

Charity Trustee Duties: A Coronavirus Guide

During the coronavirus crisis, many charity trustees will want to be sure they are complying with their duties. This quick guide aims to help them do so, however it is not a comprehensive guide to trustee duties.

1) Trustee duties in general

Although there are some differences in trustee duties and responsibilities depending on the legal structure of the charity, the duties described here broadly apply to all trustees.

The Charity Commission's introduction to trusteeship: 'The essential trustee: what you need to know; what you need to do' (<https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3>) provides excellent general guidance.

2) Advancing the charity's purposes – the overriding duty in normal circumstances

The overriding duty of all charity trustees in normal circumstances is to act in the way they consider, in good faith, most likely to achieve the purposes of the charity. These purposes will appear in the charity's governing document and may be different from (and will usually be broader than) any mission statement the charity has.

Over the coming months, it may not be possible to advance the purposes as planned. Some charities may need to cease or refocus activities, prioritise those which are financially viable, or put the current strategy on hold.

Some charities may feel in crisis or survival mode, focusing on emergency measures that may feel far removed from the charitable purposes. As the focus shifts, the trustees should ensure that all of the charity's activity is ultimately undertaken to advance the charitable purposes now or in the long run.

Trustees are not required to preserve the charity at all costs or to continue operating as before, although the trustees may feel a moral responsibility to do so. If they conclude that the charity or particular activities are no longer viable, they may bring them to an end. It may be necessary to do this in order to prevent the charity going into insolvent liquidation and potentially creating personal liability for the trustees. See our separate note on charity governance and solvency: <https://bateswells.co.uk/2020/03/charity-governance-and-solvency-a-coronavirus-guide/>

Note that the trustees' duties might switch to protecting the interests of the charity's creditors (rather than achieving the charity's purposes) if the charity is likely to go into insolvent liquidation. Some proposed changes to the law on this have been announced by the government, however, so please keep an eye out for our updates.

3) Ensure your charity is carrying out its purpose for the public benefit

Trustees must ensure that the charity is carrying out its purposes for the public benefit and must have regard to the Charity Commission's public benefit guidance. An introduction to that guidance is here: <https://www.gov.uk/guidance/public-benefit-rules-for-charities>

Physical distancing and shutdown will mean charities cannot easily engage with the public. In the circumstances, they can modify the way in which they provide public benefit, which may well include putting activities on hold temporarily. Many will look for imaginative ways of continuing to reach the public, of course; for example, theatres and concert halls making their digital material more widely available.

For some charities this may mean the section of the public they benefit changes temporarily or permanently. Check this is permitted by the governing document. And remember, the limits are set by the charity's objects, not its mission statement or what it has always done.

4) Protect those to whom you owe a duty of care

Some charities will have existing obligations to individuals, particularly their own staff and volunteers, vulnerable people for whom the charity is providing care, and other people who use the services or attend the premises.

You must provide a safe place of work and your facilities must also be safe for those visiting them. This will mean taking special precautions if you are providing essential services that are required to remain operational during the general shutdown. Follow government advice here: <https://www.gov.uk/coronavirus>

Charities that must continue to care for vulnerable people will have especially difficult decisions if they are concerned about their solvency. Take professional advice.

More information about employment law and other relevant matters is available here: <https://bateswells.co.uk/campaigns/coronavirus/>

5) Act with reasonable care and skill

You must exercise such care and skill as is reasonable in the circumstances. This duty is greater if a trustee has (or claims to have) any special knowledge or experience, or if their business or profession means they can reasonably be expected to have special knowledge or experience. As trustees grapple with the current situation, particularly relevant knowledge and experience includes financial, legal, insolvency, fundraising and HR. Where trustees do not have the expertise to take decisions, they should take appropriate advice.

6) Manage your charity's resources and assets responsibly

All trustees will be thinking about how to manage resources and assets, such as premises, staff, investments, cash (including income and expenditure) and reputation during the crisis. Trustees must manage these responsibly and prudently. During the crisis they should:

Aim to keep the charity solvent – not least because the duties in this guide cannot be achieved if insolvent. See our guide to solvency during the coronavirus crisis: <https://bateswells.co.uk/charity-governance-and-solvency-a-coronavirus-guide/>

Ensure financial procedures are adequate and consider any changes that need to be made in order to properly manage the finances during the shutdown, taking account of potential illness. Plan for key members of staff or trustees not being available.

