

Rollits <sup>LLP</sup>

# Charity Law Update

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# Automatic disqualification rule changes: **Guidance for trustees and senior managers of charities**



## Current rules

There are currently rules which automatically disqualify someone from acting as a charity trustee unless they have been granted a waiver by The Charity Commission.

Under the current rules anyone who is an undischarged bankrupt or who has unspent convictions for crimes relating to dishonesty or deception cannot act as a charity trustee without a waiver.

## New rules

From 1 August 2018 the rules which automatically disqualify someone from acting as a charity trustee will change as follows:

- The circumstances disqualifying someone from acting as a charity trustee will increase. This includes being on the Sex Offenders' Register and unspent convictions including specified terrorism or money laundering offences. The Charity Commission has published a table setting out the current legal disqualifying reasons and the new reasons which will apply from 1 August this year – see appendix to this article.
- People who are disqualified from acting as a charity trustee will **also** be disqualified from holding certain **senior manager** positions at a charity. Relevant senior manager positions are both chief executive (or equivalent) positions and chief finance officer (or equivalent) positions.

## Senior manager positions

The Charity Commission has issued detailed guidance on the automatic disqualification rule changes for charities and for individuals which can be accessed via its website. It also provides a "quick check" explanation of what a "senior manager" position affected by the new rules is.

## Chief Executive (or equivalent) position

A Chief Executive (or equivalent position) is one which:

- carries overall responsibility for the day-to-day management and control of the charity; and
- is accountable only to the charity trustees.

## Chief Finance Officer (or equivalent) positions

A Chief Finance Officer (or equivalent) position is one which:

- is accountable only to the chief executive or the trustees; and
- is responsible for overall management and control of the charity's finances.

The Charity Commission's guidance states that senior or other staff or voluntary positions with financial responsibility are not restricted when:

- they carry budgetary authority, or authority for handling, transacting or accounting for the charity's money, but
- do not carry responsibility for overall management and control of the charity's finances.

[Continues on next page...](#)

## Automatic disqualification rule changes (continued)

The job title of a person is irrelevant in determining whether they hold a restricted position and what matters is the responsibility that someone has and who they are accountable to. Neither do the rules take into account a charity's size, or the number of its staff or volunteers (i.e. the new rules apply to all charities). As above, detailed guidance is available on The Charity Commission's website, which includes examples of how the new rules apply to restricted positions and how restricted positions can be identified in different types of charities. Please also see the appendix to this article, the table published by The Charity Commission "*Does my position count as a senior manager position?*"

### Criminal offence to act while disqualified

It is usually a criminal offence for a person to act as a charity trustee whilst they are disqualified. The same principle will apply to anyone who also acts as a senior manager of a charity while disqualified after 1 August this year.

Conviction of acting as a charity trustee or senior manager of a charity while disqualified may lead to a fine, imprisonment or both for the individual. It can also lead to embarrassment and reputational damage for the charity concerned. The Charity Commission also emphasises that if someone acts whilst disqualified, they may also have to repay any money received from the charity during this period.

### Waiver

Most people who will become disqualified when the automatic disqualification rules change on 1 August this year, can choose to apply for a waiver of their disqualification before then.

There are some circumstances in which someone cannot get a waiver (e.g. if the charity's governing document prevents a person from acting as a charity trustee in those circumstances then a waiver cannot override that or if other legal rules apply which would disqualify someone from acting).

It is possible to apply to The Charity Commission for a waiver in advance of 1 August when the new rules come into force. The waiver application form is available on The Charity Commission's website with detailed guidance on how to apply.

If someone applies for a waiver before 1 August, their disqualification under the new rules will not apply until they receive a decision from The Charity Commission, and any appeal against a decision has been decided. However, it is vital that anyone who will be disqualified from acting as a charity trustee or senior manager of a charity on 1 August this year applies for a waiver before 1 August if they are to continue to act.

### Practical advice

It is important that all charities ensure that their trustees and senior managers will remain eligible to act when the new rules come into effect on 1 August.





### Declarations for charity trustees and senior managers of charities

The Charity Commission has published sample declarations for senior charity manager positions and charity trustee positions which are available on The Charity Commission's website – see the appendix to this article.

Existing trustees and senior managers of charities should be asked to read and sign the declarations to confirm that they will remain eligible to act on 1 August and these should be filed in the charity's records as evidence that action was taken to confirm their eligibility.

