

Office for
Students



Regulatory advice 5: Exempt charities

Guidance for higher education providers
that are exempt charities

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Introduction

1. This regulatory advice sets out guidance for providers of higher education in England that are exempt charities. An exempt charity is exempt from registration with and direct regulation by the Charity Commission. The Office for Students (OfS) is the principal regulator for those higher education providers in England that are exempt charities¹ and for exempt charities that are closely connected with them.² It has taken on this role from the Higher Education Funding Council for England (HEFCE) and will be the principal regulator for the existing group of higher education providers that are exempt charities until 31 July 2019 (see paragraph 23). The OfS has adopted a different approach to its role as principal regulator from that taken by HEFCE. In line with its legal duty, the OfS will focus on promoting compliance by a charity's trustees with their legal obligations in exercising control and management of the administration of the charity. The OfS has removed many of HEFCE's disclosure requirements for exempt charities and will require only those disclosures that are legally required. This will reduce regulatory burden for those providers that are exempt charities.
2. An exempt charity:
 - is a charity (see paragraph 7)
 - has to comply with charity law (see paragraphs 9 to 13 and Annex A)
 - is not registered with or directly regulated by the Charity Commission (see paragraph 1)
 - has a principal regulator (see paragraphs 20 to 23)
 - has governors that are trustees of the charity (see paragraphs 14 to 19).
3. This guidance is intended to help providers to understand:
 - their responsibilities as charities
 - the OfS's duties as the principal regulator for exempt charities
 - how the OfS will discharge its responsibilities as principal regulator.
4. This guidance should be read in conjunction with the OfS's regulatory framework (OfS 2018.01), which sets out in full the approach that we will take to the registration and regulation of providers. If there are any inconsistencies between the regulatory framework and the OfS's regulatory approach as described in this document then the regulatory framework will prevail.
5. The Charity Commission publishes guidance to charities and their trustees about the legal duties and responsibilities of both. Although the Charity Commission's guidance is framed for charities that it has registered, much of this guidance is also relevant to exempt charities, as they must also

¹ See <https://www.gov.uk/government/publications/exempt-charities-cc23>.

² Connected charities of exempt charities are also exempt under paragraph 28 of Schedule 3 to the Charities Act 2011.

comply with charity law. The Charity Commission's guidance can be found at <https://www.gov.uk/government/organisations/charity-commission>. Providers are advised to read the following Charity Commission guidance:

- a. 'The essential trustee: What you need to know, what you need to do' (CC3).³
 - b. 'Exempt charities' (CC23).⁴
 - c. 'Public benefit: Rules for charities'.⁵
6. Providers are encouraged to subscribe to the OfS's primary mailing list ('OfS alerts') at www.officeforstudents.org.uk/sign-up-for-email-alerts/, to receive briefings and alerts about OfS matters, including those relevant to exempt charities.

³ See <https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3>.

⁴ See <https://www.gov.uk/government/publications/exempt-charities-cc23>.

⁵ See <https://www.gov.uk/guidance/public-benefit-rules-for-charities>.

Section 1: Higher education providers that are charities

7. A charity is an organisation that is subject to the jurisdiction of the High Court in England and Wales and is established for charitable purposes only. This means that:
 - a. Its purposes must fall within one or more of the descriptions of purposes set out in the Charities Act 2011.⁶ For a higher education charity, this will include the advancement of education, but it may also have other charitable purposes.
 - b. Its purposes benefit the public or a sufficient section of the public and do not give rise to more than incidental personal benefit.
8. The Charity Commission has published guidance about charitable purposes and public benefit on its website.⁷ All charity trustees must have regard to the Charity Commission's guidance on public benefit when making decisions to which it is relevant.

