



The Governance  
Institute

# Charity Law and Governance

**Mark scheme**

November 2016

# Section A

Question number	Answer	Mark
1	Three <b>Reward other valid responses.</b>	(1)

Question number	Answer	Mark
2	<p><b>Any two of the following:</b></p> <ul style="list-style-type: none"> <li>• Charity Commission <b>or</b> Charity Commission for England and Wales (1)</li> <li>• Office of the Scottish Regulator (1)</li> <li>• Charity Commission for Northern Ireland (1)</li> </ul> <p><b>Accept 'OSCR' – otherwise do not accept alternative wordings for the bodies e.g. Northern Irish Charity Commission</b></p>	(2)

Question number	Answer	Mark
3	False	(1)

Question number	Answer	Mark
4	<p>(i) PB1 Public benefit: the public benefit requirement (mainly focused on potential new charities, charity registration applicants and charities whose trustees wish to alter their charity's purposes) (1)</p> <p>(ii) PB2 Public benefit: running a charity (this comments on the public benefit requirement in the context of running a charity). (1)</p> <p>(iii) PB3 Public benefit: reporting (this explains trustees' duty to report on how they have carried out the charity's purposes for the public benefit).(1)</p> <p><b>Marking notes:</b></p> <ul style="list-style-type: none"> <li>• <b>The exact titles and the explanation of the content as shown above are not necessary for each mark to be awarded, as long as the answer shows an understanding.</b></li> <li>• <b>PB1; PB2; and PB3 without accompanying narrative are not sufficient answers.</b></li> </ul> <p><b>Reward other valid responses.</b></p>	(3)

Question number	Answer	Mark
5	<p>Any <b>two</b> of the following:</p> <ul style="list-style-type: none"> <li>• To determine whether or not organisations are charities (1)</li> <li>• To encourage and facilitate the better administration of charities (1)</li> <li>• To identify and investigate the apparent misconduct or mismanagement of charities and take remedial or protective action (1)</li> <li>• To determine whether public collection certificates should be issued and remain in force (1)</li> </ul> <p><b>Accept note-form answers reflecting the above content, such as 'investigate misconduct'.</b></p> <p><b>Reward other valid responses.</b></p>	(2)

Question number	Answer	Mark
6	<p><b>Any four of the following:</b></p> <ul style="list-style-type: none"> <li>• Change of Accounting Reference Date (1) <b>Accept reference to 'ARD'</b></li> <li>• Change of Registered Office (1)</li> <li>• Creation [or change] of Single Alternative Inspection Location (1) <b>Accept reference to 'SAIL'</b></li> <li>• Change of directors and secretaries and their details (2)</li> <li>• Allotment of shares (1)</li> <li>• Change of Articles (1)</li> <li>• Mortgages and / or charges (1) <b>Award 1 for just 'mortgages' or just 'charges'</b></li> </ul> <p><b>Maximum two marks awarded for answers with variations on: change or appointment of director, or: change or appointment of secretary</b></p> <p><b>Reward other valid responses.</b></p>	(4)

Question number	Answer	Mark
7	<p>An investment which is made to further the charity's charitable purposes. (1) For example, an anti-poverty charity giving a loan to someone on a low income to help them start up their own business. (1)</p> <p><b>Reward other valid responses.</b></p>	(2)

Question number	Answer	Mark
8	C – Charitable Incorporated Organisations	(1)

Question number	Answer	Mark
9	<p>The charity is a company so it can use the Companies Act 2006 provisions: it will require a majority of members and not just those voting. (1)</p> <p>And, any <b>one</b> of the following:</p> <ul style="list-style-type: none"> <li>• Check the charity's Articles allow for a lower majority than the Companies Act. (1)</li> <li>• Check if it can be done by email. (1)</li> </ul> <p><b>Reward other valid responses.</b></p>	(2)

Question number	Answer	Mark
10	<p>Any <b>one</b> of the following:</p> <ul style="list-style-type: none"> <li>• Safeguarding against accidental loss or deliberate misappropriation (1)</li> <li>• Applying the funds and assets within the charity's charitable purposes (1)</li> <li>• Using them effectively and efficiently to deliver the greatest possible public benefit (1)</li> </ul> <p><b>Reward other valid responses. Award the second mark for a relevant example – or allow 2 marks for two separate suggestions.</b></p>	(2)

