



The Governance
Institute

Charity Law and Governance

Mark scheme

June 2016

Section A

Question number	Answer	Mark
1	<p>Any one of the following:</p> <ul style="list-style-type: none"> • There is limited or no liability for trustees/members (1) meaning there is less financial risk for trustees (1). • The charity only has to register once with the Charity Commission (1) and doesn't have to register with Companies House as well (1). • As it has its own legal identity (1), the charity can conduct business in its own name rather than the name of the trustees (1). <p>Reward other valid responses.</p>	(2)

Question number	Answer	Mark
2	Common law	(1)

Question number	Answer	Mark
3	True	(1)

Question number	Answer	Mark
4	<p>Any four of the following:</p> <ul style="list-style-type: none"> • vision/values/strategy/mission • business plan • budget • annual report and accounts • matters of significant risk • matters reserves/schemes of delegation • terms of reference • appointment of CEO / Secretary • risk management policy <p>Reward other valid responses.</p>	(4)

Question number	Answer	Mark
5	<p>Any two of the following:</p> <ul style="list-style-type: none"> • An offer to enter into a contract (1). • An acceptance of the offer of a contract (1). • Consideration for the contract passing between the parties (1). <p>Accept one-word answers such as 'offer', 'acceptance' or 'consideration'.</p> <p>Reward other valid responses.</p>	(2)

Question number	Answer	Mark
6	D – Registration with the Charity Commission	(1)

Question number	Answer	Mark
7	False	(1)

Question number	Answer	Mark
8	<p>When the investment conflicts with the charity's charitable purposes (objects) (1).</p> <p>When the charity risks losing current and future support (1).</p> <p>Do not accept just 'charitable purposes or 'current and future support'.</p> <p>Reward other valid responses.</p>	(2)

Question number	Answer	Mark
9	<p>Any of the following points up to four marks:</p> <ul style="list-style-type: none"> • Any restrictions in the charity's constitution must be observed (1). • There must be a written agreement (1) which sets out the maximum permitted level of remuneration (1). • The number of the charity's trustees who can benefit in this way is restricted to less than half. (1) • Trustees must consider relevant Charity Commission guidance (1) i.e. CC11 <i>Trustee Expenses and Payments</i> (1) <p>Allow full marks for 2 or 3 of the above points with some detail, or for outline statement of all 4 relevant points shown.</p> <p>Reward other valid responses</p>	(4)

Question number	Answer	Mark
10	An incorporated charity can hold assets in its own right (1) whereas an unincorporated charity has to hold them via nominees (1).	(2)

Section B

Question number	Answer	Mark
11	<p>Charitable trusts are very quick and easy to set up (1) and as they are seen as the traditional form for a charity, may be suitable for a new organisation.(1)</p> <p>There is no need for a two-tier structure (1) so the form is ideal for a small charity with no need for a large membership (1) or one where trustees will not face personal liability. (1)</p> <p>Charitable trusts are less regulated than incorporated bodies, which may also be attractive to a charity starting up. (1)</p> <p>Reward other valid responses</p>	(6)

Question number	Answer	Mark
12	<p>Any combination of the following:</p> <ul style="list-style-type: none"> Using effective methods of communication (1) for example, changing tone of message/language to suit the intended audience (1) or types of communication media (printed, electronic, etc) (1), transparent public reporting (1). Ensuring that views are gathered and considered (1) for example user/focus/scrutiny panels (1), social media forums (1), general feedback/complaints (1). Ensuring that beneficiaries or other stakeholders are involved in decision making (1), for example inviting them to be part of councils and committees (1), involvement in devolved decision making (1). <p>Award 1 mark for method of ensuring accountability and up to 2 marks for examples produced for each method.</p> <p>3x2 or 2x3</p> <p>Reward other valid responses.</p>	(6)

