



EXPLANATORY NOTES

Charities (Protection and Social Investment) Act 2016

Chapter 4

£6.00

CHARITIES (PROTECTION AND SOCIAL INVESTMENT) ACT

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Charities (Protection and Social Investment) Act 2016 (c. 4) which received Royal Assent on 16 March 2016.

- These Explanatory Notes have been prepared by the Cabinet Office in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Act will mean in practice; provide background information on the development of policy; and provide additional information on how the Act will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Act. They are not, and are not intended to be, a comprehensive description of the Act.

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Overview of the Act

1 The Act:

- provides stronger protection for charities in England and Wales from individuals who are unfit to be charity trustees;
- equips the Charity Commission with new or strengthened powers to tackle abuse of charity more effectively and efficiently;
- gives charities a new power to make social investments (investments that pursue both a financial and social return); and
- reinforces trustee responsibility and accountability for fund-raising and strengthens the Government's reserve powers to regulate fund-raising.

Policy background

Protection of Charities

- 2 The Charity Commission's statutory objectives include increasing public trust and confidence in charities and promoting charities' compliance with their legal obligations. A significant part of the Charity Commission's compliance work involves identifying and investigating misconduct or mismanagement in charities and taking appropriate and proportionate action in response to protect charity assets.
- 3 The Charity Commission already has a range of investigatory and enforcement powers designed to protect charitable assets where there is serious misconduct or mismanagement. As a civil regulator, the Commission has no powers of prosecution, so if the Charity Commission discovers criminal activities it reports those activities to the police or other appropriate law enforcement agencies. The Charity Commission must not become directly involved in the running of or administration of a charity, although it can under certain circumstances give directions to charity trustees, appoint interim managers to displace the trustees and make remedial schemes.
- 4 Currently, people with an unspent conviction for a criminal offence involving dishonesty or deception are automatically disqualified from acting as a charity trustee until their conviction is spent or they obtain a waiver from the disqualification from the Charity Commission.
- 5 In his 2012 statutory review of the Charities Act 2006 "Trusted and Independent; giving charity back to charities", Lord Hodgson of Astley Abbott's recommended that the Government consider extending the range of offences that automatically disqualify a person from being a charity trustee. The Government accepted his recommendation in its response in September 2013.
- 6 In December 2013 the National Audit Office (NAO) published a report on the regulatory effectiveness of the Charity Commission. The report concluded that the Charity Commission did not do enough to identify and tackle abuse of charitable status, and that this "undermines the Commission's ability to meet its statutory objective to increase public trust and confidence in charities".
- 7 The report found that the Charity Commission "needs to make greater use of its statutory powers in line with its objective of maintaining confidence in the sector; and develop an

approach to identify and deal with those few trustees who deliberately abuse charitable status”.

- 8 The NAO report also identified deficiencies in the Charity Commission’s powers and barriers to their use. It made a number of recommendations to the Charity Commission and recommended that the Cabinet Office should “assist the Commission in securing legislative changes to address gaps and deficiencies in the Commission’s powers.”
- 9 The Government’s Extremism Task Force also recommended addressing gaps and deficiencies in the Charity Commission’s powers in the specific context of tackling extremism. It recommended “consulting on new legislation to strengthen the powers of the Charity Commission: these powers will help us tackle extremism, as well as other abuses of charitable status such as tax avoidance and fraud.” Subsequently, the Home Affairs Select Committee, in its 2014 report on counter-terrorism also recommended stronger legal powers for the Charity Commission to counter the abuse of charities for terrorist purposes.
- 10 In December 2013 the Government published a consultation on 17 proposals for reform put forward by the Charity Commission and which dealt both with the range of offences resulting in automatic disqualification from charity trusteeship, and gaps and weaknesses in the Charity Commission’s existing powers.
- 11 Consultation feedback indicated broad support for the role of the Charity Commission and for ensuring it has the tools it needs to do its job. Not all of the proposals attracted support from the majority of respondents. A draft Bill was published for pre-legislative scrutiny in October 2014. Ten of the original 17 proposals were taken forward in the draft Bill.
- 12 Parliamentary pre-legislative scrutiny was undertaken by the Joint Committee on the Draft Protection of Charities Bill. The Joint Committee took evidence from a wide range of stakeholders, and published its report on the draft Bill in February 2015. The Joint Committee broadly supported the proposals to give the Charity Commission more powers, however it recommended that effective safeguards must be in place to ensure charities and their trustees are treated fairly by the Commission.
- 13 The Government’s response to the Joint Committee report was published in March 2015. It accepted most, but not all, of the Joint Committee’s recommendations, and the draft Bill was amended accordingly.
- 14 In terms of protection of charities, the Act:
 - a. adds new criteria, including certain criminal offences, to the criteria which automatically disqualify a person from being a charity trustee in England and Wales;
 - b. extends automatic disqualification to senior management positions in charities;
 - c. gives the Charity Commission a new power to disqualify an unfit person in certain circumstances from being a charity trustee and senior manager in a charity for up to 15 years, subject to safeguards;
 - d. enables the Charity Commission to continue to proceed with removal where a trustee resigns after notice of removal has been served;
 - e. gives the Charity Commission a new warning power, enabling it to issue a statutory warning where the Commission considers there is either a breach of trust or duty or other misconduct or mismanagement;
 - f. gives the Charity Commission a new power to direct a charity to be wound-up following an investigation, and after public notice of its intention to act and a period

for representations, where that would be more appropriate than attempting to restore the charity to health;

- g. enables the Charity Commission, in the context of a statutory inquiry, to direct that a charity not take certain actions.

15 The Act also:

- a. makes clear that failure to follow a Charity Commission order or direction constitutes misconduct;
- b. extends the period for which the Charity Commission may suspend a person from charity trusteeship pending removal from a maximum of one year to a maximum of two years;
- c. enables the Charity Commission to exercise its existing scheme-making power in the context of a statutory inquiry where it is satisfied that there has been misconduct or mismanagement or there is a need to protect charity property. Currently both misconduct/mismanagement and need to protect charity property limbs must be met;
- d. enables the Charity Commission to remove a disqualified trustee from a charity where they have not stepped down;
- e. updates the existing power to direct charity property to be applied to another charity to deal with a particular problem;
- f. prevents a person disqualified as a charity trustee who is also an officer of a corporate body that is a charity trustee from participating in discussions and decisions when the corporate body is acting as a charity trustee.

