

To: Board

Board Paper No: (07) OBM 27

cc: Peter Garrard
Stephen Roberts
Neil Robertson
Michelle Russell
David Walker

For meeting on: 19 July 2007

For decision

Title: CRB CHECKS FOR TRUSTEES – POLICY PROPOSALS

Issue: Consideration of the responses to the consultation paper on *CRB checks of trustees of charities* and resulting policy proposals

Recommended Board actions

- (i) The Commission's general policy position should continue to be as follows:
 - trustees must be CRB checked when there is a legal requirement to do so; and
 - trustees should be CRB checked when there is a legal entitlement to do so.
- (ii) The Commission should take the following approach to charities working with children or vulnerable adults at the point of registration:
 - (a) as part of a revised trustee declaration, ask trustees to:
 - declare that they are not disqualified from acting as a trustee;
 - declare whether they are legally required or legally entitled to carry out a CRB check and, if so, whether the check has been carried out; and
 - (b) where a trustee indicates that they have not undertaken a CRB check where there was the opportunity to do so, the Commission should provide further advice about the importance of CRB checks and ask why the check has not been carried out. However, trustees' decisions to not carry out CRB checks should not alone be grounds for refusing registration.
- (iii) The Commission should monitor specific incidents which relate to safeguarding vulnerable beneficiaries for registered charities as part of the Annual Return.
- (iv) The Commission should confirm with the Department for Children, Schools and Families (DCSF) that trustees of charities working with children or vulnerable adults should be subject to the CRB's monitoring under the new vetting and barring scheme.

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1 Introduction

In January 2006 the Daily Mirror featured a front page story, revealing that one of its journalists had registered a sham charity (i.e. it did not exist or operate) that listed a trustee with prior convictions for crimes against young people. The Commission quickly removed the sham charity from the register, but the incident led to a debate about ensuring the suitability of charity trustees, safeguarding vulnerable beneficiaries and public confidence in charity.

The Chief Executive said that *“Whilst the Daily Mirror had brought out one particular area of concern, the Commission has always been clear that it is ultimately the responsibility of trustees to ensure that all trustees of their charity are fit to act as such.”*¹

Following this incident, the Commission introduced an interim registration policy which has been in place since 1 June 2006. As a result the Commission currently requires to see CRB disclosures for trustees of charities which work with children or vulnerable adults, before registering the charity.²

The Board agreed that the Commission should carry out a formal consultation exercise on this interim policy. At its meeting on 17 January 2007 the Board considered the draft consultation paper and agreed that the consultation should have a wider scope, not only considering our policy relating to charities registering with the Commission for the first time, but also our approach to monitoring the way in which registered charities carry out CRB checks for their trustees. The Board also agreed the proposal that the policy and the consultation responses should be considered in relation to our approach to risk and the principles of best regulatory practice.

We have now received 46 responses to the consultation which closed on 11 May 2007.³ The consultation covered a wide range of detailed issues around CRB checks and this report identifies the key issues and proposes changes to existing policy. Details of other minor refinements we plan to make as a result of the consultation are available on request. We will publish a summary of responses on our website by 10 August 2007.

2 The Commission’s current policy

When trustees should be CRB checked

Our underlying policy position is that, where there is a specific legal **requirement** for a CRB check to be carried out on a trustee, a check **must** be carried out. Where there is a legal **entitlement** to carry out a CRB check on a trustee that check **should** be carried out.

We currently word the best practice element of this advice strongly. For example we ‘*strongly advise*’⁴ that these checks should be carried out and in inquiry reports we have said ‘*Charity trustees do have a duty of care and a duty to act solely in the interests of the charity. Accordingly, the Commission believes that charity trustees risk being in breach of these duties if they fail to carry out appropriate checks in a situation in which they are entitled to do so. In some circumstances such failures may be evidence of misconduct and/or mismanagement in the administration of the charity.*’⁵

¹ Minutes of the Open Board meeting on 25 January 2006

² *Registering a charity: evidence of CRB checks*

³ 44 responses were received in good time. Two of the responses are not included in the figures in this report

⁴ *Finding New Trustees (CC30)*, page 32

⁵ Inquiry report into Young Minds and Mentors, 21 May 2007, paragraph 33

Seeking evidence of CRB checks at registration

The Commission's current policy is to ask each trustee to sign a declaration form stating that they are not disqualified from acting as a trustee, before we will register a charity. In addition we ask to see satisfactory CRB disclosures for trustees where CRB checks are legally allowed. Our guidance says that we '*require*' to see disclosures in these cases and that '*The Commission will not normally register an organisation as a charity until it has seen evidence that CRB disclosures have been obtained*'.⁶

Monitoring that CRB checks are carried out for trustees of registered charities

The Commission carries out monitoring activity to find out how registered charities protect vulnerable beneficiaries. We have asked questions in the Annual Return about whether charities obtain CRB disclosures for their trustees. We also piloted a trustee eligibility check to identify trends and any specific causes for concern.

