



Charity Commission consultation on 'The essential trustee (CC3)'

Submission by the National Council for Voluntary Organisations (NCVO), the Association of Charitable Foundations (ACF) and the Charity Finance Group (CFG)

Introduction

Our response to the Charity Commission's consultation on the updated draft of its guidance 'The essential trustee (CC3)' is based on the views expressed by our members and other key stakeholders. It is also informed by the roundtable discussions organised by the Commission, which both NCVO and ACF attended.

In addition, NCVO has a number of governance experts who have contributed with their comments and analysis of the new guidance.

About NCVO

Founded in 1919, NCVO is the largest representative body for charities and voluntary organisations in England. NCVO has over 11,000 members ranging from large 'household name' charities to small community organisations.

NCVO's strategic aims are to champion and strengthen civil society and volunteering, and to strengthen voluntary organisations.

About ACF

ACF is the membership association for foundations and charitable grant-making trusts in the United Kingdom. ACF's priorities include enabling trusts and foundations to achieve good practice in grant-making and helping them to be effective in the many ways that they use their resources, including their investments for charitable purposes.

ACF has over 320 members. They range in size from large foundations with paid staff distributing over £20m a year each, to small often volunteer-run trusts distributing less than £100,000 a year. Together though they give over £1.7 billion a year to a wide range of charitable causes. Across the UK, trusts and foundations provide about 5% of the total funding of the charitable and wider voluntary sector.

About CFG

Founded in 1987, Charity Finance Group is the charity that works to improve the financial leadership of charities, promote best practice, inspire change and help organisations to make the most out of their money so they can deliver the biggest possible impact for beneficiaries. CFG has over 2300 members and they manage nearly £20 billion in charitable income. Its members work at the heart of the strategic development of their organisations, and are at the forefront of delivering sustainable and efficient charity sector.

To discuss in further detail any statements included in this response, please contact Elizabeth Chamberlain at Elizabeth.Chamberlain@ncvo.org.uk (tel. 0207 520 2559).

General comments

The 'Essential Trustee' guidance is a key resource for anyone involved in governance: in our experience it is often the first (and only) document that individuals are given when starting their role as trustees, so it is important to make it as clear and easy to use as possible.

We therefore welcome the fact that the new document is shorter in length and contains numerous links to other guidance in order to avoid repetition and keep the length to a minimum. This should make it more practical and allow trustees to 'dip in' the sections they need to read.

However, we would still want to see a full downloadable PDF available as we believe many trustees will continue to want to refer to it in this form.

Overall, the content and tone of the draft guidance places more emphasis on the responsibilities of being a trustee, and on the risks that the role entails.

We understand that the Commission's aim is to prevent mismanagement of charities by ensuring that trustees understand what compliance with legal duties looks like in practice. We also accept that in doing this the Commission faces a dilemma in that in many cases there are no specific legal duties in areas where practice ought to be standard – for example, in setting up financial controls, which all would agree are essential to the proper governance and effective running of a charity.

However, we are of the view that in too many cases the current draft takes an excessively prescriptive tone in various sections, particularly in the preface, and misrepresents the scope and nature of the duties that in fact apply to trustees. The guidance as currently drafted is, we argue, likely to inhibit action and innovation at a time when trustees need to use their discretion and innovate more, so they can meet today's challenges. Instead we believe that the current draft will leave them struggling to follow certain practices which may not be right in their context. We particularly feel that many of the good practices recommended in the current draft are relevant to medium and larger charities and may not be suitable for smaller organisations.

For example, we agree that it is best practice for charities to regularly consider how effective the charity's activities are and whether there may be better ways to carrying out the charity's purposes. However, we believe it is important for the guidance to emphasise that this should be proportionate and based on the needs of the charity. Unless the guidance is properly clarified, charities could feel obliged to use excessive resources in carrying out evaluations or reviews into their activities which are not necessary.

We therefore urge the Commission to take account of the fact that the document will be used by a wide variety of organisations – often as part of trustee induction – and we ask that those drafting the guidance find ways of highlighting the opportunities and possibilities of the role of trustee, as well as its pitfalls. The essential focus for trustees should be on delivering their charitable objects, not avoiding falling foul of the regulator.

Our two main concerns relate to the new definition of 'should', which has been significantly changed, and how the Commission will regard a failure to meet the good practice requirements as it has now defined them.