Question number	Answer	Mark
13	<p>Trustees need to ensure the relevant trading is permissible under the charity's constitutional powers (1). Any constitutional restrictions on trading must be checked and observed (1).</p> <p>The trading must be appropriate to the charity's charitable purposes (1) and not in conflict with those purposes (1).</p> <p>The charity's funds and assets must remain principally directed to the charitable activities (1). Charitable funds and assets must not be put at risk in commercial trading (1).</p> <p>Reward other valid responses, including commercial elements such as credible business plan or assessment of risk.</p>	(6)

Question number	Answer	Mark
14	<p>An incorporated organisation has its own independent legal identity (1), so it can enter into contracts and agreements in its own right (1) and as the organisation itself is responsible for the debts and liabilities that arise under such contracts and agreements (1) members are protected from these debts and liabilities (1). It also protects the trustees of the charity provided they have acted properly (1). Liability is usually limited to the amount promised by each member, which for charities limited by guarantee is usually a small amount like £1. (1)</p> <p>Reward other valid responses.</p>	(6)

Question number	Answer	Mark
15	<p>Professional fundraisers who raise funds for a charity are not employed by the charity (1) but they are being paid for their work (1), e.g. people who get direct debit donors to sign up on the street (1) or paying someone to go door-to-door to get the public to sign up to a regular direct debit donation.</p> <p>Commercial participators on the other hand, are commercial entities who raise funds for a charity through some form of business activity (1) and the activity is being completed through their normal business activities (1), e.g. supermarket giving the charity a percentage of the profit on each unit of a designated item sold (1).</p> <p>Award up to 2 marks for explanation of each concept and 1 mark for the definition. Up to 3 marks for each concept – equal weight must be given to each concept to gain the full 6 marks.</p> <p>Reward other valid responses.</p>	(6)

Question number	Answer	Mark
16	<p>Any five marks from the following:</p> <ul style="list-style-type: none"> • Focus on key items which need a decision, rather than just providing information (1) • Devise an annual work programme with the board, agreeing what is to be covered and when (1) • Drafting the agenda so that each item to be discussed is described (1) and outlining what the recommendations are (1) • Avoid overuse of 'matters arising' and 'any other business' (1) • Keep the agenda short (1) • Have a standard format for board papers (1) and keep papers concise / to a standard length (1) • Distribute papers in good time so that members can read them (1) <p>Reward other valid responses</p>	(5)

Section C

Question number	Indicative content
17	<p>The objectives and functions of the Charity Commission are set out in sections 14 and 15 of the Charities Act 2011. The functions include “Identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action.”</p> <p>If the Charity Commission receives a complaint it will consider whether to take action in regard to its Risk Framework. At the present time, the Charity Commission is placing more emphasis on taking action, and the number of investigations and enquiries are increasing. This means that it is more likely that the Charity Commission will take action on this matter. (However, in the majority of cases matters will be dealt with by the Charity Commission providing advice to the charity).</p> <p>Charities Act 2011 S 46 gives the Charity Commission the power to “institute inquiries”. The Charity Commission will usually only intervene in circumstances where it considers that:</p> <ul style="list-style-type: none"> • the Charity Commission needs to be involved; • the nature and level of risk deem intervention necessary; or • its intervention is the most effective response in the circumstances. <p>Once a formal inquiry has been instigated, the Charity Commission has a number of protective powers. Before it exercises any of these powers the Charity Commission must be satisfied either:</p> <ul style="list-style-type: none"> • that there is or has been misconduct or mismanagement in the administration of the charity; or • that it is necessary or desirable to act in order to protect the property of the charity or to ensure that any property the charity has or is due to receive is properly applied for its charitable purposes. <p>The Act also gives the Commission the power to obtain search warrants and call for documents.</p> <p>If, as a result of an inquiry, the Commission is satisfied that there is or has been misconduct or mismanagement in the administration of the charity it can suspend or terminate the membership of a trustee, officer, agent or employee of a charity or direct that a charity’s property can be used or transferred in a particular way.</p> <p>Once an inquiry has concluded the Charity Commission may publish the results of its investigation in a report or make a statement. Reports are usually published on the Charity Commission’s website. The organisation involved will usually be given an opportunity to review and make representations on the draft report before it is published.</p> <p>This case involves several very serious matters, which are:</p> <ul style="list-style-type: none"> • a manager is potentially using the charity for private advantage; • young people’s safety is being put at risk; • there is significant risk of reputation damage for charities generally, which could result in lack of public trust. <p>As such, the Charity Commission is highly likely to intervene in this case with the scope of a statutory inquiry. It may well involve other agencies, as there is criminal activity alleged which the police should investigate.</p> <ul style="list-style-type: none"> • As the case involves misuse of finances and there will be documentation relating to purchase of equipment / the manager’s finances, the Commission may well need to use powers to examine financial records and documents held by the charity and the manager (i.e. search warrants, computer records, freezing of assets). • The charity’s activities in this area may be restricted during the investigation i.e. no more activities with young people (temporary protective powers).

