

5. Trustees and governance

5.2 Trustee duties and responsibilities

In this information sheet the term 'trustee' is used to describe governing body members of non-charitable voluntary organisations, and trustees of charities. The term 'charity trustee' is used when it is necessary to differentiate charity governing body members.

Introduction

Sometimes it can be difficult to get a full picture of the duties and responsibilities a trustee has. Some are legal requirements that carry sanctions if not complied with, others are considered best practice and there are those that may be thought of as moral obligations. There is a considerable crossover with the wider concept of 'governance' and this guidance should be read in conjunction with our information sheet *5.1 Principles of governance*.

Governance can be described as: *the systems and processes concerned with ensuring the overall direction, supervision and accountability of the organisation*. It is about taking responsibility for the overall running of an organisation and doing everything within the law to ensure its success.

Trustee duties and responsibilities are a narrower subset of the overall concept of governance. A duty is a legal obligation

and virtually every duty can attract liability if not fulfilled. Trustees may attract personal liability if they fail to discharge their duties and further guidance on this can be found in our information sheet *5.7 Liability of trustees and governing body members*. In addition to duties, it is fair to say that there are compelling responsibilities which may not contain a legal obligation, but which are considered essential for the sound running of the organisation.

Duties and responsibilities can be:

- **Statutory**, arising from:
 - activities such as employing staff; occupying premises; providing services; fundraising; etc
 - being a registered charity and/or company
 - being a trust.
- **Contractual**, arising from:
 - the organisation's governing document which it forms a contract between the organisation and the members
 - legally binding agreements with third parties such as contracts of employment; leases; contracts for goods and services; etc.
- **Common law**, arising from: the decisions of the Courts which establish legal principals and duties applicable to trustees.

- **Duties of trustees**, arising from: charity and trust law.
- **Good practice**, arising from: prevailing opinions of sector leaders and experts, and the established practices within each particular sector.
- **Moral obligations**, arising from: promises made by the organisation, or other principled beliefs which guide the organisation's actions.

It is clear that trustees face duties which *must* be complied with, and responsibilities that *should* be complied with. Generally trustees place equal weight on both as they wish to do the best job possible, but in the case of charity trustees, the Charity Commission makes an explicit distinction between '*must*' and '*should*' in its guidance.

The duties of charity trustees are well understood and clearly defined, but it is also important to remember that trustees of non-charitable organisations have certain legal duties too, particularly relating to company law, and other situations such as duties owed to employees and the responsibility to file returns – some of these are dealt with below. It is fair to say however, that the principals set out for charity trustees should, where applicable, be observed by trustees of non-charitable organisations too.

Duties and responsibilities of charity trustees

Charity trustees are the people who serve on the governing body of a charity. They may be known as trustees, directors, board members, governors or committee

members etc. Whatever their name, anyone who is responsible for the general control and management of the administration of a charity is classed as a charity trustee (Charities Act 1993, s.47).

The duties and responsibilities of charity trustees have been set out in a variety of forms, but it is sensible to refer to the current Charity Commission guidance contained in their publication, *The Essential trustee: What you need to know* (CC3).

Charity trustees have, and must accept, ultimate responsibility for directing the affairs of their charity, ensuring that it is solvent and well-run, and delivering the charitable outcomes for the benefit of the public for which it was set up:

Ensuring compliance – charity trustees must ensure that their charity complies with:

- Charity law, and the requirements of the Charity Commission as regulator; in particular they must ensure that the charity prepares reports on its work, and submits annual returns and accounts as required by law. More information can be found in the publication, *The Hallmarks of an Effective Charity* (CC60).
- The requirements or rules, and the charitable purpose and objects, set out in the charity's own governing document. All charity trustees should have a copy of this document, and be familiar with it.
- The requirements of other legislation and other regulators (if any) which govern the activities of the charity; these will vary according to the type of

work the charity carries out, and whether it employs staff or volunteers.

- The requirement for charity trustees to act with integrity, not to profit from their position, and avoid any personal conflicts of interest or misuse of charity funds or assets. They should check the charity's governing document for provisions relating to conflicts of interest and more information on this can be found in the *Supporting Charities* section of the Charity Commission website, and in the publication *Payment of Charity Trustees* (CC11).

In addition to complying with the general provisions of charity law, and company law in the case of incorporated organisations, trustees also need to comply with following general legal requirements:

- The provisions concerning relationships with professional fundraisers and commercial participators currently dealt with under Charities Act 1992 Part II, thereafter to be superseded by the Charities Act 2006 in late 2007.
- The variety of regulations which currently govern public street and house-to-house collections, and thereafter the provisions of the Charities Act 2006 and new local authority rules to be implemented in early 2008.
- The statutory obligation of charity trustees under section 4(6) of the Charities Act 2006, to have regard to Charity Commission guidance on various aspects of public benefit, from early 2008.
- The annual report and accounts requirements in the Charities Act 1993

and supporting Regulations, and the current Charities SORP. Charitable companies' accounts must comply with the provisions of the prevailing Companies Act.

- The disclosure and stationary requirements relevant to the type of organisation.
- The annual and event-related (e.g. change of trustee or director) requirements relevant to the type of organisation.
- The registers, records and minutes required to be kept for the type of organisation.
- Health and safety matters.
- Employment, equal opportunities and discrimination matters.
- Risk management and insurance matters.
- Intellectual property matters.
- Land matters.
- Contract matters.
- Data protection matters.
- The impact of tax and VAT on activities.

