



Being a better trustee

Know your duties

Direct contacts



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Introduction

As a charity trustee, you have a number of legal responsibilities. You have to make sure that your charity is solvent, well-run and delivers its charitable objectives for the public benefit. There are serious consequences if you don't.

In order to guide you through what can seem like a legal minefield, we have put together this handy booklet to summarise your key duties and responsibilities as a trustee. And we are a phone call away should you require further advice and guidance.

This booklet is divided into three parts. The first part sets out the duties you have as an individual trustee. The second and third parts set out the duties of the charity itself, which you as a trustee must ensure the charity abides by.

If your charity is a registered company, you may be a company director and so have to comply with corporate law too. Our Little Green Book of Directors' Duties can assist with this. For a free copy, please contact the Marketing department on +44 (0)113 283 2500 or email jillian.szajko@walkermorris.co.uk.



Health warning

This booklet is intended for trustees of charities that are registered with the Charity Commission. Excepted and exempt charities have slightly different rules and we do not cover them in this booklet.

This booklet is for guidance only and you should not rely on it for legal advice. If you need specific advice on a matter of charity law, please contact Richard, our charity law specialist, whose details are listed on page 11.

Trustees and their responsibilities

Charity trustees are the people who serve on the governing body of a charity. The Charity Commission states that trustees have and must accept ultimate responsibility for directing the affairs of a charity, and for ensuring that it is solvent, well-run, and delivers its charitable objectives for the benefit of the public. It is crucial that you, as a trustee, are aware of your duties; if you are found to be in breach you can be disqualified from office, subject to a fine and called to account for any profits made.

COMPLY WITH REGULATIONS

A charity can be set up in different ways. As a trustee you need to know how your charity is structured so that you can make sure that it complies with the appropriate regulations.

The table below outlines the type of regulation applicable to each charitable structure:

Legal structure	Governing document	Regulatory body
Company limited by guarantee	Articles of Association	Companies House (and Charity Commission if a charity)
Community Interest Company (CIC) (limited by shares or by guarantee)	Articles of Association	Companies House & CIC Regulator
Charitable Incorporated Organisation	Charity Commission Model Constitutions	Charity Commission
Industrial and Provident Society (community benefit)	Rules	Financial Conduct Authority (FCA)
Community Benefit Society	Rules	Financial Conduct Authority (FCA)
Unincorporated Association	Constitution, rules	Charity Commission
Trust	Trust Deed or Declaration of Trust	Charity Commission

Table 1

TRUSTEES' DUTIES

There are duties imposed on you, as a charity trustee, by common law and also by statute. Some duties apply to all types of charity, others depend on how the charity is structured (e.g. as a company or an association or trust that has a constitution or deed). For each duty, we indicate which types of charitable organisation it applies to.

Common law duties: all charities

As a trustee, you have duties that arise from your 'fiduciary relationship' (i.e. the fact that you have an obligation to act in the best interests of the charity).

Your duties are:

- to act in the best interests of the charity
- to avoid conflicts of interest (see further guidance below)
- to not benefit from your role as a trustee
- undivided loyalty - this means that you should not put yourself in a position where your duty to someone / something else conflicts with your duty to the charity
- confidentiality - this means you must only disclose information, obtained in confidence from the charity, for the benefit of the charity.

These common law duties overlap with a number of the statutory duties (that is, duties that are set out in legislation).



Charity law duties: all charities

Every type of charity is subject to charity law duties. As a trustee you must:

- ensure that the charity complies with charity law and with the requirements of the Charity Commission (or **FSA**) as regulator; in particular by ensuring that the charity prepares reports on its achievements, Annual Returns and accounts as required by law. (See Accounting: all charities and Table 2 below for more detail on the accounting requirements)
- ensure that the charity does not breach any of the requirements or rules set out in its governing document and that it remains true to the charitable objects set out in them. (See Avoiding a Breach of the Objects on page 9 for more detail on charitable objects)
- comply with the requirements of other legislation and other regulators (where applicable) which govern the activities of the charity. (See Legislation on page 8)
- act with integrity, and avoid any personal conflicts of interest or misuse of charity funds or assets.

As a trustee, you also have a duty of prudence. You must:

- ensure that the charity is and will remain solvent
- use charitable funds and assets reasonably, and only in furtherance of the charity's objects
- avoid undertaking activities that might place the charity's endowment, 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.

All charity trustees must comply with the charity law duties, but there are some additional duties you will need to abide by depending on the legal status of your charity. Different duties apply if the charity is unincorporated or incorporated. Please refer to Table 1 (above) for the different types of structures.

