

Essential Trustee Guidance: September 2015

On 10th July 2015 the Charity Commission published their updated version of 'The essential trustee': guidance about the responsibilities of all charity trustees and what is expected of them by the Commission. In short, the new guidance is shorter (partly because the guidance includes several links to other guidance by the Commission), more concise and better structured than the previous version. It also uses some alternative language and details how to avoid common mistakes. There is a helpful summary of the guidance, which is 39 pages long in its full form and available on GOV.UK.

William Shawcross, chairman of the Commission says that he hopes the new clearer guidance will give confidence to trustees to know what their duties are, and empower them to carry out those duties, given that trustees are the backbone of charities.

The draft version of the guidance, which was consulted on last autumn, was met with some negative feedback. Notably, the tone of the guidance was considered by some to be off putting and there was concern over the possibility of regulatory creep. Several changes were made to the draft version as a result of the consultation.

Who does it apply to?

Trustees of both registered and unregistered charities in England and Wales. Even people who do not fulfil the definition of 'trustee' within the charity's governing document are subject to the guidance if they have ultimate responsibility and authority for governing the charity. The Commission defines trustees as people who 'lead the charity and decide how it is run'.

The guidance considers eligibility and also contains information about what other factors should be considered when appointing trustees.

It is a criminal offence to act as a trustee whilst you have been disqualified from being a trustee of another charity or disqualified as a director.

Trustees of charities that wish to claim UK tax relief and exemptions must also fulfil the 'fit and proper persons' test under the Finance Act 2010. See the HMRC guidance or contact me on 01789 206135 for more information.

What 'must' and 'should' mean in the guidance

'Must' means something is a "legal or regulatory requirement".

'Should' means "something is good practice". However, in some cases you will not fulfil your legal duties if you do not follow good practice. For example in order to fulfil your legal duty to act in your charity's best interests you must deal with conflicts of interest.

Trustees must be able to explain and justify their approach to the Commission if they decide not to follow good practice in the guidance.

The 6 main trustee duties

There are 6 main duties outlined in the guidance. The following represents a summary of and selection of parts from the guidance. However, all trustees must read the guidance in full

1 Ensure your charity is carrying out its purposes for the public benefit

Ensure you:

- Understand the charity's *purposes*, from reading the objects clause in the governing document. The objects may be broad or they may be narrow. Understand who the charity should benefit and how.
- Only use your *powers* derived from the governing document, Charities Act and other laws to further the charity's purposes.
- Do not rely on any 'mission statements' when it comes to determining the charity's objects and powers; it is the governing document that you want to rely on.
- Can understand and explain how the charity's activities carry out the charity's purposes for the public benefit.
- Take time to plan: collectively decide with all the charity trustees what activities the charity will do to fulfil its purposes. Trustees should consider whether the input from others, including staff and volunteers, in the planning of those activities would be useful.
- Periodically review the charity's achievements and effectiveness of its activities.
- Review the charity's objects occasionally. If it proves that the objects are no longer effective, the objects can usually be modified or added to, but not changed in their entirety, due to the governing document and charity law, unless permission is sought from the Commission. Consider taking advice about making changes.

2 Comply with your charity's governing document and the law

Ensure you:

- Are familiar with the governing document so that you can ensure that the charity is complying with it. The governing document, which is a legal document, contains key information about things like: whether the charity has members and if so who those members can be; how the governing document can be altered, for example in order to meet the charity's needs; and how the charity can be closed down. Each trustee should have a current copy of the governing document.
- Know enough about the *law*: you don't need to be an expert yourself but take reasonable steps to read relevant guidance and be aware of what laws apply to your charity. Also take advice when appropriate. What the charity does, where it works and how it affects the laws and regulations, such as equality and data protection and copyright law that apply to the charity.
- Charities must register with the Commission unless they are: exempt, excepted from registering or have an annual income below the threshold (which is currently £5,000) AND are not a CIO (all CIOs must register).
- All charities must maintain proper financial records and produce annual accounts. The guidance contains a list of what all registered charities must do in addition, for example send an annual return to the Commission. Exempt charities may have to send accounting information to their principal regulator. Charities with an income above £250,000, and all charitable companies, must prepare their accounts and annual report in accordance with the

Statement of Recommended Practice Accounting and Reporting by Charities (Charities SORP). Registered charities with an income above £10,000 in the last financial year must state on their financial and fundraising documents, including electronic ones, that they are registered.