Social Investment

- 16 Certain research indicates that social and environmental impact is becoming more important across the UK economy. It has been suggested that one in three British consumers will pay more for products with a positive social or environmental outcome (Based on findings of Nielsen's, Consumers who Care Survey 2013) and 60% of millennials (those born between 1980 and 2005) want to work for organisations with a social purpose (According to the recent survey of millennials by Deloitte, available at: www.deloitte.com/MillennialSurvey).
- 17 There are around 180,000 regulated social sector organisations, such as charities, community interest companies and community benefit societies with a combined annual income greater than £39 billion and workforce of more than 800,000 people (NCVO Almanac 2012, Government estimates from BIS, Small Business Survey, 2010 and ONS, Blue Book, 2011). In addition, there are an estimated 180,000 enterprises delivering social outcomes that do not take a regulated social form. These enterprises employ 1.5 million people and turnover c. £120 billion per year.
- 18 Growth in this field is being supported by a positive investment market worth around £3 billion in 2014. Whilst savings in ethical banks and credit unions rose by 29% to £1.86 billion in the last three years, the fastest growth was to be found in the smaller direct investment sector, which consists of community share issues, bonds issued by charities and bonds and equity in a small number of socially motivated public companies (Ethex positive investment report 2014).
- 19 Registered charitable trusts and foundations have £60bn assets under management and many have social missions that are highly compatible with social investment. This suggests they have the potential to provide the sort of risk capital that can support growth in this field. But

to date it is considered that regulatory uncertainty has been an inhibiting factor (only £0.1bn has been socially invested). A new power of social investment would seek to reduce this uncertainty, leading to a subsequent boost to investment (Association of Charitable Foundations Research Briefing: Charitable Trusts and Foundations' Engagement in Social Investment, 2013).

- 20 In his 2012 statutory review of the Charities Act 2006, Lord Hodgson of Astley Abbotts recognised that the current law made it difficult for charities to engage in making social investments. This is because charities are unlikely to have an express power to make social investments, but must instead rely on a combination of their separate powers to spend and their powers to invest for financial returns. He recommended that charity trustees' investment powers and duties be amended to make social investment easier for those charities that wish to undertake it.
- 21 As a result of Lord Hodgson's recommendation the Government asked the Law Commission for England and Wales to review the law, consult and make recommendations. The Law Commission published proposals for public consultation in April 2014. It proposed that charities should be given a new power to make social investments, along with associated duties when making or reviewing social investments.
- 22 The proposals were well supported by charities and the wider social investment sector, and the Law Commission reported in September 2014 recommending legislation to create a new social investment power and duties for charities.
- 23 The Act gives effect to recommendations of the Law Commission in its Recommendations Paper, Social Investment by Charities (September 2014) by:
 - a. introducing a power for charities to make social investments;
 - b. setting out the duties that must be complied with by charity trustees when making social investments, whether pursuant to the statutory power or otherwise; and
 - c. making consequential amendments to the Trustee Act 2000.
- 24 The social investment provisions in the Act, and the notes on sections on the relevant provisions below, were originally prepared by the Law Commission. Before being introduced into the House of Lords, the provisions were amended by the Government to exclude charities established by legislation and by Royal Charter from the new social investment power and duties. Further amendments were made during the passage of the Act through the House of Lords to clarify the definition of social investment and trustees' duties when making social investments.

Fund-raising

- 25 Charity fund-raising practices have been largely self-regulated by charities themselves, although there are rules and regulations relating to certain activities - for example Part 2 of the Charities Act 1992 which includes a reserve power for the Minister for the Cabinet Office to make regulations to control fund-raising for charitable institutions, data protection legislation, licensing requirements for charity collections, legislation governing lotteries. The Charity Commission's regulatory role is limited to circumstances where charitable funds are at risk or where the fund-raising indicates a serious governance failure in the charity.
- 26 In 2015 there were a series of media exposés of unacceptable fund-raising practices in which elderly and vulnerable people were targeted by charities and put under pressure to donate. Several trustees and charity chief executives gave evidence before the Public Administration and Constitutional Affairs Committee in which they expressed their shock that such poor

practices were undertaken by sub-contractors in their charities' name. The Government asked Sir Stuart Etherington to review the existing self-regulatory arrangements, supported by a cross-party panel of Peers and make recommendations for improvements. The Government put forward amendments during the passage of the Act to reinforce trustee responsibility and accountability for fund-raising.

- 27 The Act (see section 13 below) reinforces to charity trustees their responsibility to ensure that fund-raising for their charity is undertaken responsibly and in a manner that does not damage public trust and confidence in their charity or the wider charity sector. It does so by:
 - a. Requiring third party, commercial fundraisers to include terms in any contracts with charities setting out their fund-raising standards, how the fundraiser will protect vulnerable people, and how the charity will monitor whether standards are being met.
 - b. Requiring trustees of auditable charities (usually those with incomes over £1m) to include a section in their trustees' annual report setting out their approach to fund-raising, whether they use third party commercial fundraisers, and how they protect vulnerable people from undue pressure in their fund-raising.
- 28 The Etherington review ("Regulating Fundraising for the Future: Trust in charities, confidence in fundraising regulation" [www. www.ncvo.org.uk/fundraisingreview](http://www.ncvo.org.uk/fundraisingreview)) reported in September 2015. It made a number of recommendations, chief among which was the creation of a new, tougher Fundraising Regulator to self-regulate charity fund-raising. The Government accepted all of the recommendations in the Etherington Review. The new Fundraising Regulator is expected to be up-and-running in 2016.
- 29 The Act extends the scope of the existing reserve power for the Minister to regulate fund-raising. It enables the Minister to:
 - a. Require charities to register with a specified Fund-raising Regulator, comply with its requirements, have regard to its guidance and pay fees to it; or,
 - b. Make the Charity Commission responsible for regulating charity fund-raising (the Commission may charge fees for this purpose pursuant to separate regulations).

Legal background

- 30 The Charities Act 2011 contains the current provisions relating to removal and disqualification of charity trustees, and powers of the Charity Commission to act for the protection of charity. The current provisions are:
 - a. sections 76 to 87 of the Charities Act 2011 ("Powers of Commission to act for the protection of charities etc"). Most of these powers can only be exercised after the Commission has opened an inquiry under section 46 of the Charities Act 2011.
 - b. sections 178 to 184 of the Charities Act 2011 ("Disqualification of charity trustees and trustees etc.")
- 31 The Charities Act 2011 will continue to be the main Act of Parliament dealing with charity law, and this Act inserts new provisions into the 2011 Act and makes changes to it.
- 32 The Charities Act 1992 contains the reserve power for Government to regulate fund-raising by charitable institutions for charitable, philanthropic or benevolent purposes (section 64A inserted by the Charities Act 2006).

