



The Governance  
Institute

# Charity Law and Governance

**Mark scheme**

June 2018

## Section A

Question number	Answer	Mark
1	i. Community benefit society. (1) ii. Co-operative society. (1)	
	<b>Total</b>	<b>(2)</b>

Question number	Answer	Mark
2	B It is regulated only by the Charity Commission.	
	<b>Total</b>	<b>(1)</b>

Question number	Answer	Mark
3	<b>Award up to 4 marks for any four of the following:</b> The notice should include the time, date and location of the meeting (1 for any or all); the agenda (1), including the exact wording of any resolutions (1); information on voting by proxy (1); and the secretary or chair's signature and / or date of despatch (1 for either or both). <b>Reward other valid responses.</b>	
	<b>Total</b>	<b>(4)</b>

Question number	Answer	Mark
4	i. To exercise their powers in a way most likely to further the CIO's charitable purposes. (1) ii. To exercise reasonable care in the performance of their functions. (1) <b>Reward other valid responses.</b> <b>Marking guidance: Award one mark if only one of the duties is given.</b>	
	<b>Total</b>	<b>(2)</b>

Question number	Answer	Mark
5	The legal requirement is retention for six years for CIOs (1) and 10 years for companies. (1) <b>Reward other valid responses.</b>	
	<b>Total</b>	<b>(2)</b>

Question number	Answer	Mark
6	The term SAIL stands for Single Alternative Inspection Location (1), and it means a location other than the registered office of a company where registers are kept. (1) <b>Reward other valid responses.</b> <b>Marking guidance: One mark will be given for either the full title, or an accurate description of what it means.</b>	
	<b>Total</b>	<b>(1)</b>

Question number	Answer	Mark
7	True	
	<b>Total</b>	<b>(1)</b>

Question number	Answer	Mark
8	Within 9 months of the year end for Companies House (1) and within 10 months of the year end for the Charity Commission. (1) <b>Reward other valid responses.</b>	
	<b>Total</b>	<b>(2)</b>

Question number	Answer	Mark
9	The Commission's principal role is the protection of charitable funds (1) and ensuring the correct use of funds raised for charitable purposes. (1) It might decide to intervene if there was serious and imminent risk of misuse or loss of charitable funds. (1) The Commission would only use its powers if it considered the situation fell directly within its regulatory remit and the concerns were serious enough to justify intervention. (1) <b>Reward other valid responses.</b> <b>Marking guidance: Reward appropriate use of examples that illustrate when the Commission might intervene.</b>	
	<b>Total</b>	<b>(4)</b>

Question number	Answer	Mark
10	C Removal of an auditor.	
	<b>Total</b>	<b>(1)</b>

## Section B

Question number	Answer	Mark
11	<p>The advantages of this approach are the people conducting the review will know the organisation and its needs. (1) It can also save costs (1) and maintain ownership and continuity. (1) However they may also lack objectivity and a fresh approach. (1) Use of an independent contractor can help to ensure that board members are completely honest. (1) They should also have expertise in conducting such reviews. (1)</p> <p><b>Reward other valid responses.</b></p>	
	<b>Total</b>	<b>(6)</b>

Question number	Answer	Mark
12	<p>The precise meaning of 'poverty' depends on the circumstances. (1)            It can include people of modest means, not just the poorest. (1)            There must be a discernible class of people who can benefit. (1)            A charitable purpose cannot exclude the poor as potential beneficiaries. (1)            A purpose for the relief of poverty must be for the public benefit. (1)</p> <p><b>Reward other valid responses.</b></p>	
	<b>Total</b>	<b>(5)</b>

Question number	Answer	Mark
13	<p><b>Award up to 6 marks for any six of the following:</b></p> <p>If issues are identified by an inquiry the Charity Commission would be able to use its power to suspend or terminate the membership of a trustee, officer, agent or employee of a charity. (1) It is also able to prohibit resumption of trusteeship. (1)</p> <p>Another power that the Charity Commission can use following a statutory inquiry is the power to wind up a charity. (1)</p> <p>These powers can only be used in the context of a formal inquiry. (1)</p> <p>The Charity Commission also has powers that can be exercised by the Commission irrespective of whether there is a formal inquiry. (1) It can direct that a charity's property can be used or transferred in a particular way (1) if those in control of it refuse to use or apply the charity's property for the purposes of the charity. (1) The Commission also has the power to be able to direct a charity not to take specified action. (1)</p> <p><b>Reward other valid responses.</b></p> <p><b>Marking guidance: At least two powers need to be explained for six marks to be awarded.</b></p>	
	<b>Total</b>	<b>(6)</b>