Eligibility declarations for new trustees and senior managers of charities appointed after 1 August should include the new circumstances for automatic disqualification. Charities should ensure that they have appropriate systems in place for identifying trustees who subsequently become disqualified after they have been appointed. It is therefore important that charities check their pre-appointment procedures for trustees and senior managers and ensure that a person is not disqualified from acting prior to their appointment.

As above, anyone currently appointed a charity trustee or senior manager of a charity who will be disqualified from holding that position on 1 August should apply to the Charity Commission for a waiver now if they are to continue to act.

Charities should also check and update their procedures for people currently in post as trustees and senior managers to make sure that they have not become disqualified.

The Charity Commission also recommends that charities should review employment or consultancy contract terms for relevant senior manager positions. Charities may need to take legal advice if a person in a relevant post becomes disqualified when the new rules come in to force and may have to leave their position.

For charities working directly with children and vulnerable people other systems are also required to check that trustees and staff are eligible to act including disclosure and barring service checks if the role is eligible.

**Gerry Morrison**

# Automatic disqualification tables

## A. Unspent convictions for specific offences

Legal disqualifying reason	In force?	Legislation (where relevant)	Exceptions and notes
1. Unspent conviction for an offence involving dishonesty or deception	<b>In force now for trustee positions. Will also apply to senior manager positions from 01.08.18</b>	There is more information about what is meant by a dishonesty/deception offence at Annex A in the automatic disqualification guide.	<p><b>A person is no longer disqualified by the automatic disqualification rules if and when their conviction is spent</b></p> <p>You can use this guidance from the charity Unlock to work out when your conviction becomes spent, and so no longer disqualifies you from being a charity trustee and from holding certain senior manager positions at a charity. You can also look at the Nacro website or at GOV.UK for information about when convictions become spent</p>
2. Unspent conviction for specified terrorism offences	<b>Not in force yet. Coming into force on 01.08.18 for trustee and senior manager positions</b>	Offences: <ul style="list-style-type: none"> <li>to which Part 4 of the Counter-Terrorism Act 2008 applies; or</li> <li>under sections 13 or 19 of the Terrorism Act 2000 under Part 2 of the Serious Crime Act 2007 (encouraging or assisting) in relation to the offence</li> </ul>	
3. Unspent conviction for a specified money laundering offence		A money laundering offence within the meaning of section 415 of the Proceeds of Crime Act 2002	
4. Unspent conviction for specified bribery offences		An offence under sections 1,2,6 or 7 of the Bribery Act 2010	
5. Unspent conviction for the offence of contravening a Charity Commission Order or Direction		An offence under section 77 of the Charities Act 2011 – contravening a Commission Order or Direction	
6. Unspent conviction for offences of misconduct in public office, perjury, or perverting the course of justice			
7. Unspent convictions for aiding attempting or abetting the above offences		In relation to offences at 1-6 above, an offence of: <ul style="list-style-type: none"> <li>attempt, conspiracy, or incitement to commit the offence</li> <li>aiding, or abetting, counselling or procuring the commission of the offence</li> <li>under Part 2 of the Serious Crime Act 2007 (encouraging or assisting) in relation to the offence</li> </ul>	

## B. Other legal disqualifying reasons – non financial

Legal disqualifying reason	In force?	Legislation (where relevant)	Exceptions and notes
Being on the sex offenders register	<b>Not in force yet. Coming into force on 01.08.18 for trustee and senior manager positions</b>	Where a person is subject to notification requirements of Part 2 of the Sexual Offences Act 2003, commonly referred to as being on the sex offenders register	<b>Note</b> – If these notification requirements apply to a person, they are disqualified by the automatic disqualification rules even if their offence is spent
Unspent sanction for contempt of Court		Where a person has been found to be in contempt of court for making, or causing to be made, a false statement or making (or causing to be made) a false statement in a document verified by a statement of truth	A person is no longer disqualified by the automatic disqualification rules if and when the sanction for contempt becomes spent
Disobeying a Commission Order		Where a person has been found guilty of disobedience to an order or direction of the Commission under section 336(1) of the Charities Act 2011	
Being a designated persons (under specific anti-terrorist legislation)		Where a person is a designated person for the purposes of: <ul style="list-style-type: none"> <li>Part 1 of the Terrorist Asset-Freezing etc. Act 2010; or</li> <li>The Al Qaida (Asset Freezing) Regulations 2011</li> </ul>	