		<ul style="list-style-type: none"> • If the investigation finds there was wrongdoing, the Commission may use remedial powers to implement solutions. • From a reading of the scenario, it could be that the Commission would advise on how activities of managers running its services can be checked in future. • It may also investigate why the parent did not feel the charity was taking the initial complaint seriously and take further action on this. <p>It is likely that the Charity Commission would publish the results of the inquiry.</p>
Level	Mark	Descriptor
	0	No rewardable material.
Level 1	1–5	<p>A few factors relating to the Charity Commission’s approach to complaints are described or one factor is discussed in some detail. The answer is likely to be in the form of a list, with very little reference to the legislation supporting this function, or the processes that are followed. There is no discussion and points made are superficial/generic and not applied to the requirements of the question (what approach would the Commission take in this case?).</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>Answers refer to some of the factors listed in the indicative content and will show some understanding of the legal powers that the Charity Commission has to investigate complaints and the processes involved, but may not show a full knowledge of all the functions and powers and / or will not show full knowledge of the processes and powers in regard to complaints.</p> <p>Answers at this level also may give an appropriate analysis of the approach that the Charity Commission is likely to take but without showing an understanding of its legal powers.</p> <p>Answers may not relate specifically to the charity in the scenario, and will not provide a clear discussion of the action the Commission might take in this case.</p>
Level 3	11–15	<p>Answers show a detailed understanding of the matters included in the indicative content, which is clearly applied to the requirements of the question. There is potentially a great deal of detail in the answer to this question, and candidates will not be expected to have covered all of this to be marked at this level. However, they will be expected to have applied the detail of the Commission’s legal powers and the processes it follows to the scenario of the question.</p> <p>Candidates will discuss different approaches the Charity Commission could take to complaints and awareness of the different powers it can use; this is discussed in the context of what the Commission might do in this case.</p>

