

CRIMINAL AND OTHER SANCTIONS UNDER THE CHARITIES ACT 1992

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Introduction

The purpose of this article is both to set out in convenient form the new criminal offences created or to be created under the Charities Act 1992, a summary of which (together with the other principal sanctions available) appears in Part 2 below, and to examine the practical and philosophical basis for the introduction of offences into an area of law which until now has largely been unaffected by criminal sanctions.²

PART 1

Past and Present Arrangements

The traditional approach to the supervision of charities has been gentlemanly. The customary image of the Charity Commissioners was of three wise men, probably bearded and possibly puffing pipes, who hummed and hawed over problems and occasionally gave guidance like Dutch uncles, but were never unreasonable in their demands, never oppressive, and were whispered to be devoid of teeth. This comforting image matched the traditional view of charity trustees as respectable, usually middle-aged, usually male, usually English, public-spirited personages, who gave freely of their ample leisure to the administration of mostly local, mostly modest, charitable endowments set up by people like themselves.

There was a change when the Charities Act 1960 took effect, and the Commissioners' jurisdiction was extended to unendowed charities and the register of charities was set up, but the traditional approach remained, and despite having been given new, and, read literally, somewhat fierce powers of investigation, the Commissioners appeared hesitant to use them. The reason usually given was that they did not wish to despoil or discourage the delicate flower of voluntary effort and diminish the supply of trustees. The other reason was budgetary: the cost of the Commissioners' activities was treated as "charity" by the Government itself.

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² But see Charities Act 1960 ss.6(9) and 31(3).

Effect on Standards

In consequence, the standards of trusteeship which came to be accepted were on one view relatively lax: short of provable fraud (which was a matter for the Police) trustees could get away without producing accounts nearly as often as the law required, and without taking investment advice or ever changing their investments. Charities liable for compulsory registration were often not registered. Minor breaches of trust, such as spending a fiver on a wreath for a trustee's funeral, tended to be visited by a reprimand rather than a demand for repayment. Where trustees were clearly in breach of some order or direction of the Commissioners it was practically never thought worth while to apply the only available sanction, an application for committal as for contempt of court. Culturally speaking, that was not the kind of behaviour expected of an uncle. Sometimes, scandalously, the only realistic hope of solving a long standing problem was to wait until the death or retirement of the trustee or officer concerned.

On the other hand, the worst risks to charities have always been avoided by a combination of conscientious advice to trustees who request it, the extensive reliance by charities on the Official Custodian for Charities in holding their land and investments, the Commissioners' encouragement of local reviews of charities and their strict supervision of the sale (and mortgaging) of charity land, a regime which has undoubtedly led to increased prices being obtained by charities in many cases and on occasion protected charities and their trustees from over-extending themselves financially. At the same time, expertise in the investigation of allegations of abuse has built up within the Commissioners' offices, more particularly since the number of staff available for the task has been increased following the Woodfield Report³ and also since arrangements were made under the Finance Act 1986 to enable the Inland Revenue to co-operate with the Commissioners, although the great majority of complaints have always been found to be groundless or unsubstantiated by useable evidence, and that is still the position: see the Commissioners' Annual Report for 1990,⁴ where it is reported that 75% of complaints are unfounded.

³ Report "Efficiency Scrutiny of the Supervision of Charities" by Sir Philip Woodfield published by HMSO (1987).

⁴ See paragraph 49 on page 9 of the Report of the Charity Commissioners for England and Wales for the Year 1990 published by HMSO (1991).