33 The social investment provisions of the Act also make consequential changes to the Trustee Act 2000.

Territorial extent and application

- 34 The Act extends to England and Wales only. Charity law and regulation is devolved in Scotland and Northern Ireland.
- 35 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions and matters relevant to Standing Orders Nos. 83J to 83X of the Standing Orders of the House of Commons relating to Public Business.

Scotland

- 36 The Act does not contain any provisions falling within the terms of the Sewel Convention.

Wales

- 37 The Act does not contain any provisions relating to devolved matters.

Northern Ireland

- 38 The Act does not contain any provisions relating to devolved matters.

Commentary on provisions of Act

Section 1: Official warnings by the Commission

- 39 Section 1 inserts into the Charities Act 2011 new section 75A, which provides the Commission with a power to issue an official warning to a charity or charity trustee. Subsection (1) specifies when the Commission may issue a warning. A warning may be issued where there is a breach of trust or duty by a charity or trustee, or other misconduct or mismanagement in the charity. A breach of duty would include non-compliance with a Commission order or direction. Subsection (2) enables the Commission to publish a warning. The Commission is required to give notice of a warning (subsection 3), and the means by which it may do so (subsection 4). Subsection (5) requires the warning notice to specify certain matters, including the grounds for the warning, and any remedial action that could address the warning. Subsection (6) requires the Commission to take account of any representations on the content of the warning made to it within the period set out in the notice. Subsections (7) to (9) make provision for the variation of withdrawal of a warning.
- 40 There is no right of appeal to the Charity Tribunal against an official warning, as is currently the case with non-statutory warnings issued by the Commission. However in addition to the representations process described above, an official warning could be challenged through judicial review.
- 41 The official warning will be similar to powers already available to many other regulators. It is intended to be a more reasonable and proportionate way of dealing with breaches of statutory provisions of the Charities Act 2011, breaches of fiduciary duty or other mismanagement where the risks and impact on charitable assets and services are relatively low. Sometimes this may be as a more proportionate alternative to use of remedial powers such as suspensions, or removal of trustees or restitution action against trustees. In such cases the Commission will make clear that continuing or repeating the breach will lead to tougher action being taken straight away next time. In other cases, a warning might be used alongside or with reference to other powers to increase the incentive to comply.
- 42 The official warning will specify the breach, and may provide advice and guidance to the charity on how the charity can remedy the breach that has been identified in the warning. The official warning does not constitute a power of direction.
- 43 The Commission would be able, but not required, to publish official warnings. If it does publish it can do so in any form. The Commission will publish its policy for when and how this will be done and expects to apply a similar process to the way it currently deals with its discretion to publish the results of inquiries under the Charities Act 2011.
- 44 The Commission has provided the following examples of when the warning power could be used:

Example (1): unauthorised payments

A charity makes unauthorised payments to a connected company or that benefit a trustee. The size of the sums involved mean it is disproportionate to take stronger action but the Commission could issue an official warning on future conduct.

Example (2): governance problems

Breaches of a charity's governing document that lead to governance problems. For example, not running internal elections properly or repeated failure to call Annual General Meetings. This can

lead to complaints and disputes within the charity but often the impact is not great enough to justify the use of current powers. A published Warning could promote compliance and increase transparency and wider public trust and confidence.

Example (3): where a statutory inquiry would be disproportionate

The Commission is unable to make directions outside of an inquiry (the consultation proposed changing this but it was rejected by Government in the light of responses). Where the Commission considers it disproportionate and unnecessary to open an inquiry purely for the purpose of making a direction, issuing an official warning could be an alternative way of making it clear to a charity that they should take action (although the official warning power is not itself a power of direction).

Section 2: Investigations and power to suspend

- 45 Section 2 amends section 76 of the Charities Act 2011, which deals with the exercise of the Commission's temporary protective powers. It puts beyond doubt that failure to comply with an order of the Commission, or failure to remedy a breach specified in an official warning constitutes misconduct or mismanagement (section 2(2)). Failure to follow good practice could not automatically be considered to constitute misconduct or mismanagement.
- 46 It also enables the Commission to extend a suspension pending removal by up to one year, subject to a two year overall limit. The Commission asked for this change because in some cases it must await the outcome of a criminal prosecution before it can proceed with its regulatory action.

Section 3: Range of conduct to be considered when exercising powers

- 47 Section 3 inserts into the Charities Act 2011 new section 76A. Where the Commission has opened an inquiry into charity A, provided there has been misconduct/mismanagement in charity A and the Commission can link it to a person, this provision enables the Commission to take into account any other relevant evidence of that person's conduct for example in charity B or outside of charity but which may damage public trust and confidence in charity, for the purpose of deciding what protective power(s) it would be proportionate/appropriate to exercise in relation to charity A. In effect, once misconduct or mismanagement has been established this provision enables the Commission to consider whether there is other relevant evidence of misconduct or mismanagement in other charities, or conduct outside of charities which could undermine public trust and confidence in charities before determining how to act.
- 48 The Charity Commission could only take account of conduct that would be relevant to the management or administration of a charity and the Charity Commission would have to set out in its statement of reasons (section 86 Charities Act 2011 or under the new Official Warning Power in section 1 of this Act) the conduct it was taking into account in decisions to exercise any compliance powers. The Charity Commission would not be able to take into account any conduct that was not relevant to the management or administration of a charity.

Section 4: Power to remove charity trustees following an inquiry

- 49 Section 4 inserts into the Charities Act 2011 a substitute section 79 which deals with removal of charity trustees following an inquiry, and makes several consequential amendments. The revised section 79 makes it clear that the Commission can make a scheme in relation to a charity when there is an inquiry open and the Commission is satisfied that there is either misconduct or mismanagement or there is risk to charity property. The test for the Commission to exercise its power to remove a charity trustee, or other office holder, remains

that there must be both misconduct or mismanagement and risk to charity property.

- 50 The difference between the two tests is because it is considered that there must always be misconduct or mismanagement in order to remove a person from their position in the charity. However there are cases where the Commission considers it may need to make a scheme where only one limb of the test is met.
- 51 Substitute section 79(5) and (6) enable the Commission to continue the removal process (and consequent automatic disqualification) where a person ceases to hold office. This is to enable the Commission to deal with cases where the person they have been seeking to remove resigns their position in order to avoid removal and consequent disqualification.
- 52 Section 4 also replaces "privy to" with more modern language in substitute section 79. Equivalent provision is also made in sections 3, 9 and 10.

