

# DIRECTORY OF SOCIAL CHANGE

INFORMATION AND TRAINING FOR THE VOLUNTARY SECTOR

**DSC Response to the Consultation on the new draft of CC3: The Essential Trustee: what you need to know, what you need to do.**

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**Ciaran Price**  
Policy Officer  
Directory of Social Change  
Resource for London  
365 Holloway Road  
London  
N7 6PA  
[www.dsc.org.uk](http://www.dsc.org.uk)

## Background to the consultation

The Charity Commission as part of its role as a provider of regulatory advice and support publishes a guide called “The Essential Trustee” which aims to inform trustees about their responsibilities and help them make better decisions for their charity. The current version of the guidance was published in March 2012, and predates a number of changes to charity law and guidance. The Commission is consulting on The Essential Trustee in order to produce a more up-to-date version which will be more interactive allowing readers to navigate to different sources of advice.

It aims to rectify an on-going confusion in how the Commission communicates its expectations to charity trustees. In short there are things which trustees “must” do, where failure to do so would directly breach a law. There are also things trustees “should” do which, while not required directly by law, are no less important as failure to follow guidance could result in the mismanagement of the charity which itself is an offense. The version presently being consulted upon aims to clarify this and dispel any possibility that what a trustee “should” do would be interpreted as discretionary.

The Directory of Social Change, as a provider of training and information on charity governance and publisher of the Charity Trustees Handbook, has a major interest in this consultation. We recognise the importance of “the Essential Trustee” and welcome this opportunity to contribute to the development of the Commission’s advice to trustees pursuant to our principle of responsible regulation (see page 7) and our aim to ensure that charity trustees get the best possible advice and support.

## Key points

- The draft is generally clearly explained, but **the tone is overly negative** – focusing almost exclusively on the rules, responsibilities and even penalties of being a trustee, as opposed to the benefits and importance of being one. As such it risks turning talented people away from trusteeship.
- The draft makes progress in clarifying what is expected of trustees in relation to the distinction between what they “must” and “should” do. The way this distinction is phrased will be key (see Q6 statements a, f & h). In particular, the significance of not following ‘best practice’ needs to be communicated better by illustrating the **consequences to beneficiaries**, such as the diminished service that may result from poor management.
- The discussion of trustees’ liability in part 11 could usefully be introduced earlier in the document, which would alleviate some of the negative framing of the trustee’s role in the beginning of the document.

## Responses to the consultation questions

### Question 1: When did you last use the current version of The essential trustee?

1.1 The DSC regularly consults CC3 when conducting governance activities and when designing and delivering governance training.

### Question 2: Which version of the guidance do you find most helpful overall? Please say why.

2.1. Some aspects of the new draft guidance are more helpful than the older version and vice versa. The new draft is far more succinct and the format is better in that it has dispensed with the short answer-long answer approach which was repetitive. It is easier to understand and it is shorter by 10 pages making it more accessible. The new draft also develops a much clearer understanding of what is expected when the Commission says a trustee “must” do something and “should” do something. The ability to navigate to different sources of information is highly beneficial.

2.2. The tone of the older version of CC3 is much more preferable however. From the outset (in B2) it establishes an understanding of trustees as people who “wish to create positive change in society” and that their work should be “rewarding and enjoyable” which is hugely encouraging and reflects the importance of trustees to a charity. Compare this to the new draft which dedicates very little to developing a proper understanding of trusteeship, opting instead to effectively warn trustees from the beginning. The very first paragraph (part 1) reads: “...you are responsible for people, money and other charity assets. Good intentions alone aren’t enough...”. It is strongly advisable to revert back to a tone more similar to that in the older version.

2.3. In the newer version it is difficult to understand the basis for some of the ‘best practice’ guidelines. The purpose of this guidance is to inform trustees so that they can make the right decisions. However on a number of occasions **the guidance appears to become more directive and prescriptive**, stepping outside of the original brief and effectively micro-managing. For example, in 6.1 it states that “the most effective way of fulfilling a charity’s aims may involve merging...[or]... closing.” This seems like very specific advice that is specific to individual cases- it might be the best option for a charity in certain circumstances, but the regulatory basis of this advice as ‘best practice’ is not founded. Furthermore, as per 5.2 of this response, the guidance lays out “best practice” with regard to the recruitment criteria of trustees. Again it is difficult to understand the basis of this advice.

### Question 3: Is the explanation of trustees’ responsibilities clear and easy to understand? If not, what didn’t you find clear? How could the commission make it clearer?

3.1. While explanations are generally clear, the draft suffers from **an imbalance of tone that could put off very good prospective trustees**. Trustees’ responsibilities are framed in a negative and disciplinary manner from the start, with no explanation of the benefit and importance of the role. The draft on the whole lays out what is expected of trustees in terms of rules, and the negative effect of non-compliance. Too often, it fails to illustrate that the ultimate result of not following guidance is that the charity will be **less effective at meeting the needs of its beneficiaries – which should be central**.