**B. Other legal disqualifying reasons – non financial (continued)**

Legal disqualifying reason	In force?	Legislation (where relevant)	Exceptions and notes
Being a person who has been removed from a relevant office	<p><b>In force now for trustee positions. Already affects trustees – will also apply to senior manager positions from 01.08.18</b></p>	<p>Where a person has been removed:</p> <ul style="list-style-type: none"> <li>from the office of charity trustee, officer, agent or employee of a charity by an Order of the Commission under s79 of the Charities Act 2011, or earlier relevant legislation, or by a High Court Order, on the grounds of any misconduct or mismanagement in the administration of the charity</li> <li>under s34(5)(e) of the Charities and Trustee Investment (Scotland) Act 2005, or earlier relevant legislation, from being concerned in the management or control of any body</li> </ul>	
Director disqualification		<p>Where a person is subject to:</p> <ul style="list-style-type: none"> <li>a disqualification order under the Company Directors Disqualification Act 1986 or The Company Directors Disqualification (Northern Ireland) Order 2002 (SI 2002/3150; (N.I.4)); or</li> <li>an order made under s429(2) of the Insolvency Act 1986 (failure to pay under a County Court administration order)</li> </ul>	<p><b>Exception</b> – There is no disqualification if the court has <b>granted leave for a person to act as director of the charity</b> (as described in section 180 of the Charities Act 2011)</p>

**C. Other legal disqualifying reasons – financial**

Legal disqualifying reason	In force?	Legislation (where relevant)	Charity positions affected	Exceptions and notes
Insolvency	<p><b>In force now for trustee positions</b></p>	<p>Where a person is:</p> <ul style="list-style-type: none"> <li>an undischarged bankrupt</li> <li>subject to any of the following:                             <ul style="list-style-type: none"> <li>an undischarged sequestration Order</li> <li>a bankruptcy restrictions Order</li> <li>an interim Order</li> <li>a moratorium period under a debt relief Order under Part 7A of the Insolvency Act 1986</li> <li>a debt relief restrictions Order or an interim Order under Schedule 4ZB to the Insolvency Act 1986</li> </ul> </li> </ul>	<p><b>Already affects trustees – will also apply to senior manager positions from 01.08.18</b></p>	<p><b>Exception</b> – There is no disqualification for these reasons <b>if the charity concerned is a company or CIO and leave has been granted</b> under s11 of the Company Directors Disqualification Act 1986 (undischarged bankrupts) <b>for a person to act as director of the charity</b> (s180 Charities act 2011).</p>
		<p>Where a person has made a composition or arrangement with, or granted a trust deed for, their creditors and has not been discharged in respect of it</p>		

# Senior charity manager positions

## Automatic disqualification declaration

This example declaration can be used by:

- charities to make sure that individuals who hold (or who are applying for) a senior manager position will not be disqualified from holding that position from 1 August – charities can ask the individual to complete this declaration alongside any other pre-employment checks
- individuals who hold, or are applying for, a senior manager position, to declare that they will not be disqualified from holding that position from 1 August 2018

Senior manager positions<sup>1</sup> have the responsibilities of a chief executive or finance director / chief financial officer.

Charities must make sure any declaration forms are handled and processed in accordance with duties under the General Data Protection Regulation (GDPR).

From 1 August 2018 individuals will be automatically disqualified from holding a senior management position within a charity if:

- one or more of the reasons in Annex A apply; and
- they have not obtained or applied for a waiver of that disqualification from the Charity Commission

### Completing the declaration

Read the automatic disqualification guidance<sup>2</sup> first to check if you will be disqualified from 1 August 2018.

Complete and sign the declaration to confirm that you will not be disqualified when the new rules come into force.

If one of the disqualification reasons does apply, you may be able to apply for a waiver<sup>3</sup> from the Charity Commission. This may allow you to take up or continue to hold the position.

### Declaration

I declare that:

- I am not disqualified from holding a senior manager position from 1 August 2018; and
- I will inform the trustees promptly if, after the date of this declaration, one or more of the disqualification reasons applies to me.

