



CHARITY COMMISSION
FOR ENGLAND AND WALES

GUIDANCE

Charities and litigation: a guide for trustees



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Contents

1. Introduction	2
2. Taking or defending legal action - the general position for charities	5
3. Charity proceedings and the role of the commission	10
4. Applying for the commission's consent	12

1. Introduction

1.1 What this guidance is about

This guidance explains what charity trustees need to know when thinking about taking or defending legal action generally, and when the Charity Commission ('the commission') needs to be involved.

It applies to all types of legal action that a charity might have to take or defend but not to criminal cases or challenges to decisions by the commission.

It is relevant to all charities whether they are CIOs, companies, trusts, membership bodies or have another structure. It applies to both registered and unregistered charities.

1.2 The commission's regulatory interest

Legal action can present significant risks to a charity. The commission has provided this guidance to help trustees address them and comply with their legal obligations. The commission expects trustees to be able to show that they have applied the principles of this guidance where their charity is involved in legal action.

One of the commission's regulatory interests in legal action by charities stems from its role as providing a protective filter for a specific type of legal action (called 'charity proceedings') which concerns the internal administration of a charity. It may authorise this type of legal action if it has not been possible to resolve it in any other way and it is in the interests of the charity for the court to adjudicate.

This protective filter role informs the commission's general view in relation to legal proceedings that do not meet the definition of charity proceedings. This is because one of the commission's objectives is in promoting the effective use of charitable resources.

Trustees have a general duty to act in the best interests of their charity. They have a duty to protect, and where necessary, to recover, assets belonging to the charity. The decision whether or not to initiate or defend a legal action must only be made in the best interests of the charity and be balanced against the risks and consequences that any legal action could bring.

The commission expects trustees to consider legal action only after they have explored and, where appropriate, ruled out any other ways of resolving the issue in dispute.

Legal action can present significant risk to a charity's beneficiaries, assets and reputation. A trustee body has a duty to manage risk responsibly by identifying and assessing the risks their charity might face and deciding how to deal with them. The commission's role, where concerns are raised with us, is to ensure that the trustees have made their decisions in the best interests of their charity. The commission can use its powers to provide advice, guidance or an action plan, and where there are serious concerns of abuse in a charity, the commission may open a statutory inquiry under section 46 of the Charities Act.

1.3 Other connected guidance

The commission has published other guidance which gives further information on some of the issues raised in this guidance:

- **The essential trustee (CC3)**
- **It's your decision: charity trustees and decision making**
- **Charities and litigation: the legal underpinnings**
- **Conflicts of interest: a guide for charity trustees (CC29)**

- **Changing your charity's governing document (CC36)**
- **Restitution and recovery of charitable funds: Charity Commission policy**

1.4 How to use this guidance

Section 2 of this guidance is primarily intended to give trustees and their legal advisers an overview of:

- the circumstances in which a charity might take or defend legal action
- what other options are available
- the trustees' decision making process
- managing the costs of legal action
- when the commission needs to be involved

Section 3 looks at what charity proceedings are and the role of the commission. It explains:

- the definition of charity proceedings
- who else might take legal action apart from charity trustees
- what powers the commission has and when it will use them
- what to think about before applying to the commission

Section 4 looks in greater detail at:

- making an application to the commission for an order to authorise charity proceedings
- what happens when the commission makes a decision

The **legal underpinnings** explain the law and legal precedents that supports this guidance and provide greater background for trustees and their professional advisers.

A **checklist** is provided which trustees may find useful when considering taking or defending legal action.

1.5 Technical terms used in this guidance

Must and should

In this guidance:

- 'must' means something is a legal or regulatory requirement or duty that trustees must comply with
- 'should' means something is good practice that the commission expects trustees to follow and apply to their charity

Following the good practice specified in this guidance will help you to run your charity effectively, avoid difficulties and comply with your legal duties. Charities vary in terms of their size and activities. Consider and decide how best to apply this good practice to your charity's circumstances. The commission expects you to be able to explain and justify your approach, particularly if you decide not to follow good practice in this guidance.