Section 5: Power to remove disqualified trustee

- 53 Section 5 inserts into the Charities Act 2011 a new section 79A which enables the Commission to remove a disqualified charity trustee if they continue to remain in their position once disqualified. The Commission is required to give notice to each of the charity's trustees, but is not required to give public notice of the order, and is not required to provide a particular period of notice or a mechanism for representations as this is not considered necessary where an already disqualified trustee is being removed. The power does not extend to removing disqualified persons from senior management positions, as this would be for the charity's trustees to enforce (their failure to do so could result in the Commission taking action against the charity's trustees).

Section 6: Power to direct specified action not to be taken

- 54 The Commission already has the power (in section 84 of the Charities Act 2011) to direct that a charity (or trustees) take certain actions in the context of a statutory inquiry. Section 6 gives the Commission a new power to direct a charity not to take certain actions in the context of a statutory inquiry.
- 55 Section 6 inserts into the Charities Act 2011 a new section 84A which enables the Commission, once a statutory inquiry has been opened into a charity, and the Commission considers that any action if taken or continued by the charity or its trustees would constitute misconduct or mismanagement, may direct the charity or its trustees not to take it or continue it. In addition to specifying the action that must not be taken or continued, the order must set out the Commission's reasons for making it.
- 56 In addition to requiring its use only under a statutory inquiry, a further safeguard to the use of this power is that the Commission must formally review such orders at least every six months.

Section 7: Power to direct winding up

- 57 Section 7 inserts into the Charities Act 2011 a new section 84B which enables the Commission to direct a charity to wind up in certain circumstances.
- 58 The Commission's usual practice is to attempt to restore a charity to health following a statutory inquiry. However there are rare cases where it would be more appropriate for any remaining assets to be transferred to another charity with the same or similar purposes

(something the Commission can already do under existing powers) and the shell of the charity to then be wound up (which this new power would enable). The Commission itself cannot wind up the charity, as to do so would be acting in the charity's administration, so this new power enables the Commission to direct the trustees (or if necessary other persons in the charity such as any remaining employees or members) to take the necessary steps to wind it up (new section 84B(2)).

- 59 The power would only be available in the context of a statutory inquiry, the Commission must be satisfied that the charity does not operate or that its purposes could be more effectively promoted if it were to cease to operate, and that the exercise of this power is expedient in the public interest (new section 84B(1)).
- 60 New section 84B(3) enables an order to give the recipient(s) of the order powers that they may not have, in particular powers that normally only the members of the charity would be able to exercise in the context of winding up the charity. New section 84B(3) also prevents the order from requiring action to be taken that is prohibited by statute. Similar provision already exists in sections 84(3) (Power to direct specified action to be taken) and 85(3) (Power to direct application of charity property) of the Charities Act 2011. The Commission is required to give public notice of its intention to make a winding up order (new section 84B(4)) and must consider any representations made (new section 84B(5)) before making the order. The Commission must give at least 60 days public notice of intention to make a winding up order unless there is a particular need for less notice to be given (new section 84B(6)). Action taken under such an order is treated as properly done (new section 84B(7)) but existing contractual rights are protected (new section 84A(8)).
- 61 Section 7(5) provides for a right of appeal to the Tribunal, both for the recipient(s) of a winding-up order and where the order displaces members' rights or powers, the members of the charity.

Section 8: Power to direct property to be applied to another charity

- 62 Section 8 amends section 85 of the Charities Act 2011 so that the Commission may make an order to apply charity property where the person holding the property is "unable" to apply it properly (at present, a person must be "unwilling"). It also amends section 85 of the Charities Act 2011 so that compliance with the order does not result in a breach of contractual obligations to the charity (e.g. banks who act on client instruction). The Commission asked for this provision following several cases where financial institutions holding charity property were contractually unable to transfer it to secure its proper charitable application but would have been willing to do so.

Section 9: Automatic disqualification from being a trustee

- 63 Section 9 amends section 178 of the Charities Act 2011 and inserts new section 178A into the Act to extend the criteria that automatically disqualify a person from being a charity trustee.
- 64 The existing criteria for automatic disqualification remain unchanged. So, for example, a person with an unspent conviction for an offence involving deception or dishonesty is automatically disqualified until the conviction is spent or a waiver is granted by the Commission.
- 65 Cases "H" to "K" are new criteria for automatic disqualification which are not criminal offences.

- a. Case "H" is where a person has been found guilty of contempt of court in civil

proceedings where a false statement or disclosure is made.

- b. Case "I" is where a person has been found guilty in the High Court of disobedience to a Commission order or direction.
- c. Case "J" is designation under terrorist asset-freezing legislation. Designation under terrorist asset-freezing legislation can be made only on the basis of reasonable belief of involvement in terrorism, and only if it is necessary for purposes connected with protecting the public from terrorism. There is a right of appeal against such a designation. Under Case J the disqualification would last until the designation is removed.
- d. Case "K" is where a person is subject to the notification requirements of Part 2 of the Sexual Offences Act 2003, sometimes referred to as being on the "sex offenders register".

66 Subsection (6) inserts new subsections (3) and (4) into section 178. These provide that where a person is disqualified under section 178 from charity trusteeship they are also to be disqualified from positions with senior management functions. A senior management function is defined in new subsection (4). In effect it is the most senior executive position in a charity, and where control of the charity's finances has been delegated, the person (other than the most senior executive) who controls the finances.

67 New section 178A (inserted by subsection (7)) introduces convictions for several criminal offences as new criteria which would automatically disqualify a person from acting as a charity trustee until the conviction is spent or a waiver granted by the Commission. There is the potential for an overlap with the current "offences involving dishonesty or deception" criteria, which is dealt with by section 9(3).

68 Offences that have been superseded by those listed are also caught by new section 178A(2), and ancillary or inchoate offences are caught by new section 178A(3).

69 New section 178A(4) provides a power for the Minister for the Cabinet Office to make regulations to amend the list of criteria (the Minister is required to consult if the regulations add a new offence). Such regulations would be subject to Parliamentary debate and approval before they could be made.

70 The existing regime of waiver under section 181 Charities Act 2011 would also apply to persons disqualified under these new criteria, enabling such persons to apply for their disqualification to be waived in relation to a particular charity, class of charities, or any charity.

