

# **Abiding by the rule book**

Charity regulation  
and what it  
means for your  
organisation

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## Going by the book

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Voluntary organisations are accountable to multiple stakeholders – their donors, funders, beneficiaries, public supporters and staff, to name a few. This makes following the rules a complex business. As public awareness of the professionalism and commercial-mindedness of the UK's charities increases, so do the expectations of donors for accountability. In a climate of austerity, where reliance on charities is increasing, that means organisations must step up to the challenge.

One of the biggest talking points in the voluntary sector of late has been the Charity Commission's three year change-programme to make more effective use of its powers, begun under its new chief executive Paula Sussex. Underpinned by £8m of additional funding from the Treasury, and following criticism from the public accounts committee, this will be a significant year for charity regulation. In 2013-14 the sector's overseers opened 64 statutory inquiries (its most serious form of regulatory action) compared to 15 the year before – an increase of over 326%. According to the National Audit Office, so far the benefits are clear: the inquiries have led to £47m of charitable funds being accounted for.

If the enthusiastic debate surrounding this issue among charity leaders is anything to go by, regulation is hardly the dull and dusty subject one might presume it to be. We've seen other major talking points emerge recently too – notably the Lobbying Act, the new SORP (standard of recommended practice), the draft Protection of Charities Bill and the pension auto-enrolment scheme. Each throws light on how big the impact of legislative developments can be on the activities and financial stability of a charity.

We've put this practical guide together with exactly this in mind: to help charities understand regulatory best practice, as well as some of the key regulatory updates and legal cases we believe they should be keeping an eye on.

This is the fifth in a series of informative, practical guides that we are proud to have published in partnership with the Guardian Voluntary Sector Network. Visit our online Partner Zone to take advantage of these fantastic free resources: [theguardian.com/voluntary-sector-network-zurich-partner-zone](http://theguardian.com/voluntary-sector-network-zurich-partner-zone)

As a long-time supporter of the sector, we're keen to hear how charities are handling some of their challenges in this area. Please share your feedback with me by email: [amy.brettell@uk.zurich.com](mailto:amy.brettell@uk.zurich.com)

**Amy Brettell**, head of charities and social organisations, Zurich Insurance

## Searching for the straight and narrow

**Amy Brettell says that charities need to strike a balance between regulatory red tape and achieving their core mission**

It goes without saying that the charity sector is a heavily regulated one. Indeed, from the very outset of a charity's life cycle it must comply with rules that govern its formation and structure – such as evidencing public benefit and producing governing documents. Regulation then continues to run through everything it does, from fundraising to appointing trustees and paying tax.

It is easy to think of the Charity Commission as the sector's only regulator, when in fact voluntary organisations face a plethora of different bodies that oversee their activities. Indeed, the Institute of Fundraising identifies more than a dozen regulatory bodies that charities should bear in mind with regards to the legality of their work (including the Fundraising Standards Board, the Information Commissioner's Office, and the Financial Conduct Authority). Failure to comply with this broad rulebook can leave organisations open to legal challenges, reputational crises and – for trustees and staff – the threat of losing their job, facing fines and even arrest.

**“Charities shouldn't get distracted from delivering on their core purpose by getting tied up in red tape”**

No wonder then, that (especially for smaller charities) compliance can feel like a minefield. However, while understanding and integrating compliance best practice is part of the backbone of a charity's success, it is vitally important that charities do not get distracted from delivering on their core purpose by getting tied up in red tape. Regulation should be an invisible motor that steers a charity on the right course.

### Why comply?

The knock-on effects of failing to comply with regulatory requirements can pose various risks for a charity. For instance, an inquiry from the Charity Commission could cause damage to a charity's core purpose by reducing funding, decreasing competitiveness when bidding for contracts, or creating mistrust among service users.



Financial risks are also a key concern – such as penalties levied by courts if an organisation (or its trustees) are deemed liable for actions committed by staff or volunteers. There is also the risk of an insurance claim, should harm come to an individual or property during the course of a charity's engagement with them.

