

Guidance note

Charity trustee eligibility

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Charity trustee eligibility

Introduction

There are over 167,000 registered main charities in England and Wales. Charities can be structured in a number of ways, but for an organisation to be a charity it must have wholly and exclusively charitable purposes and provide public benefit¹. Each charity requires a body of trustees to lead and govern the organisation. The Charities Act 2011 defines trustees as ‘...the persons having the general control and management of the administration of a charity’ (s. 177).

Charity trustees are central to the success of a charitable organisation, being responsible for its overall direction, strategy and vision. It is therefore imperative that trustees are effective both individually and collectively if they are to have a positive impact on the charity and enable the organisation to fulfil its charitable objects. Inherent in building and maintaining an effective board of trustees is having robust systems for recruitment, appointment and induction of trustees, backed up by ongoing support and development².

It is essential that the right people are recruited to the board, not just in terms of skills, attributes and competences, but also in ensuring an individual meets the legal and constitutional eligibility criteria. Appointing a trustee who is not eligible can have serious consequences for the individual, the board and the charity.

¹ S. 3, Charities Act 2011.

² For further information on recruiting trustees, trustee induction and due diligence please see ICSA’s guidance notes at <https://www.icsa.org.uk/knowledge/charity-resources/charity-guidance-notes>

If you have any feedback on the content of these resources, or additional questions that you’d like to discuss, please contact the ICSA information centre: **020 7612 7035 | informationcentre@icsa.org.uk**

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Charity trustee eligibility

Benefits of being a trustee

Whilst the role of trustee is a serious duty, there are various positive aspects to the position that can help an individual on a personal and professional basis:

- the knowledge that you are contributing to a worthwhile cause;
- building self-confidence;
- gaining experience of committee work;
- acquiring new skills – both personal and professional – through training, information and sharing experiences; and
- the enjoyment to be had from working with a group of individuals from different backgrounds who share a similar passion for a particular cause.

The role of trustee is one that can offer considerable satisfaction, challenges and experiences, but it should not be forgotten that the position can be quite onerous and require a significant time commitment³.

A robust and transparent approach to the recruitment and background checks of trustees is therefore crucial to the ongoing performance of the charity and the fulfilment of its charitable objects. This guidance will be of interest to new and existing trustees and members of the senior management team, especially the charity secretary or governance professional.

³ Detailed guidance can be found in the Charity Commission's publication *The Essential Trustee: What you need to know* CC3.

Charity trustee eligibility

Constitutional considerations

Many governing documents of a charity will provide details as to who can and cannot be a charity trustee. The common criteria for trustee disqualification covered in a governing document include:

- ceasing to be a member;
- incapacity – unable to manage own affairs;
- non-attendance of trustee meetings – normally a set figure or a timeframe;
- being convicted of an offence; and
- breaching the trustee code of conduct or otherwise bringing the charity into disrepute or not acting in its best interests.

All trustees, however, should be aware of those criteria specific to their charity and ensure that they meet the requirements before appointment and whilst in position.

Legal considerations

There have always been legal restrictions on who can and cannot be a charity trustee. The Charities (Protection and Social Investment) Act 2016 introduced new limits on who can be a trustee and extended the regime to cover senior managers. Some automatic disqualifications come into force on 1 August 2018, but charities need to take action before that date. The Charity Commission's *Automatic disqualification rule changes: guidance for charities* (January 2018) provides an overview of the new rules.

For clarity, the automatic disqualification regime applies to a charity trustee, as defined under s. 177 of the Charity Act 2011, or a trustee for a charity, where a person or organisation who holds property on behalf of a charity (such as a holding or custodian trustee).

The full list of criteria that would disqualify an individual from becoming a trustee are below. Those coming into force on 1 August 2018 are shown in italics.

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- Being under age (16 years and over to be a director of a charitable company limited by guarantee or a charitable incorporated organisation, or 18 years and over for trusts and unincorporated associations)
- *Being on the sex offenders register*
- An unspent conviction for an offence involving:
 - deception or honesty;
 - *terrorist offences*;
 - *money laundering*;
 - *bribery*;
 - *misconduct in public office, perjury, or perverting the course of justice*;
 - *contravention of certain Charity Commission preventative orders (under s. 77 of the Charities Act 2011)*; or
 - *attempting, aiding or abetting the above offences.*
- *Contempt of court*
- *Designated individuals under specific anti-terrorist legislation*
- *Found guilty in the High Court of disobeying a Charity Commission order or direction*
- Removed from:
 - trusteeship, or as an officer, agent, or employee of a charity by the Charity Commission or High Court for misconduct or mismanagement;
 - a position of management or control of a charity in Scotland for mismanagement or misconduct;
 - being a director under the Company Director Disqualification Act 1986, including Company Directors Disqualification (Northern Ireland) Order 2002;
 - directorship by way of being an undischarged bankrupt; or
 - directorship because there is an outstanding composition or arrangement with creditors which includes an individual voluntary agreement (IVA) and is currently on the Insolvency Services Register.

Charity Commission orders can also disqualify individuals from being trustees.