3 The Commission's role and approach to regulation

Approach to risk

The Commission is a risk-based regulator. Each operational unit applies this in a tailored way, and our corporate commitment to this approach was most recently demonstrated by the Board's agreement to the Compliance and Support risk and proportionality framework in May 2007. This characterised the highest risks as those where charities' assets, services or beneficiaries are at serious risk of harm, and this is where proportionately more resources should be targeted.

Our impact assessment in the consultation paper estimated that our current approach of requiring CRB disclosures at registration costs the Commission about £100,000 a year. We suspect that the level of resource dedicated to implementing this policy is disproportionate to the risks.

Involvement in trustee recruitment decisions

There is also the question of whether it is appropriate for the Commission to play a role in trustee recruitment decisions for charities registering with objects that will involve them working with children or vulnerable adults. The Charities Act 1993, as amended by the Charities Act 2006, prevents us from acting in the administration of a charity.⁷

Better regulation principles

The Charities Act 1993, as amended by the Charities Act 2006, requires the Commission to carry out its regulatory activity in a way that is compatible with the five principles of better regulation. In reviewing our policy we have therefore considered whether our regulatory activity is proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.⁸

⁶ *Registering as a charity: evidence of CRB disclosures*

⁷ S.1 E (2) Charities Act 1993

⁸ S.1 D (2) 4 Charities Act 1993

4 Consultation responses and policy proposals

4.1 General comments

There are issues with the way in which the current system of CRB checks works. For example, a CRB check provides just a snapshot in time. The Safeguarding Vulnerable Groups Act 2006 will introduce a new vetting and barring scheme (see 4.5 below) to try to address such issues, but it is not yet clear when this might start to apply to trustees. Given that any changes we make now are likely to be superseded in time by the implementation of this legislation, we are ensuring, as far as possible, that our proposed policy changes are not resource intensive for either the Commission or charities.

We asked people only to respond to those consultation questions of most interest to their organisation. Where percentages are given in this paper, this only indicates the balance of opinion among those who answered the relevant questions.

4.2 Our proposed general policy position on CRB checks for trustees

Key points from consultation responses

Many of the responses highlighted some confusion about the Commission's policy in relation to, and the general legal situation of, CRB checks. Although this is a complex area, it did indicate that some of the Commission's guidance is not sufficiently clear about the distinction between legal requirements and best practice advice.

Most respondents (59%) took the view that where there is a legal entitlement to carry out a CRB check on a trustee, it is for the charity concerned to determine whether it is appropriate to carry out a check.

A number of responses emphasised that the approach should be based on an assessment of proportionality and risk. As many trustees are in very remote positions, the strong view was that CRB checks are not always appropriate, especially when there are other safeguards in place to ensure that they will not have direct contact with, or unsupervised access to, beneficiaries. For example, some respondents felt that having a child or adult protection policy in place is more effective at protecting beneficiaries.

Although the majority of respondents advocated a relaxation of our position, others felt that CRB checks can help to protect beneficiaries and trustees and that the Commission's policy sends out a clear message. We have summarised some of the key points respondents made to the relevant consultation questions in Annex A.

Conclusion

Despite flaws with the system, a CRB check is the best way for trustees to check whether a fellow trustee is disqualified from working with vulnerable beneficiaries. We therefore recommend that as a responsible regulator the Commission should continue to take the following general position:

- Trustees must be CRB checked when there is a legal requirement to do so; and
- Trustees should be CRB checked when there is a legal entitlement to do so.

It is the responsibility of trustees to discharge their duties appropriately. The Commission's role is to provide advice and guidance to trustees to help them to meet their legal obligations and ensure that their charity is well run. We will revisit all our relevant guidance to ensure it is as clear, consistent and helpful as possible.

In any advice the Commission provides to charities we should also be clear that we do not require a CRB check to be undertaken where it is not legally required. However we should also provide robust information about the importance of CRB checks to inform trustees' decisions. This advice should include information about the general duties that all trustees have and about the specific offences trustees risk committing if they do not undertake CRB checks. Annex B illustrates the type of robust advice that we could provide.