Question number	Indicative content
18	<p>This answer will need to show an awareness of some of the provisions of the Companies Act as it applies to general meetings. The points that should be covered are:</p> <ul style="list-style-type: none"> • A charitable company will need to follow s.307 of the Companies Act 2006 which states that the notice for a general meeting must be at least 14 clear days. The Articles are also likely to specify when the notice is deemed to be served (i.e. how long after despatch it is deemed to have been received). If this is not specified, it should be considered to be 48 hours after being posted by first class post. The definition of “clear days” means that you do not include the day that the notice is deemed to be served, nor the day of the meeting. This is in addition to the period between a notice being despatched and when it is deemed to be served. • These notice requirements mean that decisions cannot be taken at meetings on matters that are not listed on the notice. A notice for a general meeting should normally include the exact wording of any resolution. The rules on giving notice to members mean that a resolution cannot be put to the members in a general meeting unless it is sent out with the notice. • There is the possibility of serving notice late – of having “short notice”. However, for a company this usually requires the agreement of 90% of the members. With the number of members that this company has, this appears unlikely. <p>The reason for these provisions is to ensure equity between company members, and that all have the opportunity to participate. Members can look at the notice/agenda, and decide if they want to attend, or to vote by proxy. Matters will not be considered without them being notified.</p> <p>It may also be relevant to highlight that even if members could take more decisions at the meeting, the role of members should be remembered. It is for the trustees to oversee the strategy and direction of the charity, and they need to take care not to consider themselves bound by decisions taken by the members.</p> <p>Answers should also address ways in which Gifts can improve accountability to stakeholders, and may include the following points:</p> <ul style="list-style-type: none"> • Scope of accountability – to members only or are there other stakeholders? • What form does accountability take – is it just the charity reporting on what it does or is it asking for contributions? If it is the latter, there must be clarity about what a stakeholder’s involvement actually means. The trustees have a duty to act in the interests of the charity; not the members or stakeholders. • Reference to the Good Governance Code and its suggestions for improving accountability, including: <ul style="list-style-type: none"> ○ identifying stakeholders and ensuring that there is regular and effective communication with them about the organisation’s achievements and work; ○ ensuring that stakeholders have the opportunity to hold the board to account and that their views inform the organisation’s planning, decision-making and strategic reviews; ○ having clear and effective complaints procedures; ○ recognising and acting on broader organisational responsibility towards communities, wider society and the environment (insofar as this does not divert the organisation from achieving its objects). • Communicating reports, targets, impact and the information provided in the annual report. • Other ideas for member engagement such as: <ul style="list-style-type: none"> ○ Holding an open discussion section at the meeting for members to put forward ideas, No decisions could be taken on these, but they could be considered by the Board. ○ Ask members in advance for items that they would like to discuss, and put these onto the agenda. However, care should be taken not to take decisions at this meeting that should be taken by the Board.

Level	Mark	Descriptor
	0	No rewardable material.
Level 1	1–5	<p>Answers will comprise a list of recalled knowledge on AGM procedure without attempting to relate it to the charity in the scenario. Alternatively, the answer does not show understanding of law and procedure relating to AGMs and/or does not address other ways in which the charity can make itself more accountable to stakeholders.</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>Answers at this level will demonstrate:</p> <ul style="list-style-type: none"> • Knowledge of the company law requirements and procedures for an AGM. • Some attempt to explain why the proposal for AGM in the scenario is not feasible. • Some attempt to suggest better ways to make the charity accountable to its stakeholders. <p>Answers may not specifically apply to the charity in the scenario and would be less clear in the explanation of why the AGM proposal cannot go ahead or explanation of how to make the charity more accountable.</p>
Level 3	11–15	<p>Answers at this level will demonstrate:</p> <ul style="list-style-type: none"> • Detailed understanding of the company law requirements and procedures for an AGM. • Explanation of how this relates to the scenario and why these legal requirements mean that the charity cannot conduct the AGM in the way proposed. • A range of suggestions for how the charity can make itself more accountable to stakeholders. <p>Answers at this level may provide some of the reasoning behind the company law requirements.</p> <p>Strong answers will word the response in a way that recognises the concerns of the Chair and delivers the message in a constructive way.</p>

