

# Charitable Status: Pitfalls for the Unwary\*

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Charity law is a vast and complex area of law. That said, it is a growing sector with over 500,000 charities in the UK and as a result, there are many useful resources and training sessions for new charities and their Trustees.

For pre-prepared clubs taking the step towards charitable status, it can be a very positive experience. For example, many of the external Regulatory requirements re-enforce Best Practice in Good Governance and encourage clubs to carefully review their practices. Such Best Practice will help a club to prosper and facilitate easier succession over time.

It is important that the move towards charitable status is done from an informed position, with the Best Interests of the club in mind. As with any area of regulation, there are pitfalls for the unwary, some of which are featured below:

## Charitable Objects

Many organisations may be undertaking worthwhile and benevolent activity, but unfortunately not all organisations are eligible in law to be charities. The law places clear requirements on what is “charitable”; this is generally comprised of four elements:

- It must be established on a not-for-profit basis;
- The formally stated objects/purposes of the charity must fall within one of the recognised categories of charitable purpose;
- Objects must be exclusively charitable; and
- The charity must operate for the public benefit.

\*This publication is a guide of general nature. Any examples are provided by way of illustration only. This publication is not intended as legal advice and it should not be relied on in place of informed legal advice tailored to your specific circumstances.



“The advancement of amateur sport” is a one of the recognised charitable purposes which is now recognised by the Charity Act 2006.

Interested clubs may also wish to review the Charity Commission’s guidance regarding fee-charging charities and if concerned, seek further advice.

### **Governing Document and Charitable Status**

Being a charity is a type of “status” rather than a form of entity in its own right. It is a common misconception that an organisation is a “charity” whilst overlooking the structural underpinning behind that status.

Most affiliated clubs are set up as “unincorporated associations” which is the simplest way of forming an organisation.

However, some clubs do look at alternative ways of being created, if they are more suited to the club’s individual circumstances. One alternative is to incorporate as a company limited by guarantee, sometimes also with charitable status (therefore creating a charitable company).

The constitution of the club will let you know how the club is currently set-up.

For a charity, this document will also contain the charitable objects. These essentially provide the charity’s foundations - without wholly charitable objects, the club would not be able to achieve charitable status.

The governing document also deals with the way in which the charity is governed, how it functions and what the trustees can and cannot do.

### **Trustees Duties**

Charity law place specific obligations on all trustees. It is therefore important that trustees of a charity are given appropriate training and keep up to date with their responsibilities; sometimes, people take on the role of trustees without fully appreciating the significance of their role and the commitment required.

The primary concern of good trustees is to ensure fulfillment of the duties and responsibilities of the role, some of which are set out below:

- Trustees are legally responsible and in certain circumstances personally liable for ensuring compliance with relevant legislation (for example the Charities Acts 1993)



and 2006 and the Companies Act 2006), as well as the requirements of regulatory bodies such as the Charity Commission. In order to do this, trustees should have an awareness of relevant legal principles established by the courts and keep up to date with legislative changes.

- Trustees of incorporated charities (ie charitable companies) should note that the Companies Act 2006 codified some of the duties of company directors from 1 October 2007.
- Keeping a rein on the charity's activities, ensuring that it does not stray from its charitable objects or the rest of its governing document and thus go beyond the parameters within which it is allowed to operate, also forms a major part of the compliance role.
- Trustees are responsible for the administration of the charity. This means that they need to meet regularly, delegate tasks and formulate strategy and policies to take the charity forward towards achieving its charitable objects. They may decide to set up committees to undertake work on the trustees' behalf.
- One of the most complex but most significant aspects of the role of administrator is ensuring that the distinction between governance and management is not blurred. Governance refers to the maintenance of the legal, regulatory and strategic parameters of the charity. The day-to-day management of the charity by the executive team should occur strictly within those parameters.
- Trustees should remember that whilst the governing document may give them the ability to delegate their powers, ultimate responsibility for the charity rests with them. This means that whilst they are able to delegate, they cannot 'pass the buck' for errors that delegates make. This is particularly important for larger charities, where trustees may have to delegate more owing to the sheer number of matters that require consideration. It is therefore crucial that trustees act with reasonable skill and care in all that they do, including delegation. They should never expose the charity to unreasonable or unacceptable risk.
- Trustees must always put the best interests of the charity above all else, and never allow personal interests to conflict with those of the charity. For example, a trustee should not receive any payment for the work they do as a trustee and neither should they benefit from their position in any other way (although reimbursement of out of pocket expenses is permitted and payment for goods and services supplied by a trustee to a charity can be made if certain conditions are met).



- Trustees must ensure that the charity is solvent at all times. They should protect the assets of the charity and ensure that such assets are only applied in furtherance of the charity's objects. Trustees must regularly review expenditure and keep accounts.

More information regarding trustee responsibilities can be found on the Charity Commission website: [http://www.charity-commission.gov.uk/Charity\\_requirements\\_guidance/default.aspx](http://www.charity-commission.gov.uk/Charity_requirements_guidance/default.aspx)

### **Trustees Insurance**

It is possible to take out specific insurance for trustees, called "Trustee Indemnity Insurance". However, if interested, the club should not assume that membership of the ASA automatically bestows this cover; membership does carry with it some insurance cover but not this type. This notwithstanding, the policy will not cover willful acts of negligence or acts of bad faith.

### **"Fit and Proper Test" for Trustees**

The Finance Act 2010 introduced a new "Fit and Proper" requirement for all new Trustees. Further details of this are on the HMRC website: <http://www.hmrc.gov.uk/charities/guidance-notes/chapter2/fp-persons-test.htm>

### **Ineligibility to be a Trustee**

Some new charities do not realise that the law disallows certain people from being a Trustee.

In broad terms, they must not have been convicted of a serious crime, must not have been declared bankrupt and must not have been disqualified as a company director.

Clubs should take care not to appoint anyone who is ineligible. It is a good idea to have a Trustee Declaration in place, confirming eligibility ahead of appointment. For help in drawing one up, please see: <http://www.ncvo-vol.org.uk/node/30092>

### **Gift Aid on Membership Fees**

It is a common misconception that it is automatically possible to recover gift aid on membership fees paid to a club. HMRC has published guidance in this area [http://www.hmrc.gov.uk/charities/gift\\_aid/rules/memb-subscript.htm](http://www.hmrc.gov.uk/charities/gift_aid/rules/memb-subscript.htm) and if the club wishes



to find out more, can be contacted on the Charities Helpline on Tel 0845 302 0203 (open from 8.00 am to 5.00 pm, Monday to Friday). Select option 6 for Gift Aid.

Please also see the ASA's Frequently Asked Question document in this area, which is available as part of the "Charitable Status" series.

### **Keeping Up-to-Date with New Rules and Regulations**

There are often changes to charity law (for example, the Charity Act 2007 introduced wide ranging changes to charity law), or other associated laws (for example, HMRC's fit and proper test was new this year).

It is important that trustees take a proactive interest in keeping up-to date.