## Section B

Question number	Answer	Mark
11	<p><b>Allow up to five marks for any of the following points:</b></p> <p>There is a different definition of charity in Scotland and Northern Ireland (1)  <b>Allow up to one additional mark for examples of difference in definition.</b></p> <p>There is also a different approach to public benefit. (1)</p> <p>In Scotland, charities need to register with OSCR (1) but registration with the Charity Commission for Northern Ireland is not yet in force. (1)</p> <p>Charities need to seek OSCR approval for certain changes (1) and need to file accounts and annual return (1) within 9 months (1).</p> <p><b>Reward other valid responses.</b></p>	(5)

Question number	Answer	Mark
12	<p><b>Allow up to six marks for any of the following:</b></p> <ul style="list-style-type: none"> <li>• All charities are subject to charity law, for example the Charities Act 2011 (1).</li> <li>• A charity is subject to the charity regulatory regime, for example it must register with the Charity Commission (1).</li> <li>• A charity must have solely charitable purposes that are for the public benefit (1)</li> <li>• For example a charity with charitable purposes to advance the performing arts would need to ensure it enabled public access to relevant artistic performances. (1)</li> <li>• Charitable status places legal duties on the charity trustees (1)</li> <li>• For example a general legal duty to act in the best interest of the charity. (1)</li> <li>• Charitable funds and assets must be safeguarded and applied correctly to further the charity's purposes (1)</li> <li>• For example a charity with purposes to relieve poverty in Devon might make grants to poor people in that county. (1)</li> <li>• A charity must be publicly accountable, for example it must prepare annual accounts and an annual trustees' report which comply with charity law requirements. (1)</li> <li>• Unless its income is below £25,000, it must file those with the Charity Commission. (1)</li> </ul> <p><b>Allow full marks only if explanation is provided for some of the points.</b>  <b>Reward other valid responses.</b></p>	(6)

Question number	Answer	Mark
13	<p><b>Allow up to six marks for any of the following points:</b></p> <p>Agency theory is concerned with the relationship between the managers of a company and the owners (1) but a charity does not have owners in the same sense. (1)</p> <p>The theory suggests that there are potential sources of conflict that may result from a separation of ownership and control (1) but it is arguable that in charities managers share the same aim as the members and Trustees, so there is no goal divergence. (1)</p> <p>For a company, agency theory suggests that action needs to be taken to make sure that managers pursue the collective interest rather than pursue their own self-interest. (1) However, it is arguable that the managers of charities are not essentially motivated by self-interest (1)</p> <p>A key role of the board of a company is to monitor managers on behalf of shareholders. (1) Another is the importance that is placed on controlling matters such as director and manager remuneration on behalf of the shareholders. (1) These are not the primary roles of board members in charities. (1)</p> <p><b>Reward other valid responses.</b></p>	(6)

Question number	Answer	Mark
14	<p><b>Answers should explain some of the limitations in the effect that the Act has had:</b></p> <p>A charity would only be exempt from registration with the Charity Commission if it had another 'principal regulator' to regulate it as a charity. (1)</p> <p>The Charity Commission now has a role in regard to investigations and inquiries, with the agreement of the regulator. (1)</p> <p>The Charity Commission could not manage to take on the registration of all of the previously exempt charities (1), so these changes are being made over a period of time (1).</p> <p>Only those charities in the second category, which have an income exceeding £100,000 per annum, are required to register with the Charity Commission (1). Also, not all of the charities that will be in the first category have yet been assigned a principal regulator. (1)</p> <p><b>Allow up to one mark for a correct description of an exempt charity, or a charity affected by this change.</b></p> <p><b>Reward other valid responses.</b></p>	(6)

