

CHARITIES

GUIDANCE FOR ORGANISATIONS ON BECOMING A REGISTERED CHARITY IN THE FALKLAND ISLANDS



WHAT IS A CHARITY?

A "charity" is defined under the Charities Act 1960 as *"..any institution, corporate or not, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities"*. To be charitable, the legal requirements set out below must be satisfied.

HOW IS A CHARITY DEFINED IN LAW?

The three tests for what constitutes a charity is determined by common law:-

1. A charity is an organisation which benefits the public, or a sector of the public.
2. The charity's purpose is what it is set up to achieve and the objects of the charity must fall into one or more of these four categories:

Relief of poverty

Advancement of religion

Advancement of education

Public purposes.

3. The people involved in the running of the charity must not be able to gain personally during its operation, or on its winding-up.

WHY REGISTER YOUR CHARITY?

Charities law in the Falkland Islands are regulated is based on the English Charities Act 1960, the Charities Act 1985 and the Charitable Trustees Incorporation Act 1872.however it was not enforced until a change in the tax legislation in 1997.

This change in the tax legislation in 1997 enabled resident individuals and companies to claim tax deductible acknowledged donations of £50 or more, made in any year to a charity.

This then gave rise to the regulation of local charitable activity and a register of charities was created. (See 'Index to the register of charities')

From 2003 charities have been required to provide annual returns and accounts when requested, to the Attorney General in his role as Chief Charity Commissioner of Charities.

Registering your Charitable organisation on the Falkland Islands Local Charities Register also has a number of benefits, which include:

Raises the charity's profile within the Community

Enables free hire of FIG venues such as the Town Hall or FIDF Hall

It encourages local businesses and residents to make donations since they can claim them as tax deductible.



Index to the register of charities:

FIG regularly publish the 'Index to the Register of Charities' which provides a list of all Excepted and Local Registered Charities in the Islands.

The Index also includes a list of Overseas/UK charities which are officially recognised in the Falkland Islands for tax purposes. Information on these charities is kept on file in the AG's Chambers.

IMPORTANT THINGS TO KNOW:

Local charities in the Falklands can be classed as either 'registered', 'excepted' or 'exempt':

- **Registered charities** are local charities defined under the Charities Act 1960 as 'established for purposes which are by their nature or by the trusts of the charity directly wholly or mainly to the benefit of that area or part of it.' They are required to submit annual returns and accounts to the Attorney General's Chambers, to meet the regulatory requirements.
- **Excepted charities** are recognised by the Governor and registered on a list of charities approved by the Chief Charity Commissioner for the purposes of the Taxes Ordinance 1997, pursuant to the Registration of Charities (Exemption) Order 1998. Charitable donations to an 'excepted charity' can be treated as allowable discounts against a donor's chargeable income for the purposes of the Tax Ordinance 1997. They don't have to submit annual returns or accounts, but are still expected to comply with charity law. *A charity which could meet the criteria for excepted will not be classed as such if it owns property or land.
- **Exempt charities** are comprised in the Second Schedule of the Charities Act 1960. An 'exempt charity' is expected to comply with some aspects of charity law. Returns and accounts do not need to be submitted. Churches and museums fall under this category.

A Charities Commissioner will be able to advise as to which classification best fits your charity, and explain the requirements that will need to be met.

The Attorney General acting as the Chief Charity Commissioner has the power to approve, reject or remove a Charity from the Register.

If a charity does not submit annual accounts or returns when requested, it could result in the charity being removed from the register in accordance with the requirements of the Charities Act 1960.



CHARITY

HOW TO REGISTER AND WHAT YOU WILL NEED:

Contact the AGs Chambers, and they will advise whether your charity meets the criteria to be registered. Guidance may be offered on the steps needed to be taken by the applicant(s) to achieve this status.

Email: legalsupport@sec.gov.fk or cwmanager@sec.gov.fk **Tel:** 28497 / 28463


A **statement of charitable objects** should be filed with the Commissioner of Charities together with a completed **Trust Deed** (or governing document) which should set out the name and objects of the charity, the Trustees, the proceedings of the Trustees (meetings, definition of a quorum etc), property and funds.

The AGs Chambers can provide examples of these documents and provide help and guidance on your organisation's draft documentation, if needed. Lawyers can also advise and assist with the basic wording on any aspect of the trust deed except for the objects clause, which must be drafted by the individuals setting-up the organisation to avoid any future accusation of undue influence by FIG. You may also seek independent legal advice on charity registration matters.

