

Charities and litigation - a guide for trustees

In August 2016, the Charity Commission issued [guidance to charities](#) on taking or defending legal action, and when the Charity Commission should be involved.

In this briefing, we look at the guidance and its background.

Why has this guidance been introduced?

The review of the guidance on litigation by the Charity Commission appears to be the result of press coverage which the Commission felt reflected badly on the sector.

The initial draft of the consultation very strongly emphasised the position which suggested that litigation should be a last resort for charity trustees and would rarely be relevant. It was substantially amended following criticism from a number of sources, including The Charity Law Association which pointed out the importance of charity trustees acting in the best interests of their charities and taking steps to protect those interests, including litigation where necessary.

The resulting guidance is not radically different from the previous guidance ([see CC38](#)).

The Commission regularly issues guidance which it is increasingly important for charities to observe. The Commission requires charity trustees to comply with its guidance even where the guidance amounts only to best practice rather than a legal obligation. This approach was signalled with the publication of the '[the essential trustee](#)' guidance in July 2015.

What does the guidance mean for charity trustees?

The guidance sets out the Commission's regulatory interest. It now places more emphasis on the expectation that charity trustees will be able to demonstrate that they have applied the principles of the guidance where their charity is involved in legal action. This requirement reflects the Commission's increasing view that departure from its guidance may be seen as a breach of a charity trustees' duties.

The guidance requires charity trustees to consider legal action only after they have explored, and where appropriate, ruled out other ways of dealing with issues in dispute.

What does the guidance cover?

The guidance deals with two core areas. Firstly it guides charity trustees and their legal advisers on taking and defending a normal legal action, and secondly it looks at the special case of 'charity proceedings'.

Charity proceedings are defined by Section 115 of the Charities Act 2011 and generally relate to the internal administration of a charity e.g. a disputed AGM or election, breach of trustee duty or challenge to trustee decisions. Before commencing charity proceedings, the charity or the third party must obtain the Commission's consent. The guidance deals with who may bring such proceedings and the criteria the Commission will use in authorising applications for charity proceedings. The guidance details what the Commission considers and what it will require in making a decision as to whether to authorise charity proceedings.

by an Order under Section 115 of the Charities Act. It also deals with the process of appealing a refusal by the Commission to authorise charity proceedings to a Judge of the Chancery Division.

What is the guidance on general litigation?

A section on general litigation deals with the powers of both incorporated and unincorporated charities to take legal proceedings and looks at the general principles which should guide charity trustees. These deal with the duties of charity trustees to protect charity assets, to defend the charity and their duty to act in the best interests of the charity, having considered whether or not another course of action is available. They require charity trustees to take stock, take and consider legal advice, consider the economic prospects of success and the impact, consider whether the action is proportionate and decide whether it is necessary to ask the Commission for consent.

Going forward

The Commission makes clear in its general guidance that it will require charity trustees to explain and justify their approach, particularly if they decide not to follow the good practice set out in the Commission's guidance. Charity trustees should familiarise themselves with this guidance and are advised to ensure that consideration and reconsideration of the issues in the guidance are well documented in their minutes.

For more ideas on good governance generally, come along to our '[Charity governance reviews and best practice](#)' seminar in Putney on 28 September.

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