

## Charity Leadership

Key Issues in Charity Governance

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# Outline

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- What is a charity?
- Legal structure – the options for charities
- Impact of structure
- Key provisions in articles of association and constitutions, and problems that arise
- Duties and responsibilities of trustees
- Liability of trustees
- Current issues

# What is a charity?

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- Established for exclusively charitable objects
- For the public benefit
  
- Charities Act
  - Purposes
  - Analogous to those purposes
- Social Enterprise

# Legal structures for charities

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- Trust
- Unincorporated association
- Company limited by guarantee
- Charitable incorporated organisation
- Royal charter
- Statutory corporation
- Community benefit society

# Structure – why is it important?

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- Limited liability
- Separate legal “personality”
- Limited liability of members (not necessarily directors)
- What decides?
  - Employees / pensions
  - Long term obligations such as a property lease
  - Major financial commitments
  - “Risky” activities

# Trust

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- Trustees
- Trust deed
- No separate legal body (unincorporated)
- Risk of personal liability for trustees
- Issues with contracts/property

# Unincorporated association

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- Trustees (or “management committee” or “council” etc)
- Members
- Constitution or rules – a binding contract
- 2/3 rule to change if not prescribed
- No separate legal body (unincorporated)
- Risk of personal liability – who?
- Issues with contracts/property

# Company limited by guarantee

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- Directors (also trustees in a charity)
- Members (akin to shareholders) – guarantee £1
- Memorandum and Articles
- Separate legal entity can enter into contracts/hold property
- Can be charitable
- Most risks of personal liability removed but note wrongful trading/breach of trust
- Loan finance – no shares to provide “equity finance”

# Charitable Incorporated Organisation (CIO)

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- Benefits of CLG but only registered with Charity Commission
- Limited liability
- New legal form under Charities Act 2006
- Similar concepts as a company
  - Members
  - Trustees
  - Meetings, etc
- Ability to convert from CLG
- Proving popular

# Contents of constitution

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- Objects and powers
- Appointment of members
- Appointment, rotation and retirement of trustees
- Indemnities to trustees
- Meetings of trustees and members
- Administrative matters such as methods of communication
- Models from Charity Commission

# Common problems

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- What are your objects? Mission statement?
- Objects too narrow
  - Public benefit to follow from aims
- Insufficient powers
  - Inability to pay trustees for services
  - Trading not permitted at all

# Common problems

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- Overly complex
  - Membership joining and leaving rules
  - Voting procedures
  - Quorums
  - Nomination procedures.
- Membership generally and fiduciary duties
- Insufficient delegation powers (NB No chair's authority)
- Trustee indemnities too narrow
- Don't reflect Companies Act 2006 / Charities Act 2011

# Public Benefit

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- **Public benefit requirement:**
  - The legal requirement that every organisation set up for charitable aims must be able to demonstrate that its aims are for the public benefit if it is to be recognised, and registered, as a charity

# Public Benefit

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- In England and Wales, public benefit is part of what it means:
  - **to be a charity** - your charity must have only charitable purposes which must be for the public benefit ('the public benefit requirement')
  - **to operate as a charity** - as a charity trustee, when running your charity you must carry out your charity's purposes for the public benefit
  - **to report on a charity's work** - as a charity trustee, you must report each year on how you have carried out your charity's purposes for the public benefit and confirm that, in doing so, you have had regard to our public benefit guidance where relevant

# Public Benefit

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- As a charity trustee, 'having regard' to the Charity Commission's public benefit guidance means being able to show that:
  - you are aware of the guidance
  - you have taken it into account when making a decision to which the guidance is relevant
  - if you have decided to depart from the guidance, you have a good reason for doing so

# Public Benefit

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- The public benefit requirement has two aspects:
  - **the 'benefit aspect'** - to satisfy this aspect:
    - a purpose must be beneficial - *this must be in a way that is identifiable and capable of being proved by evidence where necessary and which is not based on personal views*
    - any detriment or harm that results from the purpose (to people, property or the environment) must not outweigh the benefit - *this is also based on evidence and not on personal views*

# Public Benefit

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- **the 'public aspect'** - to satisfy this aspect the purpose must:
  - benefit the public in general, or a sufficient section of the public - *what is a 'sufficient section of the public' varies from purpose to purpose*
  - not give rise to more than incidental personal benefit - *personal benefit is 'incidental' where (having regard both to its nature and to its amount) it is a necessary result or by-product of carrying out the purpose*

# Directors' Duties

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- **To promote the success of the company**
  - Where the company is a charity and is established for specific purposes other than to benefit its shareholders, the duty is to act in the way a director considers in good faith would be most likely to achieve the company's purposes (i.e. the charitable objects).