Need for Changes and the 1992 Act

Nevertheless, the public perception in recent years has been that many charities were out of control, and either allowed to build up enormous accumulations of unspent funds or subject to the manipulation of fraudsters and tax-evaders; hence the increases under the 1992 Act in the Commissioners' powers of investigation and methods of dealing with dormant charities⁵ and suspected maladministration.⁶ Instead of trusting charity trustees the public now tends to suspect that they may be up to no good and that the Commissioners' traditional approach is no longer adequate to protect the interests of donors and beneficiaries. In two areas the public is perfectly correct: the Commissioners have never had any jurisdiction over the activities of professional fund-raisers, and have had very little authority in relation to the conduct of public appeals and collections;⁷ their jurisdiction is limited to the activities of charity trustees and trustees for charities in the administration of charities or funds actually held for charitable purposes in the strict legal sense of the term.

The philosophy of the 1992 Act, which has been determined not only by public disquiet but also by the hard facts of economic reality, i.e., Treasury constraints, is to regard charity trustees as responsible adults who are expected to make most of their decisions without consulting any Dutch or other uncle, to make their own arrangements for the holding of investments, and to account publicly for their activities. Whilst advice from the Commissioners will doubtless continue to be freely available to trustees, more of it will be in the form of pre-prepared leaflets and publications such as the Commissioners' Annual Report, and in most cases a financial contribution⁸ will be demanded for additional services.

The withdrawal of effective central controls on charity property will undoubtedly increase the risks and thereby expose trustees more often to potential personal liability for breaches of trust. Further, the Government strenuously resisted, and defeated, an amendment to the Bill which would have conferred the benefits of limited liability on the trustees of unincorporated charities⁹ in their dealings with third parties. At the same time, by the time that the regulations under Part I of the Act have been made, the number of specific statutory duties on trustees will be very considerably increased.

⁵ 1992 Act s.18.

⁶ Ibid ss.6-12.

⁷ See for example the War Charities Act 1940.

⁸ See the new power to make charges under the 1992 Act s.51.

⁹ Clause 47 of the Charities Bill (as amended in Committee) entitled "Limitation of liability of trustees" was defeated at Report Stage: see Hansard (HL) Vol 535 No. 55 Cols 438-443.

We have yet to find out whether the new power for the Commissioners to bring charity proceedings¹⁰ in place of the Attorney General will result in more applications to the Court for relief against individual trustees. Third parties will be left with their normal remedies against charities, for example in contract or tort, and the new climate of opinion might well encourage them to resort to these more readily than hitherto. The sanctions for the new statutory duties, however, break new ground by consisting of specific offences enforceable by criminal proceedings and punishable by fines (or imprisonment).

Criminal Sanctions - Part I of the Act

It is apparent from the nature of the offences created by Part I of the 1992 Act, and the penalties attached to them, that company law has been used as the precedent. Offences under company law, however, are principally directed at those who engage in commercial activity and for profit, and have chosen to make use of a vehicle which protects them from personal liability. Charitable companies are subject to company law in any event, but the trustees of charities of all kinds carry out their tasks as volunteers from the goodness of their hearts, or at least without the prospect of personal gain. In the past, society and the Commissioners have shown gratitude and encouragement to them to do their (subjective) best. The provisions of the 1992 Act suggest that they take on the duties of trusteeship at their own risk, and that far stricter, objective, standards will be enforced.

In the past, for example, being a charity trustee or a trustee for a charity was a well recognised method of expiating anti-social behaviour: charity was all forgiveness and, like a Universalist Heaven, open to everyone. The design of the 1992 Act is far from forgiving: disqualification¹¹ from acting will for example inexorably follow from conviction for any offence of dishonesty, with no right to be appointed as a trustee until the offender has been rehabilitated under statute or a specific waiver has been given by the Commissioners.

It can thus be discerned that the 1992 Act treats charity trusteeship as a privilege, that of being permitted to manage property or an organisation on behalf of the public, which should be continuously justified, and not, or not simply, a matter for thanks and congratulation. The same applies to responsible employees of charities, who fortunately tend to be better remunerated (though often no less hard worked) now than in the past.

¹⁰ 1992 Act s.28.

¹¹ *Ibid* s.45.