Remember one of the charity's key assets: its reputation – even at a time of crisis. Trustees should take decisions calmly and ensure action taken does not put beneficiaries at risk.

7) Act in your charity's interests

Trustees must act in good faith in the interests of the charity. Trustees should not allow their personal interests or views to override the interests of the charity, and they must exercise independent judgement, although they are not required to act to their own detriment. Trustees should:

- Take balanced and informed decisions. Read board papers and ask for the relevant information.
- Take professional advice if needed.
- Think about both surviving the short term crisis and the long term. What will allow the charity to advance its purposes effectively during and after the crisis?
- Take decisions “within the range of decisions that a reasonable trustee body could make in the circumstances” (see the Commission guidance below). Boards will be facing difficult decisions. There will often not be one right decision but a number of reasonable ones. You are not expected to be perfect but to act reasonably.
- Make the best decisions you can based on the best information you can get. And be ready to explain why.

Review the Charity Commission’s guide on trustee decision-making: ‘It’s your decision’ (www.gov.uk/government/publications/its-your-decision-charity-trustees-and-decision-making), which provides a very good framework for reaching decisions.

Record keeping is important. Ensure proper minutes are taken. Ensure there is record of the papers and information that were considered by the board and the reasons for important decisions are stated.

If you have trustee indemnity insurance (which is designed to protect trustees personally), check: what the policy covers, that the premium has been paid, and that you have reported, (and continue to report) candidly to the insurer as required by the policy.

8) Manage conflicts of interest

If there is a potential conflict between a trustee’s interests and those of the charity, such as where a trustee might be paid for a particular service or a charity is applying for funding to an organisation with which a trustee is connected, the situation must be properly managed. The rules on conflicts can be complicated and cannot be set out in full here. Follow the provisions of the governing document and any separate conflicts policy.

Review the Charity Commission’s guidance on trustee payments at: <https://www.gov.uk/government/publications/trustee-expenses-and-payments-cc11>

9) Comply with your charity’s governing document

The trustees must ensure that the charity complies with its governing document. Typical provisions that may be relevant to the crisis are:

- What powers the charity has to further the purposes – this is particularly important if you are engaging in unusual activity for your charity, such as accessing loans or accessing funds. Do you have the necessary powers to do what you want to over the coming weeks/months?
- The rules about delegation – trustees may need to swiftly establish new committees (such as a crisis team), or amend rules of delegation to staff and existing committees to better cope with the current crisis. Keep the rules of delegation under review. Remember you are still accountable for responsibilities you have delegated.
- The administrative provisions – such as holding meetings, taking decisions without a meeting and engaging with members. For some charities it will not be possible to comply with the administrative requirements in governing documents during shutdown. For our coronavirus guidance on trustee meetings please see: <https://bateswells.co.uk/2020/03/charity-trustee-meetings-a-coronavirus-guide/>

Please also see our guide to charity regulation which signposts the Charity Commission's helpful assurance that its approach to regulation during this period will be "as flexible and supportive as possible": <https://bateswells.co.uk/2020/03/charity-regulation-coronavirus-latest/> OSCAR has provided similar reassurance to Scottish registered charities.

10) Report serious incidents

Remember the requirement to report serious incidents (including major governance breaches such as mass resignation of trustees, or significant loss of funds) to the Charity Commission and OSCAR, if registered in Scotland. Our guidance on SIRs during the present crisis is here: <https://bateswells.co.uk/2020/03/80015/>

11) Breach of duty

If a breach of duty (often called a breach of trust) gives rise to a loss to a charity, the trustees are vulnerable to a claim. Examples might include where the trustees knowingly allow funds to be spent for a purpose that is outside the charity's objects or unreasonably fail to take action to protect the charity's assets during the crisis.

Be reassured that it is rare for charity trustees to be held personally liable where they have acted in good faith, and the governing document will often protect the trustees from liability if they have. Remember, it is important to act reasonably and in good faith in these challenging circumstances; you are not expected to be perfect. Just because someone else would have taken a decision differently does not necessarily mean your decision was wrong. And even if your decision turns out to have been wrong, that does not necessarily mean you are in breach of any duty.

If you have concerns about compliance with trustee duties, make sure that you have reported (and continue to report) to the insurer.

For further information please contact:



Philip Kirkpatrick
Partner and Head of Charity
T: +44 (0)20 7551 7762
E: p.kirkpatrick@bateswells.co.uk



Erica Crump
Partner
T: +44 (0)20 7551 7782
E: e.crump@bateswells.co.uk