

# CHARITY TRUSTEES WEBINAR SERIES

# Welcome

## Charity Trustees legal update webinar: Part two

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# CHARITY TRUSTEES WEBINAR SERIES

# Your hosts

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# Purpose of this session

- *“Learn five more things in 30 minutes to strengthen your charity in 2021”*

# 5-minute guides for charity trustees

- Purpose
- Finance
- Conflicts of interest
- Decisions
- Support

# 3. Managing conflicts of interest in a charity

- Identify
- Declare
- Remove? (where serious conflicts)
- Manage
- Keep records

# Identify conflicts



# Identify conflicts

- Financial conflicts
- Loyalty conflicts
- Examples:
  - Prince Andrew Charitable Trust (June 2020)
  - Combined Funds Limited (November 2020)
  - Bersam Trust (Feb 2021)
  - Afghan Heroes (March 2021)

# Declare conflicts

- Standard agenda item
- Register of interests
- Conflicts policy



# Consider removing conflicts

- What's in the best interests of your charity?
- Serious conflicts?
  - Majority of trustees have a conflict?
  - Single trustee?
  - Decision involves significant money or risk and there is a conflict (RSI?)
- Change your plan?
- Ask conflicted trustee to resign?
- Don't appoint a conflicted person?
- Appoint additional trustees?
- Delegate relevant decision-making?

# Manage conflicts

- Trustees (or connected person) shouldn't benefit from charity unless authorised (Prince Andrew Charitable Trust).
- Get CC agreement before your charity sells or leases land to a trustee.
- Follow your governing document (if necessary seek prior CC approval).
- Member conflicts? – Cliff case (July 2020)
- Combined Funds Limited CC inquiry (Nov 2020): Official Warning given for failure to manage conflicts of interest even where no loss suffered by charity
- Approach CC to authorise conflicts?
- Law Commission charity reform proposal:
  - Recommendation 26 (accepted by Govt): CC to have power to remunerate a trustee who has done work and it would be inequitable for the trustee not to be remunerated for that work.

# Keep records of conflicts

Record:

- What the conflict was
- Who or what it affected
- When it was declared
- How you managed it.

# 4. Making decisions at a charity

- Follow the principles
- Keep records from the start
- Follow your charity's rules and the law
- Get the information you need
- Plan your meetings
- Manage conflicts of interest
- Work together to make decisions
- Involve others at your charity

# First step: who are making the decisions?

- *“The more diverse the perspectives, the wider the range of potentially viable solutions a collection of problem solvers can find.” - Philip Tetlock*
- More than 60,000 trustees called either John or David - Civil Society, Nov 2017
- *Charity Governance Code refresh Dec 2020 – EDI*
- *CRUK EDI Strategy 2021-2023 (Feb 2021)*
- *Royal Horticultural Society to allow people from ethnic minorities and different backgrounds to be elected quickly.(The Times 20.02.21)*

# Follow the principles

There will not be a perfect solution. You must:

- act within your powers
- act honestly and with good intentions and only in your charity's interests
- be sufficiently informed, taking any advice you need
- take account of all; relevant factors
- ignore irrelevant factors
- manage conflicts of interest
- make a decision that is within a range of decisions that a reasonable body of trustees could make

# Keep records from the start

- Meeting minutes
- Marie Stopes International (as it then was) – December 2019

# Get the information you need

- “*Think about what you need to know before you can make your decision.*” (RNIB inquiry, CC learnings for big charities (June 2020))
- Only *relevant* information (don’t allow personal motives or prejudices to affect your decision) – Bhamani –v- Sattar Court of Appeal Feb 2021
- Consider getting advice (St Margaret’s Somerset Hospice)
- Consider who else to check with (National Trust)
- Data- Kruger Report, Baroness Barron - philanthropists



