

Charities

50 FAQs

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

Q1. What are charities?

A.

Charities are organisations set up for the benefit of the community. They enjoy some tax advantages from the government. To qualify as a charity, an organisation must meet strict conditions about its purposes (also referred to as its objects) and certain other aspects of its government.

Q2 What is a charity's governing document?

A.

A legal document setting out the charity's purposes and, usually, how it is to be administered. It may be a Trust Deed, Constitution, Memorandum and Articles of Association, Will, Conveyance, Royal Charter, Scheme of the Charity Commission or other formal document. Charitable Incorporated Organisations will probably become another option in Spring/Summer 2010 (see Q3)

Q3. Should we choose a charitable trust, a charitable company or a charitable incorporated organisation?

A.

Charities need a legal structure, usually a trust or a company limited by guarantee. Trusts are simple and less expensive to set up and run. Companies afford charity trustees more protection against their personal assets in the case of a third party claim. CIOs are not yet available but we expect them to come in to being Spring/Summer 2010. They will give trustees the same protection as companies but will not be subject to Companies House rules. If your charity will have a large income, employ staff, own land or otherwise consider the risks to the trustees are too high for comfort, we would recommend a company or (in the future) a CIO.

Q4. Can Ministries become charities?

A.

Yes, if the work of the Ministry is exclusively charitable, then it would normally be registerable as a charity. For example, if the Ministry is advancing the Christian faith then that would be the object of the charity. We would take the view that, to be an effective charity, its purpose should

go beyond that of the prime person in the ministry; i.e. it needs to be more than a vehicle for providing financial support for that person.

As for all charities, there must be at least 3 independent trustees making the decisions. If there are to be only 3 trustees then one could be the evangelist or other 'minister' (who could be paid by the charity) but the other trustees must not be related to him or her nor to each other. The three trustees must be completely independent and decisions must be made for the benefit of the charity and not for the benefit of an individual paid trustee. The charity must have a gross annual income of at least £5,000 per annum in order to register with the Charity Commission. The salary/living of the evangelist or other person who is doing the work of the Ministry can be quite a sizeable portion of the income if the way in which the charity's objects are being fulfilled are through the work of the evangelist or 'Minister'. This becomes difficult to manage within Charity Commission guidance if the income of the primary minister changes each year and effectively takes the majority of the income the charity has.

Q5. My Church already has a Constitution. Do we need another governing document?

A.

Very often a Church Constitution relates to the internal, spiritual activities of the Church. The Charity Commission is interested in the holding and management of assets and it is usually necessary to create a Trust Deed or other structure (e.g. Memorandum and Articles of Association for a company or CIO in the future). If you would like to send your Constitution to Stewardship, we can advise.

Q6. What is an incorporated charity?

A.

This is a charity which is also a company or has a similar legal status as a corporate entity in law. At present the vast majority of corporate charities in the UK are 'charitable companies limited by guarantee'. The CIO will also have a corporate structure but not need to comply with Company Law or file documents with Companies House.

Q7. We have a really old deed/constitution. Is there any advantage in getting it updated or forming a new charity?

A.

Yes, there is an advantage in having your old deed reviewed by a legal advisor. Your governing document should reflect the actual activities of your church/charity. It will help your trustees to run the charity well under an updated deed and the Charity Commission requires that the actual activities of the charity reflect the governing document. In addition there are a number of clauses that we are recommending in Christian charity documents to help with 'best practice' because of changes in law and practice over the recent past.

Q8. What are the advantages/disadvantages of registering an organisation as a charity?

Advantages

Charities do not usually have to pay Income Tax (if Trusts), Corporation Tax (if Companies), Capital Gains Tax, Stamp Duty. There are reduced Business Rates for charities. They can benefit from the Gift Aid Scheme and Inheritance Tax provisions. Also registering as a charity provides public confidence. Funders and members of the public often require to see a registered charity number.

For smaller charities who fall below the £5,000 p.a. financial threshold, it is still possible to claim back tax on on gift-aided donations through registering with HM Revenue and Customs.

Disadvantages

“Charity” means more than “not-for-profit”; Organisations wishing to register as charities with the Charity Commission have to carry out exclusively charitable activities within the definitions set down in the law of England and Wales and that they are then regulated by the Charity Commission which insists on strict accounts regulations and limited remuneration/benefits for the trustees. For some organisations a not-for-profit company which is not a charity may be more appropriate, possibly a Community Interest Company. It should be remembered that non-charitable companies, including Community Interest Companies are not exempt from company taxation.