Full name

Signature

Date

Charity name and number

## Annex A – Disqualification reasons

After 1 August 2018, you will be automatically disqualified from acting as a trustee or senior manager if:

1. You have an **unspent** conviction for any of the following
  - a) an offence involving **deception or dishonesty**
  - b) a **terrorism** offence
    - a. to which Part 4 of the Counter-Terrorism Act 2008 applies
    - b. under sections 13 or 19 of the Terrorism Act 2000
  - c) a **money laundering** offence within the meaning of section 415 of the Proceeds of Crime Act 2002
  - d) a **bribery** offence under sections 1, 2, 6 or 7 of the Bribery Act 2010
  - e) an offence of **contravening a Commission Order or Direction** under section 77 of the Charities Act 2011
  - f) an offence of **misconduct in public office, perjury or perverting the course of justice** yes/no
  - g) In relation to the above offences, an offence of: attempt, conspiracy, or incitement to commit the offence; aiding, or abetting, counselling or procuring the commission of the offence; or, under Part 2 of the Serious Crime Act 2007 (encouraging or assisting) in relation to the offence
2. You are **on the sex offenders register** (ie. subject to notification requirements of Part 2 of the Sexual Offences Act 2003)
3. You have an unspent sanction for **contempt of court** for making, or causing to be made, a false statement or for making, or causing to be made, a false statement in a document verified by a statement of truth
4. You are a **designated person** for the purposes of Part 1 of the Terrorist Asset-Freezing etc. Act 2010, or the Al Qaida (Asset Freezing) Regulations 2011.
5. You have **previously been removed as an officer, agent or employee of a charity** by the Charity Commission, the Scottish charity regulator, or the High Court due to misconduct or mismanagement
6. You have **previously been removed as a trustee** of a charity by the Charity Commission, the Scottish charity regulator, or the High Court due to misconduct or mismanagement
7. You have been **removed from management or control of any body** under section s34(5) (e) of the Charities and Trustee Investment (Scotland) Act 2005 (or earlier legislation)
8. You are **disqualified from being a company director**, or have given a disqualification undertaking, and leave has not been granted (as described in section 180 of the Charities Act) for you to act as director of the charity
9. You are **currently declared bankrupt** (or subject to bankruptcy restrictions or an interim order)
10. You **have an individual voluntary arrangement (IVA)** to pay off debts with creditors
11. You are **subject to** a moratorium period under a **debt relief order**, or a debt relief restrictions order, or an interim order
12. You are subject to an order made under s.429(2) of the Insolvency Act 1986. (**Failure to pay under a County Court Administration Order.**)

# Trustee positions

## Automatic disqualification declaration

This example can be used alongside the existing trustee declaration<sup>1</sup> form by:

- Charities to satisfy themselves that individuals who hold (or who are applying for) a trustee position will not be disqualified from holding that position from 1 August. Charities can ask the individual to complete this declaration alongside the existing trustee declaration form if they have not already done so.
- Individuals who hold, or are applying for, a trustee position, to declare that they will not be disqualified from holding that position from 1 August 2018.

Charities must make sure any declaration forms are handled and processed in accordance with duties under the General Data Protection Regulation (GDPR).

From 1 August 2018 individuals will be automatically disqualified from acting as a trustee of a charity if:

- one or more of the reasons in Annex A apply; and
- they have not obtained a waiver of that disqualification from the Charity Commission.

### Completing the declaration

Read the automatic disqualification guidance<sup>2</sup> to decide if you will be disqualified from 1 August 2018

Complete and sign this declaration to confirm that you will not be disqualified.

If one of the disqualification reasons does apply, you may be able to apply for a waiver from the Charity Commission<sup>3</sup> which will allow you to take up or continue to act as a trustee.

Pass a copy of the completed declaration to the trustees for the charity's records (the declaration should not be sent to the Charity Commission).

### Declaration

I declare that:

- I am not disqualified from acting as a trustee from 1 August 2018; and
- I will inform the trustees promptly if, after the date of this declaration, one or more of the disqualification reasons applies to me.

