

# Charity FAQ Series

## Trustees' appointment, duties & responsibilities

September 2010

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**IMPORTANT NOTICE:** Please note that the information given in this briefing paper relates to the law for England and Wales; whilst many of the responses may apply equally to Scotland and Northern Ireland, readers from those regions should seek legal advice before applying them.

## Introduction and Health Warning

This Briefing Paper is a collection of common questions asked by charities. The answers are necessarily brief and are intended to provide an overview of the issues related to each. It may be necessary for your charity to obtain more specific advice relevant to your particular circumstances.

Stewardship's team of charity consultants will be pleased to help or to point you in the direction of appropriate advice. For details of our low cost consultancy helpline service for churches and Christian charities, please visit:

<http://www.stewardship.org.uk/smartweb/support-services/consultancy:-employers>

### Q1. Can trustees be paid for carrying out their duties as trustees?

Generally no. Trustees are unpaid and must not benefit in any way from their connection with the charity. There are, however, limited exceptions to this rule which can be applied in church and Christian charity situations. For further detail, please refer to the FAQ Series Briefing Paper: Payment and employment of trustees.

### Q2. What is a custodian trustee? What is a holding trustee?

(i) A custodian trustee is a corporation appointed to have the custody, as distinct from the management, of trust property. Where a custodian trustee is appointed to hold property of a charity, the administration of the charity is left in the hands of the charity trustees. A custodian trustee is not a charity trustee.

(ii) Holding trustees are individuals appointed to hold the property of the charity. They can only act on the lawful instructions of the charity trustees (often known as 'the managing trustees') and in accordance with any provisions contained in the governing document.

### Q3. What are the charity trustees' responsibilities? What should I do before I become a trustee?

(i) The trustees have, and must accept, ultimate responsibility for directing the affairs of the charity and ensuring that it is solvent, well run and meeting the needs for which it has been set up. All trustees should read the sections of Charity Commission publication CC3 'The Essential Trustee' that are relevant to their charity situation. This is available by clicking onto [www.charity-commission.gov.uk](http://www.charity-commission.gov.uk)

(ii) You should take all reasonable steps to find out as much as you can about the charity and about what will be expected of you as a trustee. You should obtain a copy of the governing document of the charity and ensure that it is explained to you by one of the existing trustees. You should also read the Annual Reports and Annual Accounts of the charity.

**Q4. We are a new church. We do not have three people in the church who would be suitable trustees. What do we do?**

Any charity should have a minimum of three trustees. These should be people capable of taking responsibility for managing the charity's assets who are eligible to be appointed as trustees.

If you do not have a minimum of three people who can act (see next paragraph), you may appoint trustees who are not members of your church, but who at the outset should be good advisers who take an active interest in the church. Remember that trustees should act at all times in the best interests of their charity. New trustees (especially from within the church family) can be appointed as your church grows.

Most people over 18 years of age can become trustees, but a few are not eligible. Those who have already been disqualified as company directors and those who have been convicted of any offence involving dishonesty or deception rank among the classes of people who cannot usually become trustees.

The Charity Commission publication CC30 'Finding new trustees – What charities need to know' [www.charity-commission.gov.uk/publications.cc30.aspx](http://www.charity-commission.gov.uk/publications.cc30.aspx) provides helpful further advice.

**Q5. Who appoints new trustees?**

Usually, the charity's governing document sets out how trustees are to be appointed and this varies according to the particular charity. Often the existing board of trustees appoints new trustees, but (in the case of a church) it is possible to provide that the spiritual leadership of the church will make these appointments.

**Q6. How long does the appointment of a trustee last?**

The governing document should specify the length of service of a trustee, but if it does not, the appointment continues until the trustee dies, resigns or is removed from office. However, we recommend setting up a structure by which the trustees retire on a three yearly rotational basis, with the option of being re-appointed at the end of a 3 year term for another term. This prevents trustees staying in post beyond the time that they are able to usefully contribute to the management of the charity.