# Work together to make decisions

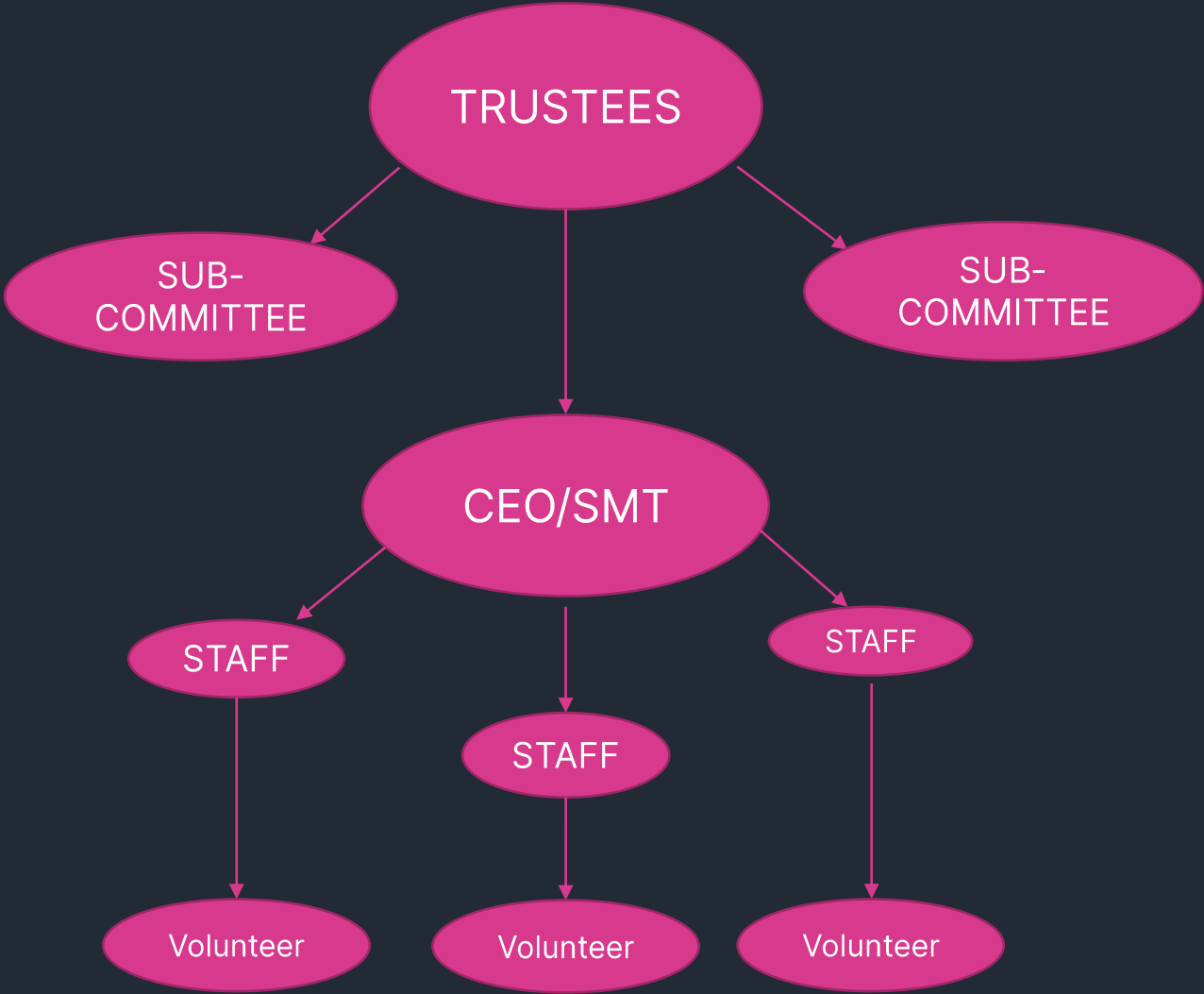
- Make decisions together: CAWRM Limited (influence of founder) (October 2020); Afghan Heroes (March 2021) – only two trustees effectively made decisions.
- Learn to agree to disagree: Central Gurdwara (March 2021):

*The inquiry concluded that disputes between the former trustees had a negative impact on the governance of the charity and they were unable to effectively manage the charity's finances. This amounted to misconduct and/or mismanagement in the administration of the charity by the former trustees.*

# Involve others at your charity...

- You may be able to delegate some decision-making to others at your charity, for example staff, volunteers or trustee committees. Many charities have the power to do this. But all the trustees remain responsible for any delegated decisions.

# DELEGATION WITHIN A CHARITY



# Official Receiver –v- trustees etc of Kids Company

Delegation of decision-making from board to CEO:

- Para 836. I have discussed these allegations in some detail earlier in this judgment, in particular in the general section addressing the question of dominance (from [579] above), and the section considering whether Ms Batmanghelidjh was a de facto director (see in particular from [736], dealing with the centrality of her role). In summary, Ms Batmanghelidjh did have a central role, including in developing strategy, but she was subject to supervision and control by the Trustees. They were the ultimate decision makers: see [588], [741] and [744] above in particular.
- Para 588: The evidence does not support a conclusion that the Board could not exert control over Ms Batmanghelidjh, but rather that it allowed someone who was regarded as a very effective CEO to operate under a broad level of delegated authority, without significant interference. The effect of doing so was that the CEO was making the “majority of decisions”.
- Para 744: At Board level, directors have the collective role of supervision and control described by Jonathan Parker J in *Re Barings* (No. 5). When carrying out executive functions as a CEO the individual in question is carrying out functions delegated by the Board, and is subject to supervision and control by the Board as a whole. This is the case even if the extent of delegated authority is significant.
- - Judgment of Mrs Justice Falk 12.02.21

