



The Governance
Institute

Charity Law and Governance

Mark scheme

June 2017

Section A

Question number	Answer	Mark
1	<p>Any two of the following up to two marks:</p> <p>Name of the member (1)</p> <p>Address of the member (1)</p> <p>Date on which the person became a member (1)</p> <p>Reward other valid responses.</p>	(2)

Question number	Answer	Mark
2	<p>Award full marks for either:</p> <p>Breach of trust (1)</p> <p>Example: misuse of funds (1) or acting outside objects (1)</p> <p>Or:</p> <p>The charity is unincorporated (1)</p> <p>Example: liability on a contract (1)</p> <p>Allow marks for use of an example or other ways of explaining</p> <p>Reward other valid responses.</p>	(2)

Question number	Answer	Mark
3	C – Privy Council	(1)

Question number	Answer	Mark
4	<p>Adopt a trustees' expenses policy and relevant procedures (1)</p> <p>Ensure only genuine and reasonable expenses are refundable (1)</p> <p>Require independent verification of the expense and why it was incurred (1)</p> <p>Allow full marks for two examples with fuller description and up to two marks for one example with description.</p> <p>Reward other valid responses.</p>	(3)

Question number	Answer	Mark
5	<p>True</p> <p>Reward other valid responses.</p>	(1)

Question number	Answer	Mark
6	<p>Award marks for any four of the following, up to four marks:</p> <p>The charitable purposes (also accept 'objects') (1)</p> <p>Dissolution clause (1)</p> <p>Provisions relating to the board (1)</p> <p>Powers of the charity (1)</p> <p>Non-distribution clauses (1)</p> <p>Reward other valid responses</p>	(4)

Question number	Answer	Mark
7	<p>Award up to two marks for any two of the following:</p> <p>Cost of generating funds from voluntary donations (1)</p> <p>Cost of fundraising trading (1)</p> <p>Cost of managing the charity's investments (1)</p> <p>Reward other valid responses.</p>	(2)

Question number	Answer	Mark
8	<p>Rules (1)</p> <p>Note to examiner: Also reward 'constitution' as an alternative valid response</p>	(1)

Question number	Answer	Mark
9	<p>Award up to two marks for any two of the following:</p> <p>Appeals against Charity Commission decisions (1)</p> <p>Reviews of Charity Commission decisions (1)</p> <p>References made by the Attorney General (1)</p> <p>Reward other valid responses</p>	(2)

Question number	Answer	Mark
10	<p>Financial Conduct Authority (1)</p> <p>Mutuals Register (1)</p>	(2)

Section B

Question number	Answer	Mark
11	<p>Trustees of all charities have a common law general duty of care in relation to investments (1). Trustees of unincorporated charities are governed by the Trustee Act (2000). (1) In accordance with this Act, trustees should: adopt an investment policy for the charity (1) and obtain and consider proper independent investment advice before using their investment powers (1) with some limited exceptions (1).</p> <p>Reward other valid responses</p> <p>Marks can also be awarded, up to five marks, for stating that the trustees should:</p> <ul style="list-style-type: none"> (a) have a written agreement with any investment manager (1) (b) measure performance of the charity's investments against those objectives (1); (c) report in their annual trustees' report on the policy and its objectives and on the performance of the charity's investments against those objectives (1); (d) observe their general statutory duty to exercise reasonable skill and care in relation to investment matters (1); and (e) have regard to the Standard Investment Criteria (1). 	(5)

Question number	Answer	Mark
12	<p>The Charities Act 2011 provides a statutory power for CIOs to alter their constitutions. (1)</p> <p>If the change is to the CIO's charitable purposes or use of assets, prior written Charity Commission consent must be obtained. (1)</p> <p>A resolution in writing agreed to by all members (1) or a resolution at a general meeting, passed by 75% majority of votes cast, is needed. (1)</p> <p>A copy of the resolution and the constitution, including the changes, must be sent to Charity Commission (1)</p> <p>A change does not take legal effect until Charity Commission has recorded it in the Register of Charities (1)</p> <p>Reward other valid responses</p>	(6)