3.2. This approach could dissuade people from entering trusteeship, especially where the issue of personal liability is not fully explained early on. This is the case in part 4 where there is an unqualified statement that “in some cases trustees may have to reimburse the charity

personally.” While this is elaborated upon in part 11, this will have a **detering effect** on the reader. It should be communicated that this outcome is extremely rare and would occur in instances where a trustee had wilfully abused their position.

3.3. In a similar way, confusion is caused by other statements that only give part of the overall picture. For example, in 2.1 it states that people who have been convicted of an offence involving dishonesty or deception are disqualified from trusteeship. This is not accurate as the disqualification order extends only to unspent convictions in these cases. While this is cleared up in 3.1 the message needs to be more consistent to avoid confusion.

3.4. The advice given in 7.6 advising that trustees avoid being “too trusting” is jarring, vague, and arguably even misleading, and it is not clear what this passage is intended to achieve. This is not an issue about trust but rather best practice which should be applied uniformly.

3.5. In part 7 some issues need clarifying. In particular the statements that trustees must “not take inappropriate risks” and “not over-commit the charity”. These statements are too vague and it is not established what the Commission means by what constitutes an appropriate risk are, or over-committal. In any case, it is the responsibility of the board of trustees to decide what is an appropriate risk, not the Commission.

#### **4. Does the guide cover all the essentials that trustees need to know about their duties? If not, what is missing?**

4.1. The draft repeatedly places the onus on trustees to ensure that they keep themselves “adequately informed”. In part 1 a stated aim of this guidance to help trustees know how to find more information when they need it, and contains hyperlinks in certain sections to this end. The Commission’s website is cited as a source of information (2.1), and the guidance signposts to two webpages, one of which has the contact details for different advisory groups (8.2). **The Commission’s role as the primary provider of regulatory advice and support should be established better** in this document. The Commission’s helpline, an important if declining resource for trustees, is not mentioned once.

4.2. The problem of help, and where to find it, relates to the issue of negative tone. Trustees are told to “inform the Commission” if something goes wrong, but this negative framing approach is not as effective as encouraging trustees to seek advice from the Commission so they are better able to get things right the first time and avoid something going wrong.

4.3. Part 7.2 deals with different income generation methods and how trustees should approach the risks and legal obligations associated with fundraising, trading, investment and leasing. It makes only passing reference to the significant and growing source of charity income through contractual arrangements with public and private bodies. The world of procurement gives rise to a number of risks, particularly to the integrity of a charity as an independent organisation from the state, its ability to deliver services to the most vulnerable people, and its ability to be properly transparent. This could be more clearly emphasised than simply including the hyperlink in 7.2.2.

4.4. As we have seen, contracts often require charities to be silent on certain issues including the nature of the contract and how the money is used. Contracted service providers may be used as scapegoats for what is ultimately the failure of public commissioners, with considerable reputational concerns for the charity. The nature of contracts makes it difficult for charities to fulfil the requirement to “be open about how [it] spends its money” and “be willing to respond openly and honestly to concerns, criticisms or complaints...” as per part 9 of the new draft. Trustees need to be aware that these arrangements can make ‘best practice’ difficult to achieve.

## 5. Do you understand the distinction between what trustees 'must' and 'should' do?

5.1. Yes, the distinction is clear for the most part.

5.2. However some of the things which fall under "good practice" - and are therefore a requirement - appear not to have been fully thought through. As per 6.6, "It is good practice to recruit trustees for the skills, experience and background they bring to the charity". Does this fall into the category of what the trustee board 'should' do? While skills are an important consideration, **ignoring the importance of values and passion for the charitable cause is short-sighted**; this is what motivates people to volunteer. It is difficult to see how filling a charity's board with people who don't really care about the issues the charity is addressing, but who are nevertheless professionally skilled in accounting or project management for instance, can really be in that charity's best interests. While the importance of "commitment" is mentioned in 8.1, what this means is too unclear. Does it mean time commitment for example?

## 6. Which of the following statements about what trustees 'should' do are helpful in explaining what it means (please answer for each):

### a. minimum good practice requirements

This phrase is useful as it communicates, without being too forceful, that there is a minimum standard requirement in the absence of any direct legal obligation. However, as per 5.2 of this response, there is possibly confusion between "good practice" and "minimum good practice" as both phrases are used in this draft.

### b. specified good practice

This is unhelpful as it does not communicate what the Commission means by 'should'. It adds another phrasing casting doubt as to whether or not this form of good practice is optional. (see above point regarding the phrase "good practice")

### c. there is no specific legal requirement

Alone this statement is unhelpful and perpetuates the confusion that what a trustee 'should' do is second place to that which a trustee 'must' do. This was not the intention. Whether or not something is a legal requirement should not be a central consideration as many non-legal requirements (the 'shoulds') are just as important to the proper governance of a charity.

### d. the commission expects you to comply

This is unhelpful – it seems heavy-handed in tone and does not explain the consequences of not meeting the Commission's expectations.

### e. if you don't comply, the commission may ask you to explain and justify your decision

This is somewhat helpful in the way it at least recognises that there are always different approaches that can achieve what the Commission expects.

