

# Corporate trustees of charities

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## Abstract

The trustees of unincorporated charities face greater personal exposure and more administrative burdens than the trustees of incorporated charities. Trustees of unincorporated charities have three main options to reduce these risks: (a) they can ‘incorporate’ the charity; (b) they can replace the board of trustees with a corporate trustee; or (c) they can incorporate the board of trustees. The author has discussed the first option elsewhere in this journal. This article will discuss the second and third options and conclude with a comparison of all the three options.

for title to be transferred every time one of the trustees dies or resigns.<sup>2</sup> This is easily and frequently forgotten. Thirdly, lenders are often less willing to loan money to small unincorporated charities because the loan must be to the trustees personally.<sup>3</sup> This can limit the charity’s ability to expand or undertake substantial projects.

To try to mitigate these disadvantages, trustees of unincorporated charities are increasingly seeking to introduce a corporate entity into the charity’s structure. To do this, charity trustees have three main options:

1. Incorporate a new charity with materially identical purposes and people and transfer the unincorporated charity’s assets to it. For example, various branches of Age UK have done this at various times since 2010.<sup>4</sup>
2. The trustees may replace themselves with a single corporate trustee or trust corporation. It is common for the outgoing trustees to become directors of that corporate trustee. For example, this was done by the Wellcome Trust in 1993,<sup>5</sup> the Dogs Trust in 2014,<sup>6</sup> and Regent’s Park College, Oxford University, in 2019.<sup>7</sup>
3. The trustees may apply to the Charity Commission for a certificate incorporating the

## Introduction

It is well-known that unincorporated charities must act through their trustees.<sup>1</sup> It is equally well-known that this brings with it three main disadvantages. First, trustees of unincorporated charities must contract in their own names on behalf of the charity. If the charity has limited assets, this can expose the trustees to personal financial risks. Secondly, trustees of unincorporated charities must hold the charity’s assets in their own names on behalf of the charity. This requires the trustees to remember to arrange

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1. For example, W Henderson and J Fowles, *Tudor on Charities* (10th ed, Sweet and Maxwell 2015), para 6-002 (trusts), and *Re Horley Town Football Club* [2006] EWHC 2386 (Ch), [2006] WTLR 1817, [5] (Lawrence Collins J) (unincorporated associations).

2. Strictly speaking, any contract with the outgoing trustees should also be novated into the names of the new trustees: Bates Wells Braithwaite LLP, *The Charities Acts Handbook* (LexisNexis Butterworths 2016), para 15.69.

3. C Alexander, *Charity Governance* (2nd ed, Jordan 2014), para 2.65.

4. See the ‘Register of merged charities’, available at <https://www.gov.uk/government/publications/register-of-merged-charities>, accessed 18 August 2022.

5. See the entry for the Wellcome Trust on the register of charities, available at <https://register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/210183/trustees>, accessed 18 August 2022.

6. See the entry for the Dogs Trust on the register of charities, available at <https://register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/227523/trustees>, accessed 18 August 2022.

7. See the Charity Commission scheme for Regent’s Park College, available at <https://www.rpc.ox.ac.uk/wp-content/uploads/2020/01/20190619-309710-scheme-corporate-trustee.pdf>, accessed 18 August 2022.

trustees as a body corporate. For example, it appears that the trustees of both the Dulwich Estate and Age Concern incorporated themselves in or around the early 2000s.<sup>8</sup>

There is surprisingly little guidance in the main charity law practitioner works on these options. This author hopes to fill that gap. The first option is discussed by this author in another article in this journal.<sup>9</sup> The second and third options are the subject of this article. This article will first explain the differences between corporate trustees, trust corporations and incorporated trustees. It will then discuss options two and three in turn before concluding with a comparison of all three options.

## Corporate trustees, trust corporations, and incorporated trustees

Somewhat unhelpfully to the lay trustee, there are three phrases which sound very similar, but which refer to different things: corporate trustees, trust corporations, and incorporated trustees. This section will explain what each of those phrases means.

