

# Assured Unitary Governance – a new model

## Is it time to place legal responsibility with those who are actually running charities?

**Philip Kirkpatrick** makes the case for a new governance model that acknowledges the increasingly complex environment in which charities operate.



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Philip helps clients with their difficult commercial and governance issues, always recognising that these are human as well as legal matters.

Whenever anything goes wrong in a charity in a way that reaches the public ear, people freely express their views about what the trustees did or did not do that led to this particular sorry state of affairs. Too little credit is given to the trustees who actually faced those circumstances and too few of us ever ask what we would have done in their shoes.

It reminds me of Theodore Roosevelt's famous 'man in the arena' speech, which begins:

*'It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes up short again and again...'*

One reason why trustees come up short is that the measures against which they are judged are unreasonable. This is particularly so in large, complex charities that have a sizeable workforce doing specialist work; but my criticism of the current model of charity governance is also applicable more widely.

The Charities Act 2011 tells us that the charity trustees are the people 'having the general control and management of the administration of a charity'. If you have ever had the general control and management of the administration of any business, you will know that it is a full-time job. And yet, at the helm of these complex charities we appoint a range of skilled and less skilled people and ask them to undertake this task on a part-time, generally unremunerated basis.

We tell them to develop strategy and policies, when they are, on the whole, less competent to do so than the staff they employ, without whose support an effective strategy and suitable policies are unlikely to emerge.

We tell them that they should not get

involved in day-to-day management – but that they have to ensure that this management is undertaken properly. How? How do they get the assurance that they need? Where do they obtain it from when even a statutory audit does not now provide sufficient assurance?

We ask them to do all this on the basis of a quarterly – or monthly at the very most – board meeting, with little if any involvement in the charity's daily activities.

We tell them they are responsible if it all goes wrong and we make them carry the can when it does.

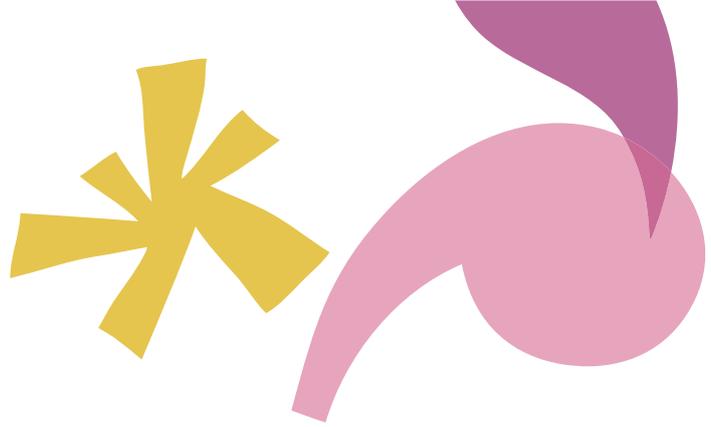
And we ask them to do it with no reward except their own satisfaction in having tried to do something good for society.

At the same time, we pretend that the people who are actually running the charity, the paid senior executives, are not in fact responsible – are not acting as trustees.

### A new model of governance

It is my view that, essentially, the model we currently use is unfair on trustees. And all too often it does not work effectively. I have therefore proposed a completely new model, which I have called 'Assured Unitary Governance'. It is intended to be just one model among many.

Assured Unitary Governance recognises that those who are actually running the charity (the senior staff, often with 'director' in their job title) are the people 'having the general control and management of the administration of [the] charity' and it calls *those* people the trustees. Alongside these there would be a non-executive chair, normally recruited externally, and another non-executive 'senior independent trustee' serving on the board of trustees. Both of these could (but need not) also be paid to take on the significant responsibilities and time commitment that society now expects of trustees.



*‘Those staff members who currently run large, complex charities would continue to run them, but would have the added regulatory burden, as well as the authority and the regulatory certainty, of being charity trustees.’*

Separately, there would be an entirely unpaid ‘assurance board’. The members of this ‘board’ would actually be, or be incorporated within, the membership of the charity. They would not be trustees and would *not* have trustee responsibilities. The assurance board’s powers and responsibilities may depend on the legal structure of the charity, but might include:

- appointing the trustees from among candidates proposed by the board of trustees;
- approving the remuneration of all trustees and the granting of any other benefit to trustees;
- authorising any arrangement in which all of the trustees are conflicted;
- receiving annual reports and accounts;
- providing advice and support to the trustees on an ad hoc basis; and
- power to remove trustees.

In large part, the assurance board would perform the functions that most trustees of large, complex charities currently think they are performing, such as providing support and guidance to the executive, bringing to that support the particular skills and experience they have. But, unlike charity trustees, the assurance board’s powers would not render them legally responsible for the management and governance of the charity. The prospect of them incurring any legal liabilities would be extremely remote. Having said that, the assurance board members would need to be deeply informed about the work of the charity – probably with quarterly meetings – and would be chosen with care, like trustees.

Members of the assurance board would appoint their own successors or, if there was a wider membership, those appointments could be recommended by the assurance board members and approved by the wider membership.

Accordingly, those staff members who currently run large, complex charities

would continue to run them, but would have the added regulatory burden, as well as the authority and the regulatory certainty, of being charity trustees. Those people who do not actually run such charities on a day-to-day basis, but are currently being held to account for doing so as trustees, would be able to provide some of the oversight and assurance that the word ‘trustee’ signifies. But they would no longer be held to unreasonably high standards by regulators and the public in respect of a task that they cannot reasonably be expected to perform.

This model does not offend principles of English and Welsh charity law, although Charity Commission consent is likely to be required for an existing charity wishing to adopt it. It would, however, be more difficult for charities registered in Scotland, because Scottish legislation prohibits payment of a majority of trustees without court approval.

#### FIND OUT MORE

The Assured Unitary Governance model has received some attention in the charity press.

<https://www.civilsociety.co.uk/news/broken-governance-model-for-large-charities-needs-radical-reform-says-lawyer.html>

<https://www.thirdsector.co.uk/recognise-reality-pay-trustees-large-charities-says-charity-lawyer/governance/article/1526340>