Q9. What is the Public Benefit requirement? If we become a charity, are there things we cannot do?

A.

Yes. Firstly there must be an identifiable benefit. Secondly the benefit must be to the public or to a section of the public. Thirdly, private benefit to an individual or group must be incidental or non-existent. There is no problem about evangelising or holding church services or doing other charitable things, so long as the general public can, to some extent, take advantage of your activities. Charity trustees must now include in their Trustees’ Annual Report a summary of the main activities undertaken in order to carry out the Charity’s aims for the public benefit. For smaller charities this needs only to be a brief statement; for larger charities a little more detail will be required. All charities must confirm that the trustees have paid due regard to the Charity Commission guidance on public benefit in deciding what activities the charity should undertake. This guidance may be found on the Charity Commission website www.charitycommission.gov.uk.

Q10. Are there any general principles relating to public benefit?

A.

Every charity must now show that it exists for the public benefit. On new registrations, each separate object of the charity must be shown to be for the public benefit. Existing charities must include in their annual reports a statement explaining how its various charitable activities benefit the public in the case of each object. It is not expected that many Christian charities will have to change what they do to any significant extent to meet these rules. If you applied for charitable registration before hearing about the public benefit requirement, do not be put off.

Q11. What is the Charity Commission?

A.

The Charity Commission is the independent regulator of charities in England and Wales. They ensure that charities are accountable, well run and meet their legal obligations in order to promote public trust and confidence.

Q12. My Church receives only a low annual income. Must we register with the Charity Commission?

A.

Most charities, including Churches, with a gross annual income of at least £5,000 must register with the Commission. Some special classes of charity are free from the requirement to register. Please refer to "Excepted Churches" below.

Q13. Do charities established in Scotland or Northern Ireland have to register with the Charity Commission?

A.

No. In Scotland and Northern Ireland the framework is different and the Commission does not regulate those charities. Charities based in, or operating from premises in Scotland need to register with OSCR (Office of Scottish Charities Regulator) which has its own rules and procedures (see www.oscr.org.uk). We can help Northern Ireland charities by preparing a governing document which can be registered for gift aid purposes with H. M. Revenue & Customs. Those requiring legal advice for setting up charities in Scotland should approach Scottish solicitors because the law of Scotland is completely different from the law of England and Wales and an English qualified solicitor would not be able to advise.

Q14. My Church belongs to a recognised denomination and is an existing Excepted Charity. Do we need to register now?

A.

This depends on the level of income. All excepted Churches are expected to have to register with the Charity Commission in the future. The Charity Commission has a Programme which sets out the dates during which various Churches should be registered. At present, only Churches with an annual income of at least £100,000 are being registered. For details of this please see our Briefing paper on 'Registration of excepted charities'. Existing excepted Churches with a lower annual income will not need to be registered until 2012 at the earliest. The timetable for those is not yet known.

Q15. Can a charity be wound up?

A.

In certain situations a charity can be wound up or its assets transferred to another charity. The governing document of the charity should be consulted.

Q16. Who are the charity trustees?

A.

They 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. They are responsible for the general control and management of the administration of a charity.

Q17. Do all Trustees have to be UK based? Do they have to be UK citizens?

A.

The majority of trustees must be normally resident in England and Wales, i.e. must live for at least 6 months of each year in England and Wales. They do not have to be UK citizens.

Q18. Can Trustees be paid?

A.

Within strict regulations, trustees can be remunerated so long as provision is made in the governing document of the charity.

1. When do we need to have specific clauses in the deed?

- a. You will need specific clauses in the deed if either now or in the future you may wish to remunerate a trustee or a close relative of a trustee. We are now recommending that if the trustees think that at any time in the future they may wish to remunerate a trustee, we insert a trustee remuneration clause. If this is not present in the governing document, then the trustees will need to apply to the Charity Commission on a case by case basis for consent to remunerate a specifically named trustee.

2. What about spouses of paid staff as trustees?

- a. Salaries or other benefits paid to the spouses or close relatives of a trustee are considered to be benefits to that trustee. You will therefore need a trustee remuneration clause in your governing document if you wish to pay salaries to relatives of trustees. Trustees should always ensure that the majority of trustees (including close relatives) are always non remunerated.