The legal obligations of a charity

9. Some higher education providers that are charities are registered with the Charity Commission, but most are exempt. If they are exempt, the OfS is their principal regulator. Many of a charity's legal obligations are the same, irrespective of whether it is registered or exempt.
10. All charities must comply with the law, including the requirements set out in the Charities Act 2011, and these requirements apply to a provider that is an exempt charity unless the Charities Act specifically states that they do not. Annex A sets out which parts of the Charities Act 2011 apply to the exempt charities for which the OfS is the principal regulator.
11. A provider's governing body is also the board of trustees of the charity and, as such, it has a set of legal responsibilities and other duties under charity law that are significant and must be met. In accordance with its governing documents, the charity should have adequate and effective arrangements for providing assurance to its governing body that it:
 - delivers its charitable purposes for the public benefit (all charities)
 - submits the information the OfS requires in its role as the principal regulator of exempt charities (exempt charities only).
12. The attention of providers that are exempt charities is drawn in particular to the legal obligation to apply their assets and funds only in the furtherance of their charitable purposes. This means that a charity must not use its assets (including land and buildings) and funds to give someone or a group of people a personal or private benefit, unless this is incidental.⁸ It must consider carefully how it

⁶ See Section 3 of the Charities Act 2011, available at <https://www.legislation.gov.uk/ukpga/2011/25/section/3>.

⁷ See <https://www.gov.uk/government/collections/charitable-purposes-and-public-benefit>.

⁸ An incidental personal benefit arises where this outcome is a necessary result of the charity carrying out its charitable purposes. The Charity Commission has published guidance about this, including examples of where an

spends its money so that it can explain how its decisions are, for example, advancing education. These responsibilities apply to **all** the funds and assets of providers that are exempt charities, and not just to the public funding or grant that a provider may receive.

13. A provider that is an exempt charity also has an obligation to supply information to allow the OfS to fulfil its role as principal regulator under the Charities Act 2011. Paragraphs 24 to 29 set out the OfS's reporting requirements for exempt charities.

Trustees and their obligations

14. If a provider is a charity, whether registered or exempt, members of its governing body are its trustees and have the responsibilities and potential liabilities that go with trustee status. Trustees have independent control over, and legal responsibility for, a charity's management and administration. They play a very important role.
15. The Charity Commission has published guidance that sets out what is required and expected of charity trustees⁹. All charity trustees are advised to read this guidance. Being aware of their duties and responsibilities will help the trustees carry out their role in a way that not only serves the charity well but also gives the trustees confidence that they are complying with the key requirements of the law.
16. In summary, trustees must:
 - ensure the charity is carrying out its purposes for the public benefit, and that its assets are applied solely for its charitable purposes
 - comply with the charity's governing document and the law
 - act in the charity's best interests, including by managing conflicts of interest
 - ensure the charity is accountable
 - manage the charity's resources responsibly, including by managing risks and protecting its assets and people
 - act with reasonable care and skill.
17. Trustees who act prudently, lawfully and in accordance with the charity's governing instrument will not generally find themselves liable for their actions. However, in cases where trustees have acted improperly the OfS may intervene to protect the interests of students, in accordance with the provisions set out in its regulatory framework. In cases where there is a potential breach of charity law, the OfS will also use its role as principal regulator to refer an issue to the Charity Commission, which may then investigate and, if the Charity Commission considers it appropriate, take remedial or protective action.

incidental personal benefit might arise, at <https://www.gov.uk/government/publications/examples-of-personal-benefit/examples-of-personal-benefit>.

⁹ See <https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3>.

18. Trustees need to be particularly careful to ensure that the charity has the means to meet its obligations when it is entering into substantial contracts or financial commitments.
19. Charities cannot generally pay their trustees or persons connected to their trustees unless they have a clear authority to do this in their governing document, from the court or the Charity Commission or under the general law. Trustees can, however, reclaim reasonable expenses they incur on charity business, such as travel expenses.