Question number	Indicative content
19	<p>Charity trustees must be mindful of their general legal duties when considering the appointment of potential new trustees. As Gordon says that he has little understanding either of the role of a charity trustee or of financial matters, it is clear he would need considerable support and help in order to be able to take on the role and discharge its significant responsibilities. In considering him as a potential new trustee, the board will need to have that in mind, balancing the time and resources that would require with the urgent need to address the charity's financial position (there is little time for Gordon to acquire and be able to apply the necessary new and additional knowledge and skills).</p> <p>All trustees share collective responsibility for the charity, which includes collective responsibility for its financial affairs.</p> <p>It is important for the trustees to maintain diligent oversight of the charity, so they are aware of key issues such as its financial position and how major risks are being identified and controlled. Maintaining the charity's solvency is crucial to avoid the risk of personal liability in the event of insolvency.</p> <p>In order to discharge their stewardship of the charity correctly, the trustees must therefore pay proper attention to the management of the charity's finances and ensure the charity remains solvent. This is a key part of the proper discharge of the general legal duties of charity trustees, including their duties to:</p> <ol style="list-style-type: none"> 1. Act in the charity's best interests; and 2. Manage the charity's resources responsibly; and 3. Act with reasonable skill and care. <p>Each individual trustee must discharge his or her responsibilities properly in relation to these matters. It is therefore essential that Gordon has an adequate understanding of the financial position of the charity and contributes to the collective management of the finances by the board of trustees.</p> <p>Gordon's family relationship with the charity's CEO (he is Pam's brother) could also call into question his suitability and independence as a trustee. The relationship creates an inherent conflict of loyalty and so a situational conflict of interest. Even the perception of such a conflict gives rise to a risk of damage to the reputation of the charity. The conflict therefore needs to be identified and properly addressed. If it cannot be adequately dealt with, to ensure the charity is not at any risk of harm, it will be inappropriate for Gordon to be appointed as a trustee. If the board reasonably considers it can be properly addressed they must ensure appropriate procedures are in place and are observed. Those should ensure Gordon does not and could not be seen as improperly influencing decisions because of his family links to the CEO of the charity. Particular care is needed about this, given the grave financial situation of the charity, for example the trustees may need to consider changes to staff terms and conditions (to reduce costs) or staff redundancies or even closure of the charity.</p> <p>A trustee can be personally liable in a number of circumstances. In this scenario, the main risks of such liability would be:</p> <ol style="list-style-type: none"> 1. Liability for breach of trustees' duties, especially breaches which result in loss to the charity (for example, if the breach of duty allowed the finances to deteriorate further). 2. Liability to contribute personally towards paying the charity's debts, if the trustees' poor management of the charity was a contributing factor in the charity becoming insolvent. <p>These liability risks are best addressed by the trustees, collectively, taking a sufficiently robust and diligent approach to addressing the financial difficulties and ensuring the charity's financial affairs are managed into a sustainable and healthy position. If that is not likely to be possible they must consider closure of the charity and should ensure that is addressed urgently, whilst it remains solvent. Trustees would be well advised to obtain urgent independent professional advice on the financial position, to help inform their discussions and decisions (for example advice from a suitably qualified and experienced insolvency adviser).</p>

		<p>Other liability protections, such as trustee indemnity insurance or restructuring the charity so that the old charity closes and passes its funds, other assets and its activities over to a new incorporated charity, are not likely to be of assistance in this case. That is because:</p> <ol style="list-style-type: none"> 1. The financial difficulties and the associated liability risks already exist and the trustees of this charity must deal swiftly and appropriately with those difficulties. 2. Any new successor charity will not automatically acquire any responsibility for the debts of the old charity and a restructure does not automatically remove any liabilities the trustee of the old charity have already incurred. <p>The legal exclusions on trustee indemnity insurance make it very unlikely that negligent or reckless trustees, who are in breach of their legal duties and/or who manage a charity into insolvency, could successfully claim on that insurance.</p>
Level	Mark	Descriptor
	0	No rewardable material.
Level 1	1–5	<p>A few factors listed in the indicative content are described or one factor is analysed in some detail. The answer is likely to be in the form of a list. There is very little reference to whether or not, or how, the personal liability risks for the trustee in the scenario could be managed. There is no analysis and points made are superficial/generic and not applied/directly linked 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>Answers apply some relevant analysis of the personal liability risks a trustee faces, showing more than just recall of knowledge and/or with some links made to the scenario. However, the answer may not explore the full range of risks the potential trustee in the scenario would face, or may not analyse whether some of the risks could be managed by the trustee or by the charity. Some of the difficulties which need to be considered, and potential ways of managing them, may be considered superficially or not at all.</p>
Level 3	11–15	<p>Answers at this level analyse a range of risks the potential trustee could face in some detail and consider how they might be managed, and the difficulties of doing so. There are detailed observations on the risks faced by the potential trustee in this scenario and there is in-depth understanding of the problems the trustee and the charity would face in trying to manage these risks.</p>