



Duties of Trustees

(November 2014)

This fact sheet describes the law in general terms as it applies in England and Wales. It is not intended to provide legal advice on specific situations and should not be relied on as a source of legal advice. If you wish to discuss specific questions please contact BCVS or a lawyer.

1. TRUSTEES' DUTIES AND RESPONSIBILITIES

- 1.1 Charity trustees are the people who have the general control and management of a charity's administration; they are ultimately responsible for the charity. Charity trustees may also be known as, directors, board members, governors or committee members. The title 'trustee' is useful because it emphasises the sense of trust the law places in them.
- 1.2 Charities can take many forms, including unincorporated associations, charitable trusts, companies limited by guarantee, charitable incorporated organisations (CIOs), statutory bodies and royal charter bodies. The duties of a charity trustee can vary according to the charity's legal form, governing documents and its status as a registered or exempt charity (e.g. unregistered charities with annual incomes of less than £5,000). For example, a trustee whose charity is a company limited by guarantee will also be a company director and will therefore be subject to additional duties imposed on all company directors. These duties are summarised in Section 5 below.
- 1.3 The overriding duty of all charity trustees is to advance the purposes of the charity.
- 1.4 The activities of charities in England and Wales are regulated by the Charity Commission (the "Commission"), which publishes extensive guidance on trustee duties and responsibilities on its website¹. This fact sheet briefly summarises the main duties of charity trustees in England and Wales under the following categories:
 - a) compliance;
 - b) prudence; and
 - c) duty of care.

2. DUTY OF COMPLIANCE

- 2.1 One of a trustee's main duties is to act as a 'compliance officer' for the charity. Trustees must ensure that the charity complies with the charity's constitution,

¹ www.gov.uk/government/organisations/charity-commission

including the charitable objects set out in it, the requirements of the Commission, and all relevant legislation. Therefore, a trustee must have an understanding of charity law and any other legislation that may be relevant to running his/her organisation, including:

- (a) company law applicable to company directors;
- (b) employment law;
- (c) data protection
- (d) health and safety legislation, for example relating to staff, volunteers and beneficiaries;
- (e) equality legislation and similar areas;
- (f) legislation protecting children or other vulnerable people; and
- (g) insolvency law, for example a trustee may be guilty of wrongful trading if he/she continues to trade or incur liabilities after he/she knew (or ought to have known) that the charity is insolvent.

- 2.2** Trustees need to be aware of who can and cannot become a trustee:
- (a) The governing document may define and restrict who can be a trustee
 - (b) Some people are legally disqualified from being a trustee and/or director such as those convicted of dishonesty or deception and undischarged bankrupts (see out Factsheet 'Checks on Trustees')
 - (c) Charities working with children and vulnerable people should carry out criminal record checks when they can, and act on the information received
 - (d) An individual may not be seen as a 'fit and proper person' by HM Revenue and Customs
- 2.3** It is good practice to obtain a signed declaration from new trustees confirming they are eligible to be a trustee.
- 2.4** Trustees must always act with integrity and avoid any personal conflicts of interest² or misuse of the charity's funds or assets.
- 2.5** All charities must prepare annual accounts and make them available to the public on request. Registered charities must also prepare a trustees' annual report (TAR). The TAR must include a report on the public benefit that the charity is providing. All CIOs and other charities with income greater than £25,000 have to file the accounts and TAR with the Commission. Trustees of charities which are companies will also have a duty to file documents with Companies House.
- 2.6** The two key principles of public benefit are:
- There must be an identifiable benefit or benefits; and
 - The benefit must be to the public or a section of the public.
- Trustees should regularly consider, and review, how their activities meet the public benefit test.
- 2.7** Trustees are usually not paid for their service as a trustee and are not entitled to receive any payment out of the charity's funds, other than reasonable and necessary out-of-pocket expenses such as the cost of travel to attend board meetings. However the constitution may allow payments to trustees for a

² Conflicts of interest are explained in more detail in Paragraphs 3.4(d) and 5.6.

specific service such as: specialised advice/services (e.g. fundraising); loans; renting premises. There are very tight restrictions on how a trustee can benefit and the way the decision is taken by the other trustees to pay a trustee (see 3.4). Trustees should seek advice before doing so.