In some cases you will be unable to comply with your legal duties if you don't follow the good practice. For example:

Your legal duty	It's vital that you
Act in your charity's best interests	Deal with conflicts of interest
Manage your charity's resources responsibly	Implement appropriate financial controls Manage risks
Act with reasonable care and skill	Take appropriate advice when you need to, for example when buying or selling land, or investing (in some cases this is a legal requirement)

Trustees who act in breach of their legal duties can be held responsible for consequences that flow from such a breach and for any loss the charity incurs as a result. When the commission looks into cases of potential breach of trust or duty or other misconduct or mismanagement, it may take account of evidence that trustees have exposed the charity, its assets or its beneficiaries to harm or undue risk by not following good practice.

The 'Charities Act' is the Charities Act 2011. This guidance occasionally refers to specific powers under this Act.

'Beneficiary or beneficiaries' means a person or group of people eligible to benefit from a charity's work. A charity's beneficiary group is usually defined in its governing document. Some charities call their beneficiaries clients or service users.

'Charity proceedings' are defined by section 115(8) of the Charities Act and relate to a specific type of legal action. Charity proceedings require specific authorisation by the commission by an order under section 115(2) of the Act, unless they are brought by the Attorney General, the commission or as specified in section 115(4).

The 'court' means the high court or any other court in England and Wales having concurrent jurisdiction or any judge or officer exercising that jurisdiction.

The 'governing document' is the legal document that sets out the rules that govern a charity. These include the charity's objects and, usually, how it must be administered. It's usually a trust deed, constitution, CIO constitution or articles of association. Some charities have a different type of document such as a conveyance, will, royal charter or commission scheme.

'In the best interests of the charity' means what the trustees reasonably believe will best enable the charity to carry out its purposes for the public benefit.

'Legal action' means the process of having something decided by a court. In this guidance, it does not cover criminal prosecutions or challenges to commission decisions.

A 'party (or parties)' to an action in this guidance means those persons who institute legal proceedings (claimants), those persons against whom the legal action is brought (defendants) and other persons with an interest in the legal action that has been recognised by the court (interested parties).

A 'suitably qualified person or adviser' is someone who the trustees could reasonably expect to be competent to advise them about a particular matter. This includes professional advisers (such as solicitors or barristers). It could also (for example) include a member of the charity's staff, a professionally qualified trustee or an adviser from another organisation.

'Trustee' means a charity trustee. Charity trustees are the people responsible for governing a charity and directing how it is managed and run. The charity's governing document may call them trustees, the board, the management committee, governors, directors, or something else. The Charities Act defines the people who have ultimate control of a charity as the charity trustees, whatever they are called in the charity's governing document.

2. Taking or defending legal action - the general position for charities

2.1 Legal action covered by this guidance

There is a wide range of legal action which a charity might become involved in including:

- claims brought by the charity against a third party, or vice versa. For example:
 - breach of contract
 - employment issues
 - boundary disputes
 - regaining legal possession of a property
 - contesting a charity's right to property under a will
 - actions for personal injury or loss arising from actions of the charity or causing harm to the charity
 - test cases to further or facilitate the charity's work
- claims concerned with its internal administration or its domestic affairs. For example:
 - whether a charity's AGM has been properly conducted
 - whether a charity's trustees have been properly appointed
 - the removal of a trustee from office
 - action for breach of trustee duty
 - challenging a trustee's decision about how to run the charity
 - internal disputes about the control or misuse of a charity's property or resources

2.2 Do all charities have the power to take or defend legal action?

Yes, although trustees need to bear in mind that taking or defending legal action must be in their charity's best interests. They must be able to demonstrate that their decisions were made accordingly. In some cases the commission's consent is necessary (see sections 3 and 4).

The legal structure of the charity means there are differences in how legal action may be taken or defended:

- Incorporated charities

Incorporated charities such as charitable companies, corporations or CIOs take or defend legal action in the name of the charity as a legal entity in its own right. If an action is brought by or against an incorporated charity, the incorporated charity will be named as a party to the action in its corporate name. If the charity is incorporated, it is the charity itself, rather than the members or the trustees, which is responsible for the charity's debts or for any other liabilities which might arise.

However, if there has been any breach of duty or the decision to bring or defend the legal action has not been taken reasonably, the trustees may be personally liable for any costs arising from the proceedings.

- Unincorporated charities

Unincorporated charities such as associations and trusts usually take or defend legal action in the names of their charity trustees. If such a charity has insufficient funds to meet any claim, its trustees may be personally liable irrespective of whether there has been any fault or breach of duty on their part.