71 The civil and criminal consequences of acting whilst disqualified (sections 183 and 184 Charities Act 2011) are extended to disqualified persons holding an office or employment from which they are disqualified under new subsections (3) and (4) of section 178 Charities Act 2011.

Section 10: Power to disqualify from being a trustee

72 Section 10 inserts four new sections (181A, 181B, 181C and 181D) into the Charities Act 2011, and makes some other consequential changes.

73 New section 181A provides the Commission with a power to disqualify a person from being a charity trustee and in a senior management position in a charity. It sets out the criteria that must be met for the Commission to make a disqualification order. To make a disqualification order the Commission must be satisfied that one or more of the listed conditions A to F is met,

that the person is unfit to be a charity trustee (either in relation to charities generally or a particular class of charity to be specified in the disqualification order), and that making the order is desirable in the public interest to protect public trust and confidence in charities.

- 74 The Minister for the Cabinet Office may vary the list of conditions by regulations (new section 181A(8)) which would be subject to Parliamentary debate and approval before they could be made (section 10(5) to (8)). The Minister is required to consult if the regulations add a new condition.
- 75 New section 181B inserted by section 10 provides that a disqualification order must specify the period of disqualification, which can be up to 15 years, but must be proportionate having regard to certain matters. It also provides that a disqualification order can only take effect after the period for lodging an appeal to the Charity Tribunal has expired without an appeal being lodged, or where an appeal is lodged when it is either withdrawn or finally determined by the Tribunal. The right of appeal against the decision to make a disqualification order is provided in section 10(9).
- 76 New section 181B also provides the Commission with a power to suspend a person from being a charity trustee once it has served notice of its intention to make a disqualification order against that person. The suspension would be for up to one year, extendable for up to a further year. The suspension would be subject to periodic review by the Commission (new section 181B(7)). Whilst suspended the person must obtain the Commission's approval before taking up any charity trustee position (new section 181B(10)). The suspension lasts until either the Commission makes a disqualification order, it gives notice of its intention not to make such an order, the period of the suspension expires, or on review the Commission considers the suspension should be discharged.
- 77 A person subject to a disqualification order would be subject to the same criminal consequences (section 10(3)) and civil consequences (section 10(4)) as a person disqualified under section 178 Charities Act 2011.
- 78 New section 181C sets out the process for making a disqualification order. The Commission must give a person at least one month's notice of its intention to make a disqualification order, and invite the person to make representations. If the person is known or believed to be a serving charity trustee, the Commission must also give notice of its proposals to the other trustees of the charity, and must give public notice of its proposals unless it considers doing so is unnecessary. The Commission must take into account any representations received during the specified period. Where a charity for which the person is a charity trustee comes to light after the specified period, the Commission need not specify a further period for representations, but would still be required to notify the other trustees of the charity. Where the Commission makes a disqualification order in respect of a person it knows or believes is a serving charity trustee, it must send a copy of the order and statement of reasons to the charity (in the case of a corporate structure) or its trustees (if unincorporated).
- 79 New section 181D provides for the variation or revocation of disqualification orders. It enables a person who is the subject of a disqualification order to apply to the Commission for the order to be varied or revoked, and provides a right of appeal to the Tribunal against a decision of the Commission not to vary or revoke a disqualification order.
- 80 The flow chart at Annex A, which has been developed with the Commission, sets out how it the section 10 disqualification process would operate. During the passage of the Bill the Commission published draft guidance on how it proposes it would exercise the disqualification power, which will be updated and subject to public consultation prior to implementation. The draft guidance details the matters that the Commission would consider in exercising the proposed power. It also sets out the other limitations that would apply to the

Commission in exercising the proposed power, including: that exercising the power would have to further the commission's statutory objectives and functions, and that the Commission would have regard to the principles of best regulatory practice (under section 16 Charities Act 2011) and be proportionate, accountable, consistent, transparent, and targeted only at cases where action is needed.

Section 11: Records of disqualification and removal

81 Section 11 amends section 182 of the Charities Act 2011. Section 182 of the Charities Act 2011 provides that the Commission must maintain a publicly accessible register of persons who have been removed from office by the Commission or the High Court. Section 11 extends that register to include details of persons subject to a disqualification order.

Section 12: Participation in corporate decisions while disqualified

82 Section 12 inserts into the Charities Act 2011 new section 184A. Where a person is disqualified (either under section 178 or new section 181A of the Charities Act 2011) and is an officer of a corporate body that is a charity trustee, this provision prohibits that person from participating in decisions relating to the charity's administration. New section 184A extends the existing criminal (section 183) and civil (section 184) sanctions to apply to officers who participate in decisions relating to a charity's administration when they are disqualified from being charity trustees.

Section 13: Fund-raising

83 Section 13 amends section 59 of the Charities Act 1992. The effect of the amendments is to prohibit commercial fundraisers from raising funds for a charitable institution unless the fund-raising agreement between the commercial fundraiser and the charitable institution includes certain terms in relation to fund-raising standards which the commercial fundraiser undertakes to follow.

84 Section 13 also amends the Charities Act 2011 by inserting new section 162A. Section 162A requires charities whose accounts have to be audited in accordance with section 144(2) (currently, those with a gross annual income over £1m; or with a gross annual income over £250,000 and assets with an aggregate value exceeding £3.26 million) to set out in their annual reports their approach to fund-raising, including, in particular, whether they use commercial fundraisers, and how they protect vulnerable people from undue pressure in their fund-raising.

Section 14: Reserve powers to control fund-raising

85 Section 14 provides two new reserve powers for Government to ensure the effective regulation of charitable fund-raising should there be insufficient support for the new self-regulatory system that is being established. It inserts two new sections into the Charities Act 1992 to add to the existing reserve power in section 64A Charities Act 1992.

86 New section 64B inserted by section 14(2) provides a new reserve power in relation to fund-raising regulators. It enables the Minister to exercise the reserve power to compel charities to register with the new fund-raising self-regulator, comply with its requirements, have regard to its guidance, and pay fees determined in line with regulations.

87 New section 64C inserted by section 14(3) enables the Minister to exercise the reserve power

to regulate fund-raising by conferring functions on the Charity Commission. Section 19 of the Charities Act 2011 enables regulations to be made specifying fees to be paid by charities to the Commission, which could be exercised alongside this reserve power. New section 64C(3) enables such regulations to be extended to charity fund-raising by non-charitable institutions, to ensure there would be no loophole if this reserve power were to be exercised.