A charity's governing document contains all the information needed to run a charity. A modern governing document usually includes :

- what the charity is set up to do (known as the objects)
- how the charity will do those things (known as powers)
- who will run it (the trustees)
- how it is run and what internal arrangements there are about meetings, voting, looking after money, etc (administrative provisions)
- what happens if the administrative provisions need to be changed
- what happens if the charity wishes to wind up.

In the case of a company limited by guarantee, the governing documents are the memorandum and articles of association. For trustees to be efficient they should have a sound knowledge of their charity's governing document.

A close-up photograph of a black and silver fountain pen lying diagonally across a white document. The pen's nib is pointing towards the top left. On the document, the text "Sign here :" is printed in a light grey font, with a thin horizontal line extending from the end of the text towards the right, ending just before the pen's nib. The lighting is soft, creating subtle shadows and highlights on the pen's metallic and black surfaces.

The Charity Commissioner will then either refuse or approve the request. If successful the Charity will receive its unique Registration number. If more information is needed to approve a request, the Commissioner will provide advice of what is needed to meet the criteria.

MAKING ALTERATIONS A CHARITY'S GOVERNING DOCUMENT:

A Charity's governing documents may need to be altered because:

- the charity can no longer pursue its original aims effectively or in a way which is actually helpful to the public in contemporary circumstances
- the administrative provisions contained in its governing document need to be modified to enable the trustees to pursue their aims effectively or with greater efficiency

Amending a governing document is subject to certain restrictions which apply to all charities. For example, there are rules stopping charities from making any alteration which would change them into organisations which would not be formally recognised as charitable.

Permission to make any alterations must be granted by the Charity Commissioner, and they will be able to advise how to do this.

Companies have the power, under the Companies Acts, to amend their memorandum and articles of association (the governing document). The procedure is contained in company law and will usually be reflected in the articles of association.



WHAT IS THE ROLE OF A TRUSTEE?

Charity trustees are the people who share ultimate responsibility for governing a charity. They have the general control and management of the administration of a charity.

A Trustee's legal duty is to:

Act in the charity's best interests
Manage the charity's resources responsibly
Act with reasonable care and skill

It is vital that a Trustee can:

Deal with conflicts of interest
Implement appropriate financial controls
Manage risks
Take appropriate advice when needed, for example when buying or selling land, or investing (in some cases this is a legal requirement)

Who can be a trustee?

Generally speaking anyone who is 18 years or over can be a trustee. However, certain people are legally disqualified from continuing to be, or from becoming a trustee. People who are disqualified are those who:

- have been convicted at any time of any offence involving deception or dishonesty, unless the conviction is legally regarded as spent
- are undischarged bankrupts
- have at any time been removed by the Charity Commission or by a court from being a charity trustee because of misconduct
- are disqualified from being company directors



What special roles can a trustee perform?

Within a charity, there are special roles which can be assigned to trustees. These include;

- **Chair:** A governance role for the charity, ensuring that the charity is managed effectively and leading the board of trustees. The Chair is often the spokesperson or figurehead for the charity.
- **Secretary:** making sure that the charity's administrative requirements are met. It may be the Secretary, rather than the Chair, who monitors members to ensure that they have carried out any actions they agreed to at a meeting.
- **Treasurer:** overseeing the charity's finances. Often the Treasurer is the bookkeeper or accountant, and is responsible for ensuring statutory returns are made to the Charity Commissioner.

How is a trustee appointed?

A charity's governing documents will detail how a trustee will be appointed for that particular charity. Rules on appointments may be different for Ecclesiastic charities, however it is helpful for all charities to inform the Charity Commissioner of any trustee appointments or resignations, to ensure that information is kept current.

For a charitable company, the 'trustees' or 'directors' are usually appointed by the members of the company in a general meeting, although it may be necessary for the directors to co-opt one or more new directors onto the Board of Directors during the year.

Termination of a trustee role:

A trustee may wish to retire or resign for a number of reasons;

- they may wish to retire
- they may have reached a retirement age which is set out in the governing document
- the other trustees may for good reason conclude that it is the charity's best interests for someone to retire.