THE DUTY OF CARE: UNINCORPORATED CHARITIES

The Trustee Act 2000 provides a statutory 'duty of care' with which trustees of unincorporated charities must comply. This general duty on trustees means that you must give enough time, thought and energy to your duties as trustee, and make reasonable use of your skills and experience. In particular, as trustee you must exercise reasonable care and skill and have particular regard to:

- any special knowledge or experience that you have (or profess to have)
- where you act in the course of a business or profession, any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

You must be aware of and abide by this duty in all aspects of your work as trustee.

Company law duties: charities which are companies

Some charitable structures are subject to both charity and company law, most commonly registered charitable companies limited by guarantee. Where a charity is registered at Companies House as well as the Charity Commission, it is regulated by both bodies.

Whilst trustees of incorporated charities do not have to abide by the duty of care in the Trustee Act (as set out above), it is good practice for all trustees to be mindful of such duty.

In addition to the governance requirements under the memorandum and articles of the company, trustees also have obligations under company law. Most of these duties are codified under the Companies Act 2006.

The Companies Act 2006 duties are:

- to act in accordance with the company's constitution
- to only exercise the powers for the purpose for which they are conferred
- to act in a way that the director considers, in good faith, is most likely to promote the success of the company
- to exercise independent judgment
- to exercise reasonable care, skill and diligence
- to avoid conflicts of interest
- not to accept benefits from third parties conferred by reason of them being a director
- to declare any direct or indirect interest in an existing or proposed transaction with the company.

If you are a trustee of a charity that is a company, then you may find Walker Morris' [Little Green Book of Directors' Duties](#) useful.

(See page 1 for how to obtain a copy)

Accounting: all charities

As a trustee, you are required to comply with accounting requirements. All charities must prepare accounts in some way. Registered charities are required by the Charity Commission to prepare accounts and make them available on request. The following table summarises the accounting and reporting requirements:

	All charities	Charitable companies	CIOs	Income £10,000+	Income £25,000+	Income £500,000+
Accounts	Yes					
Directors' report and accounts		Yes - send to Companies House	Yes - send to Charity Commission	Send to Charity Commission	Send to Charity Commission	Send to Charity Commission
Annual Report	Yes		File with Charity Commission		File with Charity Commission	File with Charity Commission
Annual Return	Annual update for smaller charities		File with Charity Commission	Send to Charity Commission	Send to Charity Commission	Send to Charity Commission
Independent examination	Only if governing document requires			Only if governing document requires	Yes	
Audit	Only if governing document requires			Only if governing document requires		Yes

Table 2

Strategy and risk: all charities

As trustee, you are responsible for setting the charity's strategic aims, objectives and direction. Identifying risks arising from its activities and managing those risks is important in helping to ensure that the charity achieves its objects. Should a serious incident occur, which may cause a significant loss of funds or a significant risk to a charity's beneficiaries, resources or reputation, it is good practice (and in the case of registered charities, a statutory requirement) for you to report the issue to the Charity Commission as soon as possible after you become aware of it.

If you are a trustee of a registered charity with either a gross annual income in excess of £500,000, or gross assets exceeding £3.26 million, you must make a statement in your Annual Report as to whether you have considered the major risks to which the charity is exposed and systems designed to minimise those risks. As part of your Annual Return, you must report any serious incident if you have not already done so, or confirm that no such incident has occurred.

Investments: all charities

Charities may need to make investments to further their charitable aims. You have some specific legal duties that apply to your decision-making processes when considering investments. You should also consider risks associated with making investments.

The Trustee Act 2000 gives you a general power of investment which allows you to place funds in any kind of investment as though you were the absolute owner of those funds. The general power of investment is in addition to any existing power, but is subject to any restrictions and exclusions in the charity's governing document. The investment powers available to trustees of charitable companies are normally set out in its articles of association and are usually similar to the general power of investment referred to above.

When exercising any power of investment you must follow standard investment criteria on the suitability and diversification of investments. You must also review the investments from time to time, and take proper advice when investing or reviewing those investments. You must also comply with the duty of care except, in the case of a constitutional power of investment, where it is excluded.

As trustee, you ought to appropriately document any decision-making process to evidence your considered and appropriate approach.

TRUSTEES' LIABILITY

It is important for you as a trustee to consider and abide by your duties, as the potential consequences of failure to do so could be damaging.

The danger

The Charity Commission can institute formal enquiries in cases of misconduct / mismanagement and has powers to remove and replace charity trustees. You may be personally liable for any debts or losses that the charity faces. This will depend on the circumstances and the charity's governing document.