### Corporate trustee

A corporate trustee is a corporation which has been appointed to act as a trustee of a charity.<sup>10</sup> That might sound somewhat tautological, but the word “corporation” does not just cover companies. It has a technical meaning which refers to the following types of legal person<sup>11</sup>:

1. Corporations which are made up of one officeholder (a “corporation sole”), such as bishops in the Church of England and the Official Custodian for Charities.
2. Corporations which are made up of more than one person (a “corporation aggregate”), such as companies formed under the Companies Acts (the most common type of corporate trustee<sup>12</sup>) and certain local authorities.

Corporate trustees can be traced back over 400 years,<sup>13</sup> and they are in common use today.<sup>14</sup> A corporate trustee does not itself need to be a charity.<sup>15</sup> For example, a local authority can act as a corporate trustee of a charity even though it is not exclusively charitable.

It is possible for corporate trustee to act as one of several charity trustees for a particular charity.<sup>16</sup> However, merely appointing a corporation as an additional trustee is unlikely to mitigate the disadvantages identified at the start of the article for the other trustees. Therefore, a charity will usually have *either* a single corporate trustee *or* multiple natural persons as trustees.<sup>17</sup>

### Trust corporation

A trust corporation is not the same thing as a corporation which acts as a trustee. The phrase “trust corporation” refers to a particular type of corporate trustee as defined in various statutes.<sup>18</sup> The statutory definition is 150 words long and will not be repeated here. In summary, a trust corporation includes two categories of corporate trustee. First, certain officeholders are automatically trust corporations (e.g. the Treasury Solicitor, the Official Solicitor, and trustees in bankruptcy). Secondly, a particular

8. *The Incorporated Trustees of the Dulwich Estate v Kaye* [2006] EWLands LRX\_137\_2005 and *R (The Incorporated Trustees of the National Council on Aging (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform* [2007] EWHC 3090 (Admin).

9. M Mills, ‘Incorporating an unincorporated charity’ (2021) 27(7) *Trusts & Trustees* 613.

10. Charity Commission Operational Guidance 38, section A2.

11. *Palmer’s Company Law*, Sweet & Maxwell, loose-leaf, January 2017, Volume 1, para 1.214.

12. *Jordan Publishing Charities Administration Service*, LexisNexis, loose-leaf, Document A1, para [7].

13. For example, *Griffith Flood’s Case* (1615) Hobart 136.

14. W Henderson and J Fowles, *Tudor on Charities* (10th ed, Sweet and Maxwell 2015), para 19-005.

15. Charity Commission Operational Guidance 38, sections A2, B1.1, and B2.5.

16. *Bodies Corporate (Joint Tenancy) Act 1899* and *Re Thompson Settlement Trusts* [1905] 1 Ch 229.

17. This is suggested by the terms of the Charity Commission’s application form to register a charity: <https://www.gov.uk/setting-up-charity/register-your-charity>.

18. Section 205(1)(xxvii) *Law of Property Act 1925*, section 68(1)(18) *Trustee Act 1925*, section 117(1)(xxx) *Settled Land Act 1925*, section 55(1)(xxvi) *Administration of Estates Act 1925*, and section 128(1) *Senior Courts Act 1981*. All of these definitions were expanded by section 3 *Law of Property (Amendment) Act 1926*.

corporation can gain trust corporation status by authorisation of the Lord Chancellor,<sup>19</sup> by appointment by the court<sup>20</sup> or the Charity Commission,<sup>21</sup> or by receiving property pursuant to a pre-merger vesting declaration.<sup>22</sup>

Trust corporations enjoy certain advantages which other corporate trustees do not. The most important of these advantages for charity trustees are:

1. The general rule is that at least two trustees must be involved in the sale of land which is held on trust in order to give valid receipt for the sale proceeds. However, a trust corporation can give valid receipt on its own.<sup>23</sup>
2. The general rule is that, unless the trust deed provides otherwise,<sup>24</sup> trustees cannot voluntarily retire if this will leave fewer than two trustees in office. However, a trust corporation may remain as the sole trustee.<sup>25</sup>
3. The general rule is that a corporate trustee cannot take out a grant of probate in its own name.<sup>26</sup> However, a trust corporation can obtain a grant of probate.<sup>27</sup> This is of particular relevance to larger charities which are frequently the only, or the only active, beneficiary of estates.
4. The general rule is that, unless the trust deed provides otherwise, at least two trustees must agree to compromise a claim by the charity. However, a trust corporation can act on its own.<sup>28</sup>