# Promote Success

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- When exercising this duty the directors must consider:
  - the likely long term consequence of any decisions;
  - the interest of the company's employees;
  - the need to foster the company's business relations with suppliers, customers and others;
  - the impact of the company's operations on the community and the environment;
  - the desirability of the company maintaining a reputation for high standards of business conduct; and
  - the need to act fairly as between members of the company.

# Directors' duties

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- **To act within the company's powers**
  - In the context of a charitable company this means within its objects and powers. Activities undertaken outside the charity's objects are "ultra vires" (beyond its powers) and can lead to personal liability for trustees
- **To exercise reasonable care, skill and diligence**
  - This is both a subjective test, taking account of the skills and experience the director actually has, as well as an objective test, where the director must achieve a reasonable standard regardless of personal skills or capabilities

# Directors' duties

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- **Not to accept benefits from third parties**
- **To declare interest in proposed transaction or arrangement**
  - A director must disclose interests that may give rise to a conflict of interest. The legislation covers the director and his “connected persons” which includes family members

# Conflicts of interest

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- S.175 CA 2006
  - A director of a company must avoid a situation in which he ***has, or can have, a direct or indirect interest that conflicts, or possibly may conflict,*** with the interests of the company
  - This applies in particular to the exploitation of any property, information or opportunity (and it is ***immaterial whether the company could take advantage of the property, information or opportunity***)

# Directors' duties

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- **Avoid conflicts of interest**
  - Your articles must include provisions regarding conflicts of interest to allow the board, if appropriate, to authorise potential conflicts of interest
  - This duty continues to apply when a director ceases to be a director as regards information received while a director
  - The general position is that a trustee may not benefit from his position as trustee unless specifically authorised by the constitution, by statute or with the consent of the Charity Commission
  - Need to understand “conflict of loyalty” – legal and reputational
  - The Charities Act has introduced a power for trustees to be paid for the supply of services (and goods connected with those services) subject to certain restrictions

# Conflict of interest management

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- Articles of association or other constitution
- Declarations
- Register of interests
- Code of conduct
- Personal benefits
- Conflict of loyalty or duties
- “representative trustee”
- Connected persons
- Process
- Resolution of the board – minutes

# Trustee benefits and remuneration

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- Generally a trustee may not benefit from his position as trustee unless specifically authorised by the constitution, by statute or with the consent of the Charity Commission
- The Charities Act introduced a power for trustees to be paid for the supply of services (and goods connected with those services) subject to certain restrictions
  - Does your constitution allow?
  - Are the conflicts this creates managed?

# Personal liability

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- Personal liability?
  - Incorporated / unincorporated?
  - Insolvency – wrongful trading
  - Breaches of trust or breach of duty
    - Personal benefit
    - Conflicts of duty
- Charity Commission statement on when it will exercise powers

# Personal liability

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- **Personal liability?**
  - Personal guarantees
  - Criminal acts
  - Statutory duties
    - Health and safety
    - Corporate manslaughter
    - Bribery Act

# Personal liability

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- Relief
  - Act reasonably
  - Act honestly
  - Ought fairly to be excused
- Indemnity from charity
- Trustee indemnity insurance – not an insurance against wrongdoing

# What goes wrong on boards

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- Not acting collectively
- Chair / CEO relationship
- Skimped or just in time approach
- Failure to take up development and networking opportunities
- Not confronting difficulties
- Becoming a manager
- Pursuit of organisational sustainability rather than objects and public benefit

# Increased public scrutiny

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**Charity fundraising tactics 'a scandal', says senior MP**