**Q7. Can a trustee resign?**

Yes. It is usually straightforward for a trustee to resign. However, especially with unincorporated charities (e.g. non company charities governed by a Trust Deed or Constitution), you should check the governing document carefully. If a trustee's resignation would result in the number of remaining trustees falling below the minimum set out in the Governing Document, a replacement trustee must be

appointed before the retiring trustee can do so. Trustees are not allowed to simply walk away from their responsibilities. The retirement (and any new appointment) must be properly recorded, as required by the Governing Document, or alternatively under the provisions of law.

If the retiring trustee's name appears on the title deeds to land, this must also be changed following the required legal procedure. On this, see also Q10.

#### **Q8. Can trustees delegate their responsibilities?**

Trustees can generally delegate certain powers to agents or employees but will, and must always, retain the ultimate responsibility for running the charity. It is, therefore, always recommended that if responsibilities are delegated to committees, one or more trustees take an active part in that committee.

Trustees are still responsible for policy and strategic direction. The law defines a trustee as a person "having the general control and management of the administration of a charity". Therefore, the carrying *out* of a decision can be delegated, but care must be taken to ensure that those to whom responsibility is delegated do not take *key decisions*, as they may well then be regarded in law as trustees themselves.

Although it will be the trustees of a Church charity who are responsible for appointing employees and entering into contracts, a Church which is led by its spiritual leaders may wish for a clause to be inserted in the governing document stating that the spiritual government and leadership of the Church Fellowship will remain with the recognised spiritual leadership and that the trustees' powers will be confined to the management of the charity's assets and, in so doing, they shall have regard to the spiritual leadership, provided that they shall not act outside their stated authority and the law.

#### **Q9. How do trustees make decisions?**

All decisions by the trustees concerning a charity are taken by all the trustees, acting collectively and as a team. However, the decisions need not be unanimous. A majority decision is sufficient, unless the charity's governing document states otherwise.

#### **Q10. Can a charity's property be held by someone other than the trustees?**

The trustees of incorporated charities (i.e. charities which are not companies) may find it convenient for the legal title to land owned by the charity to be held by the Official Custodian For Charities or by a Custodian Trustee or a Holding Trustee. This avoids the need to register each and every change in the charity's trustees with the Land Registry.

Trustees also have a power to appoint a nominee to hold the title.

#### **Q11. What duties do trustees have towards the charities assets?**

Trustees must always act to protect property owned by the charity. This means being accountable for the charity's solvency and continuing effectiveness and not exposing

the charity's assets to undue risks. If a charity has permanent endowment, particular care must be taken to maintain its value.

**Q12. Can trustees buy land?**

Yes. Trustees have a general power to buy land (this term includes buildings). This power may in some, but not all, cases be restricted by the terms of the charity's Governing Document. Trustees should exercise their statutory duty of care when exercising this power.

**Q13. Can trustees sell or lease land belonging to the charity?**

Yes, most charities can sell land belonging to them provided that to do so is in the charity's best interest and the trusts on which it is held do not prevent this. There are, however, certain legal requirements which must be met. It is recommended before selling or allowing any long term lease to be taken over any land or buildings of the charity that specialist legal advice is obtained.

**Q14. Can trustees borrow money on the security of its land?**

Generally, a charity can borrow money and give a 'charge' (i.e. a mortgage) over its land as security for a loan, but its trustees must comply with certain legal requirements, including obtaining certain advice in writing, before doing this.

**Q15. What is the statutory duty of care?**

This general duty on trustees means they must give enough time, thought and energy to their duties as trustees, and make reasonable use of their skills and experience. The amount of time which trustees will need to give to the charity they serve will differ according to the size and activities of the charity, but trustees should always bear in mind that they are ultimately responsible for the running of the charity, ensuring that it is solvent, well-run and meeting the needs for which it has been set up. Trustees should not be frightened of taking external professional advice on any matter where there may be material risk to the charity or where the trustees think they may be in breach of their duties.

The law expects trustees that possess relevant specialist skills, knowledge or experience to use those skills etc. for the benefit of their charity.

**Q16. What are the liabilities of charity trustees?**

A conscientious and committed trustee need have few worries about personal liability. It is important for all trustees to understand their position. If trustees act prudently, lawfully and in accordance with the governing document, then any liabilities such as debts or financial obligations that they incur as trustees can normally be met out of the charity's resources. However, if trustees incur liabilities or debts that total more than the value of the charity's assets, they may not be able to cover themselves in full out of the charity's property, even if the liabilities have been properly incurred.