Question number	Answer	Mark
13	<p>Any six of the following points, up to six marks:</p> <p>The 'public' means either the public at large or a section of the public (1)</p> <p>If the beneficiary group is a section of the public, it must be a sufficient size group to constitute 'the public' (1) This could include those engaged in a particular occupation or profession. (1)</p> <p>The beneficiaries must be relevant to the charity's purposes (1)</p> <p>The beneficiary group that can benefit cannot be too restricted or capricious (1) For example, the beneficiaries must not be too closely personally connected. (1)</p>	

	<p>The inhabitants of a particular geographic area, which does not have to be within England and Wales, can be a sufficient group (1)</p> <p>The beneficiaries can be located anywhere (they can be outside England and Wales) (1)</p> <p>Reward other valid responses.</p>	(6)
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Question number	Answer	Mark
14	<p>The property is held subject to a restriction on its being expended for the purposes of the charity (Charities Act 2011) (1)</p> <p>In the case of functional permanent endowment, the assets must be used directly to further the charitable purposes (1)</p> <p>The assets representing the permanent endowment funds are held permanently on trust (1)</p> <p>The charity may spend the income on its charitable purposes but not the capital (1)</p> <p>The assets that represent the endowment can be changed from time to time (1)</p> <p>Whilst the Charities Act permits the release of permanent endowment restrictions if applicable conditions are met, the approval of the Charity Commission to the relevant trustees' resolution may be necessary. (1)</p> <p>Reward other valid responses</p> <p>Allow full marks for answers with a more limited range of points but with description or examples.</p>	(6)

Question number	Answer	Mark
15	<p>Ensure at least one trustee on board of subsidiary (1)</p> <p>Ensure at least one non-trustee on board of subsidiary (1)</p> <p>Operate separate bank accounts (1)</p> <p>Keep arm's length relationship between the charity and the subsidiary (1)</p> <p>Ensure charity charges subsidiary for use of shared resources provided to the subsidiary by the charity (1)</p> <p>Enter into a suitable management agreement between the charity and the subsidiary (1)</p> <p>Reward other valid responses.</p>	(6)

Question number	Answer	Mark
16	<p>Any six of the following up to six marks:</p> <p>A contract is a binding legal agreement between two or more parties (1) whereas a grant agreement is not necessarily binding (1).</p> <p>In a contract, each party must give and receive from the other party something of value (1) but under a grant agreement a third party provides funds to the charity and does not receive any consideration in return. (1)</p>	

	<p>A contract requires the key elements of offer, acceptance and consideration (1), whereas there are no legal requirements in a grant agreement (1)</p> <p>A grant agreement commits the charity to the conditions of the grant (1) but the funder is not buying goods or services from the charity (1)</p> <p>Reward other valid responses.</p>	<p>(6)</p>
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Section C

Question number	Indicative content
17	<p>Candidates will be expected to show understanding of what the four components of the definition mean. Answers should be linked to the practical aspects of a review, giving examples of how they can be reviewed, but other approaches can be used.</p> <p>The four components can be outlined as:</p> <ul style="list-style-type: none"> • Direction: providing leadership, setting strategy; being clear about aims and process. • Effectiveness: making good use of financial and other resources. • Supervision: establishing and overseeing controls and risk management; monitoring performance; making adjustments where necessary. • Accountability: reporting to stakeholders. <p>A board that is performing well under each of these will make better decisions, manage its resources well and be as transparent as it can be. All of this is likely to lead to more effective organisation.</p> <p>Reviewing direction could comprise looking at how effective the board was at setting the strategy of the charity via a paper review, observation of board meetings, effectiveness questionnaires and interviews. The review could consider whether the board actually acts as a leader of the organisation.</p> <p>Reviewing effectiveness: whether the charity has an investments policy and a reserves policy. Also, look at agenda and papers to see what the board does to ensure that its resources are being used as effectively as possible.</p> <p>Reviewing supervision: how well the board dealt with risk management, how it monitors performance and what internal controls the organisation has in place. Is there a risk management policy in place which has been set by the board? Is there clarity regarding delegation? How does the charity monitor performance? Does it regularly review its internal controls? Note the requirement to report on this in the annual report. Possibly also refer to the Charity Commission guidance and checks as part of any review of supervision.</p> <p>Reviewing accountability – Does the board have an understanding of who its stakeholders are and how it reports to them? Reference could be made to the Good Governance Code which gives a number of examples of how a charity can demonstrate accountability.</p>