### **Incorporated trustees**

There is a second subset of corporate trustees: “incorporated trustees”.<sup>29</sup> The Charity Commission has

the power to grant a certificate of incorporation to charity trustees to confer legal identity on them as a group. Such a group of people is sometimes referred to as “incorporated trustees”.<sup>30</sup> Those trustees may then act in their new corporate name as a legal person. Although this power has existed for over 150 years,<sup>31</sup> in practice it has only been used in a meaningful way for the last 30 years.<sup>32</sup>

### **Upcoming changes**

When it comes into force in autumn 2022,<sup>33</sup> section 32 Charities Act 2022 will amend the law. Any corporate trustee which is itself a charity will automatically become a trust corporation when it is appointed as a trustee of a charity. Furthermore, any such corporate trustee which is already in office will also become a trust corporation. In practice, this will dissolve the distinction between charitable trust corporations and charitable corporate trustees: all charitable corporate trustees will be trust corporations.

However, section 32 does not apply to non-charitable corporate trustees. Therefore, the three different categories of corporate trustee will continue to apply to non-charitable organisations, including incorporated trustees.

### **Option 2: corporate trustees**

This section will consider three issues:<sup>34</sup>

1. When charity trustees have the power to appoint a corporate trustee;

19. Section 3 Law of Property (Amendment) Act 1926.

20. As prescribed by the first five statutes set out in footnote 18 above.

21. Paragraph 3 of schedule 7 Charities Act 2011.

22. Charities Act 2011, section 310, and Charitable Incorporated Organisations (General) Regulations 2012, regulation 61.

23. Section 14(2) Trustee Act 1925, section 27(2) Law of Property Act 1925, and sections 18(1)(c), 94 and 95 Settled Land Act 1925.

24. For example, *London Regional Transport Pension Fund Co Ltd v Hatt* [1993] Pens LR 227 (Ch), [130]–[145] (Knox J).

25. Trustee Act 1925, sections 37(1)(c) and 39(1).

26. Although letters of administration may be granted to the nominee or attorney of a corporate trustee: *Tristram and Coote's Probate Practice* (32nd ed, LexisNexis Butterworths 2020), paras [4.39]–[4.41] and [5.240]–[5.246], and rule 36(4)(a) Non-Contentious Probate Rules 1987.

27. Senior Courts Act 1981, sections 114(1) and 115(1).

28. Trustee Act 1925, section 15.

29. *Charities: The Law and Practice*, Sweet & Maxwell, loose-leaf, para H.63.

30. For example, Charity Commission Operational Guidance 50, section B1.4.

31. Charitable Trustees Incorporation Act 1872.

32. Charity Commission Operational Guidance 50, section A1.3.1.

33. <https://www.gov.uk/guidance/charities-act-2022-implementation-plan>.

34. See generally, the Charity Commission's Operational Guidance 38 and J Claricoat and H Phillips, ‘Corporations as Trustees’ (1996) 4(2) CL&PR 83–93.

2. The factors which charity trustees should consider when deciding whether to appoint a corporate trustee; and
3. The powers of a corporate trustee.

### **The power to appoint a corporate trustee**

In many cases, the governing document will give charity trustees the power to appoint a corporate trustee. Sometimes the governing document will explicitly mention corporate trustees. Other times the power to appoint a corporate trustee will only be clear once the governing document is read as a whole.<sup>35</sup>

If the governing document does not expressly or implicitly permit the trustees to appoint a corporate trustee, then they will need to amend the governing document. Most governing documents permit the trustees to amend the administrative provisions.<sup>36</sup> If, however, there is no express power of amendment, then the trustees may be able to rely on the statutory power of amendment in section 280 Charities Act 2011 (or, from autumn 2023,<sup>37</sup> the new powers in sections 280A and 280B).<sup>38</sup> The Charity Commission has said that “*in most circumstances*” the statutory power of amendment will allow charity trustees to introduce the power to appoint a corporate trustee.<sup>39</sup>