3 Duty to act in your charity's best interests

Trustees must act in their charity's best interests. This means that it is for the co-trustees alone to collectively decide what will best allow the charity to carry out its purposes, and always act in that way.

It may be, for example, that this is achieved by merging or collaborating with another charity or even spending all the charity's resources. Such significant decisions should be recorded. The guidance outlines the things trustees must do when making all their decisions, for example they must act in good faith.

Trustees must not be influenced by personal prejudices and strong personalities.

All trustees must engage in decision making. Although (depending on what the governing document stipulates) decisions need not usually be made unanimously, once they have been made all trustees must comply. The guidance gives advice on what to do if a trustee strongly disagrees with the other trustees' decision.

The guidance gives examples of conflict of interest situations, which is where there is a possibility of personal interests affecting trustee decisions. A conflict of loyalty can also arise where a trustee does not benefit financially from a trustee decision, but benefits in another way. In such situations, trustees must identify and declare the conflict (trustees should say if they think another trustee has a conflict), prevent it from affecting the decision and record how this was achieved.

The guidance says that in conflict of interest situations, the conflicted trustee should remove themselves from the discussion and decision making process. Trustees must follow any specific provisions in the governing document about conflict of interests. Conflicts of interest can be common, and trustees must act properly, considering how others will view their actions, in order to protect the charity's reputation and finances. If conflicts are not dealt with properly, trustees could face regulatory action for breach of duty.

The voluntary principle dictates that trustees are not paid for their work (though they can reclaim reasonable expenses). The guidance outlines what other benefits trustees must not receive, as well as the few circumstances where trustees can receive payment.

4 Manage your charity's resources responsibly

The guidance provides that trustees must act responsibly, reasonably and honestly. This entails:

- *Managing risks* that could hamper your charity's ability to carry out its activities and achieve its purposes. The number and kinds of risk your charity will face depends on, amongst other things, its size, funding and activities. The guidance provides steps to manage risks, which includes making a risk policy and once a risk has been established, evaluating which action is best, for example to insure against the risk or avoid it. The guidance contains a link to the Commission's toolkit on protecting charities from harm such as financial crime.

- *Budgeting* - trustees must determine what funds and resources the charity needs and plan and monitor the charity's income and outgoings.
- *Generating income*, preferably from a variety of sources, for example from fundraising and leasing or letting land or buildings. The guidance provides what extra things trustees must consider and be aware of if a trading subsidiary is used to generate income through non-charitable trading, for example, if the trading subsidiary begins to fail, the charity must not bail it out.
- *Managing funds and keeping them safe*, as trustees are responsible for the charity's money. The guidance gives a list of what trustees should do to adhere to this duty. For example, a budget should be set and monitored and accurate records of income and expenditure kept. The Commission should be informed if something goes wrong.
- *Managing any property owned or rented by the charity properly*. Trustees should record property as belonging to the charity; know the terms on which it is held; watch that the property is being maintained and used correctly; and that there is adequate insurance. Advice and information may need to be sought in order that important decisions, such as whether property is still helping to fulfil the charity's purpose, are made correctly. When selling or leasing land and when taking out a mortgage or loan by securing it against the charity's land, the guidance provides what all charities should and what registered charities must do. The guidance also discusses the more unique scenarios of having designated land, permanent endowment and the possibility of taking property from trustees.
- *Fulfilling responsibilities towards staff and volunteers*. To do this, trustees must adhere to relevant law regarding staff and comply with rights and responsibilities surrounding volunteers, such as not asking them to work a set number of hours. There are several things trustees should do too, which are outlined in the guidance. The guidance warns about placing too much reliance on individuals, as it could put the charity and its beneficiaries at financial risk. Charities which carry out 'regulated activities' involving children or vulnerable adults must have extra safeguarding policies and procedures.

