

PREVENTING ABUSE: COMMISSIONERS' INCREASED POWERS

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Defects of the 1960 Act

Abuse of charitable status and the failure of the Charity Commission to exercise its supervisory role effectively were matters of increasing concern during the eighties. Some of the problems were explored by a working party set up by the NCVO under the chairmanship of Harry Kidd which produced a report in 1986, *Malpractice in Fundraising for Charity*², and suggested among other things some increased powers for the Commissioners.

The Woodfield Report noted that the Commissioners powers were extensive "but experience has shown them to be in some respects inadequate or doubtful. And for whatever reason, the Commissioners have until recently been very sparing in using their powers." The Report ascribed the Commissioners' failure to supervise charities effectively to the lack of resources devoted to supervisory work, inadequate information and also to the fact that their powers required some clarification and strengthening.³ These recommendations were supported in the White Paper, *Charities: A Framework for the Future*, published in 1989 and most are included in the Charities Act 1992.

The relevant sections of the Act are to be brought into force this autumn, as reported elsewhere in this Review (see Charities Act 1992: Dates when Sections come into Force at p.177 *infra*).

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² *Malpractice in Fundraising for Charity* - Report to the National Council for Voluntary Organisations of a Working Party under the Chairmanship of Mr. Harry Kidd (1986).

³ Woodfield Report para 69; and see NCVO Report para 3.2.

Simplified Procedure for s.6 Inquiries

The procedure for conducting a formal inquiry into a charity or a class of charities under s.6 of the Charities Act 1960 is rarely used. The Commissioners have been reluctant to institute inquiries under this section and have preferred to resolve problems by negotiation and compromise. But the majority of their powers to remove trustees, employees, officers and agents of a charity and to take steps to protect a charity's assets under s.20 of the Act may only be exercised after a s.6 inquiry has taken place. The 1992 Act contains some amendments to s.6 designed to speed up the inquiry process and to clarify the Commissioners' powers.

As originally drafted s.6 required the Commissioners to make an order on every occasion when they wished to require an individual to provide accounts or statements on any matter or answer questions or to give evidence in person. An order could only be made by the Commissioners sitting as a Board and this cumbersome procedure inevitably involved delay to the advantage of wrongdoers.

Under the new regime once a s.6 inquiry has been instituted the Commissioners or the person appointed by them to conduct the inquiry need only issue a direction in relation to these matters.

Documents may be produced without the need for the person having custody of them to attend a formal hearing before the Commissioners or the person appointed by them.

The concession formerly given by s.7(4) of the Charities Act 1960 to a person claiming to hold property adversely to a charity that he should not be required to give information about it, making it necessary to apply to the court in this situation, is withdrawn. This has apparently been used in the past to thwart the Commissioners' inquiries.

Obtaining Information under s.7 Charities Act 1960

The Commissioners have power under s.7 of the 1960 Act to require any person who has in his possession any books papers or records relating to the Charity to provide copies or extracts or to allow them to be inspected by the Commissioners. They will now have a more general power to require individuals to provide them with relevant information. They may require information held on computer to be provided in legible form.

Again, persons claiming property against a charity will not now be permitted to withhold documents relating to that property.

Reports of Inquiries

The Commissioners will now be able to print and publish the report of the person who conducts an inquiry into the administration of a charity or a statement of the outcome of the inquiry in any manner they think fit even if they do not propose to take any action. They may also use methods of publication other than the printed word, for example radio or television interviews, if they consider these will bring the report to the attention of people who may be affected by the action they propose to take in relation to the charity (see ss.6(5) and 11).

This is a considerable relaxation of the previous rules which only permitted publicity to be given to the Commissioners' findings when they proposed to take some active steps as a result of their inquiry. This is beneficial since even where maladministration is demonstrated it is often not appropriate or necessary for the Commissioners to remove a trustee or to take any other action and their previous inability to publish a report will have left many interested parties in doubt as to whether the problems have been satisfactorily dealt with. This may well have unfairly added to the general dissatisfaction which prevailed about the way in which the Commissioners conducted their supervisory role.

A report of an inquiry under s.6 Charities Act 1960 certified by the Charity Commissioners will be admissible as evidence in proceedings which are instituted by the Charity Commissioners under the new power conferred by s.28 of the 1992 Act or instituted by the Attorney General in relation to a charity. This will be useful in speeding up proceedings which may be taken as a result of an inquiry.

Protective and Remedial Powers of Commissioners

While the changes outlined above address a number of niggling points which may have impeded the Commissioners in the past the alterations to s.20 (Power to act for the protection of charities) contained in s.8 of the 1992 Act are more substantial.

The new or improved powers given to the Commissioners by the 1992 Act are intended on the one hand to increase their ability to prevent mismanagement and safeguard a charity's assets and on the other to provide additional remedies where maladministration has been established. The new provisions therefore fall into two distinct classes - those described in the White Paper, *Charities: A Framework for the Future*, as temporary and protective measures and others conferring permanent and remedial powers.