Reputation should also be kept in mind, as damage to reputation is a risk that tends to piggyback onto other risks. Failure to comply with data protection laws, for instance, could have serious reputational consequences if a charity was to lose control of sensitive data.

The ever-changing regulatory landscape means that staying on top of new bills is essential. As Julian Smith and James Maloney outline on page 7, bills passing through parliament can have important regulatory outcomes for charities and those that govern them. It is important to ensure that the sweep of a politician's pen doesn't leave your charity vulnerable to unintended consequences.

As Zurich's legal associate Nicholas Thorne outlines on page 13, charities should also be aware of the risks posed by liability laws, such as non-delegable duty of care and vicarious liability. If a children's charity outsources their care service to a third party, for instance, they could still be held ultimately responsible if an accident occurs.

## TOP TIPS

How can charities embed an awareness of regulation and law, and stay on top of new developments?

**Start at the top:** leadership should be shown by trustees, the chief executive and senior directors

**Bring it to life:** demonstrate what these regulations and laws actually mean for work done at ground level

**Clarity of communication:** make sure that staff in your organisation are hearing the same messages, and that they are reinforced regularly

**Encourage personal responsibility:** it is important that people feel comfortable speaking up when something goes wrong

**Brief your volunteers:** volunteers and others who interact with your organisation on a part-time basis should also understand their roles and responsibilities

**Keep an eye on other sectors:** regulatory developments in the public sector, for instance, can often precipitate changes in the charity sector e.g. Duty of Candour which was introduced in the NHS in 2014



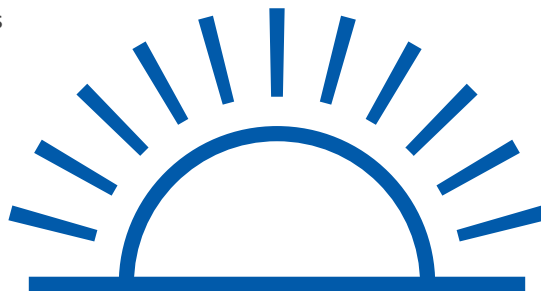
## On the bright side

Regulation can feel daunting, particularly for smaller charities and community groups. Yet compliance is a real opportunity for organisations, and the sector overall, to demonstrate competence, integrity and trustworthiness. Many would argue that regulation gives the sector great credibility and engender public trust, serving as a badge of quality.

New bills create more rules, but can also bring great opportunities. The Social Action, Responsibility and Heroism (SARaH) Bill for instance, proposed in 2015, is designed to reassure those taking part in voluntary or community activities that a court will consider the good intent of their actions if something should go wrong. This could have a positive impact for charities, such as encouraging more people to volunteer.

Regulatory best practice means finding cohesion between a charity's risk appetite, broad vision, and regulation. Over-cautiousness should not hold back innovation.

*Amy Brettell is head of charities and social organisations at Zurich*



## Regulation on the horizon

Charity leaders should always be keeping their eye on regulatory changes. Julian Smith and James Maloney outline two of the most important ones

### The protection of charities bill

The bill, currently in draft stage, was published in late 2014 following concerns about charities being used to finance terrorism, or as a means of tax avoidance. It would further strengthen the Charity Commission's powers to remove and disqualify charity trustees, and to protect charity property.

The bill proposes a new power for the commission to issue statutory warnings against charities or their trustees.

This kind of regulatory power is one enjoyed by other sector regulators (for instance, the Care Quality Commission, which oversees the healthcare sector). It is expected to be used about 25 times a year, for cases of medium level non-compliance. Importantly, there is no right of appeal.

It also adds a new list of offences which will automatically disqualify a person from being a charity trustee. These include money-laundering, bribery, perjury, perverting the course of justice, contempt of court and various offences related to terrorism.



The bill also gives the commission a wide discretionary power to disqualify a charity trustee. While this has been welcomed in principle, the bill does not lay down clear criteria and procedures. A joint parliamentary committee broadly welcomed the bill's proposals this spring, publishing a report including recommendations on its eventual enactment.

“Many have cautioned that the Charity Commission’s new powers should be used proportionately”

The bill has received a mixed response from the sector. Many have cautioned that new powers should be used proportionately. Others have questioned whether the commission has the financial resources to use any new powers. The commission has welcomed the bill but expressed disappointment at the likely delay in its implementation.

