

The role of a Trustee

Charities are a vital part of a thriving Third Sector in the United Kingdom. There are over 165,000 registered charities in England and Wales, all of which are regulated by the Charity Commission. There are a similar number of charities that are not registered with the Charity Commission, but that are subject to charity law. Those charities are exempt or excepted from registration or have income under the registration threshold.

The combined income of registered charities in England and Wales for 2015/16 was over £71 billion.

Trustees are crucial to the ongoing success of these charities and play a key part in the Sector as a whole.

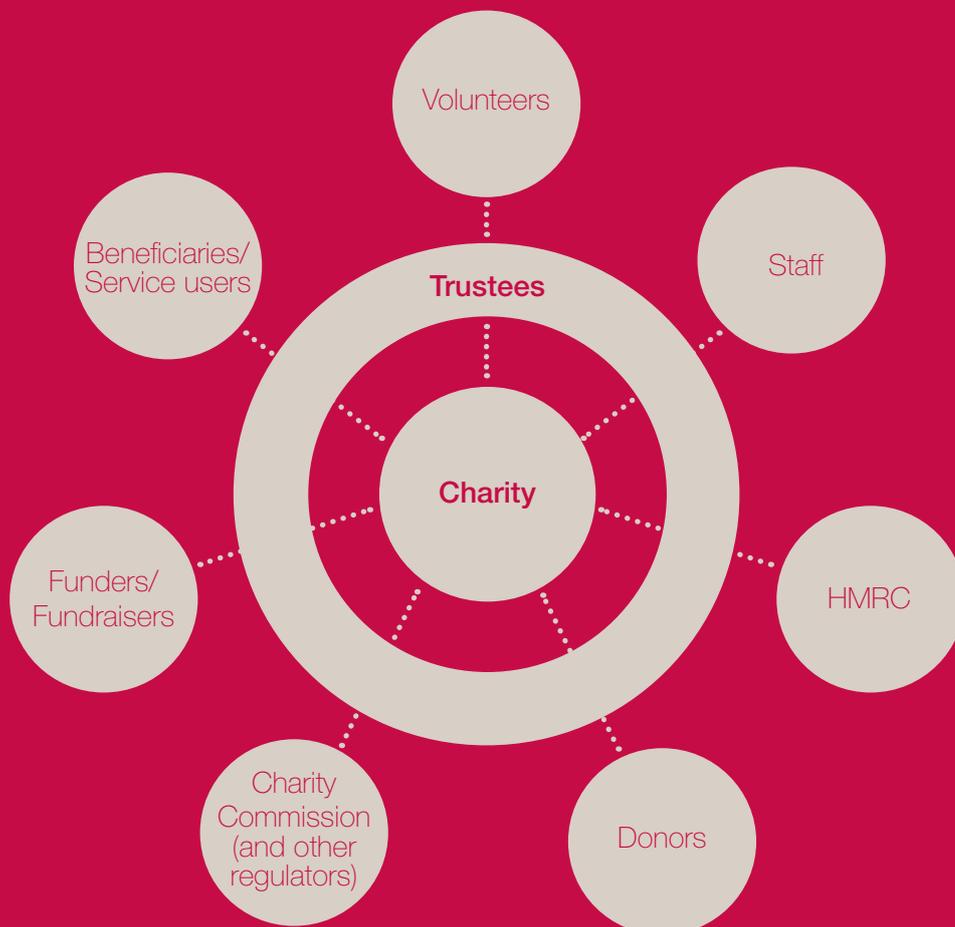
It is essential that Trustees understand their role and the Charity Commission expects Trustees to take their responsibilities seriously and give sufficient time and attention to the role.

This guide aims to steer Trustees through the basics of trusteeship to help you lead a successful, effective and compliant charity.

“Good governance is underpinned by good Trustees.”

Sir Stuart Etherington
Chief Executive of NCVO

Trustees as Guardians



What is a Trustee?

Section 177 of the Charities Act 2011 defines “charity Trustee” as “the persons having the general control and management of the administration of a charity”.

Trustees are legally responsible for managing and administering the charity ‘on trust’ for the beneficiaries and for safeguarding the charity and its assets. The Trustees collectively make decisions about the direction and activities of the charity based on the objects and powers set out in its governing document.

A governing document is the document which sets out a charity’s aims, powers and procedures. It could be a trust deed, a constitution, articles of association or something similar.

There are many terms used for Trustees – Trustee board, management committee, executive committee, board of directors, board of Trustees. Care needs to be taken because, despite what your charity calls you, if you have general control and management of the charity, you are a Trustee and need to be aware of the the responsibilities that go with it.

There can also be different types of Trustee with particular roles. For example, an ex-officio Trustee is a Trustee by virtue of their position, commonly the headmaster of a local school or the vicar at the local church.