4.3 Our proposed approach at registration

Key points from consultation responses

55% of respondents felt that our current policy of asking to see disclosures at registration does help to safeguard vulnerable beneficiaries. However 56% of respondents felt that supplying a disclosure to the Commission is an unreasonable burden.

In a separate question 82% of respondents reported that they are not asked to supply original CRB disclosures to any other regulator.

The responses illustrated a number of problems with the current policy. These are summarised in Annex A.

A key response received from the Office of the Information Commissioner raised particular concerns about data protection issues: *"The Charities Commission [sic] should not require charities to send the disclosure itself. Seeing all disclosures in all circumstances is unlikely to comply with the DPA... It is the charity itself which has the duty of care to ensure that appropriate recruitment decisions are taken...there is no need for the Commission to see the disclosure."*

Analysis of options

We have considered different approaches that the Commission could take at registration. There is an important common problem which each of the options available to us. Trustees could register a charity with general objects but then start work with vulnerable beneficiaries without informing the Commission. It could be argued that whatever evidence we seek at registration, trustees could simply tell us checks are not required. Unfortunately it is the very people we would want to stop working with vulnerable beneficiaries who are most likely to take this course of action and who we would have difficulty detecting.

This means that our current approach of seeing CRB disclosures may not be much more effective at protecting vulnerable beneficiaries than our previous policy of seeking a trustee declaration that they are not disqualified from acting as a trustee, but it is increasing the administrative burden for charities and is costly for the Commission (see section 4 below on resources). It also means that the Commission is to some extent intervening in trustee recruitment decisions.

We have assessed our policy against the better regulation principles and do not believe that the current policy is fully compatible. Our analysis is available on request.

Conclusion

We recommend that the Commission should change its current approach and should not in future ask to see CRB disclosures as part of the charity registration process. Instead we should enhance the trustee declaration we already ask trustees to complete and ask them to declare:

- that they are not disqualified from acting as a trustee; and

- whether they are legally required or legally entitled to carry out a CRB check and, if so, whether the check has been carried out

Where a trustee indicates that they have not undertaken a CRB check when legally required or entitled to do so we will provide further advice about the importance of CRB checks and ask why the check has not been carried out.

The Commission's registration decisions must be based on '*determining whether institutions are or are not charities*'⁹. Therefore, trustees' decisions to not carry out CRB checks should not be the only grounds for refusing charity registration, but will be taken into account in considering whether further questions relevant to charitable status should be raised at registration stage or any compliance action following registration.

We should be clear that this approach will **not** prevent another '*Daily Mirror-type*' registration. However, it is clear that many respondents, from charities to the Office of the Information Commissioner, view provision of CRB disclosures at registration as highly disproportionate and, possibly, in breach of the Data Protection Act. It should be remembered that making a false declaration is a criminal offence and there will be a volume of detailed checks that arise out of other operational case work, including random spot-checking.

4.4 Approach to monitoring registered charities

In the consultation document, we outlined proposals to monitor registered charities through the reporting of serious incidents, including a requirement to report such incidents in the Annual Return. This was very well received, with 96% of respondents who answered this question supporting our proposals.

Specific incidents which relate to safeguarding vulnerable beneficiaries have therefore been covered as part of the new reporting of serious incidents part of the Annual Return for 2007.

Monitoring of the CRB check status of charities' trustees will be risk-based. Monitoring will also be undertaken in all compliance cases dealing with vulnerable beneficiaries and other relevant cases which are subject to our proactive monitoring.

4.5 Moving to the vetting and barring scheme

The Safeguarding Vulnerable Groups Act 2006 includes a new vetting and barring scheme for those who work closely with children or vulnerable adults. The Home Office is responsible for implementation, with the Department for Children, Schools and Families (DCSF) and the Department of Health leading the related policy work.

The scheme will be introduced in phases from autumn 2008, but it has not been decided when the new regime will start to have an impact on the Commission and the sector we regulate. It may be implemented sector by sector, but it could be introduced by individual's disclosure numbers, meaning it would be a phased implementation across all sectors and it would affect trustees from autumn 2008.

Under this scheme, if individuals want to work in certain 'regulated positions' they would have to apply to be subject to the CRB's monitoring. It appears to be an improvement on the current system of checks because there will be a regular, rather than a one-off checking process once an individual has joined the scheme.