Question number	Answer	Mark
15	<p><b>Allow any six of the following:</b></p> <p>There are several similarities between the two forms:</p> <ul style="list-style-type: none"> <li>• CICs are companies, subject to company law. (1)</li> <li>• A CIC has its own independent legal identity and capacity. (1)</li> <li>• It has members and directors (1) and provides limited liability protection for its directors and members. (1)</li> <li>• A CIC can be limited by shares or guarantee. (1)</li> </ul> <p>However, there are significant differences and examples of the most important are:</p> <ul style="list-style-type: none"> <li>• A CIC must provide community benefit under the 'community interest test'. (1)</li> <li>• The asset lock on a CIC is compulsory. (1)</li> </ul> <p><b>Award full marks only to answers which include compare <i>and</i> contrast elements.</b></p> <p><b>Reward other valid responses.</b></p>	(6)

Question number	Answer	Mark
16	<p>The usual way is to ask the trustees to complete a self-analysis questionnaire (1). However, this can be very subjective. (1) It is important to ensure there is evidence collected for the skills (1) and some way of evaluating the responses. (1)</p> <p>There will need to be a decision whether to consider core competencies. (1) Competencies such as working in a group, strategic decision making or independent thought may be just as useful to measure (1).</p> <p><b>Reward other valid responses.</b></p>	(6)

## Section C

Question number	Indicative content
17	<p><b>Answers should address the role of the board in a charity and discuss issues around delegation and monitoring.</b></p> <ul style="list-style-type: none"> <li>• It is important for boards not to be too focussed on operational matters, but the trustees in a charity have responsibility for all the activities of a charity and so they need to be clear about what is being done on their behalf.</li> <li>• The board role is not just about setting strategy (which should include setting the business plan) but also overseeing the management functions and monitoring performance.</li> <li>• In this instance, it appears that the board is not fulfilling all these roles. It is not overseeing the management, setting a policy framework (and delegations) or monitoring performance.</li> <li>• The board of a charity will need to delegate to others to act on their behalf. However, it can never delegate responsibility; the trustees remain liable for any actions or decisions taken. This is why supervision is an important part of corporate governance. Boards need to know and to understand what is being done in their name.</li> <li>• Delegations should always be clear and should be documented.</li> <li>• There is no reason why there cannot be a high level of delegation to the CEO, provided the board has expressly agreed this, that it is within the policy framework set by the board and it is monitored.</li> <li>• Boards do need to delegate, and should not get bogged down in detail. But they still need to monitor.</li> <li>• If the board is happy for the CEO to be taking high level decisions on its behalf, these should always be in the context of its strategy and business plan. There are certain matters which a board can never delegate, as if it did so the trustees would not be fulfilling their role. So a board will always need to set the strategy and business plan. There will also be matters that a board does not consider it appropriate to delegate, depending on the organisation. All of these should be set out in a statement of the matters reserved by the board, which the CEO must work within.</li> </ul> <p>Once it has agreed its delegation, the board should also consider how best to monitor performance. There are a number of different ways to provide other monitoring information. These include:</p> <ul style="list-style-type: none"> <li>• Regular management accounts.</li> <li>• A schedule of performance against plan.</li> <li>• Key performance indicators: These are measurable values that demonstrate how effectively a company is achieving key business objectives.</li> <li>• Balanced scorecard: This is structured report, which gives an overview of a small number of data items – usually a mix of financial and non-financial items.</li> <li>• Systems of exception reporting.</li> </ul> <p>Not having proper delegation and monitoring in place is not just poor governance, it also raises the possibility that the trustees are breaching their duties.</p> <p>At the present time, with no clear delegation and no monitoring in place, the trustees are potentially breaching the following duties:</p> <ul style="list-style-type: none"> <li>• Ensuring the charity carries out its purposes for the public benefit (and does not go beyond its purposes).</li> <li>• Ensuring the charity complies with its governing document and with the law.</li> <li>• Managing the charity's resources responsibly.</li> </ul>