However, there may be situations in which the trustees are unable to amend the governing document themselves. For example, it may be inappropriate to use the power of amendment if the governing document expressly or impliedly requires the trustees to be individuals and/or to have certain qualifications which only individuals can have (e.g. belief in a particular faith).<sup>40</sup> Similarly, it may be inappropriate to use the power of

amendment if a third party who is entitled under the governing document to appoint trustees objects to the change, or if one of the trustees holds office *ex-officio* and does not consent to the change.<sup>41</sup>

In those circumstances, the trustees must apply to the Charity Commission for an order or a scheme to amend the governing document to introduce the power to appoint a corporate trustee.<sup>42</sup> The application process for an order or a scheme is beyond the scope of this article, but readers are directed to the Charity Commission’s published guidance.<sup>43</sup>

### **Deciding whether to appoint a corporate trustee**

Once the trustees are satisfied that they have the power to appoint a corporate trustee, they must consider whether it is appropriate to do so. Fundamentally, the question is whether the appointment is in the best interests of the charity.<sup>44</sup> However, in answering that question, the trustees should consider the following points:

1. Whether the proposed corporate trustee will be the sole trustee or one of many trustees.
2. If the corporate trustee will act alone, the current trustees must:
  - a. Consider whether the charity’s governing document permits sole trustees (e.g. in any quorum requirements).<sup>45</sup> If the governing document does not permit sole trustees, then the existing trustees will need to amend the relevant parts of the governing document by following the steps set out in the subsection above.

35. Charity Commission Operational Guidance 38, section B2.4.1.

36. See, for example, clause 7 of the Charity Commission’s Model Constitution for unincorporated associations and clause 31 of the Model Trust Deed.

37. <https://www.gov.uk/guidance/charities-act-2022-implementation-plan>.

38. When it comes into force, section 3 Charities Act 2022 will repeal section 280 Charities Act 2011 and introduce new sections 280A and 280B.

39. Charity Commission Operational Guidance 38, section B2.1.2.

40. J Claricoat and H Phillips, ‘Corporations as Trustees’ (1996) 4(2) CL&PR 83, 88.

41. Charity Commission Operational Guidance 38, section B2.1.2.

42. Charity Commission Operational Guidance 38, sections A6.2 and B2.1.1. For examples of the Charity Commission appointing corporate trustees by scheme, see *Charities: Law and Practice*, Sweet & Maxwell, loose-leaf, volume 5, paras App5.78 (The Lytham Schools), App5.111 (Wales Parish Festival Hall), and App5.112 (Westminster Chapel and Manse Trust, London).

43. Charity Commission Operational Guidance 500 (schemes) and 501 (orders). The power to make an order is contained in section 105 Charities Act 2011. The power to make a scheme is contained in sections 67 and 69 Charities Act 2011.

44. Charity Commission Operational Guidance 38, section B2.1.2.

45. Charity Commission Operational Guidance 38, section A6.3.

- b. Ensure that the corporate trustee has more than one director. This is because “*the capacity for debate and discussion in relation to the management of a charity is an intrinsic part of trusteeship*”.<sup>46</sup>
3. Whether the proposed corporate trustee’s articles of association are compatible with the duties of a charity trustee.<sup>47</sup>
4. Whether the proposed corporate trustee has the authority to act as a charity trustee.<sup>48</sup> There is some doubt over whether a “sweeping up” power in a company’s constitution will permit the company to act as a trustee.<sup>49</sup> Therefore, the trustees should ideally look for an express power in the corporate trustee’s constitution which allows it to act as a trustee.
5. Whether the proposed corporate trustee will have a regular group of people who will deal with the charity, or whether it will send different representatives to each meeting or event. The latter would make it very difficult to establish any useful continuity.<sup>50</sup>
6. Whether the corporate trustee will want to charge for its services. Unless there is an express power in the charity’s governing document which permits trustees to charge fees, the Charity Commission will only authorise the appointment of a fee-charging corporate trustee “*in very exceptional circumstances*”.<sup>51</sup> This may be appropriate if the work of the charity imposes an unusually high burden on the trustees because it operates in a complex field or a very broad range of fields.
7. Whether the corporate trustee needs to have the status of trust corporation in order to fulfil its

role.<sup>52</sup> Trust corporation status is likely to be necessary if:

- a. The charity owns land because only a sole trust corporation or two or more corporate trustees can give valid receipt for any sale proceeds.<sup>53</sup>
- b. The charity is likely to need to extract a grant of probate in respect of a deceased person’s estate.