A trustee who receives unauthorised benefits may be ordered to reimburse the charity even if they were not aware they were not allowed to be paid.

- 2.8** Unless a charity's constitution specifically says that trustees can be paid employees then the Commission needs to give its permission before an employee becomes a trustee, or a trustee becomes an employee. In both cases the charity will have to manage the obvious conflict of interest.
- 2.9** Trustees must ensure that they have proper control of funds where people are fundraising on behalf of the charity. They must ensure that funds are spent (or earmarked) for the purposes for which they were raised, and all funds raised should be paid into a bank account in the name of the charity before deduction of any expenses. Trustees must always ensure that:
- (a) any fundraising appeal properly describes what donations from the public will be used for; and
 - (b) a contract is drawn up where professional fundraisers are employed.
- 2.10** Trustees of registered charities are obliged to inform the Commission of any changes to details that appear on the Commission's Central Register.

3. DUTY OF PRUDENCE

- 3.1** A trustee's duty of prudence includes:
- (a) ensuring that the charity remains solvent;
 - (b) using charity funds and assets in ways that trustees reasonably believe will advance the charity's objects;
 - (c) regularly reviewing the objects and that resources are being used in the best way to advance the objects
 - (d) taking steps to protect the reputation of the charity
 - (e) avoiding undertaking activities that might place the charity's endowment, funds, assets or reputation at undue risk; and
 - (f) taking special care when investing the charity's funds or borrowing funds for the charity to use.
- 3.2** Trustees must act reasonably and prudently in all matters relating to the charity and must always bear in mind that their prime concern is the charity's interests. Trustees should not allow their personal interests or views to override this. Also they must exercise independent judgement. Even if they have been appointed to the board/committee by a third party, they must always act in the best interest of the charity, not the organisation they are from.
- 3.3** The charity's income and property must be applied only for the purposes set out in its constitution. If not then trustees can be made personally liable to reimburse the charity for the amount which has been wrongly spent.

- 3.4 The Commission provides the following guiding principles that should be followed by trustees:
- (a) **Fairness and objectivity**
The charity's expenditure must be applied fairly among those who are properly qualified to benefit from it.
 - (b) **Accumulation of surpluses**
The charity's income must be applied within a reasonable period of receipt and should not be allowed to accumulate unless the trustees have a specific use for it in mind.
 - (c) **Personal conduct of trustees**
Trustees must not let any personal views or prejudices affect their conduct, and must exercise an appropriate degree of care in administering the charity.
 - (d) **Conflict of interest**
Where trustees are required to make a decision that affects the personal interests of one of the trustees, that trustee should not be present at any discussion or vote on the matter. Any benefits to close family members and business partners of trustees must also be considered. Conflict of interest is a very wide term and includes a duty of loyalty to another organisation.
- 3.5 Trustees are accountable for the charity's solvency and must exercise overall control over its financial affairs. Trustees should ensure that the way the charity is administered is not open to abuse and that their systems of control are rigorous and constantly maintained. In particular:
- (a) trustees need to know on a continuing basis what condition the charity's land and buildings are in, that they are being properly used and that adequate insurance is in place;
 - (b) money not needed for immediate expenditure should be invested, and any investments reviewed periodically to ensure they remain suitable for the needs of the charity; and
 - (c) trustees must ensure that all income due to the charity is received, that all tax is paid and relief due is claimed.

4. DUTY OF CARE

- 4.1 All charity trustees have a general duty to act with due care and skill as is reasonable in the circumstances, using their personal skills and experience to ensure that the charity is well-run and efficient. This duty may be greater if a trustee has (or claims to have) any special knowledge or experience, or others may reasonably expect them to have. Trustees must consider seeking external professional advice on any matter where there may be material risk to the charity, or where the trustees may be in breach of their duties.
- 4.2 Trustees must meet as often as needed to do justice to the affairs of the charity and must make well-informed decisions. The Commission considers that even the smallest charity should meet at least twice a year.
- 4.3 Trustees are also responsible for setting the charity's strategic aims, objectives and direction.