Section 2: The OfS's role as principal regulator

20. This section applies to providers that are exempt charities and for which the OfS is the principal regulator (see Annex B). This section does not apply to providers that are registered charities, although the Charity Commission may place similar disclosure obligations on these providers.
21. An exempt charity is not registered with or directly regulated by the Charity Commission. The OfS is the principal regulator for higher education providers that are exempt charities.¹⁰ As such the OfS:
 - a. Has a legal duty to do all that it reasonably can to promote compliance by a charity's trustees with their legal obligations in exercising control and management of the administration of the charity. (This is the OfS's 'compliance objective' under section 26 of the Charities Act 2011; see paragraph 22 for more information about this.)
 - b. Will notify the Charity Commission if the OfS has concerns that a provider is not complying with charity law, and may ask it to open a statutory inquiry. The OfS cannot investigate charity law matters itself. The Charity Commission can only open a statutory inquiry into a provider's activities if the OfS asks it to do so.
 - c. Must be consulted by the Charity Commission before it uses any of its powers in respect of a provider, even where the provider is asking the Charity Commission to do so (for example, to allow a provider to combine endowment funds together to make them more efficient and cost-effective to manage).
22. The OfS will discharge its 'compliance objective' under charity law by:
 - a. Making information available to providers about changes to the charity law obligations that apply to exempt charities. Providers are encouraged to subscribe to the OfS's primary mailing list at www.officeforstudents.org.uk/sign-up-for-email-alerts/ ('OfS alerts') to receive such briefings and alerts.
 - b. Promoting compliance with charity law by sharing with providers relevant guidance from the Charity Commission and the Fundraising Regulator, through the mailing list set out in paragraph 6.
 - c. Working with other organisations, such as Advance HE, to develop guidance to support trustees in understanding their own and the charity's responsibilities under charity law.
 - d. Notifying the Charity Commission if the OfS has concerns about a breach of charity law or other misconduct or mismanagement in the administration of a provider that is an exempt charity, or if it becomes aware of any other matter in which the Charity Commission has a regulatory interest.

¹⁰ See <https://www.gov.uk/government/publications/exempt-charities-cc23>.

23. Schedule 3 to the Charities Act 2011 sets out categories of exempt charities.¹¹ The Department for Digital, Culture, Media and Sport, which has legal and policy responsibility for charities, is considering whether to update Schedule 3 to amend the criteria for exempt status to reflect the implementation of the Higher Education and Research Act 2017 (HERA). HERA will result in a greater number of charities being regulated by the OfS, and it could therefore be appropriate for the OfS to become the principal regulator for those that are currently registered with the Charity Commission. Any such changes would require consultation by the Department for Digital, Culture, Media and Sport and would not come into effect before 1 August 2019.

Reporting requirements placed on exempt charities by the OfS

24. The OfS's approach to regulation is set out in its regulatory framework (OfS 2018.01). Beyond those requirements that apply to all registered providers regardless of whether or not they are charities, the OfS will place few obligations on exempt charities. The OfS's requirements reflect its general duties in section 2 of HERA to have regard to the need to use its resources in an efficient, effective and economic way and to be proportionate in its regulation, including targeting regulatory activities only at cases in which action is needed. This means that providers that are exempt charities are not required to make charity-related disclosures in their financial statements beyond those required under charity law.

25. A provider that is an exempt charity is required to:

- a. State that it is a charity in every location, and in every description of document or communication, in which it is required under company law to state its registered name,¹² and in any conveyance (relating to the provider's interest in land). This applies only to a charitable company that does not have 'charity' or 'charitable' in its name. This requires an exempt charity to disclose its charitable status in its audited financial statements.
- b. Produce financial statements in accordance with the OfS's requirements, as well as in accordance of any relevant statement of recommended practice.