The Charity Commission is named as a 'supervisory authority' within the Act. This means that we will be able to request information about those in the scheme.

⁹ S.7 Charities Act 1993

We have been asked by DCSF whether charity trustees of children's charities and vulnerable adult's charities should be subject to the CRB's monitoring under the scheme. If we said 'no' it would mean that the only checks that would be available for trustees would be enhanced CRB checks.

In the consultation we asked whether trustees should be subject to monitoring. 73% of those answering the question agreed that they should.

We have been asked (subject to us agreeing that trustees should be subject to monitoring) who would check that these trustees are members of the scheme. One suggestion from DCSF is that one nominated person from within each charity (who may or may not be a trustee) could be responsible for checking that the trustees are subject to monitoring and the Commission could have a role in checking that this one nominated person for each charity is also subject to the CRB's monitoring.

Conclusion

The new vetting and barring scheme should be an improvement as it will remove the problem that standard CRB disclosures become out of date. We therefore recommend that trustees should be subject to the scheme.

We do not have sufficient information about how the scheme will work in practice to give advice about who would check that trustees are subject to monitoring. We have asked DCSF to provide more information.

5 Resources

The impact assessment which accompanied the consultation document¹⁰ included estimated costs in relation to the Commission's original policy of seeing trustee declarations and the current approach of seeing CRB disclosures at registration. The resulting figures are set out in the table below.

Policy		Cost for charities		Cost to Commission
		Cost to sector	Cost per disclosure	
Original policy	Trustee declarations	£581,400	£39	£5,400
Current approach	Receiving CRB disclosures	£738,900	£49	£108,000

Our proposed approach of seeking a revised trustee declaration should bring the costs back in line with those of our original policy. This would remove a significant administrative burden for charities.

6 Timing

A summary of the consultation responses will be published on our website by 10 August 2007.

If the proposals in this paper are agreed, we will update guidance on the website so that changes to policy can be implemented as soon as possible. We envisage being able to update materials in time for a launch date of end of September or beginning of October.

¹⁰ The consultation paper including the impact assessment is available at:
<http://www.charitycommission.gov.uk/enhancingcharities/consultations.asp#recent>

7 Risk assessment

Risk	Likelihood	Impact	Mitigation
Risk that any changes in policy are seen as unnecessary given that the new vetting and barring scheme may be introduced from autumn 2008	Medium	Medium	Continue to work with DCFS to ensure we are aware of their implementation timetable. Include our reasoning that we are trying to reduce any unnecessary administrative burdens for charities in our communications plan.
Risk that the Commission's policy is criticised as too lenient, too heavy handed, ineffective or burdensome as a result of changes	High	Medium	This is an area of policy in which we will always be open to criticism. Develop media lines on the basis that we have listened to the views of charities and other key stakeholders. Changes acknowledge that it is the role of trustees to manage their charity and the Commission will act in line with our proportionate approach to regulation.

8 Communication/Handling Issues

Any change to the Commission's approach in this controversial area of law and policy is likely to generate media and sector interest. We are developing a communications plan which will be finalised once we have agreement on policy with the Board.

9 Diversity issues

We targeted the consultation at a wide range of charities and other organisations, including those that deal with children and vulnerable adults from diverse sections of society.

10 Conclusion

The Board is asked to agree the recommendations on the front page of this report.

SCHEDULE OF ATTACHED PAPERS:

Annex A: Summary of comments made about key aspects of our policy

Annex B: Advice about the importance of carrying out CRB checks

Summary of comments made about key aspects of our policy

Which trustees should be CRB checked?

Against current policy

- Overuse of CRB checks ignores peoples rights – they are only supposed to be used when there is some risk that is sufficiently significant that it outweighs a persons right to confidentiality of personal information
- The approach must be based on proportionality and risk assessment
- Checks are only appropriate for those with direct or unsupervised contact with vulnerable beneficiaries – a lot of trustees are in very remote positions and CRB checks are overkill. Need to distinguish between charities providing services and those giving arm's length grants
- CRB checks aren't very effective and reliable as they become out of date instantly. This is a blunt instrument and is only one of a package of safeguards that charities can use. What is appropriate will depend on the circumstances. Other safeguards include recruitment practices, organisational policies on protection, officers tasked with safeguarding roles, ensuring trustees are accompanied by CRB checked person if having access to beneficiaries
- Overuse of CRB checks could be used as tool for social exclusion. The voluntary sector has long history in helping to rehabilitate offenders, but over use of CRB checks does not support this and can stigmatise people.
- Charities are in the best position to know what is appropriate for their circumstances and a charity's view that its own trustees shouldn't be CRB checked should be respected, they are responsible for the decision.
- Overuse of CRB checks deters people from being trustees and volunteering