Some types of legal action, whatever the legal structure of the charity, need the consent of the commission. These are a specific category of legal action, concerning the constitution or administration of a charity and are called charity proceedings.

You can find further information on charity proceedings and how to apply for the commission's consent in sections 3 and 4 of this guidance.

2.3 The general principles that should guide trustees

A decision to proceed with legal action should be made in accordance with the principles set out in the guidance **It's your decision: charity trustees and decision making**.

There are some important principles that should guide trustees if they are considering taking or defending legal action. These are that:

- trustees have a duty to protect or secure their charity's assets and, where, necessary, to recover, assets belonging to the charity; taking or defending legal action to might be one way to fulfill this duty
- a charity's funds must be spent on carrying out its aims and the trustees have a duty to act in the best interests of their charity - a decision to take or defend legal action must be made exclusively in the best interests of the charity, having considered whether or not another course of action is available
- in making their decision, the trustees should:
 - take and consider legal advice
 - consider and assess the economic prospects of success or failure and the impact on the charity
 - consider whether their intended actions are proportionate in the circumstances
 - decide whether it is necessary or appropriate to ask for the commission's consent or advice
- whatever the outcome of legal action, the downsides are typically that it will cost the charity time and money and may have a negative impact on its reputation - even if the charity wins it may not recover all its legal costs
- unless time constraints for bringing or responding to an action prevent it, the commission will expect trustees to explore and, if appropriate, rule out all other reasonable options open to them to resolve the issue, such as alternative dispute resolution or agreeing a legal compromise
- unless a charity has the necessary in house expertise, in order to make a proper decision it will usually be appropriate to take and consider professional legal advice, as well as whatever other specialist advice they might need to inform their decision
- transparency about the reasons for taking legal action is very important in explaining why the trustees decided on this course of action - the trustees must be able to justify their decision because the charity's actions may have an impact on the charity's reputation and supporters

- in some circumstances, the trustees may be liable for pay any legal costs personally, for example if:
 - the court considers that the costs have not been properly and reasonably incurred
 - trustees are not able to demonstrate that they have considered all the relevant principles in making their decision
- in the case of unincorporated charities, the charity has insufficient funds to meet them

2.4 Alternatives to taking or defending legal action

If trustees find themselves faced with taking or defending legal action, the commission will expect them to have thoroughly explored and, if appropriate, ruled out all other reasonable ways of resolving the issue beforehand.

Trustees may be able to avoid becoming involved in legal action by using dispute resolution. Common forms of dispute resolution are:

- negotiation - in which the parties try to settle the dispute between themselves, sometimes using advisers
- mediation - where an independent third party acts as facilitator between the parties; there are a number of organisations which provide mediation services

Find out more about **disagreements and disputes in charities**.

Mediation can be very effective since it can help look at the legal as well as wider issues to help find a lasting comprehensive solution.

The court and litigation system is structured to encourage parties to make a serious attempt to settle the dispute at the earliest possible stage. A court may refuse to consider an issue until mediation or another form of alternative dispute resolution has been tried and may make an order that parties try alternative dispute resolution first.

2.5 Entering into a legal compromise

A compromise is a legally binding agreement between 2 or more parties to settle a dispute without it going through the full litigation and court process. An example of such a compromise might be where it is doubtful whether a bequest to a charity under a will is valid and the charity and other beneficiaries under the will reach an agreement about the division of the deceased's property.

The trustees' duty to protect and secure the charity's assets applies equally in compromising a claim as it does in taking or defending legal action. Trustees should take care to ensure they secure as favourable a settlement as reasonably possible in the interests of the charity, taking account of all relevant factors. Considerations may include how entering into the compromise could affect the charity's reputation and whether the course of action could affect the charity's position in other disputes.

To properly carry out their duty of care, trustees should make a fully informed decision, taking specialist advice from a suitably qualified person. The guidance on decision making **It's your decision: charity trustees and decision making** sets out how trustees should reach their decision.

In reaching any negotiated, mediated or compromised settlement of a claim, the trustees should be satisfied that they have the power to implement the settlement terms. The guidance **The trustees' power to compromise** gives further information. If the trustees think that they might be challenged about being allowed to use alternative dispute resolution or agreeing a legally binding compromise, they could give themselves the power.