- 88 Section 14(5) requires the Charity Commission to be consulted prior to the exercise of either of the new reserve powers.

Section 15: Power to make social investments

- 89 Section 15 amends the Charities Act 2011 by inserting Part 14A, which contains three sections: section 292A (meaning of “social investment”); section 292B (general power to make social investments); and section 292C (charity trustees’ duties in relation to social investments). It also makes consequential amendments to the Trustee Act 2000.

Section 292A: Meaning of “social investment”

- 90 Section 292A defines “social investment” for the purposes of Part 14A. Subsection (2) defines a social investment by reference to the objectives that are sought to be achieved by entering into the transaction. A relevant act of a charity is a social investment if it is done with a view to both (a) directly furthering the charity’s purposes and (b) achieving a financial return for the charity.
- 91 Traditionally, charities have either applied their funds in direct furtherance of their purposes (for example by making grants to beneficiaries) or invested their funds to yield a financial return which can then be applied in direct furtherance of the charity’s purposes (for example by purchasing government bonds). A social investment is an act done with the objective of achieving both of these outcomes.
- 92 Any valid act done by a charity (or its charity trustees) can be said in one sense to be done in furtherance of the charity’s purposes; the powers of the charity cannot be exercised for any other purpose. The requirement in subsection (2)(a) that an act must be done with a view to “directly” furthering the charity’s purposes means that there must be a sufficiently close causal connection between the act done and the charitable good achieved that fits within its express purposes. The purchase by a charity of government bonds with the sole objective of providing an income for the charity would not directly further the purposes of the charity within subsection (2)(a) since the investment has little proximity to the charitable good achieved by spending the income. By contrast, the purchase of shares in a medical research company by a charity for the advancement of medicine could directly further the purposes of the charity because it brings about a charitable good in the form of the work of the company.
- 93 The word “directly” should not be read as excluding the possibility of the achievement of the charity’s purposes in effect being done by a third party, as in the example above.
- 94 Examples of acts that might constitute social investments include:
- a. a charity for the support of homeless people lets out housing at a low rent;
 - b. an overseas development charity invests in a fair trade tea production enterprise that is expected to yield a low financial return;
 - c. a charity for the advancement of medicine makes a high-risk investment in a medical research company which is in the early stages of developing a potential new treatment; and

- d. a diabetes charity invests in a company that is developing foods intended to reduce the impact of diabetes on sufferers and which will be available to the general public;
 - e. a charity for the reduction of reoffending invests in a social impact bond to fund a project which provides support to individuals leaving prison.
- 95 An act of the charity is, in the case of an unincorporated charity, an act of the charity trustees (subsection (3)) since an unincorporated charity has no legal personality.
- 96 A relevant act of a charity is defined by subsection (4). An application or use of funds or other property (subsection (4)(a)) includes purchasing an asset such as land or shares, advancing money by way of loan and granting permission to use or occupy land (for example by lease or by licence). Taking on a commitment in relation to the liability of another person (subsection (4)(b)) includes guaranteeing the liability of another person and providing security for such a liability.
- 97 A charity may wish to make a social investment out of funds or other property held on special trust. Property held on special trust is property which is held and administered for any special purposes of the charity on separate trusts relating only to that property: Charities Act 2011, section 287(1). The reference to the charity's purposes in subsection (2)(a) is, in the case of a social investment out of funds or other property held on special trust, to the special purposes of the special trust.
- 98 Subsection (5) makes clear that a relevant act may qualify as a social investment even where funds or other property are not applied or used with a view to generating a financial profit (whether in the form of income or capital growth). From a financial perspective, a social investment may be neutral (for example, an interest-free loan or a rent-free lease) or even loss-making (for example, if only part of the initial outlay is recovered). But an application or use of funds that is expected to result in a total loss of those funds is not a social investment. So a social investment (a) may increase in value and/or yield an income, (b) may be financially neutral, or (c) may decrease in value.
- 99 A guarantee or other commitment can qualify as a social investment. Subsection (6) provides that such a guarantee or commitment will be made with a view to a financial return (under subsection (2)(b)) where the charity trustees expect that it will not be called upon in full or at all.
- 100 Charities can make social investments in a wide range of enterprises without necessarily having to restrict the use of the funds specifically to the charity's purposes; subsection (7) makes clear that a social investment need not exclusively further the charity's purposes. A social investment might give rise to other outcomes that are not part of the charity's mission. But any such outcomes cannot be part of the trustees' motivation for making the social investment; section 292C(2)(c) provides that the relevant considerations in deciding whether a social investment is suitable are (a) the expected direct furtherance of the charity's purposes and (b) the expected financial return. Taking the example in paragraph [80(d)] above, the company's activities do not exclusively further the charity's purposes because the food will be available to the general public; it may nevertheless be an appropriate social investment based on the trustees' assessment of the expected direct furtherance of the charity's purposes and the expected financial return.
- 101 A social investment might also amount to an investment for other purposes (such as under the Trustee Act 2000, accounting rules or the charity's governing document), but subsection (8) makes clear that a transaction can be a social investment without also being an investment for such other purposes.

Section 292B: General power to make social investments

- 102 A general power to make social investments is conferred by subsection (1).
- 103 Subsection (2) imposes a condition on the exercise of the power in relation to permanent endowment. Permanent endowment is property held subject to a restriction on its being spent for the purposes of the charity. A charity is to be treated for the purposes of the Charities Act 2011 as having permanent endowment unless all property held for the purposes of the charity may be spent for those purposes without distinction between capital and income: Charities Act 2011, s 353(3). Subsection (2) provides that the power is not to be used to make a social investment using permanent endowment unless the charity trustees expect that any restriction on spending the permanent endowment will be complied with; in most cases this means that the charity trustees must expect the value of the permanent endowment to be maintained. This is in contrast to other funds, which may be used to make a social investment provided that a financial return is expected, where a financial return is anything short of total loss of the funds.
- 104 Subsection (3)(a) provides that the power may be restricted or excluded by the trusts of the charity. The trusts of a charity are the provisions establishing it as a charity and regulating its purposes and administration, whether those provisions take effect by way of trust or not: Charities Act 2011, s 353(1). This may include, for example, a trust deed or the articles of association of a charitable company.
- 105 Subsection (3)(b) provides that the power is, subject to subsection (3)(a), in addition to any other power that the charity or charity trustees have to make a social investment. The power supplements rather than replaces other social investment powers.
- 106 Subsection (4) provides that the power to make social investments in section 292A and the duties when making social investments in section 292C apply to charities in existence when Part 14A comes into force (that is, the date on which section 15 of the Act comes into force) as well as to charities established after that date. The power and duties do not, however, apply to charities established by legislation (or whose purposes and functions are set out in legislation) or charities established by Royal Charter. Such charities must rely on their existing powers in order to make social investments or alternatively seek an amendment to the relevant legislation or Royal Charter to introduce such a power.