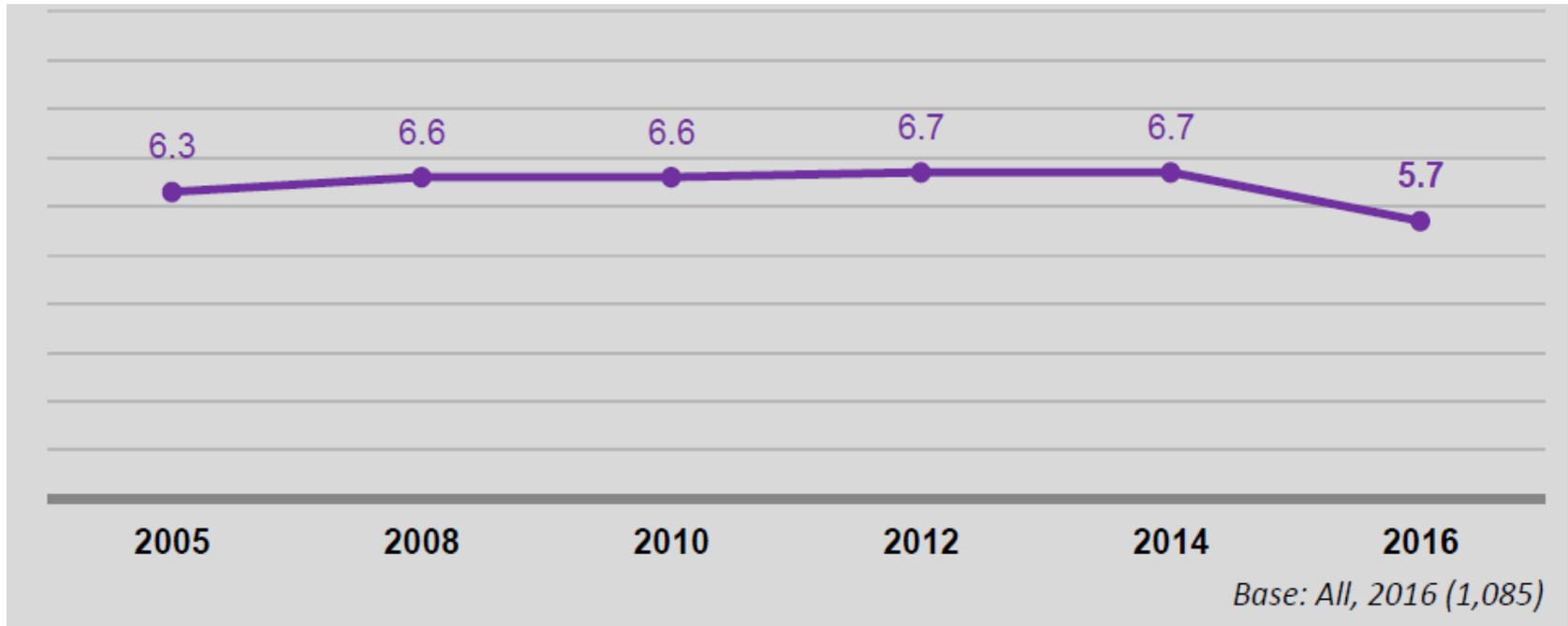
Outrage as charity bosses pocket six-figure salaries from generous public donations

Charities face scrutiny over trading of elderly man's data

**Chuggers banned from 100th town**

# Declining trust and confidence in charities

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Public trust in charities on a scale of 0-10

Source: Public Trust and Confidence in Charities 2016, Charity Commission

NB: 2017 has seen a rise back to 6.3

# Charity Commission Regulation

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*Public scrutiny of unacceptable fundraising practices, data protection violations and poor governance resulted in trust and confidence in charities falling to unprecedented levels in 2016.*

*Our principle focus continues to be on ensuring trustees' compliance with their duties - intervening directly, seeking restitution or taking enforcement action.*

