paid in cash to evade tax. There was no evidence of the charity applying funds in furtherance of its objects. The Commission reported its findings to the Police, the Benefits Agency and HM Revenue and Customs and removed the charity from the register on the basis that it did not operate and did not seek restitution for the charity.

3.2 Ceased to Exist

Of the 513 reported inquiries 9 were removed because they had ceased to exist. This is 29 % of the total number of institutions removed and 1.94 % of the total number of inquiry reports.

Of the charities removed on this ground 5 were removed after 84 charities were investigated because they failed to submit annual returns and accounts. These charities were listed in 3 inquiry reports called “Enforcing Submission of Annual Return and Accounts Reports”.⁴⁷ No specific details were given in the inquiry reports but a search of the central register details revealed that 5 were removed on this ground.

Of the remaining 4 charities 2 were removed because they had been struck off the Companies register.⁴⁸ In Hands of Hope Children’s Cancer Fund⁴⁹ there was £10,000 left in a bank account. Rather than go to the expense of restoring the company to the register the Commission, with the consent of the Treasury Solicitor, made a scheme transferring the funds to another charity Sargent Cancer Care for Children.⁵⁰ Following that transfer the charity was removed from the register. A general procedure was agreed for similar cases.

⁴⁶ Registered charity number 1092021.

⁴⁷ www.charity-commission.gov.uk/investigations/inquiryreports/afraid.asp

⁴⁸ See *Hands of Hope Children’s Cancer Fund* registered charity number 1054815 and *The Sulis Trust* 1010428.

⁴⁹ *Ibid.*

⁵⁰ Registered charity number 1085616.

The Royal Masonic Hospital Association⁵¹ had objects to further the work of the Royal Masonic Hospital.⁵² Following the Hospital's closure the trustees sought to use its funds to reinstate the Hospital. A Receiver and Manager was appointed who recommended that a scheme be made giving him the power to dissolve the charity and apply the remaining funds for charitable purposes. Once this had happened the charity was removed from the register on the ground that it had ceased to exist.

The Martin Foundation Trust⁵³ was removed because, as the Commission said in its report, it had ceased to operate in May 2000 and had effectively ceased to exist at that date.

3.3 Change in Trusts

Only 1 charity was removed on this ground. This represents 3.25 % of the total charities removed from the register. Of the total 513 inquiries 0.19 % were removed for this reason. In Heavitree Social Centre⁵⁴ a social centre and grounds organisation had amended its constitution to become a charity but had continued to carry out non-charitable activities. Its real property had originally been conveyed for non-charitable social club purposes. The Commission concluded that the solution was for the charity to amend its objects so that it ceased to be a charity because in reality it was a social club. Funds acquired following its conversion to being a charity would continue to be held for charitable purposes although its real property would be held for the new non-charitable purposes.

3.4 No Longer Considers is a Charity

Only one charity was removed on this ground representing 3.25 % of the total number of charities removed from the register. Of the total 513 reported inquiries only 0.19 % were removed for this reason.

In Christian Corps International⁵⁵ the charity had objects to advance the Christian faith particularly in the business world. The Commission found that the charity's four trustees owned a wholesale jewellery company and that company owned a jewellery manufacturing company based in Thailand. All the trustees and members of the charity worked for the wholesale company. Although this company covenanted 70 % of its profits to the charity the Commission considered that the contribution by the charity through its trustees and members and its supporters

51 Registered charity number 265152.

52 Registered charity number 205793.

53 *The Martin Foundation Trust* registered charity number 1067149.

54 Registered charity number 300829.

55 Registered number 327193.

amounted to non-charitable expenditure. In so far as the trustees and members benefited this could not be regarded as incidental.

The charity published a newsletter and carried out a small amount of broadcasting in furtherance of its objects. These activities also promoted the products of the wholesale company. The charity's property included a chapel and a library but members of the public were not encouraged to use these facilities. The Commission concluded that there was very little charitable activity and that the institution was neither established for exclusively charitable purposes nor was it established for the benefit of the public. The Commission therefore removed the institution from the register of charities.

It should be noted that two of the charities⁵⁶ which were removed because they did not operate could arguably have been removed because they were sham charities. In conclusion, the Commission are presently reluctant to remove charities from the register on the basis that they no longer appear to be charitable.

4. Conclusion

The Commission's powers of protection under sections 18 and 19 Charities Act 1993 are designed as their statutory heading indicates for the "protection of charity" and not for a way of indirectly bringing about the removal of charities. The powers of removal under section 3 (4) Charities Act 1993 are not designed to punish trustees failing to carry out the trusts of a charity.⁵⁷

The documentary analysis supports this conclusion about the Commission's powers of protection. Of the 513 inquiry reports examined from 2003 to 2004 the Commission only decided to remove 31 from the register. This shows that the Commission generally recognise that its powers of protection are to protect charitable property and not to indirectly bring about the removal of charities.

The Commission's powers of protection and the approach taken by the Commission in investigation cases corroborates the proposition put forward in this article that the Commission's powers of removal are limited and that it will only be in rare cases that a charity can be removed from the register. When this happens it is more likely to be on the grounds that the charity has ceased to exist or does not operate than the Commission considering that an institution is no longer a charity.⁵⁸

⁵⁶ *Yes! Positive Thinking Foundation and Bright Sparks Theatre School.*

⁵⁷ See Nathan "*The Charities Act 1960*" (1st ed, 1962) p.52 where the architect of the original powers of protection commented on the intention of Parliament.

⁵⁸ S.3 (4) Charities Act 1993.

It was also shown that the Commission often gives inconsistent reasons in its inquiry reports as to why a charity has been removed when it is removed because it does not operate or has ceased to exist. This supports another proposition put forward in this article that the Commission's powers of removal need to be clarified.

One potential problem might be that the Commission starts to equate breaches of trust with grounds for removal on the basis that a charity does not operate. The Commission is under a general duty to undertake proportionate regulation⁵⁹ and therefore where funds are insignificant it would be open to the Commission not to seek restitution and to remove a charity from the register. The difficulty is that it is not clear what would amount to proportionate regulation and there is therefore a need for the Commission to clarify its position.

⁵⁹ Under section 1 D (2) 4. Charities Act 1993 the Commission, when performing its general functions, have a general duty to "*be proportionate.....and targeted only at cases in which action is needed.*"