Eligibility

To be eligible as a charity Trustee you must be:

- At least 16 years old – for a charitable company limited by guarantee or a charitable incorporated organisation (“CIO”)
- At least 18 – for any other charity

Trustees must:

- Be properly appointed (following the provisions in your governing document)
- Not be disqualified under the Charities Act 2011 (including being removed as a company director or charity Trustee because of wrongdoing, having an unspent conviction for an offence involving dishonesty or deception, bankruptcy or other arrangement) or under the Charities (Protection and Social Investment) Act 2016

- Depending on the activities your charity carries out there may be specific checks you need to complete to ensure a Trustee is eligible to act, for example DBS checks

Appointing Trustees

When appointing Trustees you must follow the provisions in your governing document and any applicable legal provisions – Companies Act 2006 for companies and the Trustee Act 1925 for trusts and unincorporated bodies.

Trustees appointed without following these rules may be invalidly appointed and legal advice should be taken to ensure compliance.

All Trustees should be asked to sign a declaration confirming they are eligible to act and to confirm they are a ‘fit and proper’ person in line with HMRC guidance.

Liability of Trustees

Trustees must act with integrity and use reasonable care and skill to ensure the charity is well run. This could involve seeking professional advice, especially where there is potential risk to the charity’s assets. Trustees have ultimate responsibility for their charity (if things go wrong) and can be held personally liable to:

- Third parties, eg when contracting with third parties. The extent of liability depends on the legal structure of the charity (see Legal Structures)
- The charity for breach of trust or Trustee duties. If any loss is caused the Trustee is liable to reimburse the charity for that loss. For example, where a Trustee has acted dishonestly, recklessly or negligently. Claims can be brought by fellow Trustees, the Charity Commission or the Attorney General
- Acting honestly, reasonably, in good faith and taking professional advice when needed will generally protect Trustees from personal liability

Often Trustees take the decision to ‘incorporate’ their charity in order to reduce the risk of personal liability. Incorporation can protect the Trustees from ongoing personal liability (except in wrongful and fraudulent trading situations), although it will not remove a Trustee’s liability to the charity for breach of trust. For more on this see Legal Structures.

Key duties & responsibilities of a Trustee

Fundamentally the role of the charity Trustee is to promote the purposes of the charity and to safeguard its assets.

These overriding duties and responsibilities are:

To understand your role

- Read Charity Commission guidance, 'CC3 – The Essential Trustee' as a minimum

To act in the best interests of your charity

- Avoid conflicts of interest/loyalty
- Do not receive benefits from the charity unless authorised and in the charity's interests
- Make decisions based on the charity's interests and ensure it achieves its objectives
- Make informed decisions
- Safeguard and protect the charity's assets, including reputation

To ensure your charity's objects (or purposes) are exclusively charitable and for the public benefit

- A charity must carry out its objects for the public benefit. As a Trustee it is your responsibility to have regard to the Charity Commission's guidance on public benefit and to bear that in mind when carrying out your powers and duties and when making decisions. Broadly, you need to understand:

what your charity is set up to achieve

how your charity benefits the public

why this is beneficial

how the charity will carry out its purposes for the public benefit

- The Trustees must also report on this in their annual report

To ensure the proper administration of your charity

- Read and comply with the terms in your governing document – act within your powers and follow the procedures set out in it
- Ensure compliance with charity law and any other applicable law/regulatory requirements. You must take reasonable steps to keep up to date with current law and any changes to it by reading guidance or attending appropriate training
- Act collectively – all Trustees should take an active role as you are all responsible
- Practice good governance – hold regular Trustee meetings, record decision making and the reasons for those decisions, manage conflicts of interest
- Act with reasonable care and skill – take professional advice when needed and give sufficient time to your role
- Undertake and promote responsible management:
 - Ensure your charity's assets are only used to carry out its objects
 - Act responsibly, reasonably and honestly (sometimes called the duty of prudence)
 - Ensure appropriate safeguards are in place to make sure charity assets are used appropriately, for example, having an investment policy in place
 - Avoid placing the charity's assets, beneficiaries or reputation at risk

Ensure effective financial management

- Comply with accounting and reporting requirements – all charities must prepare accounts and, if you are a registered charity, depending on your income, you will need to submit accounts, a Trustees' Annual Report and an Annual Return to the Charity Commission (see the Charity Commission's guidance for more details of your obligations)

- Your charity's history of submitting its financial information is publicly available on the Charity Commission's website (if you are a registered charity) so it is vital to get this right as potential funders and donors can easily access this information
- If you are also registered with Companies House you will have additional filing requirements
- For those charities which are exempt or excepted from registration, you will have filing requirements with your regulator
- Have financial controls in place and regularly review them – eg annual review of accounts budgeting and reserves policy
- Manage risk – this will vary depending on your charity's size and activities, but may include managing staff and property, working with vulnerable adults or children
- Plan for the future – ensure your charity will remain solvent and ensure that you have considered the issue of reserves and documented your policy in writing
- Investments – consider them carefully, take appropriate professional advice and have a written investment policy
- If you are a grant-making body, have a clear grant-making policy