Find out more about **Changing your charity's governing document (CC36)**

Where there may be a potential or actual conflict of interest the trustees must:

- identify any conflict
- prevent it from affecting the decision
- record the conflict and how the trustees prevented it from affecting the decision

The guidance **Conflicts of interest: a guide for charity trustees** explains what trustees need to do in this situation.

2.6 What charities can do to manage the personal risk of costs

Taking or defending legal action means there is a risk of personal liability to the trustees of a charity. Trustees should examine and establish, before taking legal action or at the outset of defending legal action, their potential liability for the costs of the legal action and how this liability could be mitigated.

For a trustee, whatever the legal form of their charity, there is the risk of personal liability for legal costs if the decision to take or defend legal action was not made reasonably. Both parties involved in legal action are likely to incur significant costs regardless of whether they win or lose, although the costs are likely to be higher for the losing party. Even if a charity is successful in taking any legal action they may not receive back all their costs.

There are steps that trustee can take to reduce the risk of personal liability for costs. When considering whether to take or defend legal action, the trustees should be aware of what the risks might be and plan how to handle them if they occur. They should:

- consider the general principles in the **guidance on decision making** and work through the **checklist** which accompanies this guidance to help ensure that their decision is in the interests of the charity
- seek professional advice to help inform their decision-making
- apply to the commission for an order under section 115 of the Charities Act authorising the particular legal action if the legal action constitutes charity proceedings (see section 3)
- look at insurance products that may cover the charity and its trustees against costs incurred through taking or defending legal action; trustees can take advice on what is available from an insurance adviser or broker
- ask the commission for an order under section 105 of the Act to authorise the use of charity funds for litigation
- ask the commission to give advice under section 110 of the Charities Act about whether they would be acting in accordance with their duties in taking or defending legal action; the commission will only provide advice under s110 where:
 - the written request for advice (including an email request) is from any charity trustee or trustee for a charity, or an agent acting on behalf of the trustees
 - the advice requested falls properly within the scope of advising trustees on issues relating to the performance of their duties in the context of the proper administration of the charity
 - general advice available through the commission's website (particularly the guidance *It's your decision: charity trustees and decision making*) is not sufficient in the circumstances

- the circumstances are so serious that in the absence of an opinion or advice from the commission, the trustees would contemplate (because of the costs involved in making an application to court, the commission cannot expect trustees to state definitely that they would make such an application) making an application to court, in order to:
 - determine whether or not they are acting within their trusts in reaching the decision
 - receive reassurance that they have acted lawfully and costs have been properly incurred
- consider applying for an order of the court, this is known as a Beddoe order and is a form of charity proceeding and will need to be authorised by the commission - only in exceptional circumstances, when the commission is unable to use own powers as set out in the bullet point above, will it permit an application for a Beddoe order

3. Charity proceedings and the role of the commission

3.1 What are charity proceedings?

Charity proceedings are defined by section 115 of the Act and relate to a specific type of legal action. These generally relate to the internal administration or domestic affairs of a charity and examples are given in section 2.1.

Where a charity is involved in a legal action that falls within the definition of charity proceedings, then it must apply for the commission's authority before proceeding. However, it is sometimes a third party (not the charity) who will apply for the commission's consent, for example a former trustee.

3.2 What are not charity proceedings

Charity proceedings are not concerned with issues between a charity and a third party over matters such as:

- breach of contract
- debt actions
- employment disputes
- claims for rent arrears
- defamation
- property rights

It is worth noting however that what may start out as a different type of legal action, can sometimes lead to charity proceedings. For example, an office holder in a charity may occupy premises in connection with that office. If there is a claim for possession of those premises and the way the office holder has been removed from office is pleaded as part of the defence, this may become charity proceedings.

3.3 Who can bring charity proceedings?

The Charities Act sets out who can take charity proceedings - they are:

- the charity
- any of the charity trustees
- any person interested in the charity (explained further in the legal underpinnings)
- if it is a local charity, any 2 or more inhabitants of the area of the charity

There are special procedural rules for charity proceedings in the **court civil procedure rules**, are available online (see Part 64 in particular).