If trust corporation status is necessary, then the existing trustees may need to apply to the Charity Commission for a scheme to appoint a sole corporate trustee as a trust corporation.<sup>54</sup>

### **The corporate trustee’s powers**

Once it has been appointed, the corporate trustee’s powers will be those set out in the *charity’s* governing document. However, the corporate trustee’s own constitution “*is relevant to the question of how the body corporate signifies its corporate will as trustee of the charitable trust*”.<sup>55</sup> In practice, this means that the corporate trustee’s constitution may indirectly introduce powers which are not contained in the charity’s governing document or limit powers which are in the governing document. For example, the corporate trustee’s constitution may permit the directors to delegate functions to a committee, whether or not the charity’s governing document permits this. Similarly, the corporate trustee’s constitution may limit the types of investment which its directors can make on behalf of the charity, even if there is no such restriction in the charity’s governing document.<sup>56</sup>

Unless the Charity Commission has made a “linking direction” between the charity and the corporate

46. C Alexander, *Charity Governance* (2nd ed, Jordan 2014), para 8.2.

47. Charity Commission Operational Guidance 38, sections A6.1 and B2.3.1.

48. Charity Commission Operational Guidance 38, sections A6.1 and A6.3.

49. J Claricoat and H Phillips, ‘Corporations as Trustees’ (1996) 4(2) CL&PR 83, 86–87. However, the Charity Commission suggests that it may be enough if the power to act as a trustee can be implied into the corporate trustee’s constitution because it “*is reasonably incidental to the furtherance of the corporation’s objects*”: Charity Commission Operational Guidance 38, section B2.2.

50. Charity Commission Operational Guidance 38, section B2.3.3.

51. Charity Commission Operational Guidance 38, section B2.3.4. See generally the Charity Commission’s CC11, ‘Trustee expenses and payments’, section 5.

52. Charity Commission Operational Guidance 38, sections A6.3 and B.2.4.1.

53. Law of Property Act 1925, section 27(2). The effect of this subsection cannot be excluded by the terms of the governing document: *London Regional Transport Pension Fund Co Ltd v Hatt* [1993] Pens LR 227, [141] (Knox J).

54. Charity Commission Operational Guidance 38, section B.2.4.1.

55. Charity Commission Operational Guidance 38, section A7.

56. *Tolley’s Charities Manual*, LexisNexis, loose-leaf, Division A, para [2B.17].



trustee,<sup>57</sup> the corporate trustee should keep separate books and accounts for itself and for the charity.<sup>58</sup> However, the corporate trustee may be able to file dormant accounts for itself if its only function is to act as a charity trustee for one charity.<sup>59</sup>

The main benefit of appointing a corporate trustee is that the directors' liability is usually limited to the value of the corporate trustee's assets.<sup>60</sup> However, the directors of the corporate trustee are not entirely off the hook. For example, the directors may still be personally liable for knowing receipt, dishonest assistance and/or for misfeasance if the corporate trustee goes into liquidation.<sup>61</sup> Therefore, "for all practical purposes, [the directors] should assume that they owe the same duties to the charity as the corporate trustee. In other words, that they should regard themselves as charity trustees".<sup>62</sup>

### Option 3: incorporating trustees

The final option open to charity trustees to avoid some of the difficulties identified in the introduction above is to incorporate *themselves* (rather than the charity).<sup>63</sup> In a nutshell, this process confers legal personality on the trustees as a group. This section will explain when charity trustees will be incorporated, how trustees can apply to be incorporated, and the effect of incorporation.