5 Act with reasonable care and skill

- Trustees of unincorporated charities must use reasonable care and skill, as provided in the Trustee Act 2000. Company law and the Charities Act apply similar duties on directors of charitable companies and trustees of CIOs. The definition of 'reasonable' depends on the knowledge and experience each trustee has. All trustees have a general duty of care.
- Trustees should seek professional advice where necessary, for example where high-value contracts are being entered into or legal action is being considered.
- Trustees need to know what to do if something were to go wrong, and the guidance provides a list of possible action to take. Serious incidents (the guidance defines these) should be reported to the commission to avoid regulatory action being taken.
- If trustees do not act with reasonable care and skill, either because they don't understand how to or are unwilling to, the Commission will get involved. If the situation is serious enough, a statutory inquiry will be opened.

6 Ensure your charity is accountable by complying with statutory accounting and reporting requirements

- Every charity must produce accounts to the Commission and trustees must provide an up-to-date version of the accounts to anyone who asks for it. Every registered charity must also provide other information to the Commission each year. Trustees should check the guidance

to determine what exactly they must produce, as it will depend on the income the charity receives and whether or not it is a company. It should be remembered that all the charity's trustees are responsible for the accounts, whether or not they have signed them. Depending on the type of charity, information may also have to be provided to other regulators.

- Trustees must be accountable to those who have an interest in their charity. This may be achieved by having an appropriate complaints procedure.
- To ensure your charity is compliant with the law, trustees can review the charity's practice against a governance code, or a quality standard, for example.
- Although trustees may delegate day to day activities to certain trustees, volunteers or staff, remember that they cannot delegate their overall responsibility to them or risky or unusual decisions. The limits of any delegated authority should be set out in writing and how the delegated authority is used should be reported on, monitored and periodically reviewed. Communication is important.
- To avoid mistakes, trustees must not be afraid to ask questions of other trustees, staff and volunteers regarding their role and use of resources. Trustees must also ensure they understand what things mean, for example what the charity's finances are, as all trustees are responsible for the charity's finances.
- The guidance finishes with an explanation of how trustees could become liable; an explanation and useful table about the different charity structures there are and the implications for trustees; and a description of what the chair and treasurer of a charity do.

Liability

Generally the law protects trustees from personal liability if they have acted honestly and reasonably, and indemnity provisions can be relied on. But any unauthorised payment to a trustee must be repaid. The guidance outlines in 10.4 what trustees can do to reduce their risk of become personally liable.

Whether trustees become liable to third parties, for example to an employee whose rights have been breached or to a member of the public injured on the charity's property, depends on if the charity is incorporated. Even if the charity is unincorporated, the charity can normally meet liabilities incurred, unless the charity's assets are insufficient to meet the claim. Unincorporated charities which enter into contracts and employ staff should consider becoming incorporated.

Trustees should be aware that they could incur criminal liability if the charity's staff commit offences, for example under the Bribery Act.

It would seem that the revised guidance has generally been welcomed by the charity sector. One fear is that the overall impression created by it may discourage potential trustees and it is to be hoped that this will not be the case.

Further information

Read more about Lodders' Charity Law expertise: www.lodders.co.uk/services/charity-law

Find out more about the author, Mark Lewis: www.lodders.co.uk/people/mark-lewis

See the guidance in full on gov.uk: <https://www.gov.uk/government/news/the-essential-trustee-new-guidance-on-trustees-responsibilities>

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