Question number	Answer	Mark
14	<p><b>Award up to 6 marks for any six of the following:</b></p> <p>The Companies Act 2006 has a requirement to obtain consent and this needs to be explicit consent (1) unless the communication is via a website, and there is a provision in the Articles allowing this, or the membership has passed a resolution to this effect. (1) In these instances the Act allows a company to rely upon deemed consent. (1) Also, the company must notify the members that the document has been placed on the website. (1) Unless the member has also consented to being contacted by electronic means, this information must be provided in hard copy form (1) and a member also always has a right to ask for a hard copy. (1) A company cannot refuse to give hard copies. (1)</p> <p><b>Reward other valid responses.</b></p>	
	<b>Total</b>	<b>(6)</b>

Question number	Answer	Mark
15	<p>In order to hold the register of members and persons with significant control in this way the charity would need to get the consent of those affected. (1) This can be agreed on incorporation, by the first members and first persons with significant control (1). After incorporation, all of its members must agree. (1) With a register of persons with significant control, after incorporation, a company can elect to hold it there but only if has given notice to the persons and none of them have objected. (1) For the other registers there is not the same need for complete consent. (1) If the board voted by a majority to keep the other registers in this way, it would be a valid decision. (1)</p> <p><b>Reward other valid responses.</b></p>	
	<b>Total</b>	<b>(6)</b>

Question number	Answer	Mark
16	<p>The Charity Tribunal is a legal tribunal established to hear charity appeal cases. (1)</p> <p>The Charity Tribunal can deal with:</p> <ul style="list-style-type: none"> <li>• Appeals against some Charity Commission decisions. (1)</li> <li>• Reviews regarding Charity Commission decisions. (1)</li> <li>• References made to it by either the Attorney General or the Charity Commission. (1)</li> </ul> <p>In an appeal case, the Tribunal can make a fresh decision itself. (1) In a review case, the Tribunal considers the procedure the Commission followed and can remit the matter back to the Commission for a fresh decision in light of the Tribunal's findings. (1)</p> <p><b>Reward other valid responses.</b></p>	
	<b>Total</b>	<b>(6)</b>

## Section C

Question number	Indicative content
17	<p>The answer should be set out as an email to the Chair. Information on what the secretary can also do to support the Chair can be included in that email, or listed separately. Answers should explain the importance of effective board meetings for good governance and the need for the board to work well together as a decision-making team.</p> <p>There are a number of points which should be identified in the answer. Answers could include:</p> <ul style="list-style-type: none"> <li>• Information on how to ensure that meetings are effective. This should include documentation and information; focus on board role; hygiene factors; and behaviour.</li> <li>• The importance of the agenda not being too long. This does not seem to be the case with this agenda. An ideal agenda is no more than eight substantive items.</li> <li>• It is good practice to review the work programme for the year.</li> <li>• The board needs to be focused on its core roles, i.e. setting strategy; overseeing the management functions: setting a policy framework and monitoring performance.</li> <li>• It is a good idea to have a timed agenda.</li> <li>• Timings and breaks are important. Meetings should not be overlong, but 1.5 hours is not a long time for a board meeting.</li> </ul> <p>One of the things that is apparent in the question is that this a large board, as it has 21 members. The Chair will need to consider the impact of this in the meetings, as research has shown that smaller boards work more effectively. The Chair may also need to consider the background of board members, and whether there are potential conflicts of interest to be dealt with.</p> <p>The Chair has said that she wants strong personalities to shine through. To be an effective Chair, she may need to be reminded that a good Chair will encourage everyone to have some input. Care needs to be taken to ensure that some members do not dominate.</p> <p>It is also noted that the CEO thinks that it is unnecessary to have discussion where there are clear recommendations. The CEO may need to be reminded that it is the board that is responsible for setting the strategic direction of the charity, and that it needs to give full consideration to recommendations. It should not operate as a rubber stamping body.</p> <p>There are a number of points regarding running a meeting effectively that should also be highlighted:</p> <ul style="list-style-type: none"> <li>• The Chair needs to spend their time listening, moving the discussion on, and then summarising each agenda item.</li> <li>• The FODA approach (which should be explained).</li> <li>• Board members should address the meeting through the Chair.</li> <li>• Making sure that the meeting does not get bogged down in formalities.</li> <li>• Possibly adopting some meeting protocols.</li> <li>• The need for independent thought and constructive challenge.</li> <li>• The impact of the personality types of board members.</li> </ul>