#### When can charity trustees incorporate?

The Charity Commission has the power to grant charity trustees a certificate of incorporation if it considers that incorporating the charity trustees would be in the

interests of the charity.<sup>64</sup> The Charity Commission interprets this test to mean that "some factor exists which would positively improve the administration of the charity as compared with a situation where the trustee body is not incorporated".<sup>65</sup> To put the point another way, there must "appear to be opportunities to make use of the incorporated status now or at some realistic time in the future".<sup>66</sup> This test is likely to be satisfied if the charity has regular contractual relations or numerous different investments.<sup>67</sup> On the other hand, the Charity Commission will not grant a certificate if:

1. The charity is required to be registered but has not been registered.<sup>68</sup>
2. The charity's property consists entirely of land (in which case it is more appropriate to vest the property in the Official Custodian for Charities).<sup>69</sup> However, incorporation is more likely to be granted if a religious charity which only holds land has religious objections to using the services of the Official Custodian.<sup>70</sup>
3. The charity's property consists only of investments which may be registered in the name of an unincorporated charity (e.g. government stocks).<sup>71</sup>
4. The charity's property consists only of bank accounts which may be registered in the name of an unincorporated charity.<sup>72</sup>
5. The Charity Commission is not satisfied that all of the charity trustees were validly appointed.<sup>73</sup> If there is any doubt over the appointment of any trustees, this will need to be resolved by the charity

57. Pursuant to section 12 Charities Act 2011.

58. Charity Commission Operational Guidance 38, section A8.

59. *Jordan Publishing Charities Administration Service*, LexisNexis, loose-leaf, Document A1, para [7].

60. Bates Wells Braithwaite LLP, *The Charities Acts Handbook* (LexisNexis Butterworths 2016), para 15.74.

61. *Tolley's Charities Manual*, LexisNexis, loose-leaf, Division A, para [2B.10], e.g. *HR v JAPT* [1997] EWHC Ch 371, [1997] Pens LR 99.

62. C Alexander, *Charity Governance* (2nd ed, Jordan 2014), para 6.28.

63. See generally the Charity Commission's CC43 'Incorporation of charity trustees' and Operational Guidance 50.

64. Charities Act 2011, section 251(1).

65. Charity Commission Operational Guidance 50, section B2.1.

66. Charity Commission Operational Guidance 50, section B3.1.

67. Charity Commission Operational Guidance 50, sections B3.3 and 3.4.

68. Charities Act 2011, section 251(3).

69. Charity Commission Operational Guidance 50, section B3.3.

70. Charity Commission Operational Guidance 50, section B3.5.

71. Charity Commission Operational Guidance 50, section B3.4.

72. Charity Commission Operational Guidance 50, section B3.4.

73. Charities Act 2011, section 257.

using its powers or, if that is not possible, by the Charity Commission making a scheme or an order.<sup>74</sup>

### **The effect of incorporation**

If a certificate of incorporation is granted, then on the date stated in the certificate the charity trustees automatically become a body corporate known by the name in the certificate.<sup>75</sup>

Incorporation automatically vests in the body corporate all property held by the original trustees (except property held by the Official Custodian for Charities) and the trustees' rights and liabilities in connection with the charity's property.<sup>76</sup> From then on, the charity trustees may sue and be sued under their corporate name.<sup>77</sup> Nevertheless, any gift which is made to the charity or the original charity trustees automatically takes effect as a gift to the body corporate.<sup>78</sup>

Incorporation does not affect the terms of the charity's governing document, so the body corporate has the same rights and duties as the original trustees.<sup>79</sup> Similarly, the obligation to file annual accounts remains with the charity and the trustees should continue to submit accounts in the charity's name (and not the name of the body corporate).<sup>80</sup>

Incorporating the trustees can be a relatively quick and easy way to allow an unincorporated charity to hold assets, enter contracts, and avoid the need for the charity's property to be transferred to new people every time the body of trustees changes. However, incorporation does not limit trustees' liability in the same way as introducing a corporate trustee would because the trustees are

still personally liable to the charity's creditors if the charity runs out of funds.<sup>81</sup> Furthermore, the trustees are still "answerable and accountable for their own acts, receipts, neglects, and defaults, and for the due administration of the charity and its property" as if no incorporation had occurred.<sup>82</sup> For example, existing contracts which named specific trustees continue to be binding against those people personally, regardless of whether they cease to be trustees.<sup>83</sup> Therefore, incorporating the trustees is usually only appropriate where the trustees do not consider that they need additional protection but want to simplify the administration of charity property or contracts.

