

## Trustee training: Regulatory and governance update – Part two – Q&A responses

For more information on any of the answers provided, please contact the partners quoted using the information below:

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Question	Answer
<p>Several of the charities I have just joined as a Trustee have members, i.e. incorporated. Do you have any examples you could talk about of the members actually doing something substantive/useful/difficult? Their role looks a bit theoretical from my reading of the governance documents.</p>	<p>In many cases the members and trustees are identical, often by definition in the governing document. In the majority of charitable companies the role of the company members is notional rather than practical. There are cases though where the role of members is more substantive. These include charities which are established by or “under the wing of” other bodies. In these cases members often are, or act for, that other body. Examples might be corporate foundations, charities established by churches or similar. In these cases the member(s) will often have nomination rights over some or all of the trustee body. Academy trusts are required to have a membership which is distinct from the trustee body and which undertake specific roles. Some membership based charities have a company membership that comprises its members in the broader sense – in these examples the role of members is clearly more active.</p>
<p>Any general thoughts on how Trustees should approach discussions about a possible merger with another charity? What are the key questions/issues we should be thinking about?</p>	<p>As with all significant decisions, the key driver should be whether the proposed merger will lead to better delivery of your charity’s objects. The details will vary considerably depending on factors such as whether your charity is struggling to survive in its current form but some key principles will apply. Among the first hurdles to clear is whether there is a congruence of objects – there will nearly always be at least overlap but legal advice and Charity Commission approval will be needed to deal with activities that fall outside one or the other charity’s current objects. Once the acceptability in principle of a merger has been confirmed, the key issues for trustees will be around assurance that the cultural and organisational fit is right, which will include among other processes an appropriate level of legal and financial due diligence and agreements</p>

	<p>around matters such as participation in the new board and leadership team etc.</p>
<p>Do you have any guidance on an ethical fundraising policy?</p>	<p>Good and helpful guidance on ethical fundraising can be found on the Fundraising Regulator's website <a href="http://www.fundraisingregulator.org.uk">www.fundraisingregulator.org.uk</a></p>
<p>It would be interesting to add a column to your reserves table to cover pensions deficits - which in many cases now dwarf the positive reserves elsewhere. Any thoughts on how to handle pensions deficits when thinking about reserve policies?</p>	<p>The liabilities of the pension fund are separate from the liabilities of the charity and therefore it would be the pension trustees that might have a problem if the pension scheme was unable to meet its obligations. However, this is the reason why there are many pension scheme protection funds, to protect those schemes that might get into trouble. The only real way a charity would be troubled by its relationship with a pension scheme would be, for example if it's made commitments to make contributions, or to ring fence certain assets but improperly reneges on those obligations.</p>
<p>Could you comment on any particular considerations in relation to trading subsidiaries?</p>	<p>This is too big a topic for a concise answer but one key point is to recognise that a trading subsidiary is a separate legal entity and must have (proportionately to the circumstances) independent governance. While they're rare, governance structures need to allow for separate consideration of the interests of the company and the charity. This has been highlighted in a number of instances where a trading subsidiary is in financial distress due to COVID-19 control measures and the parent charity is asked for financial support or forbearance.</p> <p>One aspect where particular care is needed is the potential funding of, or provision of financial support to, a trading subsidiary by the charity. In many cases the trading subsidiary may be carrying out activities that are commercial in nature and which may not, therefore, be consistent with the charity's objectives. In these situations it is important that the charity's funds aren't used inappropriately and that any financial support by the charity is given the consideration that would be afforded to any other investment decision. In particular, it would be expected that any loan by the charity to its subsidiary was commercial in nature with clear terms, with a commercial rate of interest being charged and where the charity had some form of security if at all possible - such as a legal charge over the subsidiary's assets. Given the challenges posed by COVID-19, we expect there to be an increasing number of instances where there is greater pressure on charity trustees to provide support to trading subsidiaries. We</p>

	<p>would always advise that trustees seek professional legal and financial advice in this situation.</p> <p>There is also some useful Charity Commission guidance on the relationship between charities and non-charities which is worth reading: <a href="https://www.gov.uk/guidance-for-charities-with-a-connection-to-a-non-charity">https://www.gov.uk/guidance-for-charities-with-a-connection-to-a-non-charity</a></p>
<p>Risk management - a comment: where charity also has limited company status then trustees are also directors and if they dissolve the charity in an insolvent way there could also be personal financial and reputational risk including personal credit rating.</p>	<p>If your charity has limited liability this usually means that once the charity has exhausted its funds, there is no recourse to members or trustees. The exceptions to this would be where trustees have behaved recklessly or dishonestly and the Insolvency Act would be important here. In this instance the same rules would apply to charity as apply to a business, e.g. if for example there was money paid out in preference, to creditors inappropriately or the charity kept trading regardless of the fact that it was obviously insolvent, then there might be ramifications for trustees.</p> <p>However, generally speaking charities don't get into these issues overnight and where trustees have sought advice generally they are protected and, as with any area of managing a charity, the risk that comes back to individuals is only likely to crystalize where trustees have behaved improperly.</p> <p>If your charity does find itself in a situation where you cannot pay your debts then that is the time to bring in an external adviser and seek help. In turn, the act of doing so, gives you the personal protection as you have sought expert advice and not knowingly continued to trade when you're unable.</p> <p>In the case of an unincorporated charity (those that aren't CIOs or companies for example), trustees are personally liable for charity debt. However, in most instances the Court or the Charity Commission have powers to relieve trustees of liability where they have not acted improperly.</p>
<p>Can it be appropriate to consider designated funds as part of the "reserve"?</p>	<p>Designated funds are those that the trustees have chosen to set aside from the charity's free reserves. While they are excluded from the calculation of reserves in a reserves policy, they may be released into free reserves at trustees' discretion.</p>

How should fellow volunteer Trustees for a MAT hold one another to account, if for example trustees are being negligent or reckless in their duties by being silent and not contributing. By process or is there a responsibility for individual challenge?

It is very difficult to comment on this without understanding the precise nature of the issues behind the question. However, in the first instance, it would be hoped that this would be something that could be discussed openly in a trustees' meeting or taken up privately with the Chair of Trustees with a view that they may address the issue. If this fails to resolve the issue, specific professional advice should be sought.