Section 292C: Charity trustees' duties in relation to social investments

- 107 The duties set out in this section apply whenever a social investment is made after the commencement of Part 15A, whether or not making the social investment in question involves the exercise of the power conferred by section 292B(1). In other words, the duties apply whether or not, technically, the new power conferred by this Act is the power being used to make the social investment in question.
- 108 The duties cover steps to be taken before a social investment is made (subsection (2)) and a duty to review the charity's social investments from time to time (subsection (3)). Trustees must be satisfied that a social investment is in the interests of the charity based on its overall benefit to the charity, namely the combination of (a) the expected direct furtherance of the charity's purposes and (b) the expected financial return (subsection (2)(c)). A charity might make a social investment with an emphasis on the charity's purposes, or with an emphasis on the financial return, or where the trustees' motivation is both in equal measure.
- 109 The duties may not be restricted or excluded by the trusts of the charity (subsection (5)).
- 110 Some social investments will also be investments for the purposes of Part 2 of the Trustee Act 2000. In such cases, the duties in this section replace the duties in section 4 (standard

investment criteria) and section 5 (advice) of that Act; this is the effect of subsections (6) and (7).

111 A social investment made before the commencement of Part 15A is not subject to the duty to review under subsection (3). That is the effect of subsection (1). Where such a social investment made by the trustees of a charitable trust is also an investment for the purposes of Part 2 of the Trustee Act 2000, the corresponding duties of that Act will apply.

Consequential amendments to the Trustee Act 2000

112 Subsections (2) to (4) make amendments to the Trustee Act 2000 in consequence of section 292C(6) of the Charities Act 2011. The amendments insert words into sections 4 and 5 of the Trustee Act 2000 to refer to the effect of section 292C(6) in disapplying the duties in those sections in the case of investments that are also social investments to which section 292C applies.

Section 16: Reviews of the operation of this Act

113 Section 16 makes provision for the operation of the Act to be reviewed by the Minister. The first review must start within three years following enactment, reporting within a year. Subsequent reviews must take place at least every five years thereafter. It specifies the matters that must be considered in the review, and for a report of the review to be laid in Parliament.

Section 17: Short title, extent and commencement

114 Section 17 makes provision for the commencement of the Act, and extends its provisions to England and Wales only.

Commencement

115 Provisions of the Act will come into force on days appointed by the Minister for the Cabinet Office in regulations which are not subject to Parliamentary procedure.

Related documents

116 The following documents are relevant to the Act and can be read at the stated locations:

- [Consultation on Extending the Charity Commission's Powers to Tackle Abuse in Charities](#) (December 2013)

(www.gov.uk/government/consultations/extending-charity-commissions-powers-to-tackle-abuse-in-charities)
- [Powers to Tackle Abuse in Charities: Summary of consultation responses and Government response](#) (October 2014)

(www.gov.uk/government/publications/draft-protection-of-charities-bill)
- [Impact assessment: Charity Commission Powers](#) (October 2014)

(www.gov.uk/government/publications/draft-protection-of-charities-bill)
- [Social Investment by Charities: The Law Commission's Recommendations](#) (September 2014)

(www.lawcom.gov.uk/clarifying-the-legal-framework-for-social-investment-by-charities/)

- [Government response to the Joint Committee on the draft Protection of Charities Bill](#) (March 2015)

(www.gov.uk/government/news/government-response-to-the-joint-committee-on-the-draft-protection-of-charities-bill)

- [Proposed power to disqualify: Charity Commission's first thoughts](#) (May 2015)

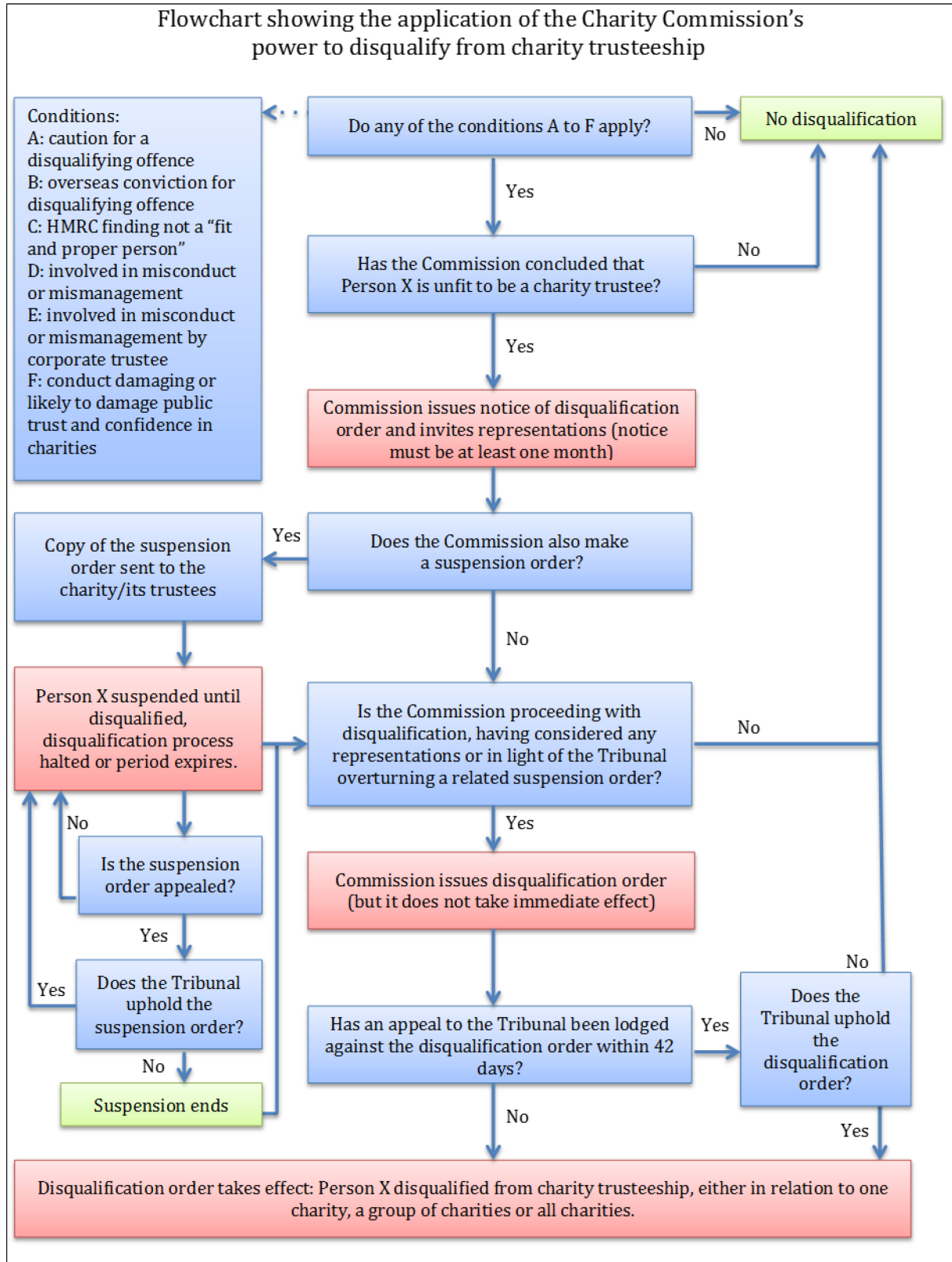
(www.gov.uk/government/publications/proposed-power-to-disqualify-charity-commissions-first-thoughts)