	<ul style="list-style-type: none"> <li>Acting with reasonable care and skill.</li> </ul> <p>So this means that it is important that measures are taken.</p>
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Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1</b>	1–5	<p>A few measures the board should take are described <b>or</b> one key measure is discussed in some detail. The answer is likely to be in the form of a list, with little or no discussion of the issues. The answer may focus only on delegation or on monitoring, but not both. The points made are superficial / generic and not applied to the requirements of the question, that is, to discuss the measures.</p> <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	<p>Some measures the board should take are discussed, <b>or</b> a few key measures are discussed in some detail. The answer is unbalanced, with more focus on certain measures over others, or with more emphasis on either delegation or monitoring. 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>
<b>Level 3</b>	11–15	<p>A range of measures the board should take are discussed, <b>or</b> a few key measures are discussed in depth. The answer is well-balanced, with equal weight given to a number of different measures and consideration given to delegation as well as monitoring. The majority of points made are relevant to the requirements of the question, that is, to discuss the measures rather than just list or explain them.</p>

Question number	Indicative content
18	<p><b>Answers should include an explanation of the legal form of registered society and discuss the factors which do and do not make this form suitable for a housing association.</b></p> <p>Explanation of some key features of the legal form 'registered society' includes:</p> <ul style="list-style-type: none"> <li>• It creates an incorporated body with independent legal identity.</li> <li>• However, this is not a company under the Companies Act 2006, but it is incorporated under the relevant legislation.</li> <li>• This form provides limited liability protection for the trustees.</li> </ul> <p><b>Candidates may identify the relevant legislation as the Co-Operative and Community Benefit Societies Act 2014 – this will be credited but is not necessary for a pass-level answer.</b></p> <p>Answers should demonstrate understanding that, of the two types of registered society (co-operative and community benefit) only the community benefit type can be a <i>charitable</i> registered society. The 'community benefit' type of registered society must operate its business primarily for the benefit of non-members.</p> <p>In the context of a discussion, answers should indicate both advantages and disadvantages of the legal form for a housing association.</p> <p>Suggested advantages may include:</p> <ul style="list-style-type: none"> <li>• It is a common legal form in the social housing sector.</li> <li>• It gives the capacity to hold assets and to enter into legal agreements, have and enforce rights and so on, which would all be relevant and helpful to the activities of a housing association as a charity.</li> <li>• For example, the association would have the ability to acquire, hold and let housing units to beneficiaries; it would have the ability to employ staff or engage independent contractors necessary for carrying out the charity's activities.</li> <li>• The legal requirement for a community benefit type of registered society to operate its business primarily for the benefit of non-members, and to use its profits to further its stated purposes, sits well with the charity law obligation to pursue the charity's purposes 'for the public benefit' and to apply the charity's resources to that end.</li> </ul> <p>Disadvantages may include:</p> <ul style="list-style-type: none"> <li>• Registered societies that are charities are exempt from registration with the Charity Commission. This can be disadvantageous, for instance because it does not give instant public confirmation of charitable status. Exempt charities are not permitted to make voluntary registrations with the Charity Commission so this is difficult to address in practice.</li> <li>• Registered societies are subject to an 'alternative principal regulator' within the financial services regulatory regime. That does not sit altogether happily with the charitable nature of a charitable community benefit type of registered society.</li> <li>• The law and regulation relating to registered societies is still rather dated and the procedures required for certain actions or changes are legally and administratively 'heavy' for instance if there is a proposed change to the rules of the society (its governing document).</li> </ul>

Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1</b>	1–5	<p>A few points regarding the suitability of the registered society legal form for a housing association are described <b>or</b> one key point is discussed in some detail. The answer is likely to be in the form of a list, with little or no discussion of suitability. The answer may focus on one point with limited coverage of other factors. The points made are superficial / generic and not applied to the requirements of the question, that is to discuss the suitability of this legal form for a housing association.</p> <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	<p>Some points regarding the suitability of the registered society legal form for a housing association are discussed <b>or</b> a few key points are discussed in some detail. The answer is unbalanced, with more focus on certain points over others. Most points made are relevant to the requirements of the question, but the link is not always clear – the element of discussion may be missing or the answer may not always link to a housing association.</p>
<b>Level 3</b>	11–15	<p>A range of points regarding the suitability of the registered society legal form for a housing association are discussed <b>or</b> a few key points are discussed in depth. The answer is well-balanced, with equal weight given to a number of different points. The majority of points made are relevant to the requirements of the question, to discuss the suitability of the form in the context of a housing association.</p>