Level	Mark	Descriptor
	0	No rewardable material.
Level 1	1–5	<p>A few aspects of the definition are described or one key aspect is discussed in some detail. The answer is likely to be in the form of a list, with very little discussion on how the definition could be used as the basis of a review. The answer may focus on reviewing governance without reference to the definition or may discuss the definition without reference to its practical application to a review. The points made are superficial / generic and not applied to the requirements of the question.</p> <p>Award up to a maximum of only 5 marks if the answer comprises a list of recalled knowledge on the topic and does not attempt to address the requirements of the question.</p>
Level 2	6–10	<p>Some aspects of the definition are discussed or a few aspects are discussed in some detail. The answer is unbalanced, with more focus on some parts of the definition at the expense of others. Answers may deal with some aspects of reviewing governance without making explicit the link to the definition and how it can be applied in practice. Most points made are relevant to the requirements of the question, but the link is not always clear and the element of discussion may be missing in some areas.</p>
Level 3	11–15	<p>A range of aspects of the definition are discussed or a few key aspects are discussed in some detail. The answer is well-balanced, with equal weight given to a number of aspects of the definition and consideration given to the practical application when carrying out a review. The majority of points made are relevant to the requirements of the question, that is, to discuss how the definition may be used in practice rather than just explaining it.</p>

Question number	Indicative content
18	<p>The answer should be written in the style of a report and should both discuss the legal requirements, and show an understanding of the reasons for them. It should also give practical advice.</p> <p>The reason for the legal requirements are for the charity to operate as transparently as it can and to give people key information about the charity. The requirements for registers to be held by companies also links to the need for companies to be governed effectively, and to have some transparency.</p> <p>Names and company/charity information</p> <ul style="list-style-type: none"> Charities that are registered with the Charity Commission must state that they are a 'registered charity', on notices, advertisements or other documents which solicit money or property. A company must also show in legible characters the name on the company's certificate of incorporation on the website. It must also show the address of the registered office, the place of registration (England and Wales), and the registered company number. Under the Business Names Act 1985 the true name must be stated on all business letters, orders, invoices, receipts etc. Including all of the correct legal information can actually help the charity to look more professional. The charity could consider changing its name to the one that it uses. This would require a decision by the company members. It would not require the approval of the Charity Commission, but it would be advisable to check first that the proposed name was not too like one held by another charity. If it wants to retain its registered name, staff and volunteers should be briefed on what they need to do to show the full, correct name on their stationery, emails etc. The charity may also want to think about losing "Ltd" from the name. It has a right to do this, as a charitable company, but it would still need to show on its stationery that it had limited status. <p>Registers</p> <ul style="list-style-type: none"> A company has to maintain a number of registers (these should be listed). These need to be maintained as historic documents – i.e. showing all past members and directors, not just the current ones. Whether or not somebody is listed as a member or director on the register can be proof of whether or not they actually are or were a member or director. The registers of charitable companies are open to inspection by any member of the public (with the exception of the register of directors' residential addresses). If registers are held electronically, adequate precautions must be taken for guarding against falsification and facilitating their discovery. They must be capable of being reproduced in legible hard copy form. Registers may be kept at 'a single alternative inspection location' or at Companies House. Whilst holding the registers at Companies House may seem like a simple solution, to do so usually requires the consent of those affected. <p>Reward other valid responses.</p>