In favour of current policy

- CRB checks can help to protect beneficiaries and trustees
- Current policy sends out a clear message
- Although the CRB check system is not ideal, other safeguards are limited
- Even where initially a trustee won't have contact with beneficiaries, circumstances do change, so it is safer to carry out checks
- Trustees are in position of leadership, trust and respect. Having CRB checks follows naturally from trustees' duty of care
- Although there are other safeguards, none replace CRB checks

Evidence at registration

Against the Commission seeing disclosures

- In some cases, for enhanced disclosures additional information (for example about ongoing police investigations) is supplied only on the version of the certificate which the CRB sends to the registered body or to the charity via an umbrella body. In some cases extra police information is sent to the registered or umbrella body in a letter. The Commission is seeing the individual's version of the disclosure, so it's making decisions on incomplete information in some cases.
- The Commission's request to see disclosures means that people in the charity see disclosures that they otherwise wouldn't and small charities aren't geared up to deal with sensitive information appropriately
- The Commission collecting CRB disclosures as a standard procedure would, in the opinion of the Office of the Information Commissioner, be unlikely to comply with the Data Protection Act.
- A disclosure is just a snapshot in time and not effective because it becomes out of date straight away
- The process is tediously time consuming and causes significant delays to registration
- The Commission does not have the power to prevent or delay registration on this basis. CRB checks are not linked to the registration function
- If people are intent on harm, bureaucracy won't stop them
- The Commission doesn't need to see disclosures it's not part of its role
- It's a disincentive to volunteering
- Charities own policies are more important in safeguarding

In favour of the Commission seeing disclosures

- Avoids fakes
- Consistent approach

Advice about the importance of carrying out CRB checks

Below is an illustration of the type of text that could be used in describing our policy and why it is important that CRB checks are carried out. Any such advice would also be accompanied by comprehensive definitions of terms such as 'children's charity' and 'regulated position' as understanding the legal definition of these terms is crucial in deciding whether certain obligations and/or offences relate to trustees of individual charities. For brevity, we have not included the definitions in this paper, but they are available on request.

Our policy

CRB checks are currently the best way for trustees to check whether a fellow trustee is disqualified from working with vulnerable beneficiaries. For this reason the Commission's policy is that trustees:

- must be CRB checked when there is a legal requirement to do so; and
- should be CRB checked when there is a legal entitlement to do so.

Trustees' general duties

All charity trustees have a duty of care and a duty to act solely in the interests of their charity. Accordingly, the Commission believes that charity trustees risk being in breach of these duties if they fail without good reason to carry out appropriate CRB checks when they are entitled to do so. In some circumstances such failures may be viewed as evidence of misconduct and / or mismanagement in the administration of the charity.

Specific offences

An individual who is disqualified from working with children commits an offence if he applies for, offers to become, accepts a position as, or does any work in a regulated position. This includes the regulated position of trustee of a children's charity. (S.35 Criminal Justice and Court Services Act 2000)

An individual is guilty of an offence if he offers a regulated position (including a position as a trustee of a children's charity) to an individual who is disqualified from working with children. He is also guilty of an offence if he fails to remove such an individual from that position. It is not a defence to claim that he did not know that the individual was disqualified. (S.35 Criminal Justice and Court Services Act 2000)

An individual who is considered unsuitable to work with vulnerable adults (as indicated by their inclusion in the Protection of Vulnerable Adults (POVA) list) is guilty of an offence if he knowingly applies for, offers to do, accepts or does any work in a care position. This applies to those trustees who by virtue of their trustee position also carry out work in a care position. (S.89 Care Standards Act 2000)

Specific legal obligations

Providers of care services for vulnerable adults must check that prospective employees (including trustees) are not included on the POVA list if they are proposing to offer the individual work in a care position. Providers of care services will include trustees of charities which provide care services. (S.89 Care Standards Act 2000)

Child care organisations must check that prospective employees (including trustees) are not included in the Protection of Children Act (POCA) list if they are proposing to offer the individual work in a child care position. Child care organisations will include some charities and the trustees of these charities will have legal obligations in this respect. (S.7 POCA 1999)