Question number	Indicative content
19	<p><b>Answers should refer to trustee duties and responsibilities to ensure the financial stability of the organisation and to manage SF funds and other assets prudently and in a sustainable manner. Answers should also take account of trustees' legal duties to ensure compliance with charity fundraising law and regulation – especially re the proposed 'deal' with Bigg. In both financial and legal considerations, answers should evaluate the impact of each proposal and what the implications might be if SF takes it up.</b></p> <p><b>Review of staffing</b></p> <p>SF has both employed staff and independent contractors. There is an indication that different legal rules and procedures will apply to ending those two different legal relationships, if decisions are taken to reduce 'head count'.</p> <p><b>Proposal for commercial sponsorship</b></p> <p>There are potential private benefit issues regarding the proposals relating to Bigg (i.e. the legal rule that any private benefits which arise from a charity's charitable activities should be only those that are necessary and incidental to carrying out the charitable activity).</p> <p>This proposal is likely to create a 'commercial participator' relationship so legal requirements include: written agreement between charity and Bigg; that particular areas must be addressed in that agreement; need for disclosures to the public at or before the point they are invited to 'sign up' for the Bigg products/services; this includes detailed and clear information on the financial arrangements, in particular making it clear to the public the amount or percentage of funds per sale that will be donated to the charity.</p> <p><b>Use of logo</b></p> <p>Prominent use of the Bigg name and logo may give rise to reputational risks and/or VAT issues (this could amount to provision of advertising services to Bigg by the charity, on which the charity should charge VAT to Bigg).</p> <p><b>Moving deposited funds</b></p> <p>This is an investment decision so trustees must comply with Trustee Act 2000 requirements, which apply because this is an unincorporated charitable trust. Those requirements mean trustees must address areas such as:</p> <ul style="list-style-type: none"> <li>• does the proposal fit within the investment policy and investment objectives the trustees have set for the charity?</li> <li>• need to consider the Standard Investment Criteria; and</li> <li>• trustees' statutory general duty of care regarding investment matters (such as the need to diversify investments).</li> </ul> <p>The Trustee Act imposes additional requirements where discretionary management powers are to be given to a third party, which include the need for a written agreement that addresses specific areas, the need to set performance criteria for the manager and to ensure the manager is instructed to act within the charity's investment policy and its investment objectives, the need to monitor manager's performance overall and specifically to monitor the manager's compliance with that investment policy etc.</p> <p>Trustees should periodically review the arrangements they have in place for using investment managers, including reviewing who they use to advise and reviewing the details of their arrangements with the advisers.</p> <p><b>Charging for entry to events</b></p> <p>This raises issues relating to public benefit and the potential for charges to make it difficult for some people to benefit. The SF trustees need to consider carefully whether to make the charges and what level charges should be set at. They should also consider whether the problem of making events unaffordable for some people can be offset, for example by reduced</p>

	<p>fees for the unwaged). Trustees should be aware of relevant parts of the Charity Commission public benefit guidance when addressing such matters.</p> <p>It is important that trustees do consider relevant issues and make a balanced and reasonable decision. If fees are introduced, trustees should monitor the impact of that and keep fee levels under periodic review.</p>
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Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1</b>	1–5	<p>A few areas of impact and implication of the ideas are described, or one key area is evaluated in some detail. The answer is likely to be in the form of a list. The answer may focus on one area proposed by the working party, with limited comment on the other ideas. The points made are superficial / generic and not applied to the requirements of the question, that is, to evaluate each proposal for its potential impact and implications.</p> <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	<p>Some areas of impact and implication of the ideas are evaluated, or a few key areas are evaluated in some detail. The answer is unbalanced, with more evaluation of certain proposals at the expense of others. Most points made are relevant to the requirements of the question, but the link is not always clear – the element of evaluation may be missing or the answer may not always link to both impact and implications of each proposal.</p>
<b>Level 3</b>	11–15	<p>A range of areas of impact and implication of the ideas are evaluated, or a few key areas are discussed in depth. The answer is well-balanced, with equal weight given to the different proposals, and equal consideration of impact and further implications. The majority of points made are relevant to the requirements of the question, that is, to evaluate each proposal put forward.</p>