# Law Commission reform: streamlined decision-making?

- Reports before selling land
- Releasing permanent endowment
- Failed appeals
- Ex gratia payments

# 5. Working with the Charity Commission

- The Commission's objectives (s14 Charities Act 2011) are to:
  - increase public trust and confidence in charities
  - promote awareness and understanding of the operation of the public benefit requirement
  - promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities
  - promote the effective use of charitable resources
  - enhance the accountability of charities to donors, beneficiaries and the general public
- The Commission's general functions (s15) include:
  - encouraging and facilitating the better administration of charities;
  - Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action
- The Commission's general duties (s16) include having regard to the principles of best regulatory practice (including the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed).

# Charity Commission priorities for 2020/21

*“Being open for business means that we will be a more confident regulator, giving voice to the issues which we know are of public concern. We will make it easier for the public and for trustees, who are trying to do the right thing, to contact us and to know that we are listening and responding to their concerns. Trustees will also find it easier to get the help they need, either from our contact centre or our guidance, in a format that they can understand. In our casework, we will become more agile, data driven and proactive. While we will continue to deliver service improvements, we will also focus on proactively identifying areas of concern and responding to them quickly, so that as we become better at detecting, deterring and preventing wrongdoing and harm, charities are better informed and more effective at protecting themselves.”*

# Working with the Charity Commission

- Charity register details
- Annual return, report and accounts
- Dealing with serious problems and reporting them to CC
- Free help, information and services you can get from CC
- Other sources of help to support trustees



# Annual return, report and accounts

- An opportunity, not a chore.
- Trustees' annual report:
  - The Charities (Accounts and Reports) Regulations 2008
  - Charity reserves policies: demonstrating and building resilience (Nov 2018)
  - Why should trustees explain the difference that their charity makes? (CC blog 10.11.20)

*CC reviewed 102 trustees' annual reports filed for the 2017 financial year. Only 4 out of 10 trustees' annual reports met the legal requirement to report on public benefit. Fewer than 1 in 10 charities went beyond this to make explaining the impact of their work an important part of their trustees' annual report. Six charities had focussed on the difference the charity had made to the lives of the people the charity was set up to help. Another charity had focussed on the charity's impact on wider society. None had covered both aspects.*

- Accounts

# Dealing with serious problems and reporting them to the CC

- If something goes wrong the trustees should consider if the problem has caused (or could cause) significant harm or loss to the charity or the people it helps. If so, it should be reported to the CC promptly as a serious incident, even if the trustees ask someone to do this on their behalf.
- Prince Andrew Charitable Trust (June 2020)
  - The Duke of York's household repaid £355,297 to the charity because trustees cannot be paid to act as directors of a subsidiary company, unless there is authority from the charity's governing document or the payments are authorised by the Commission or the court, none of which were in place at the charity.
  - This issue came to light after the charity reported to the Commission a potential reputational risk arising from significant media coverage of an interview with the Duke of York, broadcast by the BBC, in November 2019. The Commission found that resulting action taken by the charity and its subsidiaries was appropriate.
  - However, proactive examination of the charity's accounts and records at the time identified other issues of concern that required further attention.

# Free help, info and services from CC

- “CC” and Operational Guidance
- 0300 066 9197 (9am-5pm)
- Sign up for updates

# When might you need permission from CC?

- Changing governing document
- Paying a trustee or someone connected with them
- Buying, selling or leasing land from or to anyone connected with the charity
- Spending money or selling land that the charity should keep forever
- But, in the context of its general function to encourage and facilitate the better administration of charities (s15 CA 2011) and mindful of its general duty to have regard to the need to use its resources in the most efficient, effective and economic way (s16), the CC has pushed the Government to adopt many of the Law Commission's recommended reforms of charity law which will remove some red tape and lessen the need to secure CC approval in lower value/ low risk matters eg:
  - Power to release permanent endowment restrictions up to £25,000
  - Power to make ex gratia payments up to certain limits (depending on charity size) without prior CC authority

# Suggested further reading...