117 The following document is relevant to the Act and is available at www.parliament.uk:

- [Report of the Joint Committee on the draft Protection of Charities Bill \(HL Paper 108, HC 813\)](#) (February 2015)

(www.parliament.uk/business/committees/committees-a-z/joint-select/draft-protection-of-charities-bill/publications1/)

Annex A - Power to disqualify from being a trustee



These Explanatory Notes relate to the Charities (Protection and Social Investment) Act 2016 (c. 4) which received Royal Assent on 16 March 2016

Annex B - Territorial extent and application in the United Kingdom

118 The entire Act extends to and applies to England and Wales.¹

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Entire Act	Yes	Yes	No	No	No	Yes	Yes	No

¹ References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

Annex C - Hansard References

119 The following table sets out the dates and Hansard references for each stage of the Act's passage through Parliament.

Stage	Date	Hansard Reference
<i>House of Lords</i>		
Introduction	28 May 2015	House of Lords Vol. 762 No.4 Col. 30
Second Reading	10 June 2015	House of Lords Vol. 762 No. 11 Col. 798
Grand Committee: 1st sitting	23 June 2015	House of Lords Vol. 762 No. 19 Col. GC 71
Grand Committee: 2nd sitting	29 June 2015	House of Lords Vol. 762 No. 22 Col. GC 117
Grand Committee: 3rd sitting	01 July 2015	House of Lords Vol. 762 No. 24 Col. GC 153
Grand Committee: 4th sitting	06 July 2015	House of Lords Vol. 764 No. 26 Col. GC 1
Report	20 July 2015	House of Lords Vol. 764 No. 35 Col. 904
Third Reading	14 September 2015	House of Lords Vol. 764 No. 43 Col. 1648
Lords Consideration of Commons Amendments	02 February 2016	House of Lords Vol. 768 No. 104 Col. 1730
<i>House of Commons</i>		
Introduction	15 September 2015	N/A
Second Reading	3 December 2015	House of Commons Vol. 603 No. 81 Col. 558
Public Bill Committee: 1st sitting	15 December 2015	PBC (Bill 069) 2015 - 2016 Col. 3
Public Bill Committee: 2nd sitting	15 December 2015	PBC (Bill 069) 2015 - 2016 Col. 39
Public Bill Committee: 3rd sitting	5 January 2016	PBC (Bill 069) 2015 - 2016 Col. 57
Public Bill Committee: 4th sitting	5 January 2016	PBC (Bill 069) 2015 - 2016 Col. 91
Public Bill Committee: 5th sitting	7 January 2016	PBC (Bill 069) 2015 - 2016 Col. 107
Report, Legislative Grand Committee and Third Reading	26 January 2016	House of Commons Vol. 605 No. 104 Col. 168
Royal Assent	16 March 2016	House of Commons Vol. 607 No. 134 Col. 986
		House of Lords Vol. 769 No. 127 Col. 1843

These Explanatory Notes relate to the Charities (Protection and Social Investment) Act 2016 (c. 4) which received Royal Assent on 16 March 2016

Annex D - Progress of Bill Table

120 This Annex shows how each section and Schedule of the Act was numbered during the passage of the Bill through Parliament.

Section of the Act	Bill as Introduced in the Lords	Bill as amended in Committee in the Lords	Bill as amended on Report in the Lords	Bill as introduced in the Commons	Bill as amended in Committee in the Commons	Bill as amended on Report in the Commons
Section 1	Clause 1	Clause 1	Clause 1	Clause 1	Clause 1	Clause 1
Section 2	Clause 2	Clause 2	Clause 2	Clause 2	Clause 2	Clause 2
Section 3	Clause 3	Clause 3	Clause 3	Clause 3	Clause 3	Clause 3
Section 4	Clause 4	Clause 4	Clause 4	Clause 4	Clause 4	Clause 4
Section 5	Clause 5	Clause 5	Clause 5	Clause 5	Clause 5	Clause 5
Section 6	Clause 6	Clause 6	Clause 6	Clause 6	Clause 6	Clause 6
Section 7	Clause 7	Clause 7	Clause 7	Clause 7	Clause 7	Clause 7
Section 8	Clause 8	Clause 8	Clause 8	Clause 8	Clause 8	Clause 8
Section 9	Clause 9	Clause 9	Clause 10	Clause 10	Clause 9	Clause 9
Section 10	Clause 10	Clause 10	Clause 11	Clause 11	Clause 10	Clause 10
Section 11	Clause 11	Clause 11	Clause 12	Clause 12	Clause 11	Clause 11
Section 12	Clause 12	Clause 12	Clause 13	Clause 13	Clause 12	Clause 12
Section 13			Clause 14	Clause 14	Clause 13	Clause 13
Section 14					Clause 14	Clause 14
Section 15	Clause 13	Clause 13	Clause 15	Clause 15	Clause 15	Clause 15
Section 16	Clause 14	Clause 14	Clause 16	Clause 16	Clause 16	Clause 16
Section 17	Clause 15	Clause 15	Clause 17	Clause 17	Clause 17	Clause 17

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