- 4.4 This duty of care is very significant. Essentially, provided trustees can show that they are acting reasonably, in a way which furthers the legal objectives of the charity, it is unlikely they can be criticised under charity law.
- 4.5 Trustees have a duty to act collectively and have individual and shared responsibility for the charity and decisions made. Decisions can be made by majority; unless the constitution says otherwise, but unless individuals have their disagreement recorded they will be deemed to have been party to that decision. Therefore trustees should take an active role.
- 4.6 Even if there are particular roles such as Chair and Treasurer all decisions taken are a shared responsibility of all the trustees.
- 4.7 While trustees have ultimate responsibility they may wish to delegate to others, there are no restrictions on implementation or seeking recommendation but if decision-making is being delegated:
- Trustees must have the power to delegate in the constitution
 - Set out the terms in writing (e.g. minutes of a trustees meeting) covering:
 - What powers are delegated
 - To whom
 - Timing and nature of reporting back
 - Any financial or budgetary limits

5. DIRECTORS' DUTIES

- 5.1 The duties of company directors are set out in the Companies Act 2006 and are very similar to those for trustees. These are:
- (a) to promote the success of the company;
 - (b) to act within their powers;
 - (c) to exercise independent judgment;
 - (d) to exercise reasonable care, skill and diligence;
 - (e) to avoid conflicts of interests;
 - (f) not to accept benefits from third parties; and
 - (g) to declare interests in transactions or arrangements with the charity.

What each of these duties involves is set out in more detail below.

5.2 Duty to promote the success of the company

Trustees must act in the way they consider, in good faith, would be most likely to promote the success of the charity so as best to further its charitable purposes. When making any decision, trustees must have regard (amongst other things) to:

- (a) the likely consequences of any decision in the long term;
- (b) the interests of the charity's employees;
- (c) the need to foster the charity's business relationships with suppliers, customers and others;
- (d) the impact of the charity's operations on the community and the environment; and
- (e) the desirability of the charity maintaining a reputation for high standards of business conduct.

Please note that this duty would be displaced if the charity became insolvent, when trustees may be obliged to consider or act in the interests of creditors of the charity.

5.3 Duty to act within powers

Trustees must act in accordance with the charity's constitution and must only exercise the powers contained in the constitution for their proper purpose.

5.4 Duty to exercise independent judgement

Trustees must exercise independent judgement. This duty does not prevent trustees relying on external advice, as long as they exercise their own judgement in deciding whether or not to follow the advice.

5.5 Duty to exercise reasonable care, skill and diligence

Each trustee must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both:

- (a) the general knowledge, skill and experience that may be reasonably expected of a person carrying out the functions carried out by that trustee in relation to the charity; and
- (b) the general knowledge, skill and experience that the trustee actually has. This means that a trustee must exercise the degree of skill which may reasonably be expected of a person with that particular knowledge and experience.

5.6 Duty to avoid conflicts of interest

Trustees must avoid situations in which they have, or could have, an interest which conflicts, or may conflict, with the charity's interests. The duty applies, in particular, to the exploitation of property, information or opportunity. It applies whether or not the charity could take advantage of the property, information or opportunity. The duty continues to apply after a person ceases to be a trustee; a trustee does not need to have any influence over a particular situation for a conflict to arise.

The scope for conflict situations arising is wide. For example, interests are likely to conflict where a trustee is also a director of another company which deals with the charity, although the duty will not be infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest.

5.7 Duty not to accept benefits from third parties

A trustee must not accept any benefit from a third party where that benefit arises because of his/her being a trustee, or doing or not doing anything as a trustee. This duty will continue to apply after a person ceases to be a trustee in relation to anything done or omitted to be done before he/she ceased to be a trustee. The duty will not be infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest. Accepting a benefit from the charity or its subsidiaries will not be in breach of the duty.

5.8 Duty to declare interests in transactions or arrangements with the charity

Each trustee must declare to the other trustees the nature and extent of any interest, whether direct or indirect, that he/she has in any transaction or

arrangement with the charity. Good practice is for trustees to annually fill in a formal Declaration of Interests form.