26. The requirements in paragraph 25 are set out in the OfS's forthcoming accounts direction.

27. From time to time the OfS may request additional information to allow it to address any potential charity-related issues, such as:

- a. To allow the OfS to provide a view to the Charity Commission when a provider has asked the Charity Commission to use one of its enablement powers (for example, to authorise an ex gratia payment).
- b. To help the OfS to understand how charitable assets are being used to remunerate senior officers or to pay for senior officers' expenses.
- c. In response to a concern, complaint or whistleblowing notification about a provider's compliance with its responsibilities under charity law. The OfS will use the information

¹¹ See <https://www.legislation.gov.uk/ukpga/2011/25/schedule/3>.

¹² See Section 82 of the Companies Act 2006.

provided by the provider to determine whether it would be appropriate to ask the Charity Commission to consider opening a formal statutory inquiry under section 46 of the Charities Act 2011¹³ or to use its other regulatory or enforcement powers.¹⁴

28. A provider must provide the OfS with the information that it requests at the time and in the manner and form it specifies.
29. Information that a provider provides in relation to paragraph 28 may be of a sensitive nature, and the OfS will treat it with care. The OfS will ask for the information to fulfil its obligations as principal regulator, and this may involve consultation with the Charity Commission to determine whether it would be appropriate to ask the Charity Commission to open an inquiry into the exempt charity's activities or to use any of its other regulatory or enforcement powers.

¹³ See <https://www.legislation.gov.uk/ukpga/2011/25/section/46>.

¹⁴ The Charity Commission will apply its regulatory and risk framework to determine how it will engage with concerns and the action it will take to address them. This is available at <https://www.gov.uk/government/publications/risk-framework-charity-commission/regulatory-and-risk-framework>.

Annex A: Summary of charity law provisions

1. This annex provides a summary of the main provisions of the Charities Act 2011 that apply to exempt charities. It also sets out those with which exempt charities do not have to comply for charity law purposes. Please note that the Charities Act 2011 is not the only source of charity law. As described above, the trustees of an exempt charity also have the same general duties and responsibilities as trustees of other charities. For further guidance on exempt charities and the law, please see section 3 of the Charity Commission’s guidance on exempt charities.
2. The following requirements apply to exempt charities under the Charities Act 2011:

Area of charity law that applies	Section of Charities Act 2011
<p>Meaning of charity and charitable purposes</p> <p>These sections set out the legal definition of a charity and so determine the criteria an organisation must meet in order to be a charity. This is summarised in paragraph 7 of the main body of this regulatory advice.</p>	sections 1 to 6
<p>Offence of supplying false information to the Charity Commission</p> <p>This section sets out that it is an offence for a person knowingly or recklessly to provide false or misleading information to the Charity Commission. This includes information provided as part of an inquiry.</p>	section 60
<p>Duty of trustees in relation to application of property cy près</p> <p>This section sets out that if the trustees of a charitable trust cannot carry out its charitable purposes, they have a duty to apply to the Charity Commission for a scheme to alter the charitable trust’s purposes to secure its effective use for the charity.</p>	section 61
<p>Preparation of accounts</p> <p>This section sets out that trustees of an exempt charity must keep proper books of account and must prepare consecutive statements of account consisting on each occasion of an income and expenditure statement (relating to a period of not more than 15 months) and a balance sheet relating to the end of that period.</p>	section 136
<p>Auditors’ duty to report matters</p> <p>This section sets out that auditors have a duty to report the following to an exempt charity’s principal regulator: a matter that relates to the activities or affairs of the charity or any connected charity which the auditor has reasonable cause to believe is likely to be of material significance for the Charity’s Commission’s powers to undertake inquiries or to act for the protection of charities.</p>	section 160