## Case study

### Planning ahead for new finance rules

**Rui Domingues, former director of finance & ICT at Friends of the Elderly, explains how he and his team prepared for the new SORP**

We were on a path of discovery for two years before the new charity Statement of Recommended Practice (SORP) – the rules that govern charity accounting – were established. Why? Because getting it wrong could affect our ability to access funding from donors (individual, corporate or trusts) and other financial sources. **The acronym U.N.C.L.E. helped us prepare for this change.**

**Understanding:** reading the SORP was the first step, along with establishing which SORP would apply (as there are two). The Charity Commission also produced a brilliant microsite ([charitySORP.org](http://charitySORP.org)), with useful help sheets.

**Numbers:** this meant getting into the numbers and the system changes that would be needed; for instance, how introducing pension liabilities to our balance sheet would affect our reserves

**Communication:** we shared key messages about the change with internal stakeholders (such as trustees, committee members, senior staff) and started to plan external comms (with trusts, statutory funders, donors)

**Lessons:** the charity sector is strong because we share information. I presented lessons learned at conferences and networking meetings, and would encourage others to do the same

**Engage:** our prior year’s accounts also need to be shown in the new SORP format. So now is the time to engage early in collecting the right data



## Charity Commission guidance (CC3)

Another important regulatory issue that charity leaders, and especially charity trustees, should be aware of is the recent consultation on The Essential Trustee: what you need to know (CC3). This is a core guidance document that sets out what the commission expects of charity trustees. The most significant potential change is a blurring of the lines between legal requirements and good practice standards (that are not legal requirements). Under the proposals, if trustees do not follow specified good practice, the commission may treat this as evidence of misconduct or mismanagement. This change is important because of the way it could interact with the protection of charities bill – particularly the commission’s power to remove trustees from office where there is evidence of misconduct or mismanagement.

However it remains to be seen what emerges from the consultation (which ended on 17 February 2015) and what approach the commission takes.

*Julian Smith is a partner and James Maloney is a senior associate at Farrer & Co*



## HOW CAN CHARITIES PREPARE?

### The draft protection of charities bill

The bill would, if enacted in its current form, bolster the commission’s powers to intervene in the running of charities. Much of the bill is likely to be of little concern to well-run charities. However, charities will want to have procedures in place to respond if a warning is issued against them.

### The new CC3

If the new CC3 that emerges is the same as the consultation draft, it will become particularly important for trustees to understand the consequences of not following good practice guidance.

The publication of a new CC3 also presents a good opportunity for any charity to review its own governance procedures and to confirm these meet modern standards.

The commission’s updated guidance on conflicts of interest is particularly relevant, which has already encouraged some charities to review and update their conflicts policies and procedures at meetings. This can be read at: [www.gov.uk/government/publications/conflicts-of-interest-a-guide-for-charity-trustees-cc29](http://www.gov.uk/government/publications/conflicts-of-interest-a-guide-for-charity-trustees-cc29)



## In thee we trust: regulation and trustees

**Trustees bear the ultimate liability for an organisation and its actions. Sarah Miller of the Charity Commission outlines their responsibilities and what to do if something goes wrong**

How can I make sure my charity is acting properly? Where do I go to find out what rules are relevant to my organisation? Who can help me if I need guidance? These are questions that will run through the minds of all charity trustees and chief executives at some point. The charity sector is a vast one and the sheer amount of information and guidance can be daunting.

“Whether you are a small organisation or very large, the rules you need to know are quite similar”

Trustees hold the ultimate responsibility for their charities. They are responsible for the behaviour of the chief executive and staff, and for the overall governance of the charity.

Trustees play a vital role in a charity’s health, volunteering their time and working together to make essential decisions about the charity’s finances, activities and plans for the future. Becoming a trustee is an excellent way to

learn new skills, enhance professional development, and gain experience in a charity at a strategic level. So how can trustees ensure they are up-to-speed on their regulatory obligations? Our job is to make sure charities know what they have to do, the public know what charities do and that charities are held to account. Unfortunately it’s not as simple as “the Charity Commission is a one-stop shop”, we are a good place to start. Whether your charity is small or very large, the rules and information you need to know are quite similar, and our guidance is written to be accessible to all.

