

Eligibility and Disqualification

The rules relating to who can and cannot serve on the governing body of an organisation come from different sources. These include the organisation's governing document and legislation relating to that particular type of organisation. There are also requirements set out in the law relating specifically to charities and it is this area of charity law that is discussed below.

The governing document

An organisation's governing document may set out eligibility requirements, for example that a member of the governing body must live in a particular area or be a member of the organisation. Similarly, the governing document may also specify that a governing body member must stand down in certain situations.

Minors

In charities set up as trusts, trustees must be at least 18 years of age. Although this does not strictly apply to charities set up as unincorporated associations, the Charity Commission generally requires members of a charitable association's governing body to be 18 or over.

In charitable companies, the minimum age for a director is usually 16.

At the time of writing it is not yet clear whether the minimum age for trustees of a charitable incorporated organisation (CIO) will be 16 or 18.

Trustee benefits and conflicts of interest

Charity law generally requires that trustees must not benefit from their position and that they must not be in a situation where their interests are conflicted. This has important implications for charities which want to have trustees that are employees, users/beneficiaries or closely connected to the organisation in some other way. It also affects organisations wanting to pay trustees for serving on the governing body or other work done for the charity.

Capacity

To be a charity trustee, a person must be capable of understanding what trusteeship means and carrying out the duties of trustees. Unless a court has said that they are incapable of managing their own affairs, persons with mental ill health, a learning disability or a disability which affects memory or communication can be charity trustees.

It is crucial to ensure that they receive appropriate induction and ongoing training and support. They must be able to take part in decisions based on a reasonable understanding of the issues, including financial and legal issues, to assess the risks involved. The chair and

treasurer, in particular, must ensure issues, options and implications are appropriately explained.

Where capacity varies depending on a person's mental state, the organisation should have guidelines for dealing with situations where a governing body member appears incapable of acting appropriately as a trustee.

Charities working with children and vulnerable adults

It is an offence to serve on the governing body of a children's charity or an educational institution, or to serve on the governing body of a vulnerable adults' charity, while barred or disqualified from working with the relevant group. It is also an offence for anyone knowingly to offer a position to a person who is barred or disqualified from this type of work.

Trustees of charities working with children or vulnerable adults are in some situations required to undergo criminal record checks before becoming a trustee. As registration under the vetting and barring scheme is now being introduced, most but not all such trustees will have to be registered with the scheme. Even where it is not a statutory requirement, it is good practice for charities working with children or vulnerable adults to carry out such checks, and the Charity Commission recommends this.

Disqualification under charity law

In particular circumstances a person can be disqualified from acting as a trustee. The grounds for disqualification apply to trustees of all charities, including those which are exempt or excepted from registering with the Charity Commission. They are:

- having been convicted for any offence involving dishonesty or deception, unless the conviction is spent under the terms of the **Rehabilitation of Offenders Act 1974**;
- having been declared bankrupt or (in Scotland) having assets sequestered, unless the bankruptcy or sequestration has been discharged or permission has been granted under the **Company Directors Disqualification Act 1986** for the person to act as director of a charitable company;
- having made a composition or arrangement, including an **individual voluntary arrangement** with creditors which has not been discharged;
- having been removed by the Charity Commission or the high court from being a trustee of or for any charity;
- having been removed by the court of session in Scotland from being involved in the management of any charitable body;
- being subject to a disqualification order under the **Company Directors Disqualification Act 1986**, unless permission has been given to act as a director of a charitable company;
- being subject to an order made under the **Insolvency Act 1986** for failure to make payments under a county court administration order, unless permission to act as a charity trustee has been granted by the court which made the order.

Charity Commission waiver

Someone who has been disqualified on any of these grounds can apply to the Charity Commission for the disqualification to be waived. However, the Commission cannot override certain types of disqualification including one under a provision in a charity's governing document.

If a person has been disqualified for more than five years following removal as a charity trustee by the Commission or the courts, the Commission must grant a request for a waiver unless it has a good reason not to.

Serving while disqualified

It is an offence to serve as a trustee of or for a charity while disqualified. Any person who serves as a trustee while disqualified may be required by the Charity Commission to repay to the charity any expenses or other payments received whilst disqualified.

A charity's governing document may specify that the trustee automatically ceases to be a member of the governing body as soon as he or she becomes disqualified. If it does not specify this, the person should resign or, if necessary, be removed from the governing body under the procedure in the governing document or under the provisions of the **Trustee Act 1925** or **Companies Act**. While waiting for removal the person remains a trustee but must not attend meetings or take part in any way in managing the charity.

People who are disqualified and are not trustees can be invited to attend trustee meetings in a non-voting capacity, but need to be careful not to act in ways which could be seen as influencing or taking part in decisions.

Protecting trustees and the organisation

To ensure an individual does not inadvertently serve while disqualified, the Charity Commission recommends requiring all charity trustees, when elected or appointed, to sign a declaration that they are not disqualified from serving as a charity trustee. A model form is available from the Commission. The charity can make clear that the person may be able to apply to the Charity Commission for a waiver if he or she is disqualified.

The Commission also recommends that charities check:

- the register of bankruptcies and individual voluntary arrangements on the Insolvency Service website
- the register of disqualified directors on the Companies House website
- the register of trustees removed by the Charity Commission or courts, which is kept at Commission offices.

This article is based on an extract from the recently published third edition of the Russell-Cooke Voluntary Sector Legal Handbook.

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