Criticism in the House of Lords

Lord Simon of Glaisdale and others, in debates on the Bill in the House of Lords¹² (there was no debate in the House of Commons), criticised many of the proposed new offences as offences of strict liability, a conviction for which could be obtained without proof of *mens rea*. In an area of law where the spirit invariably informs the letter and moral considerations are more highly regarded than purely technical rules, it is certainly odd to find that offences can be committed without genuine fault or even in some cases knowledge, or that the burden of proof, once the *actus reus* is proved, is on the defence rather than the prosecution. The Government resisted these persuasive arguments by relying, in effect, on administrative expediency and the fact that most of the offences carry fines rather than prison sentences. No doubt too much public time and money would be spent if it were necessary to prove a mental element, and in view of the fact that some of the offences inevitably consist of failure to act or to check, which may be due to lack of care or concern or time rather than deliberate intention, the risk of failed prosecution or of failure to prosecute would doubtless be too high for the offences to bite in the manner intended.

In addition, it has to be borne in mind that the Commissioners themselves will not be the prosecutors. As far at least as Part I of the Act is concerned, this task will be left to the Crown Prosecution Service, although usually on information supplied by the Commissioners. Secondly, the consent of the Director of Public Prosecutions¹³ will be required before any prosecution is brought under Part I. The indications are that the prosecution of trustees and officers will be treated as a last resort and will not in fact be embarked upon unless the alleged offender's culpability is obvious. In practice this may mean that the Commissioners will make a practice of issuing warnings and threats before alerting the potential prosecutors, thus giving offenders an opportunity of righting their omissions, and generally behaving in their customary gentlemanly manner despite the fact that nowadays they neither number three, nor are all men or bearded.

Criminal Sanctions - Part II of the Act

The offences under Part II are also completely new, as are the substantive provisions. Professional fund-raisers and commercial participators,¹⁴ as such, are not used to being regulated except by the law of contract, and in practice some have been guilty of appalling abuse not only of their charity clients but also of the goodwill of the public. It will therefore be instructive to note how the Secretary of State (for this area is not a matter for the Commissioners) interprets and applies the new requirements, and of course the regulations themselves are awaited with baited breath by fund-raising consultants and others.

It seems likely, however, that there will sometimes be difficulty in determining

¹² See, for example, Hansard (HL) Vol 535 No 56 Cols 1245-6.

¹³ 1992 Act s 55. See Hansard (HL) Vol 535 No 55 Cols 1191-2.

¹⁴ For definitions, see 1992 Act s.58.

whether the requirements to state "in general terms"¹⁵ the method by which a professional fund-raiser is to be remunerated, or the method of distributing profits from a project in which a commercial participator is involved, have been complied with. It may be that a purposive interpretation will be chosen, and that the test to be applied will be whether what is stated and/or omitted is liable to mislead the average member of the public who may be thinking of contributing to a charitable or kindred cause.

Criminal Sanctions - Part III of the Act

The offences under Part III are less controversial since they are based on existing offences under the House to House Collections Act¹⁶ and the other (rather badly drafted) legislation under which local authorities, the Police and the Home Office currently keep control of public collections. Nevertheless it is interesting to note that the House of Lords brought about one very humane amendment: what is now s.73(2)(c)(ii) would originally have entitled a constable to demand a signature from a collector; this was abandoned after it was pointed out to the Government that many very successful collectors nowadays are disabled people for whom meeting such a demand might be a physical impossibility.¹⁷

¹⁵ i.e., in s.60(1)(c), (2)(c) and (3)(c).

¹⁶ i.e., the House to House Collections Act 1939, the Police, Factories etc (Miscellaneous Provisions) Act 1916, the War Charities Act 1940 and the National Assistance Act 1948.

¹⁷ House of Lords Official Report on the Public Bill Committee's 6th Sitting on the Charities Bill (12th December 1991) Cols 267-270 and Hansard (HL) Vol 535 No 56 Cols 1244-1245.