Area of charity law that applies	Section of Charities Act 2011
<p>Supply by charity trustees of copy of most recent accounts</p> <p>This section sets out that a provider that is an exempt charity must provide a copy of its most recent accounts to anyone who makes a written request, within two months. It may charge a reasonable fee to cover the costs of doing this.</p>	section 172(1)
<p>Meaning of ‘charity trustees’ and disqualification of trustees</p> <p>These sections set out who the trustees are and the circumstances and procedures under which a person is disqualified from being a charity trustee.</p>	sections 177 to 184A
<p>Requirements on charitable companies to disclose charitable status</p> <p>This section sets out the requirements for a charitable company to disclose its charitable status (unless its name includes the word ‘charity’ or ‘charitable’) in every location, and in every description of document or communication, in which it is required by regulations under section 82 of the Companies Act 2006 to state its registered name and in any instruments relating to the provider’s interest in land¹⁵.</p>	section 194
<p>Restrictions on charitable companies’ powers to amend their governing documents</p> <p>These sections set out that changes to the objects, dissolution provisions, and rules on paying trustees or persons connected to them require the Charity Commission’s written prior permission.</p>	sections 197 to 198

3. The following Charity Commission enforcement powers in the Charities Act 2011 apply to exempt charities, though the Charity Commission must consult the principal regulator before exercising them:

Inquiry, enforcement and protective powers	Section of Charities Act 2011
Power to require a charity’s name to be changed.	sections 42 to 45
Power to institute an inquiry, including obtaining evidence and a search warrant for the purposes of an inquiry. The Charity Commission cannot institute an inquiry into an exempt charity unless this has been requested by its principal regulator.	sections 46 to 49

¹⁵ The Company, Limited Liability Partnership and Business (Names and Trading Disclosures) Regulations 2015/17 set out where the registered name must be displayed. This includes official publications.

Inquiry, enforcement and protective powers	Section of Charities Act 2011
Power to publish the results of inquiries.	Section 50
Powers to call for documents and to search records.	sections 52 to 53
Powers to suspend and remove trustees, officers and managers and to appoint interim managers.	sections 76, 79, 80, 83
Power to direct specified action to be taken, to direct specified action not to be taken, to direct the application of a charity's property, and to direct winding up.	sections 84 to 85
Power to give directions about the dormant bank accounts of charities.	sections 107 to 109
Power to determine the membership of a charity.	section 111
Power (with the Attorney General) to wind up a charity under the Insolvency Act.	sections 113 to 114
Requirement for the Charity Commission to maintain a record of persons it has removed from office, disqualified or both.	sections 182
Power to require reimbursement of the charity by a disqualified trustee who had received remuneration for providing services to the charity.	section 186
Acceptance for safe keeping of any document related to a charity.	section 340

4. The following enablement powers¹⁶ in the Charities Act 2011 apply to exempt charities, though again the Charity Commission must consult the principal regulator before exercising them:

Enablement power (advice and permissions)	Section of Charities Act 2011
Powers to deal with failed fundraising appeals by authorising the cy près application of gifts from unknown or disclaiming donors.	sections 63 to 66

¹⁶ A support power is one that the Charity Commission can exercise on the request of (and so in support of) the charity itself.

Enablement power (advice and permissions)	Section of Charities Act 2011
Procedure for amending Royal Charters by scheme.	section 68
Powers to make schemes, including the Charity Commission's powers in relation to this, to enable administration of a charity, appoint or remove a trustee, officer or employee, vest or transfer property.	sections 69, 70
Power to make schemes altering provision made by Acts of Parliament establishing or regulating a charity.	section 73
Requirement for Charity Commission or court consent to incur expenditure to prepare or promote a bill in Parliament.	section 74
Establishment of common investment or deposit funds.	sections 96 to 103
Power to authorise dealings with charity property.	section 105
Power to authorise ex gratia payments.	section 106
Power to give advice.	section 110
Proceedings by other persons.	section 115
Power to waive the disqualification of a trustee.	section 181
Power to relieve trustees and auditors from liability.	section 191
Power to authorise regulated amendments (e.g. alteration to objects)	section 198
Incorporation of charity trustees.	sections 251 to 266

5. The following charity law requirements **do not** apply to exempt charities:

Area of charity law that does not apply	Section of Charities Act 2011
<p>Registration and names of charities</p> <p>An exempt charity cannot register with the Charity Commission, and must not describe itself as registered or use a registered number.</p>	sections 29 to 41