Full name

Signature

Date

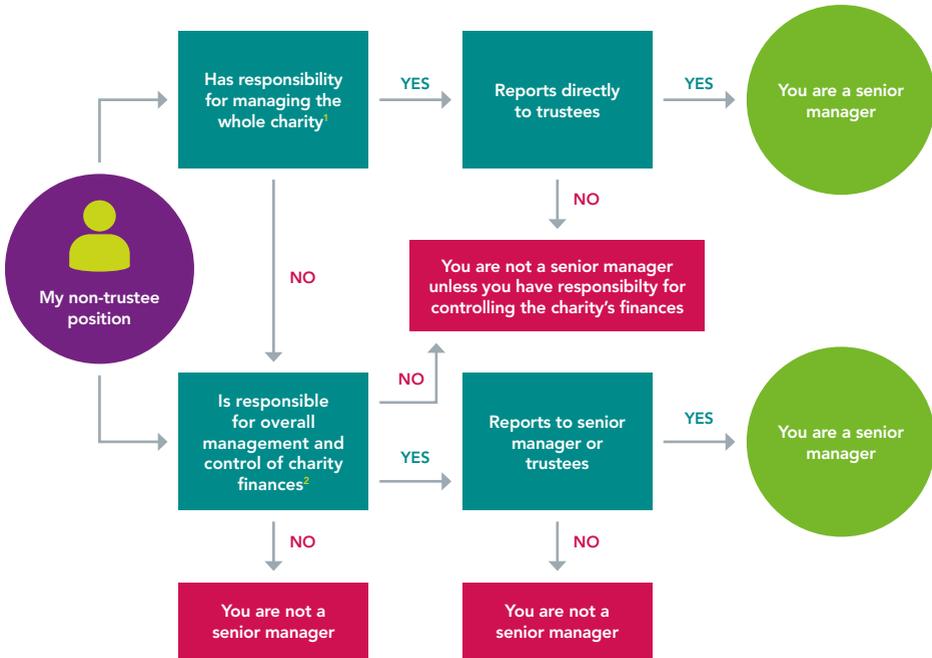
Charity name and number

## Annex A – Disqualification reasons

After 1 August 2018, you will be automatically disqualified from acting as a trustee if:

1. You have an **unspent** conviction for any of the following
  - a) an offence involving **deception or dishonesty**
  - b) a **terrorism** offence
    - a. to which Part 4 of the Counter-Terrorism Act 2008 applies
    - b. under sections 13 or 19 of the Terrorism Act 2000
  - c) a **money laundering** offence within the meaning of section 415 of the Proceeds of Crime Act 2002
  - d) a **bribery** offence under sections 1, 2, 6 or 7 of the Bribery Act 2010
  - e) an offence of **contravening a Commission Order or Direction** under section 77 of the Charities Act 2011
  - f) an offence of **misconduct in public office, perjury or perverting the course of justice** yes/no
  - g) In relation to the above offences, an offence of: attempt, conspiracy, or incitement to commit the offence; aiding, or abetting, counselling or procuring the commission of the offence; or, under Part 2 of the Serious Crime Act 2007(encouraging or assisting)in relation to the offence
2. You are **on the sex offenders register** (ie. subject to notification requirements of Part 2 of the Sexual Offences Act 2003)
3. You have an unspent sanction for **contempt of court** for making, or causing to be made, a false statement or for making , or causing to be made, a false statement in a document verified by a statement of truth
4. You have been found guilty of **disobedience to an order or direction of the Commission** under section 336(1) of the Charities Act 2011.
5. You are a **designated person** for the purposes of Part 1 of the Terrorist Asset-Freezing etc. Act 2010, or the Al Qaida (Asset Freezing) Regulations 2011.
6. You have **previously been removed as an officer, agent or employee of a charity** by the Charity Commission, the Scottish charity regulator, or the High Court due to misconduct or mismanagement
7. You have **previously been removed as a trustee** of a charity by the Charity Commission, the Scottish charity regulator, or the High Court due to misconduct or mismanagement
8. You have been **removed from management or control of anybody** under section s34(5) (e) of the Charities and Trustee Investment (Scotland) Act 2005 (or earlier legislation)
9. You are **disqualified from being a company director**, or have given a disqualification undertaking, and leave has not been granted (as described in section 180 of the Charities Act) for you to act as director of the charity
10. You are **currently declared bankrupt** (or subject to bankruptcy restrictions or an interim order)
11. You **have an individual voluntary arrangement (IVA)** to pay off debts with creditors
12. You are **subject to a moratorium period under a debt relief order**, or a debt relief restrictions order, or an interim order
13. You are subject to an order made under s.429(2) of the Insolvency Act 1986. (**Failure to pay under a County Court Administration Order.**)

# Does my position count as a senior manager position?



1. Responsibility for managing the whole charity means having responsibility for the day to day control and operation of the charity, typically held by a Chief Executive or equivalent.

2. Control over finances means responsibility for overall management and control of the charity's finances, typically held by a Chief Finance Officer or Director of Finance or equivalent. Other financial positions which carry authority for budgets, handling transacting or accounting for the charity's money but which are not responsible for overall control, do not count as senior manager positions.

## Information

If you have any queries on any issues raised in this newsletter, or any charity matters in general please contact:

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The law is stated as at 19 June 2018.

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