### Valuable resources

It’s very important that as a trustee you read our guidance to make sure you’re working within charity law.

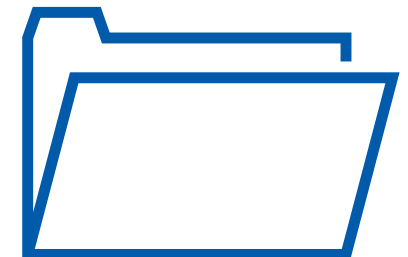
Your starting point may be The Essential Trustee (CC3), which includes trustee duties and responsibilities at a glance, notes on compliance, useful definitions and what to do if things go wrong. It is especially important to keep on top of this guidance in light of forthcoming changes (see page 7 for more on this). Chief executives should also have a working knowledge of our guidance, for instance on issues such as campaigning, or the importance of financial controls, but the trustees hold the ultimate responsibility.

Communication is also key. If something goes wrong in your charity, or you suspect it is going to, report it to us. This is called making a serious incident report. We can then ascertain whether we need to get involved and, if we do, how we need to go about it.

### Know your responsibilities

Understanding what’s expected of you as a trustee is important. Sometimes trustees make genuine mistakes, and we recognise this. If something goes wrong, there are several things we may do. In some cases we simply offer guidance and advice to help get the charity back on the right foot, or we may need to obtain further information. In the most serious circumstances we can open a statutory inquiry, a legal power enabling us to formally investigate a charity and to use our protective powers for the benefit of the charity and its beneficiaries, assets or reputation.

Take a look at our case reports and inquiry reports and see what lessons you can take away. These reports describe what went wrong in a charity, how we got involved and what the outcomes were. Use them to help you ensure that you don’t make the same mistakes.



## Stay on your toes

Like any sector, the charity world is always changing, so try signing up to newsletters delivered to your inbox.

Finally, there are a lot of organisations out there who can also help. Umbrella bodies such as the National Council of Voluntary Organisations (NCVO), Small Charities Coalition and the Association of Chief Executives of Voluntary Organisations (ACEVO) are there to listen, and offer information and support. The Institute of Fundraising promotes best practice in fundraising, and HMRC is where queries on tax and gift aid should be directed.



“A question at the forefront of a trustee’s mind should be: is my charity accountable to the public?”

Overall, the two questions that should be at the forefront of your mind as a charity trustee are “am I fulfilling my duties?” and “is my charity remaining accountable to the public?” By reading our guidance, filing your charity’s annual information on time and considering some of the points raised here, you’ll make a great start on answering these questions. Understanding your role and duties is vital in order for you to run your charity correctly, but once you do, trusteeship is immensely rewarding in many ways.

*Sarah Miller is the head of press and public affairs at the Charity Commission*

### VALUABLE ONLINE RESOURCES FOR TRUSTEES

- The Essential Trustee (CC3): guidance on the responsibilities of being a charity trustee and the rules with which trustees must comply [www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3](http://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3)
- Serious incident report: how to alert the Charity Commission of a serious incident [www.gov.uk/how-to-report-a-serious-incident-in-your-charity](http://www.gov.uk/how-to-report-a-serious-incident-in-your-charity)
- Case studies: these reports of Charity Commission regulatory casework offer lessons to be learned [www.gov.uk/government/publications/case-reports-charity-commission](http://www.gov.uk/government/publications/case-reports-charity-commission)

## Taking responsibility for others

**Nicholas Thorne explains why every charity should know about the key rules and court decisions on vicarious liability and the delegation of care to third party providers**

Awareness of legal liability is essential for those in the voluntary sector, particularly because of their focus on caring for communities and vulnerable people.

New partnerships and ways of working have brought fresh challenges, both in their dealings with outsourcing bodies and with the greater range of activities now being undertaken. Two concepts in particular need to be considered and understood.