Area of charity law that does not apply	Section of Charities Act 2011
<p>Dispositions and mortgages of land</p> <p>These sections relate to restrictions on the disposal of land and on mortgages, in respect of both England and Wales.</p> <p>Note: the Charities Act requires charities to include certain statements in the documentation relating to a disposal or mortgage. These requirements do apply to exempt charities.</p>	<p>sections 117 to 126</p>
<p>Accounts, auditing and annual reports</p> <p>All exempt charities must produce proper accounts, although the way in which they do this differs from registered charities. Exempt charities do not have to comply with the Charities Act requirements to file accounts or annual reports with the Charity Commission, to have their accounts audited or to produce a trustees' annual report. They do, however, have to produce accounts in accordance with their principal regulator's requirements, as well as any relevant statement of recommended practice.</p> <p>The Office for Students may, for its own regulatory purposes, require a provider to produce and publish audited financial statements (accounts) but this requirement does not relate to a provider's status as an exempt charity or otherwise.</p>	<p>sections 130 to 135, 137 to 159, 161 to 171, 173</p>

Annex B: List of exempt charities

This Annex sets out the exempt charities for which the Office for Students (OfS) is the principal regulator. In addition to those charities listed below, the OfS is principal regulator for connected charities under paragraph 28 of Schedule 3 to the Charities Act 2011.

Anglia Ruskin University	The Institute of Cancer Research: Royal Cancer Hospital	University of Greenwich
The Arts University Bournemouth	University of Central Lancashire	University of Hertfordshire
University of the Arts London	University of Chichester	University of Huddersfield
Aston University	City, University of London	University of Hull
University of Bath	Courtauld Institute of Art	Imperial College of Science, Technology and Medicine
Bath Spa University	Coventry University	University of Keele
University of Bedfordshire	Cranfield University	University of Kent
Birkbeck College	University for the Creative Arts	King's College London
University College Birmingham	University of Cumbria	Kingston University
University of Birmingham	De Montfort University	University of Lancaster
Birmingham City University	University of Derby	University of Leeds
University of Bolton	University of Durham	Leeds Arts University
Bournemouth University	University of East Anglia	Leeds Beckett University
University of Bradford	University of East London	The University of Leicester
University of Brighton	Edge Hill University	University of Lincoln
University of Bristol	University of Essex	University of Liverpool
The University College of Osteopathy	University of Exeter	Liverpool John Moores University
Brunel University London	Falmouth University	University College London
Buckinghamshire New University	University of Gloucestershire	University of London
University of Cambridge	Goldsmiths College	London Business School
		London School of Economics & Political Science

London School of Hygiene and Tropical Medicine	University of Plymouth	University of Southampton
London Metropolitan University	Plymouth College of Art	Solent University
London South Bank University	University of Portsmouth	Staffordshire University
Loughborough University	Queen Mary University of London	University of Suffolk
University of Manchester	Ravensbourne	University of Sunderland
Manchester Metropolitan University	University of Reading	University of Surrey
Middlesex University	Roehampton University	The University of Sussex
University of Newcastle upon Tyne	The Royal Central School of Speech and Drama	Teesside University
University of Northampton	Royal College of Art	University of Warwick
University of Northumbria at Newcastle	Royal Holloway College and Bedford New College	University of the West of England, Bristol
Norwich University of the Arts	Royal Northern College of Music	The University of West London
The University of Nottingham	The Royal Veterinary College	The University of Westminster
Nottingham Trent University	St George's, University of London	University of Winchester
The Open University	University of St Mark & St John	The University of Wolverhampton
School of Oriental and African Studies	The University of Salford	University of Worcester
University of Oxford	The University of Sheffield	Writtle University College
Oxford Brookes University	Sheffield Hallam University	University of York
		York St John University



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