### **The application process**

The process of applying for incorporation is relatively straightforward. The charity trustees should contact the Charity Commission to ask for the application pack. The form must be completed and signed by the trustees.<sup>84</sup> Principally, the form asks the trustees to explain why they believe that incorporation is appropriate and asks them to provide various pieces of information (e.g. the names of the trustees, a list of all of the charity's assets, the proposed name of the body corporate).<sup>85</sup>

There are no statutory requirements governing the name of the body corporate, but the Charity Commission insists that the word "Trustees" or "Governors" should appear and the word "Registered" should be avoided.<sup>86</sup> In practice, almost all incorporated trustees end up being called "*The Trustees of [charity name]*" or "*The Incorporated Trustees of [charity name]*".

In theory, the Charity Commission may impose conditions or directions on the charity or its trustees when granting a certificate.<sup>87</sup> However, in practice, the

74. Charity Commission Operational Guidance 50, section B3.2.1.

75. Charities Act 2011, sections 251(4)(a) and 258(2).

76. Charities Act 2011, sections 251(4)(b) and 252.

77. Charities Act 2011, section 251(5).

78. Charities Act 2011, section 253.

79. *Tolley's Charities Manual*, LexisNexis, loose-leaf, Division A, para [2B.6].

80. Charity Commission Operational Guidance 50, section B1.1.6.

81. Bates Wells Braithwaite LLP, *The Charities Acts Handbook* (LexisNexis Butterworths 2016), para 15.72.

82. Charities Act 2011, sections 251(4) and 254.

83. Charity Commission Operational Guidance 50, section B1.2.

84. Charities Act 2011, section 256(1).

85. Charity Commission Operational Guidance 50, section B2.4.

86. Charity Commission Operational Guidance 50, section B3.6.

87. Charities Act 2011, sections 251(2) and 255(1).

Charity Commission only rarely imposes anything other than standard conditions relating to the use and custody of the body corporate's seal (if the trustees choose to have one).<sup>88</sup> Nevertheless, if any conditions are imposed, trustees should ensure that they comply with them because a failure to comply is treated as a breach of a court order.<sup>89</sup>

## Comparisons and conclusion

The trustees of unincorporated charities often face greater personal exposure than the trustees of incorporated charities. This personal exposure can also create various practical problems for the charity. Charity trustees have three main options to try to minimise these risks: (a) they can 'incorporate' the charity; (b) they can replace the board of trustees with a corporate trustee; or (c) they can incorporate the board of trustees.

Incorporating the charity itself is often the most expensive and time-consuming option, but it provides the greatest protection against the practical problems associated with being a trustee of an unincorporated charity. In practice, it is the most popular option.

Appointing a corporate trustee can be a quicker and cheaper option than incorporating the charity. This option is particularly useful if the trustees can incorporate a corporate trustee themselves or have identified a

suitable existing organisation which operates in the charity's sphere. However, the process can become complicated if the governing document expressly or impliedly prohibits corporate trustees. Furthermore, unless the trustees can incorporate the corporate trustee themselves, they must rely on an existing organisation being willing to act for free. In practice, it can be difficult to find such organisations. Therefore, this option is most appropriate if the charity cannot afford to incorporate but the trustees are willing and able to incorporate a new corporate trustee.

Incorporating the trustees will often be the simplest and cheapest option because it does not involve incorporating a new charity or a new corporate trustee or paying a corporate trustee. However, incorporating the trustees does not limit the trustees' liability in the same way as the other two options. Therefore, in reality, this option is most appropriate if the charity has religious objections to a corporate structure or the main aim is to ease the administration of the charity's assets and property rather than reduce the trustees' personal liability.

Overall, each option has its advantages and disadvantages. Ultimately, it is up to the charity's trustees, acting in the best interests of the charity, to decide which one to select.

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88. Charity Commission Operational Guidance 50, section B3.4. It is not mandatory to have a seal: section 251(7) Charities Act 2011.

89. Charities Act 2011, sections 255(2) and 336.