As the duty applies to indirect interests, a trustee need not be a party to the transaction for the duty to apply and should declare his/her interest where another person contracts with the charity and that person's interest amounts to a direct or indirect interest on the trustee's part, for example where a trustee's spouse is employed by the charity.

5.9 Guidance on directors' duties

In 2007 the Government issued the following useful guidance on complying with these duties:

- (a) act in the charity's best interests, taking everything you think relevant into account;
- (b) obey the charity's constitution and decisions taken under it;
- (c) be honest, and remember that the charity's property belongs to the charity;
- (d) be diligent, careful and well informed about the charity's affairs. If you have any special skills or experience, use them;
- (e) make sure the charity keeps records of the board's decisions;
- (f) remember that you remain responsible for the work you give to others;
- (g) avoid situations where your interests conflict with those of the charity. When in doubt, disclose potential conflicts quickly; and
- (h) seek external advice where necessary, particularly if the charity is in financial difficulty.

6. LIABILITIES OF TRUSTEES

6.1 The extent of individual liability will depend a lot on what legal form a charity has. If the charity is a company or CIO it will have its own legal identity and limited individual liability, if it is a trust or an unincorporated association (e.g. an organisation with a membership and committee) the charity does not have its own identity and potentially unlimited individual liability.

6.2 A company or CIO can enter into contracts, agreements and other legal relationships in its own right. It is the company/CIO, not the individual trustees or members, which is liable for the debts (except in certain circumstances, see 6.5). For instance if someone slips on a spillage and sues the charity but the insurance policy does not cover the cost of the claim then the company or CIO must find the balance. If the charity does not have enough money then the injured person will lose out.

6.3 A trust and unincorporated association can only enter into legal agreements with individual trustees acting in their own name on behalf of the charity. Therefore in law they can be held personally liable and in the example in 6.2 if the charity runs out of money then the injured person can seek the balance from one or all of the trustees. Therefore they potentially have unlimited liability.

6.4 In the past it was very usual for charities to start as unincorporated associations but then convert to a charitable company as their activities and

legal relationships expand, e.g. employ staff, operate a building. However since 2013 charities can form as CIOs and have the same limited liability of charitable companies without the additional reporting to Companies House.

- 6.5 However trustees could also be personally liable even if the charity is a company or CIO, these include:
- (a) Wrongful or fraudulent trading if insolvent
 - (b) Knowingly breaking the law resulting in financial penalties for the charity
 - (c) Failure to deduct PAYE
 - (d) Breach of trust such as spending charity monies outside the objects or inadequate insurance.
- 6.6 In practice it is very rare for charity trustees to be held personally liable for breach of trust where they have acted in good faith. The Commission accepts that very often these arise from honest mistakes and will work with trustees to help them get back on track.

7. SOURCES/FURTHER INFORMATION

- 7.1 BCVS can give individual support and advice on being a trustee and good practice. Its website also has a number of factsheets and pages for trustees.
- 7.2 CC3 The Essential Trustee (www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3)
- 7.3 CC29 A Guide To Conflicts of Interest For Charity Trustees (www.gov.uk/government/publications/conflicts-of-interest-a-guide-for-charity-trustees-cc29)
- 7.4 Payments to charity trustees: what the rules are (www.gov.uk/payments-to-charity-trustees-what-the-rules-are)
- 7.5 CC15b - Charity Reporting and Accounting: The essentials (www.gov.uk/government/publications/charity-reporting-and-accounting-the-essentials-cc15b)
- 7.6 Charities and Public Benefit (www.gov.uk/public-benefit-rules-for-charities)
- 7.7 It's your decision: charity trustees and decision making (www.gov.uk/government/publications/its-your-decision-charity-trustees-and-decision-making)
- 7.8 Fundraising legally and responsibly (www.gov.uk/fundraising-legally-and-responsibly)
- 7.9 Free guide to trustee duties from law firm Bates Wells Braithwaite (www.bwbllp.com/file/duties-of-charity-trustees-colour-amended-version-pdf)

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