3. Is it all right to have one family group heavily represented on the board?

- a. The trustees should ensure that one family group does not dominate the trustees' meetings. Although there is nothing wrong with a husband and wife team serving on a board of trustees, the Charity Commission will consider the couple to be one 'unit'. The board of trustees should always comprise at least enough independent trustees so that non-family members outnumber family members.

4. What rate of pay is right for trustees?

- a. The rate of pay of a trustee should be carefully considered by the other trustees who should always put first the interests of the charity and not the interests of the individual trustee or employee.

5. I am a pastor but don't receive a salary but do get expenses paid for me. Is this OK if I am also a trustee?

- a. There is a sharp distinction made between remunerating a trustee (i.e. paying a salary or other benefit) and re-imbursing a trustee for out of pocket expenses incurred during the course of his/her duties as a trustee. All trustees can receive reimbursement for out of pocket expenses.

However, in the case of "pastors' expenses" which could be quite substantial sums being taken out of Church charity funds to cover, say, living expenses, a car and petrol etc. to carry out their pastoral work., where that pastor is a trustee, a remuneration clause should be inserted in the governing document to enable them to receive that benefit from the charity. In trustees' meetings where these are discussed he should acknowledge a conflict of interest and be absent from that part of the meeting in which trustees discuss and make decisions on those expenses.

6. Can I be self-employed and paid by the church/charity and be a trustee?

- a. Yes, as long as the other trustees are content that the payment of a self-employed trustee is beneficial to the Church/charity then a salary may be paid.

Generally, any trustee who is receiving any benefit from the Church/charity must declare a conflict of interest at a trustees meeting when that item appears on the agenda and must leave the room having no input or vote in the discussion. In most instances what is paid to them will need to be disclosed in the charity's public annual accounts.

Q19. (and also see Q18.) Can a trustee be employed by the charity?

A.

There is a presumption in law that trustees must not benefit from their position of trust but there are exceptions where the governing document of the charity explicitly authorises the employment of a trustee, or if permission has been given by the Charity Commission or by a Court of Law

Q20. Can trustees be paid for carrying out their duties as trustees?

A.

Generally no. Most trustees are unpaid and must not benefit in any way from their connection with the charity. There are limited exceptions to this rule and all trustees may be reimbursed by the charity for out of pocket expenses incurred as a result of carrying out their duties as trustees.

Q21. What is a custodian trustee? What is a holding trustee?

A.

(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.

Q22. What are the charity trustees' responsibilities? What should I do before I become a trustee?

A.

(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. You should read the Charity Commission publication CC3 which sets out trustees' responsibilities. This can be obtained free of charge from the Charity Commission (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.

Q23. We are a new church and we do not have three people who would be suitable trustees. What do I do?

A.

You should ensure that the first 3 trustees are capable of taking responsibility for managing the charity's assets and that they are eligible.

If you do not have a minimum of three people who can act (see below), you may appoint trustees who are not members of your church but who should be good advisers at the outset. New trustees 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 are some of the people who cannot usually become trustees.

Q24. Who appoints new trustees?

A.

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 appoint new trustees.

Q25. How long does the appointment of a trustee last?

A.

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. We often 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.

Q26. Can a trustee resign?

A.

Yes. It is usually straightforward for a trustee to resign. However, especially with unincorporated charities (e.g. charities governed by a Trust Deed or Constitution) you should check the governing document carefully. If a trustee's resignation would leave only one or two remaining trustees, you should ensure that a replacement trustee is appointed before you retire as trustees are not allowed to simply walk away from their responsibilities.

Q27. Can trustees delegate their responsibilities?

A.

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, that one trustee is a member of that committee.

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.

Q28. How do trustees make decisions?

A.

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.

Q29. Can a charity's property be held by someone other than the trustees?

A.

The trustees of incorporated charities (i.e. charities which are not companies) may find it convenient for the titled land owned by the charity to be held by the Official Custodian For Charities or by a Custodian Trustee or a Holding Trustee. Trustees also have a power to appoint a nominee to hold the title.

Q30. What duties do trustees have towards charity property?

A.

Trustees must always act to protect property owned by the charity. If a charity has permanent endowments, particular care must be taken to maintain its value.

Q31. What is permanent endowment?

A.

This is the property of the charity (e.g. land, buildings, investments or cash) which the trustees may not spend as if it were income. It must be held permanently. Unless it specifies to the contrary any income from these assets can be spent but not any capital gains arising.

Q32. Can trustees buy land?

A.

Yes. Trustees have a general power to buy land (this term includes buildings).