Different rules apply to the directors of charitable companies as company law also applies. This confers limited liability on trustee company directors in most, but not all, circumstances. Companies and, in future, Charitable Incorporated Organisations, will in most instances protect the trustees' personal assets from third party claims.

**Q17. How often do trustees need to meet?**

They must meet as often as needed to do justice to the affairs of the charity and make well informed decisions. Trustees who do not meet often enough risk breaching their duty of care. In practice, for charities with little happening operationally, this could be twice a year. For charities with a lot changing, it needs to be much more frequently. A reasonable level for many small churches and charities is 3-4 times a year.

**Q18. What are charity trustees' duties in relation to fund raising?**

Trustees must ensure that they have proper control of funds where people are raising money on their behalf and particularly if a professional fundraiser is employed. They must also ensure that funds are spent for the purposes for which they were raised. This involves properly accounting for the funds raised as 'restricted' funds where the appeal is for a purpose narrower than general purposes.

There are now legal requirements covering some aspects of fundraising as well as best practice guidance. For further detail, see the Charity Commission guidance 'Charities and Fundraising' CC20 ([www.charity-commission.gov.uk/publications/cc20.aspx](http://www.charity-commission.gov.uk/publications/cc20.aspx)) and 'Charities and Commercial Partners (RS2)' ([www.charity-commission.gov.uk/publications/rs2.aspx](http://www.charity-commission.gov.uk/publications/rs2.aspx))

**Q19. What powers do charity trustees have when investing funds?**

The Trustee Act 2000 gives trustees a general power of investment. This allows trustees to place funds in any kind of investment as though they were the absolute owner of those funds. Trustees must comply with certain conditions when using this power. However, the general power of investment is subject to any restrictions and exclusions in the charity's governing document.

That said, trustees must usually exercise a legal duty of care. This means they must consider the suitability of investments and whether they should be diversified in order to spread risk. The investment portfolio should also be reviewed at regular intervals.

More detailed advice on selecting and managing investments is given in the Charity Commission Guidance CC14 ([www.charity-commission.gov.uk/publications/cc14.aspx](http://www.charity-commission.gov.uk/publications/cc14.aspx))

**Q20. Can a charity insure trustees against personal liability?**

Where it is in the interests of the charity, trustees can be insured by their charity against personal liability for negligence or similar failure. This insurance does not, however, insure the trustees against the risk of the charity running out of money or incurring costs that are greater than the assets of the charity.

For more detail on when a charity can purchase trustees indemnity insurance and any restrictions that there may be in doing so, please refer to our separate Briefing Paper, 'Introduction to insurance for churches and charities'.

**Q21. What is a quorum?**

A quorum is the minimum number of trustees who must be present for the meeting of the trustees to be properly constituted. The governing document may specify this. When setting up a charity, the trustees should set as a quorum a number or percentage of trustees to be present at each meeting. This is to ensure that decisions are taken only where there is sufficient trustee support for the proposals made, but at the same time is not so onerous as to prevent the charity functioning well.

**Q22. Who is the Secretary of the charity?**

In a non-company charity, the Secretary is an officer of a charity who may be a trustee, employee or other agent of the charity. Their duties may be to convene meetings, take minutes, etc. and their role may or may not be set down in the Charity's Governing Document. Unless the governing document requires a Secretary, it is not essential to appoint one.

In a company charity, the 'Company Secretary' has duties set out in company law. See Q23.

**Q23. What is a Company Secretary?**

A Company Secretary is an officer of a charitable company with duties set out in company law to ensure compliance with the charity's own governing document and various legal matters. The Company Secretary should be a person (whether or not a trustee) who will ensure that meetings are held regularly and that the Annual Report and Accounts and other documents are filed in good time with Companies House to avoid incurring a fine.

Although private companies are not now legally required to appoint a Company Secretary, the Charity Commission recommends that charities do still do so. Each charity must, in any case, ensure that someone is responsible for calling meetings and complying with the requirements of both Companies House and the Charity Commission.