

A new focus on charity governance

The collapse of Kids Company and recent hostile press coverage of parts of the charity sector provide cautionary tales for charity trustees. Ever since the financial crisis of 2009 and the subsequent deep cuts in the Charity Commission's budget, the Commission has increasingly been emphasising the responsibilities and duties of trustees in respect of their charities.

A changing regulator

The Charity Commission, under financial and political pressure, has been focussing on its formal role as regulator. The Commission's objectives, set out in the Charities Act 2011, include:

- increasing public trust and confidence in charities,
- promoting awareness and understanding of the public benefit requirement,
- promoting compliance by charity trustees with their legal obligations in relation to the control and management of the administration of their charities,
- promoting the effective use of charitable resources, and
- enhancing the accountability of charities to their donors, beneficiaries and the general public.

In the financial year 2014/15, the Commission opened 1,162 operational compliance cases and 103 formal inquiries. In the year 2011/12 this was 108 and 12 respectively. This is a massive increase from the handful of cases opened each year during the 2000s when the Commission had an (often criticised) reluctance to open formal inquiries except in the most extreme of circumstances and where the Commission had no option but to do so.

In the current environment, where an issue is brought to the attention of the Commission, charity trustees should anticipate a firm response. Of course this may attract unwanted publicity, as the Commission announce the opening of a compliance case or an inquiry on its website and this is quickly picked up by the sector press. In the current environment you can in some cases expect the national press to be interested too.

New Commission guidance

In addition to its legal powers, the Commission issues guidance, much of which is excellent. Most recently the Commission has updated its guidance on trustee duties, *The Essential Trustee (CC3)*. Within this guidance the Commission has made it clear it no longer expects trustees just to comply with their legal duties, but also to follow best practice within the sector. This increases the burden on trustees; in part because it's not always clear what best practice is when applied across the vast array of charitable organisations with diverse legal structures and operational models.

This additional burden and a statement from the Commission's chief executive that "*trustees will no longer be given the benefit of the doubt*", has increased anxiety further.

Knowing your responsibilities

The recent high profile collapses of Broadcasting Support Services, the British Association for Adopting and Fostering and Kids Company have focussed attention on the role of charities in society and on charity trustees.

Now, more than ever, charity trustees need to educate themselves as to their responsibilities. The first place to look is their charity's governing document. We are always surprised by the number of trustees we meet who do not have an understanding of the legal structure of their charity, let alone the rules and regulations that govern its operation.

Not only is this essential to understand what the trustees' potential exposure to personal liability is, but the governing document also sets out the objects for which the organisation is established. All the charity's activities should be focussed on achieving those objectives.

We also often find that trustees may have not followed the correct appointment procedures under their governing document, leaving question marks over the validity of their decisions.

Charities trustees then need to consider what they need to do to fulfil those duties and to understand that they operate at a "strategic" level. It's not usually sufficient just to turn up at meetings and nod!

Delegation

Trustees of larger organisations have employees who undertake much of the day-to-day work and it's perfectly appropriate for charity trustees to delegate those activities and, in practice, it's essential to do so. Trustees should maintain strategic oversight and muddling in, instructing employees, or intervening in contract negotiations, usually causes more problems than it solves.

The balance between the roles of trustees and staff can often get confused. The scope of the delegation should be clearly understood by both trustees and executive team and it's a good idea to have a written 'scheme of delegation' in place.

Trustees cannot delegate their responsibility where things go wrong. So it's important as a trustee to ensure you can fulfil that duty by having appropriate reporting and feedback such as regular management accounts, project reports and reports against strategic goals set out in the plans. In order to ensure that the reports can be relied upon there should be appropriate internal controls established.

Keeping records

It is also vitally important that the trustees keep appropriate records and minutes of meetings which reflect the decisions they reach. Just saying "we decided to end the contract..." is insufficient to protect trustees, were the Commission to become involved. There needs to be some reasoning and justification for the decision to enable trustees to defend their decision.

A decision should always be in the interests of the charity and charity trustees will want minutes to explain why that decision was both reasonable in the circumstances and in the interests of the charity. The Commission is very unlikely to take action against trustees who have acted honestly and reasonably in the circumstances, but if you don't have proper records, you may be unable to demonstrate that.

Kids Company

Much of the criticism around the failure of Kids Company has focussed on the trustees' failure to ensure financial sustainability by ensuring the charity had reserves available to it for that "rainy day" and the apparent belief that the government, or generous philanthropists, would always step up to fund the charity's service delivery.

Another feature appears to have been "founder syndrome" whereby a dominant, influential and charismatic leader causes charity trustees to take too much for granted causing the trustees to step back from the challenge that it is appropriate for them to give to an executive team.

Some practical tips

In the current environment charity trustees would be well advised to review the scope of their delegated authorities and how they are ensuring appropriate feedback, to enable them to comply with their governance duties.

They should also re-consider their charity's underlying operational risks with renewed vigour and consider those issues, in particular reputational issues that might make for a good headline in a newspaper. For many organisations this is not an inconsiderable task and may involve a review of their fundraising practices, how those resources are used and how transparent the charity's reporting of them is.

Further information

In this note we have touched on just some issues in relation to charity governance. Our team, with its specialism in the charity and social business sector, would be delighted to talk through any governance and legal issues that you may have.

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