Another point of interest is that enforcement of the existing law has been patchy, partly because of the difficulties of interpretation and partly because different authorities adopted different views of it. The modernisation of the law in this area may lead to improved enforcement, but there will still be scope for differing standards in different places, and it will be of interest to see whether national, non-charitable bodies such as Amnesty International and Greenpeace will be unduly hampered in their fund-raising campaigns by the fact the orders made by the Commissioners under s.72 of the Act will not be available to them, and any nationwide public appeal will strictly require permits from all the local authorities concerned.¹⁸

PART 2

Offences under Part I of the Act

- *S.3(4) In the case of a registered charity which had a gross income of £5,000 or more in its last financial year, issuing/authorising the issue of any document in s.3(2)(a) (e.g., an advertisement soliciting funds) or (c) (e.g., an invoice), or signing any document under s.2(3)(b) (e.g., a cheque) which does not state that it is a registered charity.

Maximum Fine: 3rd level.

- *S.8(9) Amending s.20(10) of the Charities Act 1960: Contravening an order of the Commissioners under substituted s.20(1)(iv) (order not to part with property of a charity without the Commissioners' approval), (v) (order to a charity's debtor not to pay the charity without the Commissioners' approval) or (vi) (order restricting the transactions which may be entered into or payments made by/on behalf of a charity without the Commissioners' approval).

Maximum Penalties: (i) Fine on 5th level; (ii) Action for breach of trust against charity in case of contravention of order under substituted s.20(1)(iv) or (vi) (see s.8) may be taken in addition to prosecution.

- *S.27 Persistent failure without reasonable excuse to comply with any requirement imposed by s.23(3) (supply of annual report, with attached statement of account to Commissioners) or s.25(3) (provision of accounts to member of public on written request) or s.26(2) (annual returns to Commissioners by registered charity).

Maximum Fine: 4th level.

[S.40(4) Offence under s.6(3) of the Companies Act 1989 committed if a charitable company defaults in complying with s.40(3) of 1992 Act (consent of Commissioners to be supplied to Registrar of Companies with alteration to objects, etc, of charitable company).

¹⁸ House of Lords Official Report on the Public Bill Committee's 6th Sitting (op cit) Cols 245-250 and Hansard (HL) Vol 536 No 60 Cols 222-226.

Penalty: See Companies Act 1989.]

- *S.46(1) Acting as a charity trustee while disqualified, except in relation to a charitable company (see Company Law requirements) or if disqualified by being an undischarged bankrupt or subject to disqualification order under the Company Directors Disqualification Act 1986 or the Insolvency Act 1986 s.429(2)(b).

Maximum Penalties: (i) On summary conviction, 6 months prison or fine of statutory maximum or both; (ii) On indictment, 2 years Prison or fine or both; (iii) Commissioners may order repayment of any remuneration, expenses or value of benefits received from charity.

- *S.54(1) Knowingly/recklessly supplying false/misleading information to the Commissioners in purported compliance with a statutory requirement or in circumstances in which the offender could reasonably be expected to know that information was required for the Commissioners' statutory functions: or wilfully altering/suppressing/concealing/destroying a document which the offender is or is liable to be required to produce to the Commissioners under a statutory provision.

Maximum Penalties: (i) On summary conviction, fine of statutory maximum; (ii) On indictment, 2 years prison or fine or both.

*See under "Offences Generally" below.

Offences under Part II of the Act

S.60(7) Failure to comply with any requirement in s.60(1) to (5) (professional fundraiser to provide statement about institution to benefit, or purpose and manner of distribution, general method of determining his remuneration, and right to cancel donations where applicable; commercial participator to provide statement of institution(s) to benefit, shares or proportions if more than one, general method of determining the proportion of profit to go to the institution(s) and any donations to be made by him). Defence to prove that all reasonable precautions were taken and due diligence was exercised to avoid committing the offence. A person other than the professional fundraiser or commercial participator, whose act/default causes the offence, may be charged in addition or instead.

Maximum Fine: 5th level.