Demonstrate accountability and be transparent

- Make sure you have accountability and clear reporting lines (within the charity) – be able to demonstrate your charity is complying with the law, is running effectively and accounts to its members
- Keep the Register of Charities up to date
- Report serious incidents - if there is, or there is a risk of, financial loss, harm to your charity's reputation, beneficiaries or criminal activity – professional advice should be taken, but you must report it as soon as possible after the event occurs. The Charity Commission will consider it to be mismanagement if a report is not made

Develop a vision and strategy for the charity

- Plan and review - think long-term!
- Monitor and maintain policies – it is important to regularly review these and keep them up to date. Examples of key policies include managing conflicts of interest, reserves, investment and Trustees' code of conduct
- Some policies are required to be in writing, either by virtue of legislation or regulatory requirements – an investment policy in writing, delegating management to a professional, for example

“Effective, capable Trustee boards will always be the first and most important line of defence against any problem in charity”

Charity Commission Annual Report 2015-16

Legal structures

Structure is key and can impact not only on a charity in terms of how it operates and the regulatory regime which applies to it, but also in terms of potential liability for Trustees. The information below sets out a summary of some (but not all) of the legal structures charities can be formed under. All are subject to overriding principles of charity law.

Legal Form	Features
Trust	<ul style="list-style-type: none">• Governing document – usually trust deed• Suitable for smaller charities who are not going to be taking on large contracts or employees• Regulated by the Charity Commission (unless an exempt charity with no other regulator)• Eg small grant-giving charities
Unincorporated association	<ul style="list-style-type: none">• Governing document – usually a constitution• Membership organisation• Regulated by the Charity Commission (unless an exempt charity with no other regulator)
Company limited by guarantee	<ul style="list-style-type: none">• Governing document – Articles of Association• Liability limited to the amount set out in the Articles of Association• Has its own legal personality• Regulated by the Charity Commission (unless an exempt charity with no other regulator) and Companies House
Charitable Incorporated Organisation (CIO)	<ul style="list-style-type: none">• Intended to have the benefits of incorporated structure with less of the administrative burden• Has its own legal personality• Regulated by the Charity Commission only (unless an exempt charity with no other regulator)
Community Benefit Society	<ul style="list-style-type: none">• Liability limited• Has its own legal personality• Regulated by the Financial Conduct Authority

What structure you choose will depend on what your activities are. Broadly speaking, it is only appropriate to be unincorporated if you are a pure grant-giving charity.

If your charity grows in size, owns land (freehold or leasehold) or starts entering into contracts or employing staff then it should incorporate.

Incorporation is a technical process and will require legal advice.

Top tips for Trustees

Act in the best interests
of the charity

1

Carry out annual reviews of
your policies/procedures and
update them as appropriate

2

Most importantly – celebrate
and shout about your
successes!

3

Keep up to date – take advantage
of free sources of information eg
on the Charity Commission and
HMRC's websites. Many professional
organisations, including Higgs & Sons,
run regular seminars/workshops on
key issues for charities

4

Read your governing document:

- understand the charity's
objects and powers and act
within those parameters
- understand your charity's
structure – do you have
members, for example?

5

6

Ensure safeguarding
protection is in place and
carry out appropriate checks

7

Keep an audit trail – consider
decisions carefully, minute your
reasons for making them and
have evidence to back this up

8

Seek professional advice
when needed

Higgs & Sons Charity & Not for Profit team



Kirsty McEwen

Partner, Charity & Not for Profit

A solicitor with over 15 years' post-qualification experience, Kirsty is a specialist charities lawyer who has spent many years advising the charity & not for profit / voluntary sector on all aspects of their operations.

She has acted for many well-known and established charities, advising on constitutional matters, governance issues and regulatory requirements.

Kirsty is an approved Interim Manager and is often appointed by the Charity Commission in the context of its investigative and regulatory work, acting for charities that have issues with regard to administration and management.

Kirsty sat on the Charity Law Association's Working Party which reviewed and responded to the Law Commission's Consultation on Technical Issues in Charity Law in July 2015.

Kirsty is a member of The Charity Law Association, The Ecclesiastical Law Society, the STEP Charities UK Special Interest Group, the STEP Philanthropy Advisors Global Special Interest Group and is a full member of STEP. She is also a Trustee of the Solicitors Benevolent Association.

As a renowned expert in her area of specialism, Kirsty is regularly invited to write and speak on issues affecting the Third Sector.

kirsty.mcewen@higgsandsons.co.uk
01384 327322



Ellie Williams

Solicitor, Charity & Not for Profit

Ellie is a specialist lawyer in our Charity & Not for Profit team and advises a variety of charity and voluntary organisations on all aspects of their operations.

Ellie previously worked for the Charity Commission providing advice and guidance to charities on administrative, governance and regulatory matters. Her work at the Commission included guiding charities through dissolution, amendments to governing documents and sales of charity land.

In her role Ellie also delivered training to the Third Sector including charity Trustees, Local Authority and Voluntary Council employees about compliance with the various legal and regulatory obligations.

ellie.williams@higgsandsons.co.uk
01384 327317

Contact us

www.higgsandsons.co.uk

0345 111 5050



Find us on Facebook



@HiggsandSons

HIGGS
&sons
S O L I C I T O R S