In addition, HMRC requires trustees and managers of charities claiming gift aid to meet the 'fit and proper persons test'. Factors contributing to HMRC not deeming someone as a fit and proper person include individuals:

- with a history of tax fraud;
- with a history of other fraudulent behaviour, including misrepresentation and/or identity theft;
- whom HMRC is aware has been involved in attacks against or abuse of the tax system; and
- barred from acting as a charity trustee or company director.

Charity trustee eligibility

It is an offence for an individual to act as a charity trustee when disqualified. If a disqualified person is appointed as a charity trustee, the appointment will be invalid. Furthermore, if problems arise with a trustee, and it emerges that existing trustees failed to follow Charity Commission guidance⁴, the Commission may consider the trustees to have acted improperly.

Charity Commission waivers

If an individual is automatically disqualified, they need to resign from their position or seek a waiver from the Charity Commission, where this is an option.

A waiver can be given to an individual in respect of a named charity/charities, a class of charities or all charities. Though the latter is unlikely to be granted due to the risk the sector may face. In considering a waiver, the Commission will:

- assess its case on its merits;
- focus on the best interests of the charity or charities involved; and
- ensure the waiver will not damage public trust or confidence on the sector.

A waiver decision of the Charity Commission can be appealed.

The Commission must provide a waiver when the individual was a trustee, agent, employee or officer of a charity and was removed by the Commission more than five years prior to the application of the waiver.

The Commission cannot provide a waiver where:

- it would override the charity's governing document or rules;
- the individual is or will be disqualified for reasons outside of the automatic disqualification regime; or
- the charity is a company limited by guarantee (CLG) or charitable incorporated organisation (CIO) and the individual is disqualified under Company Directors Disqualification Act 1986, or the Insolvency Act 1986, or failed to pay a county court administration order and those disqualifications are still in place.

⁴ CC30 – Finding new trustees <https://www.gov.uk/government/publications/finding-new-trustees-cc30/finding-new-trustees#vetting-trustees-prior-to-appointment>

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The Commission can refuse a waiver when it feels there's a real risk of repeat behaviour, there is evidence of an individual's unsuitability for the role, or if the named charity/charities does not support the application.

Acting while disqualified

If the Charity Commission finds an individual to be acting while disqualified it will:

- contact the individual;
- bring the issue to the attention of the trustees;
- order the individual to repay to the charity any expenses, benefits, remuneration or the value of gifts in kind received; and
- consider referring the matter to the police.

Due diligence

To ensure a trustee meets the legal requirements the charity can ask them to sign a declaration of eligibility⁵, but there are also other checks the charity secretary or governance professional, or where they are not in place a trustee, should undertake to ensure that the individual is eligible to serve:

- Individual Insolvency Register⁶
- Disclosure and Barring Service, if the charity works with young people and/or vulnerable adults⁷
- Companies House (director disqualifications)⁸
- Charity Commission (trustee removals)⁹.

Additionally, if the charity receives gift aid, the prospective trustee must meet the HMRC 'fit and proper persons test'. Further information about the test can be found on the HMRC website¹⁰.

5 A specimen version of such a declaration can be found on the ICSA website.

6 www.gov.uk/government/organisations/insolvency-service

7 www.gov.uk/government/collections/dbs-eligibility-guidance

8 www.gov.uk/government/organisations/companies-house

9 www.charitycommissionni.org.uk/concerns-and-decisions/register-of-removed-trustees/

10 www.gov.uk/government/publications/charities-fit-and-proper-persons-test/guidance-on-the-fit-and-proper-persons-test

Charity trustee eligibility

Senior manager implications

The extended automatic disqualification regime now includes relevant senior managers within a charity such as the chief executive and chief financial officer. A chief executive is defined as someone who:

‘...carries overall responsibility for day-to-day management and has control over the charity, and is accountable only to the trustees¹¹.’

A chief finance officer is someone deemed to be accountable to the chief executive or trustees for the overall management and control of the charity's finances. Other senior positions which have financial responsibilities, such as budgetary control, but do not carry the overall responsibility for the charity's financial control and management are not covered by the extended automatic disqualification regime.

As paid employees, there are other factors that must be considered should such an employee be found to be disqualified. Trustees who find themselves in this situation should refer to the Charity Commission's *Automatic disqualification rules for charity trustees and charity senior positions* (January 2018)¹² and where appropriate seek the advice of a HR professional.

¹¹ See the Charity Commission's *Automatic disqualification rules for charity trustees and charity senior positions*, January 2018.

¹² Other guidance of interest can be found at www.hubblock.org.uk/information/charities/ for further information on spent and unspent convictions and www.nacro.org.uk/resettlement-advice-service/support-for-individuals/disclosing-criminal-records/rehabilitation-offenders-act or www.gov.uk/offenders-and-employment



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Visit icsa.org.uk/charity-resources for more charity governance related information.

Guidance notes are prepared by the ICSA policy team to support the work of company secretaries and other governance professionals working in the corporate, not-for-profit and sports sectors, and in academy and in NHS Trusts.

Guidance notes offer authoritative advice, interpretation and sample materials for the many issues involved in the management and support of boards. As such, they are invaluable for those helping their organisations to build trust through good governance.

There are over 100 guidance notes available to ICSA members at www.icsa.org.uk/guidance

**The Institute of Chartered Secretaries
and Administrators**

Saffron House, 6–10 Kirby Street
London EC1N 8TS

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The Institute of Chartered
Secretaries and Administrators