S.63(1) Falsely representing that the body for which funds are being solicited is a registered charity.

Maximum Fine: 5th level.

S.64(4) Breach of regulations to be made on professional fund-raising and commercial participation, under regulations.

Maximum Fine: 2nd level.

Offences under Part III of the Act

S.66(2) Promoter conducting a public charitable collection without either a permit from the local authority of the area or an Order from the Charity Commissioners (for charities *stricto sensu* only).

Maximum Fine: 4th level.

S.73(3) Breach of regulations to be made on applications for permits/orders, and conduct of public charitable collections, under regulations.

Maximum Fine: 2nd level.

S.74(1) Display/use of a prescribed badge/certificate not held by the person concerned for the purpose of the relevant appeal or collection; or a badge/certificate/other article or document deceptively similar to a prescribed badge/certificate.

Maximum Fine: 4th level.

S.74(3) Knowingly/recklessly supplying false information in application for permit.

Maximum Fine: 4th level

(For supplying false information to the Commissioners in applying for an order under s.72, see s.54 above).

Offences Generally

- *S.55 Prosecution for certain Part I offences requires to be brought by or with the prior consent of the Director of Public Prosecutions. The offences concerned are marked * above.
- S.75 Where the offence is under the 1992 Act or regulations (or under the 1960 Act as amended) and is committed by a corporate body, a director, manager, secretary or similar officer, or someone purporting to act as such, may commit the offence in addition to the corporate body if the offence is proved to have been committed with his consent/connivance or is due to his neglect.

Non-criminal sanctions

- S.21(4) Where a charity (not a charitable company) is required by order of the Commissioners to have a professional audit by a person appointed by the Commissioners (either where it has not complied with a requirement for a professional audit within 10 months of the end of the year in question or where the Commissioners decide that a professional audit is desirable although the charity is not otherwise required on income/expenditure grounds to have such an audit) the Commissioners are entitled to recover the expenses of the audit from the charity trustees, who are jointly and severally liable. (The charity itself may have to bear the expenses if the Commissioners do not recover them from the trustees).

S.46(4) The Commissioners may require a person who has acted as a trustee while disqualified to repay to the charity any remuneration or expenses or the value of any other benefits received whether or not criminal proceedings are also taken.

Breaches of Trust Generally

Proceedings by Attorney General/Commissioners (s.28)/co-trustees for injunction or damages or account or restitution of property. Substituted *s.20 of Charities Act 1960* as set out in s.8: Freezing of assets and restrictions on transactions/payments by charity.

Appointment of receiver and manager by Commissioners or Court.

Appointment of additional trustees by Commissioners or Court.

Suspension/removal of trustee/officer.

Establishment of scheme, winding up of charity and/or transfer of property to another charity.

Removal of funds to care of Official Custodian.

Action by Inland Revenue/Customs & Excise/Rating Authority, etc (see s.52)

Non-Compliance with any requirement imposed under the Charitable Trustees Incorporation Act 1872 (as amended by the 1992 Act), the Charities Act 1960 (as amended by the 1992 Act) or the 1992 Act.

Proceedings as for contempt of Court

ONLY IF

- (i) there is no criminal penalty available for non-compliance or persistent non-compliance AND
- (ii) the requirement is imposed by order or direction of the Commissioners to which *s.41 of the 1960 Act* applies.

N.B. *S.41 of the 1960 Act* applies (i) under the 1960 Act, (ii) to any order (sc or direction) under the 1992 Act s.12 (regulation of certain Scots charities), s.22 (2) (directions given by Commissioners when someone fails to afford facilities to charity's auditor/independent examiner), and s.46 (requirement that person acting as trustee while disqualified repay remuneration, expenses of value of benefits); and to *s.12A of the 1872 Act* as set out in the 1992 Act Schedule 4, para 9 (order requiring transfer of property to trustees or their nominee on dissolution of corporate trustee body under the 1872 Act).