	<p>Other ways that the company secretary could support the Chair in this regard could be:</p> <ul style="list-style-type: none"> <li>• Via agenda playing and the forward work programmed.</li> <li>• Ensuring that the papers brought forward are clear and appropriate.</li> <li>• Supporting other ways to make the board more effective, for example, board performance review, and skills audits.</li> <li>• Advice and support on good governance.</li> <li>• Possible review of the board composition.</li> <li>• Training and support on the board role, and making sure that the board members and CEO understand the role.</li> </ul>
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Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1</b>	1–5	<ul style="list-style-type: none"> <li>• A few key points relating to best practice for effective meetings are identified but are not directly linked to the scenario and are accompanied by little detail.</li> <li>• The answer demonstrates limited understanding of best practice for effective meetings. This is communicated in a basic way with simple or generalised statements.</li> <li>• Points made are superficial and not directly linked to the scenario in the question.</li> <li>• The answer includes limited advice given in relation to the charity or explanation of what the company secretary can do to support the Chair.</li> </ul> <p><b>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.</b></p>
<b>Level 2</b>	6–10	<ul style="list-style-type: none"> <li>• Some points regarding best practice for effective meetings are identified, some of which are relevant to the scenario and described in detail.</li> <li>• The answer demonstrates some understanding of best practice for effective meetings and expresses some ideas with clarity.</li> <li>• Some points made are relevant and linked to the scenario in the question.</li> <li>• The answer includes some advice in relation to the charity and explanation of what the company secretary can do to support the Chair.</li> </ul>
<b>Level 3</b>	11–15	<ul style="list-style-type: none"> <li>• A range of points regarding best practice for effective meetings are identified, the majority of which are linked to the scenario and described in some detail.</li> <li>• The answer demonstrates a good understanding of best practice for effective meetings and is communicated in a logical writing structure.</li> <li>• A range of points made a relevant and linked to the scenario in the question.</li> <li>• The answer includes good advice in relation to the charity and a strong explanation of what the company secretary can do to support the Chair.</li> </ul>

Question number	Indicative content
18	<p>Answers should discuss both areas set out in the question: what must be included in a charity's constitution and what else might be included. Answers also need to explain the reasons why a matter must be or might be included, as required by the question. Answers could include the following:</p> <p><b>Matters that must be included:</b></p> <p>The charity's name (for practical reasons – to identify the organisation to which the constitution applies; for some legal forms the relevant legal rules require the name to be started (for example, CIO)).</p> <p>Charitable purposes (the 'objects') – this is essential because a charity must have purposes within the 'descriptions' of charitable purposes in the Charities Act.</p> <p>Non-distribution clauses, ensuring the charity's income and its assets can only be used for the stated charitable purpose (this is a rule of charity law but in practice the Charity Commission expects to see a clause in the constitution that reflects the rule; a company wishing to omit 'Limited' from its name would have to include such a clause as one of the company law conditions for omission of 'Limited').</p> <p>Usually a clause restricting benefits to trustees (and to members, in a membership charity) is also included. (This too reflects the underlying principles of charity law regarding restrictions on benefits to trustees and members, in practice the Charity Commission expects to see a clause in the constitution that reflects the principles.)</p> <p>There may also be a 'winding up' clause specifying how the charity can be formally closed down. (For some legal forms there are statutory provisions on the process of winding up, for example, regulating the winding up of companies or CIOs. However it is usual for a charity's constitution to reflect the charity law principle that final funds must be given to a comparable charitable purpose.)</p> <p>Some contents will depend on which legal form is chosen for the new charity. For example, a charitable company's articles must comply with company law and a CIO's constitution must comply with the relevant CIO regulations.</p> <p>Otherwise, the rest of the contents will depend on what is suitable for the particular circumstances.</p> <p>If it is a membership legal form charity, the constitution needs to include clauses relating to eligibility for membership and the processes by which people become and cease to be members. It will also address members' meetings, such as the AGM, and how the members take decisions.</p> <p><b>Matters often included:</b></p> <p>Other areas that might need to be included will depend on circumstances and the specific legal form of the particular charity. Examples of areas that might need to be included are:</p> <p><u>Powers of the charity</u></p> <p>A charitable company may choose not to include these as, under the Companies Act 2006, it has statutory power to do anything lawful in pursuit of its objects. Other legal forms of charity that do not have a comparable statutory power (for example, an unincorporated members' association) may find it helpful to include specific powers.</p> <p><u>Who can be a trustee and how trustees are appointed</u></p> <p>There are some legal rules about who is and is not eligible to be a trustee (those who are legally disqualified cannot be appointed). In addition to those rules, a charity may wish to include further eligibility criteria, for example, some membership charities require any candidate for appointment as a trustee to be a current member of the charity.</p> <p><u>Rules and procedures for board meetings and how decisions are taken by the trustees</u></p> <p>Some legal rules may automatically apply, for example, a charitable company's trustees must</p>