If a trustee decides that they wish to retire they should tell the remaining trustees. The trustee should write to the chairperson, unless it is specified otherwise in the governing document, notifying them of their intentions. It is good practice to give fellow trustees adequate warning so that they can find a replacement trustee.

A trustee may be able to retire without a replacement being appointed but this will depend on the provisions in the governing instrument.

It can be difficult to recognise when it is the right time for a fellow trustee to stand down, and when to tell them. For instance there can be a problem with trustees who have served for a long time. Occasionally they may not adapt well to legitimate changes within the organisation or be willing or able to take them forward. Again, a trustee may simply become too infirm to continue but not be able to bring themselves to give up trusteeship. However, for charities to run effectively it is important that trustees as a whole recognise that it may be time to request that someone retires from office.

If the trustee concerned is not prepared to retire voluntarily, then the trustees will have to consider whether they have the grounds for removal. To avoid such a situation arising it is advisable to have a set some term to trusteeship and state that in the governing document (together with a re-election procedure). It is important for all trustees to consider on a regular basis, say once a year, whether they are still contributing effectively to the charity and whether it is appropriate for them to retire.

Removal of a Trustee:

A charity should have provisions in its governing document which state the circumstances in which trustees can be removed. For instance, the governing document may specify that the trustees can remove a trustee if he or she consistently fails to attend meetings, or in the following circumstances:

- Following the trustee's death.
- If they have been absent from the country for an unbroken period of 12 months.
- If they refuse to act
- If they are considered incapable or unfit to act as a trustee. For instance, if he or she is of unsound mind, or is seriously ill enough to not be able to conduct their affairs or if it is discovered that they have become bankrupt.



Liability of Trustees:

Some charity trustees, and people thinking about becoming trustees, are nowadays influenced by the thought that they might be "personally liable" if things go wrong with the charity. What they fear is that, if they make a mistake in the running of the charity or if it gets into debt, they might have to make good any loss or shortfall out of their own private resources.

While for a few people this can be a real worry that leads them to resign their trusteeship, it is in fact extremely rare for a trustee to be made "personally liable" in this way. Generally, the law protects trustees who have acted reasonably from the consequences of honest mistakes, and trustees can take their own measures to reduce the risk still further, such as operating as a company limited by guarantee.

Contractual Liability

Many charities need to enter into contracts in order to carry out their work. Most commonly, charities enter into contracts with suppliers of goods or services.

This can range from an agreement with a local shop to photocopy the charity's newsletter to a multi-million pound contract for the purchase or construction of new premises for the charity.

If the charity is an incorporated charity - a charitable company - then a contract entered into by a charity for goods and services is between the charity, as a legal entity in its own right, and the supplier. Since it is the charity, and not its trustees personally, who are party to the contract, the trustees have no personal liability under it. (That being said, directors of a company may be ordered by the Court to contribute to the company's assets in some circumstances if the company continues to trade after it has become reasonably clear that the company is heading for insolvency).



Breach of Trust

All trustees must administer their charity in accordance with the terms of its governing document (i.e. trust deed, its memorandum and articles of association) and with the requirements of charity law. A charity's governing document sets out the charity's objects and powers that the trustees can exercise in pursuing those objects.

A breach of trust occurs when trustees act in a way that is contrary to the terms of their governing document, or when they fail to perform their duties as trustees. Using the charity's resources for some purpose not within the charity's objects (what it has been set up to do) is a breach of trust as is, for instance, investing the charity's money in a type of investment not permitted under the investment rules applying to the charity.

When trustees commit a breach of trust which results in some financial loss to the charity, they become liable to make good that loss. Trustees who are familiar with the contents of their charity's governing document, and who have acquired a reasonable knowledge of the law as it applies to their charity, are very unlikely to commit a breach of trust.

Trustees can reduce the likelihood even further by taking and following professional advice on any point on which they are unsure. In the last resort, the Court is able to excuse a trustee from liability if it is satisfied that he or she acted honestly and reasonably and ought fairly to be excused.

Other Types of Liability - Insurance

Charities are no different from other organisations in the duty of care owed to their employees and to members of the public visiting charity's premises. Charities should have employer's liability insurance and public indemnity insurance.

Any vehicles owned by the charity must be insured in accordance with the legal requirements. Trustees have a duty to safeguard the property of their charity, and it is important that they insure it adequately. If they do not do so, and the property is lost or devalued, the trustees may be personally liable for the loss.