We do not consider this new definition - which suggests a set of mandatory behaviours - to be consistent with basic charity law, which establishes general principles to be interpreted in the particular circumstances, and not prescriptive lists to be applied to all circumstances. Although the Commission have sought to reassure us that their intention is not to effectively elevate what they view as minimum good practice requirements to legal requirements, we remain concerned. We fear not only that trustees will be misled by the quasi-legal status given in this draft to general good practice recommendations, but that the guidance itself will invite questioning by lawyers, the Tribunal and, ultimately, the courts.

Furthermore, in view of the Commission's statement that the 'should' requirements are not optional and that there will be consequences of failing to comply with them, we are concerned about the effect that this significant change in approach could have in relation to the other guidance documents produced by the Commission which also contain 'should' requirements. In time, the new definition of 'should' could easily lead to a situation where good practice recommendations from the Commission are elevated to and treated as legal requirements that *must* be met by trustees. There is therefore a high risk of regulatory creep.

The fundamental issue which both the new draft and previous versions have grappled with, is the challenge of trying to derive detailed and practical recommendations for action from high level principles based in trust law.

For example the duty of care is a broad principle, which can be relevant to many trustee decisions and actions. The nature of the duty will vary according to the nature of the decision, the type of organisation, the person making it, and many other factors.

So, although the idea of simplifying the guidance by identifying sets of behaviours that are commonly associated with meeting legal obligations is sensible, we are concerned that the current draft will mean that trustees will lose sight of the fundamental guiding principles.

In our view, the guidance needs to focus first of all on the fundamental, overarching duties on trustees and the principles that rule their implementation rather than the details of their practical application. If trustees understand the fundamental duty, then it should be relatively straight forward to apply the right standard of care when making decisions. If the Commission would still like to indicate the basic levels of good practice that it looks for, and the absence of which provides *prima facie* evidence of breach of a legal duty, then it would be appropriate to include these as just that – some examples that, in most cases, provide evidence of basic compliance. We suggest that this approach would avoid the confusion around the 'shoulds' that relate to minimum good standards and the 'other' good practices that relate to effectiveness. We discuss these in more detail in our answers to the specific consultation questions below.

Consultation questions

Is the explanation of trustees' responsibilities clear and easy to understand? If not, what didn't you find clear? How could the Commission make it clearer?

We found that the new guidance creates a considerable amount of confusion with regards to what are the legal duties of being a trustee stemming from trust law, what are the other legal duties involved in managing a charity (stemming from employment law, equality law, health and safety law, etc.), and what is recommended good practice.

The absence in the preface of an explanation of the duty of care is particularly problematic. We think that a statement about what the duty of care is, and a clarification that what is reasonable in the circumstances will depend on a range of factors, would help put the rest of the document in perspective.

On a specific point, section 7.1 (1) on Fundraising mentions social investment. We agree that social investment should be included in the guidance, but that this is not a question of 'fundraising'. Fundraising is income, whereas as a social investment is a liability/debt which should not be confused with fundraising. It is important the Commission's guidance is clear on this as trustees are ultimately responsible for financial decisions and there are risks with social investment that may not be considered if trustees believe that it is similar to 'fundraising' income.

Moreover, the guidance refers to listening and responding to "what supporters and funders say". We believe that this phrase should be clarified to take into account the need for charities always to place their mission and needs of their beneficiaries at the forefront of all decision making. Ultimately, while good communication with supporters and funders is best practice, trustees should not feel that they should tailor their decisions to the wishes of supporters and funders.

We are also concerned about the inclusion a sentence that states that 'the most effective way of fulfilling a charity's aims may involve merging with another charity or spending all of its resources and closing'. We agree that charities should focus on the long term needs of their beneficiaries and that they should regularly review how they can best meet their charitable objectives. It is also important that trustees understand that acting in the best interests of the charitable objects is not the same as preserving the organisation at all costs. However, we are concerned that the inclusion on this statement in the midst of guidance on legal duties and good practice could be taken as a direction from the Charity Commission towards mergers. As such, its inclusion is unhelpful and we believe it should be removed. The Charity Commission should reference its detailed guidance on mergers in section 7 without additional comment.

Does the guide cover all the essentials that trustees need to know about their duties? If not, what is missing?

Section 9 does not refer to the Statement of Recommended Practices (SORP) for charities and this should be added, as well as a link to the SORP website to assist trustees in finding the relevant information.

Section 7.5 on managing volunteers and staff does not refer to pension law – which is particularly important for charities which employ staff. Moreover, with the upcoming obligation for small charities to auto-enrol their staff in pensions from April 2016, we believe that “ensuring that people have appropriate pension provision” should be a specific point in this section.

Do you understand the distinction between what trustees ‘must’ and ‘should’ do?