### Non-delegable duty of care

**In brief: in certain circumstances, an organisation will remain ultimately responsible for the safe delivery of a service even if that service has been outsourced to a third party**

Non-delegable duty of care gained notoriety following the decision by the supreme court in 2013 in the case of *Woodland v Essex*. In this case, a school outsourced the provision of swimming lessons during school hours to a third party provider at a local swimming baths. Tragically, a pupil suffered a near-drowning incident, and as a result she sustained severe brain damage.

Although the school had delegated the swimming lesson, it was deemed to owe a non-delegable duty of care to the pupil. The school was therefore liable for the negligent performance of the third party that was providing the swimming lesson.

There were a few key factors that established this. One was that the pupil was a child and thus vulnerable, the second was that the lesson took place during school hours, and the third was that the swimming lesson was an activity the school had assumed a duty to perform, even though it had outsourced that activity to another provider.

Charities should take note of this court decision, particularly because it could apply to those persons who are especially vulnerable, dependant on others for care, or at risk of injury. For example, residents of care homes were specifically mentioned in the court’s judgment.





It is quite clear that outsourcing bodies such as local authorities, as a consequence of court cases such as these, will seek to ensure their contracts for services with charities are watertight.

For example, we may see local authorities putting more emphasis on ensuring that the employees/volunteers working for the charity are competent, that they have the appropriate qualifications and are suitably trained to be delivering the service. Equally, a charity that outsources any part of its care should seek similar assurances from its contractors. With partnership working on the rise, there may be an increasing need to interrogate contracts carefully so as to understand where liability really sits.

## Vicarious liability

**In brief: an employer may be held liable for the negligent acts or omissions of their employees, or even the actions of their volunteers**

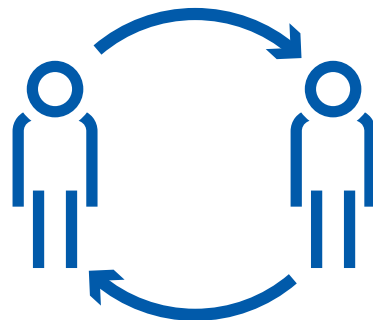
Vicarious liability is similar to non-delegable duty of care, but it is not the same. For example, in the previously discussed *Woodland v Essex* case, had the lifeguards and swimming teachers been employed directly by the school (and not by a third party), then the school's "vicarious liability" for their negligent actions would have been established instead.

*"Trustees should pay particular attention, as it is they who may be held responsible for the actions of others"*

Charity trustees should pay particular attention to vicarious liability, as it is they who may be held responsible for wrongful acts or omissions committed by those working for their charity. The Charity Commission provides further guidance on this:

[www.gov.uk/government/publications/vicarious-liability-of-a-charity-or-its-trustees](http://www.gov.uk/government/publications/vicarious-liability-of-a-charity-or-its-trustees)

It is important to note that, for liability to attach, an accident simply taking place at work is not sufficient – it is necessary for there to be a close connection between the accident and the nature of the work (such as an accident which occurs while directly administering care or other core services). Courts will take a practical approach when an employee's actions are contrary to any instructions given.



For example, in the very recent 2015 case of *Graham v Commercial Bodyworks*, where a car bodyshop employee was burned after a colleague sprayed his overalls with a flammable liquid and then used a cigarette lighter in the vicinity, the employer was not held vicariously liable because this "prank" was deemed "reckless conduct" that did not relate to the employee's work.

*"Charities would be well-advised to ensure they know who is doing what on their behalf"*

Of greater concern to charities will be the diversity of their workforce, which include both paid employees and volunteers. Where an element of control is exercised over the volunteer, then arguably they too will be considered an employee of the charity and vicarious liability can attach.

Charities would be well-advised to ensure they know who is doing what on their behalf and in their name. Reliance on volunteers is central to any charity's operation, but a careful assessment of their activities does need to be undertaken to ensure charities do not fall foul of the law.

*Nicholas Thorne is a partner at BLM, a risk and insurance law firm and one of Zurich Insurance's panel solicitors. If you have any questions about the issues discussed in this article, speak to your insurer*



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on behalf of Zurich Insurance.

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