Level	Mark	Descriptor
	0	No rewardable material.
Level 1	1–5	<p>A few points regarding the legal requirements are identified or one key point is analysed in some detail. The answer is likely to be in the form of a list, with little or no analysis of the legal position and very limited advice. The answer may focus only on the legal requirements, without related advice to RW or may offer advice only, which is not clearly linked to legal requirements. The points made are superficial / generic and not applied to the requirements of the question.</p> <p>Award up to a maximum of only 5 marks if the answer comprises a list of recalled knowledge on the topic and does not attempt to address the requirements of the question.</p>
Level 2	6–10	<p>Some points regarding the legal requirements are analysed or a few key points are analysed in some detail. The answer is unbalanced, with more focus on either the analysis of legal requirements or advice to RW. Most points made are relevant to the requirements of the question but the link is not always clear – the element of analysis may be missing or the answer may not always link to the case of RW.</p>
Level 3	11–15	<p>A range of points regarding the legal requirements are analysed or a few key points are discussed in depth. The answer is well-balanced, with equal weight given to analysing the legal requirements and providing related advice to RW. The majority of points made are relevant to the requirements of the question, to analyse the legal requirements and link them to relevant advice for RW in each of the areas highlighted by the scenario.</p>

Question number	Indicative content
19	<p>Accountability is very important for charities but the way that this charity is dealing with it raises a number of problems in terms of its governance. The Good Governance Code gives a number of examples of how a charity can demonstrate accountability, including ensuring that stakeholders' views inform the organisation's planning, decision-making and strategic reviews. But this charity appears to have gone beyond this.</p> <ul style="list-style-type: none"> • Even if the charity has members, its accountability is not just to its members. Its primary accountability is to its beneficiaries, present and future. The objects of this charity mean that it has quite a wide beneficiary group; wider than its membership. In a charitable company the duty to promote the success of the company means to act in the furtherance of the objects, not in the interests of the members. • The charity trustees are potentially failing in their duties. Also, the way the Council and Board are set up means that it is possible that there is also a lack of clarity about who the trustees actually are. By allowing the Council to join with it in setting the strategy, the trustees are not fulfilling their role. They are placing themselves at risk of potential liability. Setting the strategy and agreeing the budget are matters that are core to the role of a Board and these would usually be matters reserved by a Board. • There needs to be much greater clarity about what the Council's involvement actually means. The trustees need to be able to override the views of the Council in order to fulfill their wider, legal obligations. • The charity should be as open and transparent as possible but there are limits on this; it needs to protect its decision-making processes. The charity should find alternative ways of reporting on its Board meetings. Having members observing at Board meetings may be fine, but care needs to be taken to ensure that it does not impact on the effectiveness of the Board meetings and that confidentiality is maintained. • The Board needs to focus on the core role of the Board - setting strategy, overseeing the management functions, setting a policy framework and monitoring performance. This is much broader than the operational role described in the question. Whilst members being able to refer matters to the Board may be a useful way of keeping in touch, the Board needs to ensure that it does not divert it from its core work, or make it focus too much on operational matters. • The method of appointment to the Board may mean that it does not have a sufficient range of skills and experience. The charity should undertake a skills analysis to determine its needs and any potential gaps. It possibly also needs to revise its appointment process. • There needs to be greater understanding of the role of a charity's members. The trustees need to manage the members' expectations about the role, and about the benefits of being members in the context of the charity's charitable purposes. Members need to understand that the charity exists to serve its beneficiaries and not its own members. <p>Reward other valid responses.</p>

Level	Mark	Descriptor
	0	No rewardable material.
Level 1	1–5	<p>A few challenges are described or one key challenge is analysed in some detail. The answer is likely to be in the form of a list, with little or no analysis of the governance challenges which can be inferred from the scenario. The answer may focus on one point with limited coverage of other governance challenges. The points made are superficial / generic and not applied to the issues raised in the scenario.</p> <p>Award up to a maximum of only 5 marks if the answer comprises a list of recalled knowledge on the topic and does not attempt to address the requirements of the question.</p>
Level 2	6–10	<p>Some challenges are analysed or a few key challenges are analysed in some detail. The answer is unbalanced, with more focus on certain governance challenges at the expense of others. Most points made are relevant to the requirements of the question and the issues raised in the scenario, but the link is not always clear.</p>
Level 3	11–15	<p>A range of governance challenges are analysed or a few key challenges are analysed in some depth. The answer is well-balanced, with equal weight given to a number of different challenges which are inferred from the scenario. The majority of points made are relevant to the requirements of the question and to the situation of the organisation described in the scenario.</p>

Examiner's Comments

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Examiner's comments

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Examiner's general comments

The quality of answers was generally good for the June 2017 session. Many candidates achieved consistent marks for all three sections of the paper, rather than achieving very high marks in one section and lower marks in other sections. This seems to indicate a fairly broad basis to the type of knowledge and understanding. However, there were some questions which were not answered well, and these are described below. A very high proportion of candidates answered all of the questions in the paper.