Q33. Can trustees sell or lease land belonging to the charity?

A.

Yes, most charities can sell land unless the trusts on which it is held prevent this. There are certain requirements which they must meet when selling a charity's land. 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.

Q34. Can the charity borrow money on the security of its land?

A.

Generally a charity can borrow money and give a Charge (i.e. a Mortgage) on its land as security for a loan, but its trustees must comply with certain conditions including obtaining certain advice in writing before doing this.

Q35. What is the statutory duty of care?

A.

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.

Q36. What are the liabilities of charity trustees?

A.

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. Companies and, in future, CIOs, will in most instances protect the trustees' personal assets from third party claims.

Q37. How often do trustees need to meet?

A.

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.

Q38. Which details must appear on my charity's letterheads etc?

A.

Every registered charity with an income over £10,000 in its last financial year must state that it is a registered charity on many of its financial documents including cheques, invoices and receipts. It is not a requirement to state the charity's registered number but it is good practice to do so.

Q39. Do trustees have to keep accounts?

A.

Yes. All charities must prepare annual accounts that comply with the Charities Acts, and if they are companies, with the Companies Acts. This is the case whether they are registered or excepted charities. Different rules apply to different sizes and types of charity. Preparing accounts is, of course, only one part of proper financial planning and control.

Registered charities with income over £10,000 and all charities preparing accounts complying with Statement of Recommended Practice 2005 must also prepare a Trustees annual report to go with the accounts.

Q40. Why are accounts and a report necessary?

A.

Because they are an essential part of the accountability of charities to funders, regulators and the wider public. They are also required by Charity Law. The formal accounts of charities are public documents that can be requested by any member of the general public.

Q41. Do charity accounts need external audit or scrutiny?

A.

Currently all charities with a gross income of more than £10,000 must have their accounts scrutinized by "an independent person". This level is shortly to be increased to £25,000 but no date has yet been set for this change. Larger charities, normally those with income over £500,000 or gross assets over £2.8 million, will need a full external audit. Charities that are companies must comply with company law as well.

Q42. What are charity trustees' duties in relation to fund raising?

A.

Trustees must ensure that any fund raising activity carried out by or on behalf of their charity, is properly undertaken and that all funds collected are properly accounted for.

Where professional fundraisers (essentially those being paid to raise money) are to be used there are additional requirements which trustees should be aware of. See the Charity Commission guidance CC20 (www.charity-commission.gov.uk/publications/cc20.asp)

Q43. What powers do charity trustees have when investing funds?

A.

The Trustee Act 2000 gives trustees a general power to 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.

Q44. Can a charity insure trustees against personal liability?

A.

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.

Q45. What is a Charity Commission Scheme?

A.

legal document made by the Charity Commission normally under Section 16 of the Charities Act 1993 used to change almost any aspect of a charity's purposes or administrative provisions.

Q46. What is a quorum?

A.

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 to be practicable.

Q47. Who is the Secretary of the charity?

A.

An Officer of a charity who may be a trustee, employee or other agent of the charity. Unless the governing document requires this it is not essential to nominate a 'secretary'.

Q48. What is a Company Secretary?

A.

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.

Q49. May a charity trade?

A.

Yes, a charity may trade to any extent directly to fulfil its stated objects. So, for example, if one of your charity's objects is "to advance the Christian faith" you can sell Christian books, tapes, CD's etc to any extent. If you have a Coffee shop, the purpose of which is to advance the Christian faith (e.g. you have Christian posters and literature available and the staff are there to "gossip the Gospel") then you can trade under the charity "umbrella".

If the purpose of the Coffee shop is simply to raise money for the charity, then you may need to set up a subsidiary trading company. This is a complex area but, in general, as long as the trading income does not exceed £50,000 or 25% of the overall annual income of the charity, trading may be carried out by the charity itself. Substantial permanent trading activities, e.g. setting up a Charity Shop, will probably need the establishment of a subsidiary trading company. There is guidance available from both HM Revenue and Customs and the Charity Commission on their websites titled "Charities and trading".

Q50. Can a charity have aims that are political?

A.

A charity cannot exist for a political aim, which is any aim directed at furthering the interests of any political party or securing or opposing a change in the law. An organisation will not be charitable if its aims are political. Charities which are being established to operate abroad should therefore ensure that their objects do not include a statement to change the law of a country in any respect. Charities are also not allowed to do anything which will break the law either in this or any other country.