Temporary and Protective Powers

An important criticism of the 1960 Act⁴ was that it did not help the Commissioners to prevent the misuse of a charity's funds while its affairs were being examined. Their powers to remove trustees and to protect property under the section were exercisable only where they were satisfied as the result of a s.6 inquiry both that there had been misconduct or mismanagement and that action was necessary in order to protect charitable funds. The effect of this was that substantial progress in the inquiry had to be made before the Commissioners could act although the inquiry need not be actually completed. In the Sanctuary case⁵ referred to in the NCVO Report a delay of six months occurred before a freezing order was made during which time a further £5,000 was collected from the public. The Commissioners appear to have been willing to act rather more quickly in later cases but the difficulty still existed.

Now the Commissioners will be able to take certain steps to protect the charity's assets at any point during an inquiry when they are satisfied *either* that it is necessary or desirable in order to protect the property of the charity *or* that there has been misconduct or mismanagement. The following temporary and protective powers are exercisable in this situation. They can suspend a charity trustee, officer, employee or agent for twelve months pending a decision as to whether he should be removed; additional charity trustees may be appointed as necessary to administer the charity (see below); property may be vested in the Official Custodian; a receiver and manager may be appointed (see below); freezing orders may be made and the trustees' powers may be restricted.

Appointing Additional Trustees: s.8(2)(ii)

The danger of mismanagement or dishonesty is greatest where a single individual has effective control over a charity. This was the conclusion reached by the NCVO report on Malpractice in Fund-raising referred to above.⁶ The Commissioners already had power under s.20(4)(d) of the 1960 Act to appoint an additional trustee where there was only a single non-corporate trustee and where a trustee could not be found or was outside the jurisdiction, but the working party recommended⁷ that the Commissioners should in addition have power to refuse to register a charity which had less than three trustees. The White Paper⁸ preferred to follow the less drastic suggestion of the Woodfield Report⁹ that the Commissioners should have power to require that a charity should have at least three trustees. S.20(1) Charities Act 1960

⁴ White Paper Chapter 5.

⁵ *Jones v A-G* (1976) *The Times*, 10 November, mentioned in the Commissioners Reports for 1971, 1972, 1976 and 1977.

⁶ NCVO Report para 5.42.

⁷ NCVO Report para 5.45.

⁸ White Paper Chapter 5 para 8.

⁹ White Paper Chapter 5 para 17.

has now been amended to allow the Commissioners to appoint such number of additional trustees as they consider necessary for the proper administration of a charity when they are satisfied that there has been misconduct or mismanagement or that it is necessary or desirable in order to protect the property of the charity.

Appointment of Receiver and Manager: s.9

Many problems affecting charities arise as much from incompetence and neglect as dishonesty or maladministration. The Commissioners will now have what should be a useful weapon with which to protect the charity's assets in either situation. S.20(1) of the 1960 Act now provides that the Commissioners will have a similar power to that of the court to appoint a receiver and manager who will be answerable to them. The receiver or manager, who may not be an officer or employee of the Commissioners, will have such of the powers of the trustees as the Commissioners shall prescribe and may be protected by advice given under s.24 in the same way as the trustees themselves. Receivers and managers may be paid for their services, unlike trustees, so it is clearly intended that professional people should have a similar role to the receiver of an insolvent company.

An appeal may be brought under s.18 of the Act against an order appointing a receiver and manager either by the Attorney-General or by the charity or any of the charity trustees without the need for the leave of the Commissioners to be obtained.

Permanent Remedies

The power to remove permanently, as opposed to suspending, a charity trustee who has been guilty of or facilitated or been privy to misconduct or mismanagement may still only be exercised when the Commissioners are satisfied that there has been both misconduct or mismanagement *and* that it is necessary or desirable in order to protect the charity's property (s.20(1A)). In these circumstances the Commissioners now have power to make a scheme for the administration of a charity without the need for an application from the trustees. Again this measure was recommended by Woodfield. Misconduct or mismanagement for these purposes includes the use of funds for any purpose which are excessive in relation to the property likely to be applied for the charitable purposes (s.20(2) as amended). Presumably this provision is directed in particular to the employment of professional fund-raisers.

The proposal in the White Paper¹⁰ that the Commissioners should also be able to transfer the charity's assets to another charity has not been included.

The Commissioners have always been able to remove a bankrupt charity trustee, a trustee who is unwilling to act or one who is resident outside the jurisdiction without the need for a s.6 inquiry. Now under s.20(3) of the 1960 Act as amended they can also remove a charity trustee who has been adjudicated bankrupt or has made an arrangement with his creditors in the last five years even though he has been subsequently discharged, or an individual trustee who is unable to act because he is suffering from mental disorder.

¹⁰ White Paper Chapter 5 para 19.

Penalties

The level of fines for contravention of an order of the Commissioners freezing property, preventing payments being made to the charity without their approval and restricting the actions which trustees can make has been increased, but proceedings require the consent of the DPP. Imprisonment is no longer a possible penalty.

Charitable Companies: s.10

The additional powers given to the Commissioners in relation to charitable companies are to be considered in a later issue.