We acknowledge that the distinction between ‘must’ and ‘should’ has always been problematic, given the range of duties and responsibilities that trustees take on. However in the new version this distinction is even more blurred. In particular, the document creates a certain amount of confusion as to:

- when a good practice requirement has regulatory significance so that absence of its implementation is *prima facie* evidence of breach of a legal duty; and
- when instead a good practice requirement is desirable for the effective running of a charity and therefore a matter best left to the trustees’ discretion.

To say that not following a ‘should’ requirement ‘may’ constitute a breach of duty is unclear and not helpful, particularly when the behaviour has been identified as ‘good practice’. Many trustees will associate ‘good practice’ with acting beyond minimum legal requirements, but we understand that the Commission is using it in this context to indicate how to achieve ‘the minimum’.

We suggest a tiered approach may be more accurate a representation of the law and more helpful to trustees:

1. it would first articulate the basic legal duties before setting out the core principles which govern their implementation;
2. it would only then describe the ‘minimum good practice’ which in the Commission’s view provides evidence of compliance; and
3. separate from that the ‘recommended best practice’ which relates to effectiveness.

We believe the opportunity of using text boxes and other formatting techniques should allow these different ‘registers’ of guidance to be clearly indicated in the document.

It would then be important to ensure that the use of these different meanings throughout the new guide is given careful thought and is consistent.

At the moment, as mentioned there seems to be a disconnect between the introductory statement and the actual body of the text: there are various sections in the document where the new definition of ‘should’ outlined in the preface doesn’t relate to how ‘should’ is intended.

Within the body of the text there are a number of cases where the definition of ‘should’ seems to have been used according to its interpretation in previous guidance, suggesting that the action is aspirational as opposed to necessary in order to meet legal requirements.

For example, section 2 page 4 says: ‘where to find out more about good practice that will support your charity’s effectiveness’. This seems to reflect the notion of good practice as desirable from an

effectiveness point of view rather than a legal compliance point of view, and therefore adds to the confusion.

Again on the same page, section 2.3 says: 'you should also ensure your charity is accountable; this includes open and honest two-way communication with beneficiaries, supporters or regulators'. This is indeed desirable, but while charities are legally obliged make reports to the Commission, failing to communicate well with supporters and beneficiaries, although it may arguably impair effectiveness, is unlikely to result in a breach of legal duty and investigation by the Commission.

In addition, there would still need to be a better acknowledgement in the guidance that there exists a range of options and behaviours: at the moment, much of the guidance reads as saying that something that is not 'good practice' is automatically 'bad practice', when the reality is much more varied and trustees generally have options about how to go about fulfilling their charitable objectives.

On the other hand, many of the 'should' requirements are stated in vague terms without reference to supporting case law or statutory provision to support the assertion that failing to perform these 'should' requirements would be a breach of duty or constitute misconduct or mismanagement. In addition, the draft guidance fails to note that in some cases trustees must reconcile conflicting obligations.

For example, section 2.3, says that trustees 'should ensure open and honest two-way communication with beneficiaries, supporters and regulators'. But it fails to take into account that this is not always possible due to confidentiality or data protection issues.

Do you think the guidance strikes the right balance between reassuring trustees that the law protects them if they comply with the legal duties, and highlighting the potential consequences of acting negligently or in bad faith?

The Commission has acknowledged that the basic legal responsibilities of trustees have not changed, nor has its role as regulator. However the guidance, and especially its new preface, could easily be interpreted as excessively prescriptive and focusing too much on the risks of being a trustee rather than the freedom they have to innovate – particularly relevant in today's changing environment. It seems to have lost sight of the main purpose of trustees' duties which – rather than being to avoid falling foul of the regulator – is to deliver their charitable purposes.

Various of our stakeholders have expressed the view that the new guidance goes a step too far, and we understand these concerns in light of the following factors:

- the new gloss on 'must' and 'should' creates a prescriptive tone for how the document is read;
- throughout the document there is a failure to recognise the broad range of discretion that is often exercised by trustees when deciding what is in the best interests of their charity;
- the guidance has been published at a time when the Commission is taking a much stronger approach to regulation, and will therefore be viewed in this context.

The risk is that, although the general principles remain the same, new burdens and possible liabilities will be associated with the role of trustees. In turn this could mean that potential trustees will be deterred from taking on the role, or that existing trustees will be inhibited from taking innovative action. This could be problematic at a time when trustees need to experiment more to meet the challenges facing the sector today.

We feel that the general tone of the document could be improved by including in the opening paragraphs some of the more positive sentences, such as the recognition that 'it's extremely rare for trustees who act honestly and reasonably to be held personally liable'.