Foreword to Charity Commission Annual Report and Accounts 2016-17



**CHARITY COMMISSION**  
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# CC - STATS



## Facts and figures about our compliance case work in 2015-16

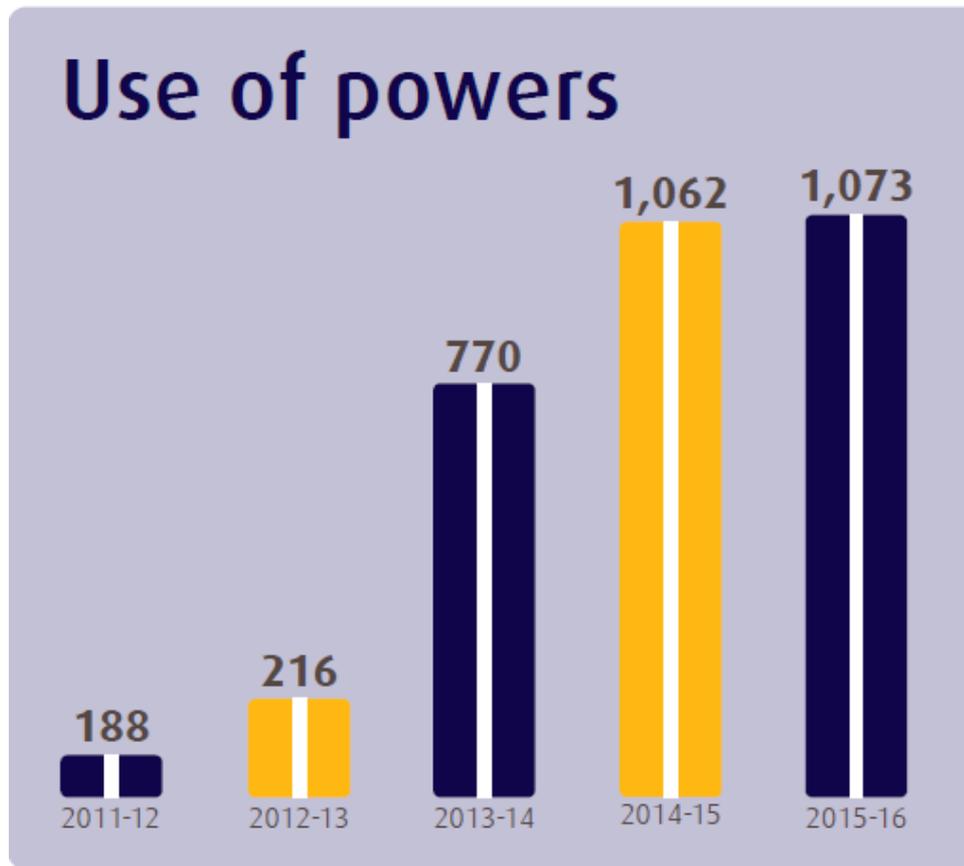


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# More robust regulation

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Source: Charity Commission

# Focus on Governance

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- In 2015 to 2016, serious governance concerns featured in 898 new operational compliance cases
- Sarah Atkinson, Director of Policy and Communications at the Charity Commission:

*It's vital that charities get their heads around governance. Following good governance practices, not just paying lip service but really understanding and applying them, could have averted many of the bad headlines of the last two years."*

# Focus on Governance

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- Governance problems can include:
  - failure to manage conflicts of interest,
  - unauthorised private benefit (for example trustees or those they know benefitting personally from their involvement) and
  - poor decision-making and record keeping.
- Core governance issues came up in 68% of our opened operational compliance cases and 65% of our closed cases. Two thirds of the whistleblowing cases we saw (98 out of 142) were related to governance issues.
- Reports of serious incidents made by the charities themselves lag behind, with just under 10% of such reports being about governance issues (216 out of 2,217).

# Focus on Governance

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- In 2015 to 16 serious governance concerns featured in:
  - 42 new inquiries, 20 completed inquiries
  - 216 reports of serious incidents
  - 98 whistleblowing reports
  - 898 new operational compliance cases and 854 completed operational compliance cases
  - 105 new monitoring cases
  - 140 disclosures between us and other agencies

# New Charity Commission powers

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- Charities (Protection and Social Investment) Act 2016
- New powers:
  - Issuing official warnings
  - Removing trustees or employees for mismanagement or misconduct
  - Disqualifying individuals from trusteeships
  - Extending list of convictions leading to automatic disqualification as a trustee
  - To require statutory regulation of fundraising

# Trustee responsibilities

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*“We will respect and protect charities’ independence. Under law trustees must manage their own charities. So long as they are within the law and in accordance with Charity governing documents trustees have a broad discretion to act as they think fit”*

Charity Commission revised regulatory statement, January 2017

# The Essential Trustee



GUIDANCE

The essential trustee: what you need to know, what you need to do



# The Essential Trustee

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- Prescriptive advice for trustees
- Must/should
- Not following best practice could be considered a breach of trustee duties

# New statement of duties of charity trustees

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- Ensure your charity is carrying out its purposes for the public benefit
- Comply with your governing document and the law
- Act in the charity's best interests
- Manage your charity's resources responsibly
- Act with reasonable care and skill
- Ensure your charity is accountable

# Lessons from Kids Company – still relevant

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- Reserves
- Skills on board
- Holding CEO to account
- Length of trustee terms
- Chair/CEO relationship
- Strategic planning
- Risk management and access to financial information
- Media involvement

# Fundraising Regulator

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- Up and running in England and Wales
- Sets and promotes the Code of Fundraising Practice
- Investigates cases
- Adjudicates complaints – about fundraising practice
- Use of Personal Data – Fundraising Preference Service – “reset” opt out

# Other issues

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- Data protection and Information Commissioner
  - Cyber security
  - Fraud
- Annual return
- Serious incident reporting

# Charity Governance Code

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- Put together by a steering group and endorsed by the Charity Commission
- Hear more this afternoon
- Principles and recommended practice – not legal/regulatory requirements – “deliberately aspirational”

# Reading and further guidance

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- Good Governance – A Code for the Voluntary and Community Sector
- Charity Commission booklets:
  - “The Essential Trustee What You Need to Know (CC3)
  - “It’s your decision: charity trustees and decision making”
  - “Conflicts of interest: a guide for charity trustees” (CC29)
  - “Public benefit: a summary”

# Contact details

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