take decisions within the relevant company law rules on decision-making by directors. However it is usually helpful to include some specific rules and procedures in the constitution on areas such as notice of meetings and the chairing of meetings.

Rules and procedures relating to conflicts of interest

For most legal forms of charity it is not a legal requirement to address these areas in the constitution but it is good governance practice to do so.

Relevant clauses can also be useful reminders of the key legal principles of charity law regarding conflicts of interest and regarding the duties of trustees in this area.

Requirements about reporting, accounting and other accountability, such as the keeping of registers and records

Charity law (and company law, for charitable companies) imposes requirements on charities regarding all these areas, the detail varies depending on the legal form of the charity and other factors such as financial thresholds. However including some overview provisions in the constitution, as reminders and signposts, is helpful.

Provisions dealing with how the constitution can be altered

This is common but is not always a requirement because some legal forms of charity have a statutory power to alter their constitutions. For example, a charitable company has this under the Companies Act.

Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1</b>	1–5	<ul style="list-style-type: none"> <li>• A few key points relating to the matters that must be included in a charity's constitution and those that are often included are identified but are accompanied by little detail.</li> <li>• The answer demonstrates limited understanding of the legal requirements, and the different legal forms of charities and differences in their constitutions. This is communicated in a basic way with simple or generalised statements.</li> <li>• Examples to illustrate why a particular area must be included or may need to be addressed are limited.</li> <li>• Points made are superficial and not directly linked to the requirements of the question.</li> </ul> <p><b>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.</b></p>
<b>Level 2</b>	6–10	<ul style="list-style-type: none"> <li>• Some points regarding the matters that must be included in a charity's constitution and those that are often included are identified, some of which are relevant to the scenario and described in detail.</li> <li>• The answer demonstrates some understanding of the legal requirements, and the different legal forms of charities and differences in their constitutions, and expresses some ideas with clarity.</li> <li>• Examples are used to illustrate why a particular area must be included or may need to be addressed.</li> <li>• Some points made are relevant and linked to the requirements of the question.</li> </ul>
<b>Level 3</b>	11–15	<ul style="list-style-type: none"> <li>• A range of points regarding the matters that must be included in a charity's constitution and those that are often included are identified, the majority of which are described in some detail.</li> <li>• The answer demonstrates a good understanding of the legal requirements, and the different legal forms of charities and differences in their constitutions and is communicated in a logical writing structure.</li> <li>• The answer provides additional comments on why the clauses are required or might be appropriate, supported by a range of examples.</li> <li>• A range of points made are relevant and linked to the requirements of the question.</li> </ul>

