

What does the new Charities (Protection and Social Investment) Act mean for the voluntary sector?

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*The Charities (Protection and Social Investment) Act 2016 was passed this year, and introduced a range of measures including the empowerment of the Charities Commission to 'crack down' on potential abuses of the sector from financial abuses. Here, **Nicole Bolleyer** and **Anika Gauja** look at the practical impact of the legislation, and ask what the bill means for the voluntary sector.*



An autonomous civil society is considered a cornerstone of modern democracy, especially in those democracies with strong liberal traditions such as the UK, as well as Ireland, the US, Australia, New Zealand and Canada. In these democracies non-profit or charitable organisations have traditionally been less regulated than for-profit organisations.

However, since the 9/11 attacks the debate has shifted, with voluntary organisations now being perceived as a potential threat. Charities are considered especially 'vulnerable' to abuse. There are two main concerns. First, that terrorist groups take the legal form of a charity to have a legitimate front for their activities (e.g. to channel funding or to collect donations). This legal form is particularly attractive since charities receive privileged treatment by tax authorities, both through tax relief directly granted to the organisation and indirectly to its donors. The second concern is the potential for terrorist abuse through the exploitation of charities, particularly humanitarian ones that operate internationally (including areas where terrorist groups might be active) by channelling money to supporters abroad without the charity necessarily being aware of this.

How anti-terrorism measures might affect the voluntary sector, including charities, is an issue that has been widely discussed since the September 11 attacks in the US. However, two aspects relevant to this debate have not been addressed. The first is how anti-terrorism laws vary across democracies in the extent to which they specifically target, and therefore, constrain, the activities of charities. The second is the extent to which charities are affected by anti-terrorism legislation that might use broader legal categories that subsume charities, without explicitly naming

them.

Interestingly, until February 2016, with the passage of the *Charities (Protection and Social Investment) Act*, charity law in England and Wales did not explicitly refer to the prevention of terrorist abuse in any explicit way. This was unusual as Ireland, Australia, Canada and New Zealand had already reformed the legal regulation of charities (either through revisions of charity or tax law) and introduced explicit references to the combat of terrorist groups (mainly regarding charity registration) post 9/11. In the US, such anti-terrorist provisions existed prior to the attacks and were strengthened afterwards.

The lack of explicit legal recognition in charity law in England and Wales, however, did not mean that the Charity Commission was not actively involved in attempts to prevent terrorist abuse. While post 9/11 legislation explicitly targeting terrorism and its related activities has expanded considerably, the combat of terrorism is also regulated through inclusive concepts, be it through the ban of unlawful groups (or through criminalising their support) or sanctions against various forms of misconduct. Prior to the *Charities (Protection and Social Investment) Act*, the Commission was empowered to suspend trustees or remove a charity from the register in instances of 'misconduct or mismanagement in the administration of the charity' (*Charities Act 2011*), or if the Commission no longer considered an organisation to be a charity, with terrorist activity and charitable status being incompatible. Furthermore, reflecting the actual impact of anti-terrorism measures, the Commission has been actively involved in investigating cases of terrorist abuse of charities without explicit reference to terrorism.

The *Charities (Protection and Social Investment) Act* has now strengthened the Commission's role in the fight against terrorism by making its powers more explicit (rather than allocating it completely new ones). This Act is not focused exclusively on the combat of terrorism (it also targets money laundering and sexual offences). Yet it could affect the day-to-day operations of charities more than legislation in other jurisdictions passed earlier on in the post-9/11 period. This is because earlier legislation was specifically tailored to prevent the registration of terrorist organisations and hence has a much narrower remit (for example the *Charities Registration (Security Information) Act* in Canada).

The *Charities (Protection and Social Investment) Act* creates a new list of offences that automatically disqualify a person from being a charity trustee under a range of conditions (for example, when being involved in money laundering or various terrorist offences). These conditions need not necessarily amount to a conviction. An attempt to commit an act, or to conspire to commit an act, or to incite an act that falls under the ambit of anti-terrorism legislation, also constitute grounds for disqualification. Critics have argued that the new Act risks blurring the boundary between the legal obligations charities have to comply with and non-binding guidance. Concerns are that the Commission could treat a failure to follow good practice on behalf of trustees as evidence for misconduct, which is, in turn, a ground based on which the Commission has the power to remove trustees.

This criticism points to a broader concern regarding the impact of anti-terrorism laws on charities that applies not only to the UK, but to other established common law democracies such as Australia, Canada, Ireland, New Zealand and the United States.

In the period after 9/11 anti-terrorism measures and voluntary sector regulation have become more explicitly connected in newly adopted legislation or through revisions of pre-existing acts, suggesting the need for charities to adapt to new legal environments imposing new sets of constraints. The main challenge for charities or those citizens involved in their day-to-day operations lies, however, in the broadening of derivative offences, for example, the criminalising of (increasingly broadly defined) 'support' for or of 'facilitation' of terrorism) which blurs the lines between what is legal and what is not. Provisions that have received particular criticism refer to 'material support' (US), 'the facilitation of terrorist activities' (Canada) or 'informal membership' in terrorist organisations (Australia).

Compounding the ambiguity surrounding the scope and applicability of those derivative offences, vague provisions that make it easier to violate laws unintentionally are also problematic. For example, in the UK, Australia and New Zealand, in cases of terrorist financing, charities must demonstrate that they have made a reasonable effort to know

the origin and subsequent use of resources provided. Canada and the US have dropped knowledge requirements altogether, in the former jurisdiction related to the facilitation of terrorist activities, in the latter in the area of terrorist financing. In these democracies it is therefore possible to commit a terrorist offence unknowingly.

The existence of legislation that creates extensive scope for authorities to interfere with the voluntary sector does not necessarily mean that they will use or even exploit such leeway. However, such legislation might have consequences even before being implemented: charities tend to respond to legal uncertainty by pre-emptively withdrawing from activities that could bring them in conflict with anti-terrorism legislation (e.g. some of their international activities). Hence the impact of anti-terrorism legislation on charities and the voluntary sector is likely to be significant. On the one hand, the new *Charities (Protection and Social Investment) Act* provides greater clarity for these organisations by indicating specific instances of misconduct that relate to terrorism. On the other, however, the fact that these offences may be committed without conviction may create further uncertainty.

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