Duty of prudence – charity trustees must:

- Ensure that the charity is and will remain solvent; this means that charity trustees need to keep themselves informed of the charity's activities and financial position.
- Use charitable funds and assets wisely, and only to further the purposes and interests of the charity.
- Avoid undertaking activities that might place the charity's property, funds, assets or reputation at undue risk.
- Take special care when investing the funds of the charity, or borrowing funds for the charity to use.

Two provisions of the Insolvency Act 1986 can impose personal liability on trustees/directors where both a charitable or non-charitable company is in financial difficulty:

- Wrongful Trading (s.214) – a company director can be personally liable where they knew, or ought to have known, that the company could not avoid insolvent liquidation and they failed to exercise sufficient diligence to minimise loss to creditors.
- Fraudulent Trading (s.213) - a company director can be personally liable where they carried on a business whilst insolvent with intent to defraud creditors.

NB. Liability of this nature is rare where directors exercise reasonable diligence in monitoring and managing the financial affairs of the company, but it is important to bear in mind that it is the directors/trustees who have ultimate responsibility for the activities of the company and should closely monitor all delegated finance functions.

The trustees must safeguard the charity's funds, property and other assets – including intangible assets such as reputation and intellectual property rights (e.g. copyright, trademarks, domain names) - whilst applying them towards the charity's objects. Surplus cash not immediately required for the charity's activities should be invested in suitable investments or set aside as reserves, and further guidance can be found in the Charity Commission publications, *Investment of Charitable Funds* (CC14) and *Charities' Reserves* (CC19).

Surplus non-investment assets should be used to generate an income or capital

benefit if possible, or else should be disposed of for sufficient consideration. All funds generated from such sources should be applied towards the furtherance of the objects.

Duty of care – charity trustees must:

- Exercise reasonable care and skill as charity trustees, using personal knowledge and experience to ensure that the charity is well-run and efficient.
- Consider getting external professional advice on all matters where there may be material risk to the charity, or where the trustees may be in breach of their duties.

It is necessary to consider this Duty of Care in further detail. The Trustee Act 2000 imposes an additional statutory duty beyond the duty of care referred to above. Both trustees of charitable and non-charitable trusts are under a duty to exercise such care and skill as is reasonable in all the circumstances in the exercise of a range of powers, including powers of investment, delegation to agents and others, acquiring land, insuring property, etc. Section 1 of the Act requires the level of care and skill to be assessed having regard to:

- any special knowledge or expertise that the trustee has or holds him or herself out as having; and
- where a trustee acts in the course of a business or profession, to any special knowledge or expertise that it is reasonable to expect of a person acting in the course of that kind of business or profession.

In principal, this duty only applies to the exercise of powers conferred by the Act, but the courts are likely to imply a similar duty of care to the exercise of other powers exercised by trustees, and this approach is taken by the Charity Commission.

Whilst the Act does not apply to the duty of company directors in company law, it is likely to relate the discharge of their functions as charity trustees if the company is also a charity – once again this view is adopted by the Charity Commission. The duty of care imposed by the Act is higher than that implied by company law. However, company law is being reformed and the Companies Act 2006 will be introduced over the period leading up to October 2008.

The Companies Act 2006 finally codifies a number of statutory duties of company directors, and will both apply to charitable and non-charitable companies. From October 2007 these statutory duties will require directors:

- to act within their powers;
- to exercise independent skill and judgment;
- to exercise reasonable care, skill and diligence;
- to avoid conflict of interest;
- to declare interests;
- not to accept benefits from third parties, and
- to promote the success of the company.

Conclusion

The position of trustee carries clear duties and responsibilities. Because it is usually a voluntary role, it should only be undertaken because the individual is committed to furthering the organisation's purposes and has some of the skills, experience and personal qualities needed for the strategic management of that particular organisation.

This process can be assisted by ensuring that trustees are made fully aware of their duties and responsibilities during induction, and the use of Trustee Declarations and Role Descriptions can further reinforce this – relevant guidance is given in our information sheet *5.4 Recruitment, selection and induction of governing body members*.

Taken as a whole, non-charity trustees should assume that all the above duties apply to them as they do to charity trustees, and therefore discharge them to the standards prescribed by the new Charities and Companies Acts, and the Charity Commission guidance. This will ensure that the risk of personal liability is minimised, the law is complied with and best practice is demonstrated in the running of the organisation.

Further information

Governance Hub

Good governance – a code for the voluntary and community sector, and, Trustee & Management Committee - National Occupational Standards

www.governancehub.org.uk

Charity Commission for England and Wales

CC3 The Essential trustee: What you need to know

CC60 Hallmarks of an Effective Charity

CC11 Payment of Charity Trustees

In the *Supporting Charities* section of the website:

*How to be and Effective Charity Trustee
Trustee responsibilities*

www.charity-commission.gov.uk

Cabinet Office

Charities Act 2006 and supporting material

www.cabinetoffice.gov.uk/third_sector

Companies House

Companies Act 2006 and supporting material

www.companieshouse.gov.uk

The Institute of Chartered Company

Secretaries and Administrators

The Role & Duties of Charity Trustees

www.icsa.org.uk

Disclaimer

The information provided in this sheet is intended for guidance only. It is not a substitute for professional advice and we cannot accept any responsibility for loss occasioned as a result of any person acting or refraining from acting upon it.

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