Preventive Action

One of the criticisms of the previous regime was the lack of preventive powers.¹¹ There was nothing similar to the Company Directors Disqualification Act 1986 to prevent an individual who had been removed from the office of charity trustee or convicted of fraud or dishonesty acting as a trustee of a charitable trust on another occasion.

¹¹ NCVO Report para 5.48 and Woodfield para 7.3.

Disqualification from Acting as Trustee: ss.46 and 47

The NCVO report¹² on *Malpractice in Fundraising for Charity* published in 1986 recommended legislation:

1. to prevent a person who had been removed from being a charity trustee by the Charity Commissioners from acting as a trustee of another charity
2. to prohibit persons who had been convicted of offences involving dishonesty from acting as charity trustee.

These proposals were agreed to by the Woodfield Report¹³ and endorsed in the White Paper¹⁴ and have been incorporated in the 1992 Act.

S.46 of the Act provides that an individual is automatically debarred from acting as a charity trustee or a trustee for a charity in the following circumstances:

- (a) he has been convicted of an offence involving dishonesty or deception other than a spent conviction under the Rehabilitation of Offenders Act.
- (b) he is an undischarged bankrupt or his estate has been sequestrated.
- (c) he has made a composition or arrangement with or granted a trust deed for his creditors and has not been discharged.
- (d) he has been removed from office as a trustee by the Charity Commissioners or the High Court on the grounds of misconduct or mismanagement in the administration of the charity for which he was responsible or to which he was privy or which he contributed to or facilitated. The Commissioners are required to keep a register of all the persons who have been removed from office which will be open to public inspection.
- (e) he has been removed from being in control of any body under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.
- (f) he is subject to a disqualification order under the Company Directors Disqualification Act 1986 or the Insolvency Act 1986.

These provisions apply both to charity trustees, that is persons having the general control and management of the administration of a charity (s.46 Charities Act 1960) and trustees for a charity, i.e., custodian or holding trustees such as are commonly appointed to hold property for the purposes of a charitable unincorporated association such as a community centre.

¹² NCVO Report para 5.48.

¹³ Woodfield Recommendation number 15.

¹⁴ White Paper Chapter 5 paras 4-6.

Paragraph (a) broadly follows the proposals in the White Paper but with one important change. The original suggestion was for a person to be disqualified if he had been convicted of certain specific indictable offences involving fraud, theft, forgery or financial misappropriation. Section 45(1)(a) refers more broadly to offences involving dishonesty or deception. Although it will usually be clear whether an offence involves dishonesty or deception there may be some doubtful cases. Possible examples are the offence of travelling on a train without a valid ticket and being in possession of stolen goods. This is unfortunate since it is essential that there should be no doubt as to whether a charity trustee is disqualified.¹⁵

The Charity Commissioners have power on an application from any person who is disqualified under s.45 to grant a waiver permitting him to act as a charity trustee or trustee for a charity and may grant waivers prior to the section coming into force. The power does not extend to a director of a charitable company who has been the subject of a disqualification order under the Company Directors Disqualification Act 1986 or is an undischarged bankrupt unless leave has been granted by the court for him to act as a director of another company.

The Effect of Disqualification

The effect of disqualification seems to be that a trustee is prevented from acting but his office is not automatically vacated. If this is correct then once the reason for disqualification no longer exists (for example because his conviction is spent or he is discharged from bankruptcy) he will be reinstated as a trustee provided that his term of office has not expired and he has not been removed under the terms of the governing instrument. In the case of a trustee of a charitable trust or a holding trustee any property of the charity will continue to be vested in him. The Commissioners are given power by s.20 of the 1960 Act as amended to vest or transfer property held in trust for a charity where they have removed a trustee after a s.6 inquiry but there does not appear to be any similar provision where a trustee has been disqualified and there is no automatic transfer of property to the remaining trustees.

A person who acts as a charity trustee or trustee for a charity while disqualified commits an offence punishable on indictment with imprisonment of up to two years or a fine, or on summary conviction with a fine or imprisonment for up to six months. Proceedings require the consent of the DPP.

Protection similar to that contained in the Companies Act 1985 is given to those dealing with the charity by s.46(3) which provides that no act of a person who has been disqualified is invalid solely because of the disqualification.

A person who acts as a charity trustee or trustee for a charity while disqualified can be required by order of the Charity Commissioners to repay to the charity any remuneration payment or benefit he has received from the charity in respect of the time when he has so acted including payment for expenses.

These preventive measures apply to all charities including exempt charities.

¹⁵ I am indebted to Jean Warburton who drew my attention to this point.

Conclusion

The 1992 Act has given effect to most of the recommendations of the critics of the supervisory regime established by the 1960 Act. The Commissioners' powers have been greatly enhanced and defects in the legal framework have been remedied. Considerable resources are now devoted to the Monitoring and Investigations Division which now employs about fifty staff. It seems that the Charity Commission are now fully equipped to investigate and check abuses as required by s.1(3) Charities Act 1960. It will be interesting to see how effectively they will use the weapons which have been given to them.