- **The normal position:** If you act prudently, lawfully and in accordance with the governing document, then any liabilities that you incur as trustee can normally be met out of the charity's resources. However, if you incur liabilities or debts that amount in total to more than the value of the charity's assets you may not be able to cover yourself in full out of the charity's property, even if the liabilities have been properly incurred
- **If you act imprudently:** If you act imprudently, or are otherwise in breach of the law or the governing document, the position is different. Here, you may be personally responsible for liabilities incurred by the charity, or for making good any loss to the charity. Since trustees act collectively in running a charity, you will usually be collectively responsible for meeting any such liability.

The Commission can take proceedings in court for the recovery, from trustees personally, of funds lost to charity as a result of a breach of trust by the trustees. In cases where a breach of trust causes a loss to the charity, you could be relieved of your liability to pay, provided you have acted honestly and reasonably.

Conflicts of Interest

The Charity Commission has recently published detailed guidance as to how to manage a situation where a conflict of interest arises.

As referred to above, you have a legal duty to act in the best interests of the charity when making decisions as a trustee. If you have a personal (or any other) interest in the outcome of any decision you have to make, then this is likely to amount to a conflict of interest and you will not be seen as complying with your duty unless you follow the steps set out below:

1. **Identify** - you must declare a conflict of interest as soon as you are aware of any possibility that your personal or wider interests could influence your decision-making. Having a standard conflict of interest agenda item at the beginning of each trustee meeting and/or implementing a conflict of interest policy could help identify a situation where a conflict of interest arises
2. **Prevent** - In the event that a conflict of interest is identified, you will need to find an appropriate way forward. This could be by either managing the conflict (if it is less serious), for example by ensuring that the individual affected does not take part in any discussions in connection with the issue, or by following any instructions as to managing conflict of interests in your charity's governing document. Bear in mind that in some situations you will need to comply with legal restrictions or get approval from the Charity Commission. With this in mind, you may require legal advice in more serious situations
3. **Record** - Keep a written record of any conflict of interest and how you managed the situation within the minutes of the relevant meeting. It will be useful to include:
 - What sort of conflict of interest it was
 - Which trustee or trustees were affected
 - If any conflicts of interest were declared in advance
 - An outline of the discussion
 - If anyone withdrew from the discussion
 - How you and the other trustees made the decision in your charity's best interests.

If you follow the steps above you should avoid:

- Making any decisions that could later be overturned
- Risking the charity's reputation
- Having to repay the charity for an unauthorised payment to trustees.

WHAT YOU CAN DO

You should be particularly careful when entering into substantial contracts or borrowings to ensure that the charity has the means to meet its obligations.

You can be insured by your charity against personal liability where it is in the charity's interests. The Charities Act 2011 allows almost all charities to buy trustee indemnity insurance policies. There are certain limitations; for example, the policies cannot include cover for criminal fines or penalties, a trustee's costs in defending criminal proceedings if he or she is convicted of fraud, dishonesty or reckless conduct, or where the trustee's liability results from a deliberate disregard of the charity's interests.



Ensuring the charity complies with legislation

LEGISLATION

Like any other organisation, charities have to abide by the law. As well as the regulatory frameworks specific to each type of charity (see Comply with Regulations on page 2 above) the following may apply depending on what activities the charity carries out:

- employment law (for charities employing staff)
- the terms of a lease; occupier's liability; disability discrimination e.g. access (for charities owning or occupying property)
- health and safety legislation (for staff, volunteers and beneficiaries)
- equalities legislation; freedom of information (for charities carrying out a public function)
- data protection legislation (if a charity holds personal details (of staff, volunteers, beneficiaries))
- any sector-specific regulation (for example for charities providing registered care or working with children or vulnerable adults).

It is an essential job of a trustee that you ensure that your charity complies with all applicable legislation. The Charity Commission recommends that you seek external advice to ensure the practices of your charity are lawful.

FAILURE TO COMPLY

You are ultimately responsible for your charity's compliance. Where you fail, a regulatory compliance case or statutory inquiry may be opened. Measures may include the suspension and removal of trustees, officers, agents or employees of the charity, placing restrictions on charity funds or assets and appointing an interim manager to run the charity temporarily.

If a charity fails to comply with all applicable legislation and regulation, the charity may face some difficult consequences which may include:

- fines, penalties or censure from licensing or activity regulators
- loss of license to undertake a particular activity or activities
- employee or consumer action for negligence and/or
- reputational risks.