### f. if you don't comply, you may be in breach of a legal duty

This is useful as it is making the facts clear. The use of the word 'may' is also welcome. However there could be confusion between an indication of possible enforcement action as opposed to non-compliance potentially leading to the charity's ineffectiveness.

### g. if you don't comply, it is difficult to see how you can satisfy your legal duties

This is unclear and not helpful. Trustees exist to ensure the charity meets the needs of its beneficiaries, not to meet legal requirements. A better approach would illustrate how

non-compliance could impact badly on beneficiaries.

**h. if you don't comply, the commission may treat this as evidence of misconduct or mismanagement**

While again the tone is edging in the wrong direction, this is somewhat helpful in the sense that it makes the connection between the requirement to follow best practice and the regulatory consequences for not doing so, in the absence of any direct legal obligation.

**7. Do you think the guidance strikes the right balance between:**

- **reassuring trustees that the law protects them if they comply with their legal duties, and**
- **highlighting the potential consequences of acting negligently or in bad faith?**

**If not, where does the balance need to be adjusted?**

7.1. In a word, no. The tone of the draft is far too imbalanced towards pointing out negative consequences and away from reassurance. Further, it does little to 'sell' the crucial role of trusteeship to trustees – in fact the opposite. This is not only about tone but the ordering of the different sections. For example, part 4 states that trustees “may have to reimburse the charity personally” in cases of wrongdoing or negligence and does not explain this further until part 11. While part 11 does offer some reassurance to the reader, it is important to have a consistent message throughout. **A prospective trustee reading this guidance to decide whether to make the commitment to trusteeship may well have given up at part 4.**

7.2. It is important to ensure that the guidance does not falsely give the impression that charities are uniquely problematic, especially where this cannot be backed up by evidence. In 6.5 for example it does this by stating that “Conflicts of interest... are quite common in charities.” There is no substantiation of this with evidence. The phrasing doesn't give the impression that it may be common but is not necessarily a problem if handled appropriately.

7.3. As for consequences, the document could do more to capture the fundamental issue at stake: **that a failure to adhere to best practice guidance could lead ultimately to the demise of the charity**, and compromise the effectiveness of the charity to the ultimate detriment of the charity's beneficiaries.

**8. 'The essential trustee' is a familiar title to trustees and charity advisors. Should the commission keep this title? If not, what should the guide be called instead?**

8.1. “The Essential Trustee” is a good title and reflects the importance of the document. However the proposed tagline “what you need to know, what you need to do” only reflects the overweening focus on requirements of the tone therein, and not what really matters-meeting the needs of beneficiaries. A better title could be along the lines of: “The Essential Trustee: what you need to know to govern your charity effectively”.

**9. Some trustees seem to be unfamiliar with their duties. What more could the commission do to raise awareness of this guidance? How could your organisation help?**

9.1. It might be useful to dedicate a part of this document ideas a charity might use to make better use of this guidance. 11.3 already recommends giving a copy of the guidance to new trustees. It might be more effective too if trustees (or certain officers) had it to hand during meetings.

9.2 The guidance needs to be promoted to charities and prospective trustees. There are any

number of ways to do this, for example during Trustees Week. The Commission could support organisations such as DSC, which already provides support in this area, to deliver specialised workshops to benefit charity trustees.

## About the Directory of Social Change

The Directory of Social Change (DSC) has a vision of an independent voluntary sector at the heart of social change. We believe that the activities of charities and other voluntary organisations are crucial to the health of our society.

Through our publications, courses and conferences, we come in contact with thousands of organisations each year. The majority are small to medium-sized, rely on volunteers and are constantly struggling to maintain and improve the services they provide.

We are not a membership body. Our public commentary and the policy positions we take are based on clear principles, and are informed by the contact we have with these organisations. We also undertake campaigns on issues that affect them or which evolve out of our research.

We view our role as that of a 'concerned citizen', acting as a champion on behalf of the voluntary sector in its widest sense. We ask critical questions, challenge the prevailing view, and try to promote debate on issues we consider to be important.

## DSC's principle of Responsible Regulation

DSC believes that voluntary activity should be regulated responsibly. Some regulation is necessary to safeguard and maintain the interests of the general public, the beneficiary, and of the organisations and individuals being regulated. However, it should have a demonstrable benefit and should aim to empower and strengthen voluntary activity rather than control it unnecessarily.

We believe that:

- a) **Regulation should be proportionate** – it must strike a balance between perceived risk and intended benefit. It should recognise the diversity of voluntary sector activity and be developed and applied in a proportionate way.
- b) **Regulation should be appropriate** – it must be informed by the characteristics, capacity, and needs of the organisations and individuals that are being regulated. Insofar as is possible it should be focussed, rather than acting as a blunt instrument that has unintended effects.
- c) **Regulation should be enabling** – it should seek to empower rather than control voluntary activity. The reasons for the regulation and the regulation itself must be properly understood by those institutions which are applying it. It should be accessible and intelligible to those being regulated. It should seek as far as possible to encourage self-regulation rather than focus simply on enforcement.