Comment on questions and answers

Section A

Most candidates answered this section of the paper well. Questions where answers could have been improved are set out below.

Question 2

Whilst many candidates identified a correct reason for a trustee becoming personally liable, some did not provide enough detail, for example, by providing an example.

Question 4

A high number of candidates did not correctly describe the policies and procedures required in regard to trustee expenses. A number of candidates answered this question in regard to conflicts of interest or payments / benefits to trustees, rather than expenses.

Question 7

Again, a high number of candidates did not correctly answer this question, with very few getting high marks. Also, many answers were incorrect in regard to how the costs / payments to professional fundraisers needed to be recorded in the annual report and accounts.

Section B

Section B was generally answered well. However, there were few high marks. There were some questions that seemed difficult for a high proportion of candidates.

Question 11

This question was generally answered well. The responses were good in regard to the common law duties, and many candidates showed they had a clear understanding of the requirements of the Trustee Act 2000.

Question 12

The answers to this question were more mixed, showing some gaps in candidates' understanding of the specific charitable incorporated organisation (CIO) requirements. Many answers were based on a common sense approach, or an understanding of some of the rules regarding changing constitutions that can apply across all charities. There was less evidence of knowledge of the specific CIO requirements. Many candidates got mixed up with the requirements regarding written resolutions for CIOs, not realising that to change the constitution of a CIO by a resolution in writing needs to be agreed to by all the members.

Question 13

Some candidates answered this well, but a number did not correctly answer the question, with many choosing to write a broad answer on public benefit without addressing the actual question set.

Question 14

This question was generally answered well.

Question 15

This question was also generally answered well. However, a number of candidates wrote very broadly about why trading subsidiaries are established, rather than focussing on the necessary arrangements that should be in place to separate a trading subsidiary from its parent charity.

Question 16

There were mixed answers to this question. Some candidates answered it well, however, many did not focus on the key differences between a contract and a grant. This was a question where many candidates achieved some marks, but few managed to achieve high marks, because of omitting key points, such as the fact that a grant agreement is not necessarily binding.

Section C

Whilst most candidates answered Section C well, few answered all three of the questions well.

Question 17

This was the question in Section C that had the lowest level of performance. One of the issues that arose was that many candidates took “effectiveness” to mean the effectiveness of the board rather than of the charity. Also, a number of candidates correctly defined direction, effectiveness, supervision and accountability, but did not accurately describe the ways in which they could be used as a basis for reviewing governance.

Many candidates picked up on the fact that the definition in the question concerned systems and processes, and so did not really cover behaviour, which is now seen as a significant component of governance. This was a good point to make. However, the question still needed to be answered, with behaviour being discussed alongside the elements of this definition. Answers that discussed governance, without looking at how the definition could be used as a basis for a review, could not gain sufficient marks for a pass.

Question 18

This question was generally answered well, although candidates seemed to have a better understanding of the law regarding registers than the legal requirements on the use of the name, and on what information needs to be provided for a charitable company. Some candidates tried to apply a common sense approach to this answer, rather than applying specific knowledge of the law, and this produced some mixed results.

Where a number of answers could have been improved, was in the provision of advice and the tone of the report. It is important to remember that when a question asks a candidates to write a report, credit is available for the answer being in a report format, and the tone being appropriate to a board report.

Question 19

This was the question that was answered best in Section C. Most candidates defined most of the key points within the question and showed a good level of understanding of the issues it raised. There were a small number of answers that made incorrect points due to misreading of the question. For example, some candidates incorrectly thought that there was only one board meeting each year and some thought that the Council had 1,500 members. It is always a good idea to re-read through the question when you have finished your answer, to check that you have identified the facts correctly.

Other comments

Always check the question to ensure that you have read it accurately and that your answer is focussing on the question itself, and not just its general subject matter. Sometimes it is clear that a candidate has the knowledge but marks cannot be awarded, as the question itself has not been answered.