What you can do

All of these consequences could damage the charity significantly and may even result in the charity being forced to dissolve. It is therefore crucial that you comply with all applicable regulation and ensure that your charity acts within the appropriate statutory and regulatory regime. You can minimise any risk by:

- identifying key legal and regulatory requirements
- allocating responsibility for key compliance procedures
- putting in place compliance monitoring and reporting procedures
- preparing adequately and properly for compliance visits
- obtaining compliance reports from regulators where appropriate.

Ensuring the charity acts within its objects

It is essential that charities are clear about why they exist, who they aim to help and how they set about achieving their objectives. It is your duty as trustee to ensure that your charity acts within the objects and powers set out in its governing document and, if not, that appropriate changes are made so that you do not act beyond the objects of the charity and breach your duties as trustee.

YOUR RESPONSIBILITY

You have, and must accept, ultimate responsibility for directing the affairs of your 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.

Your decisions about activities or services must be directed by the charity's objects and should follow its mission and planned priorities rather than e.g. fundraising opportunities. You should be able to explain how all of the charity's activities relate to and support its purposes and benefit the public.

AVOIDING A BREACH OF THE OBJECTS

These are some things that you should consider when considering any new activity or service:

- is the activity consistent with the charity's objects and powers?
- how does it fit in with the charity's mission and aims and current work plan?
- how will it meet the needs of the charity's beneficiaries?
- how will it be funded?
- has the charity fully assessed the risks and taken steps to mitigate them?

UPDATING THE CHARITY'S OBJECTS

It is natural for a charity to evolve with the changing needs in the community that it serves. You should periodically review the charity's objects to ensure that they are still appropriate. Where the charity's activities no longer reflect the objects, it is your duty to seek to change the governing document. How this is done will depend on the structure of the charity, its size and the terms of its governing document. For example:

- All charitable companies can amend their articles of association; however, there are certain 'regulated alterations' that require Charity Commission approval (one of these is changing the statement of the objects of the charity)
- Unincorporated charities with incomes of less than £10,000 can change their governing document, even if there is no express power to do so in the governing document. However, the Commission will need to be consulted if the change affects the charity's purposes or powers, and may involve a conflict of interest
- Unincorporated charities with incomes of more than £10,000 can change their purposes only if the governing document provides specific powers
- Where none of these options are available, you can apply for a Scheme (which is a legal document issued by the Commission that gives the power to add to, replace or amend any or all of the provisions of the charity's governing document).

You must always inform the Commission of any changes made.

Conclusion

We hope that you have found the information contained in this booklet useful, interesting and informative. Please remember that this booklet is for guidance only and you should not rely on it for legal advice.

If you need specific advice on a matter of charity law, please contact Richard, our charity law specialist, whose details are listed on page 11. We will be happy to hear from you and advise you.

ABOUT WALKER MORRIS

Walker Morris is a firm of solicitors based in Leeds but serving clients throughout the UK: 71 per cent of our clients are based outside Yorkshire. We can trace our origins back almost 130 years to the 1880s. Over the past decade we have more than quadrupled in size and now employ over 500 staff, which ranks the firm in the leading 100 UK law firms. We are ranked by independent assessors among the top UK law firms for the number of recognised legal specialists in our teams.

Within the Energy, Infrastructure & Government Team we have a reputation for excellent work in a number of areas relating to charitable trusts. Richard Auton is a member of the Charity Law Association.

FURTHER READING

There is extensive guidance available on all the topics covered in this booklet (and more) on the Charity Commission website - www.gov.uk/government/organisations/charity-commission. We recommend the following in particular for further reading:

- [CC3 - The Essential Trustee: what you need to know](#)
- [CC10 - Hallmarks of an Effective Charity](#)
- [CC29 – Conflicts of Interest: a guide for charity trustees](#)

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Our people



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Richard joined Walker Morris in 2001. Prior to this Richard had spent over 25 years in local government working for Devon, West Glamorgan, North Yorkshire County Council and Norfolk County Councils. From 1989 to 2001 Richard was Director of Law and Administration and then City Clerk with Norwich City Council and was the appointed Monitoring Officer.

Richard has considerable experience of advising and setting up charitable bodies including Housing Associations, Arts and Leisure Trusts and Historic Buildings Trusts. Some examples of his charities experience include:

- **The Forum, Norwich** - As City Clerk with Norwich CC, Richard was a key member of the team which secured the construction of The Forum, the East of England Landmark Millennium Project run by the Forum Trust.
- **Hepworth Gallery** - Richard was part of the team involved in advising on setting up the Hepworth Trust to run the Hepworth Gallery in Wakefield.
- **Ferens Gallery** - Richard advised Hull CC on possible options to transfer the Ferens Art Gallery to a charitable trust.