3.4 The criteria for authorising applications for charity proceedings

The commission has a regulatory role in deciding whether to authorise the taking of such proceedings. Charitable funds must be spent on furthering charitable purposes and not, for example, on:

- legal costs defending claims that have no merit or reasonable prospects of success
- actions that are driven by, say, personal motives rather than the charity's best interests
- actions which can be dealt with by the commission using its powers (for example, by providing formal advice or making an order), or resolved by other means such as mediation

It is also important for the commission to be satisfied that it is in the interests of the charity that the matter be adjudicated upon by the court and resolved there. This means that the commission will generally only authorise charity proceedings where matters are contentious, intractable, and difficult and cannot be resolved in any other way whether by the commission or anybody else.

Urgent cases

There are strict timescales for both bringing such proceedings and their subsequent conduct through the court system, and if legal action has already been started before it was realised that the commission's consent was required, it may be difficult to meet particular deadlines. This means that it is important that a comprehensive case, with supporting evidence, is made to the commission as soon as possible to enable it to consider an application for authorisation.

If there is, for example, a limitation point or deadline they need not wait for the commission's consent before issuing proceedings. They should take appropriate steps to deal with this particular point (but nothing further) as the commission has no power to change these dates if missed. In these circumstances, the court will usually put the proceedings on hold until the commission has decided whether to authorise them or not.

If the commission refuses to make an order, the applicants must apply to the court to authorise the proceedings before the matter can proceed.

4. Applying for the commission's consent

4.1 Is a charity involved?

The commission can only authorise charity proceedings where a charity is involved.

However, if there is doubt over whether the organisation is a charity, the commission may be able to authorise charity proceedings in so far as the organisation is charitable.

4.2 What the commission considers in an application for consent to charity proceedings

When an application for consent to charity proceedings is made, the commission's main concern will be whether it will be in the interests of the charity for the court to be asked to adjudicate on the matter. The commission will also consider whether:

- the legal action constitutes charity proceedings
- the proceedings are being brought by persons that qualify to bring charity proceedings, for example because they are sufficiently interested
- it can deal with the matter in a different way by using its other powers
- the proceedings are properly brought with correct parties and suitable relief is sought in the right form

4.3 How to make an application for consent to charity proceedings

Any application and supporting evidence should clearly demonstrate why the proposed action is in the charity's interests and its likelihood of success. If the application is not complete the commission will not be able to consider it further. Normally the application will be best supported by providing the following documentation:

- a formal request for a s.115 Order (the commission's powers only apply once a request is made)
- a copy claim form/defence and statements of truth
- the legal opinion on merits and prospects of success; this doesn't necessarily need to be from Counsel depending on the complexity and risks of the issue
- the costs estimate
- the value of assets involved - if appropriate
- up to date information about the charity's finances
- an evaluation of benefits and risks which will/may flow from successful legal action
- an assessment of risks associated with proceeding (including to the reputation of the charity)
- the prospects of mediation/compromise - the details should be set out in full

4.4 The next steps

Assuming that all the relevant information has been supplied, the commission will decide whether it can authorise any or all of the charity proceedings by an order under section 115 of the Charities Act. Any papers supplied to the commission will be treated as confidential as the commission needs to see copies of legal advice and will treat any papers supplied to it as confidential.

This means that the commission handles this information appropriately and with care. As a public authority, the Freedom of Information Act applies to the commission. However, a range of exemptions may apply to this kind of information, for example data protection, commercially sensitive information and information that has the necessary legal qualities of confidence. If the information provided is particularly sensitive or confidential and this is not likely to be evident to us, you will need to tell the commission and explain why this is so.

If the commission decides that an order can be made, it will:

- notify the party (see definitions in section 1.5) bringing the proceedings
- draft the order or go ahead and make the order (depending on the circumstances of the case)
- send a copy of the order to the party bringing the proceedings
- send a copy of the order to the Attorney General, as required by the Charities Act

If the commission decides that an order cannot be made, it will notify the applicant, giving the reasons for its decision.

If the commission decides it cannot make an order, the party bringing the proceedings can apply to a judge of the Chancery Division of the High Court for leave to issue proceedings under s.115(5) of the Act. If an application is made, the party bringing the proceedings should provide a copy of the commission's refusal letter to the court with the application.

The application must be made within 21 days of refusal and the commission must be made defendant to such claim but the application does not need to be served on the commission (see **court civil procedure rules**, are available online, part 64.6 in particular).