Question number	Indicative content
19	<p>Answers should address areas such as trustee decision-making, the risk of breach of trust (in the context of the charity's purposes), the nature of the services being tendered and their relationship to the charitable purposes, risk issues (including the financial risks) and the conflicts of interest issues.</p> <p>Answers should also address how the charity can enter into a binding contract and demonstrate understanding of the legal rules on what makes a 'contract' and how a charity can legally commit to a contract. Answers should also comment on the issue of the charity's purposes in the context of this proposed contract.</p> <p>Answers could include the following:</p> <p><b>Issues for the trustees</b></p> <p>The trustees must exercise independence in their decision-making about this matter, ensuring they act only in the best interests of the charity. Trustees must follow a proper decision-making process.</p> <p>If the charity did enter into a contract on the terms of the tender it would be acting outside its charitable purposes. That is likely to be a breach of trust (because of the use of charitable resources outside the charitable purposes) and that would expose the trustees to potential personal liability.</p> <p>The provision of public services under a contract is a potential way to carry out appropriate charitable activities and so provide appropriate charitable public benefit. However, this charity can only provide such services if they are charitable services, falling entirely within its charitable purposes. For reasons I have explained, that is not the case under the terms of this tender.</p> <p>There are significant financial risks and potential penalties involved. Also the funds are therefore restricted and could not be used to support the charity's general overheads or to fund any staff or contractor costs not directly related to delivery of care to beneficiaries under this contract. The charity already has difficulties with regard to its finances and these extra risks are significant. The trustees must be mindful of their responsibilities to safeguard the financial stability of the charity and to ensure it remains solvent.</p> <p>The trustees should seek to obtain full cost recovery (the charity should not subsidise the public service out of charitable funds).</p> <p>The trustees are keen to safeguard all current employee roles and to retain all the consultants. The income from this contract could not be used to support the costs of all those posts, as explained above. If redundancies do eventually have to be made and/or the contracts with the retained contractors terminated, there will be further costs involved in that.</p> <p>There is a conflict of interest (in particular a conflict of loyalty) as the son of the Chair of trustees is employed by the NHS Trust that is tendering this contract and his role is at one of the centres where the activities required by the contract must be carried out. Trustees must manage this conflict properly and they should take account of the Charity Commission's guidance on conflicts of interest, which recommends conflicts should be avoided whenever possible. The identified conflict must be declared openly to the whole board and the conflicted trustee must not take any part in the consideration of the matter and on any decision about the matter. Should the charity decide to make a bid and be successful, the ongoing conflict would have to be carefully managed.</p> <p>The trustees should also be mindful of their responsibility to safeguard the charity's reputation.</p> <p>There are also risks of personal liability for the trustees, because the charity is unincorporated. It therefore does not have the legal capacity to become a party to this contract so individuals must do so instead, that would probably be some or all of the trustees. They would therefore be exposed to personal liability with regard to the contract.</p> <p>The trustees need to be aware that a contract is fundamentally different from a grant. Under a contract, the charity is selling services to the other party under the terms of a contract. Whereas</p>

under a grant agreement, a third party gives funds to the charity so that the charity can carry out its charitable purposes in general or carry out a particular specified activity within those purposes.

### **How the charity can enter into a binding contract**

The charity would need to accept the offer in this tender, committing itself to provide the services described in the tender in return for payment and in accordance with the other terms set out in the tender.

A charity can only enter into a contract that is within its charitable purposes and within its powers.

There is a legal problem here because the group of people to whom services are to be delivered and the geographic area both go outside the charity's charitable purposes. So, the contract cannot be validly entered into unless the terms of the proposed contract are modified (to fall within the purposes) or the charity alters its purposes (that would require prior Charity Commission consent).

If those fundamental legal issues can be properly dealt with, the other key requirements for this charity to enter into a binding contract would include:

Appropriate individuals will need to sign the contract in their own names, acting for the charity, (for example, some of the trustees) because in an unincorporated trust the charity does not have legal capacity to enter into a contract directly.

A proper decision of the trustees is needed, approving the proposed contract terms and authorising execution of the contract. If all the trustees will be parties the Charities Act procedure to authorise two of them to sign on behalf of all of them could be used.

Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1</b>	1–5	<ul style="list-style-type: none"> <li>• A few key points relating to the stewardship of funds and assets and contracting are identified but are not directly linked to the scenario and are accompanied by little detail.</li> <li>• The answer demonstrates limited understanding of the issues the trustees should consider. This is communicated in a basic way with simple or generalised statements.</li> <li>• Points made are superficial and not directly linked to the scenario in the question.</li> <li>• The answer includes limited advice given in relation to the issues the charity should consider or how it can enter into a binding contract.</li> </ul> <p><b>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.</b></p>
<b>Level 2</b>	6–10	<ul style="list-style-type: none"> <li>• Some points regarding the stewardship of funds and assets and contracting are identified, some of which are relevant to the scenario and described in detail.</li> <li>• The answer demonstrates some understanding of the issues the trustees should consider and expresses some ideas with clarity.</li> <li>• Some points made are relevant and linked to the scenario in the question.</li> <li>• The answer includes some advice in relation to the issues the charity should consider and how it can enter into a binding contract.</li> </ul>
<b>Level 3</b>	11–15	<ul style="list-style-type: none"> <li>• A range of points regarding the stewardship of funds and assets and contracting are identified, the majority of which are linked to the scenario and described in some detail.</li> <li>• The answer demonstrates a good understanding of the issues the trustees should consider and is communicated in a logical writing structure.</li> <li>• A range of points made a relevant and linked to the scenario in the question.</li> <li>• The answer includes good advice in relation to the issues the charity should consider and how it can enter into a binding contract.</li> </ul>