

Governance Masterclass For Community Groups

facilitated by Steven Moe



Parry Field
Lawyers

To the heart of what matters.

Introduction

We want to help improve governance for community groups. In this case study we provide a “could be real life” scenario, to help us draw out key principles of governance.

When reading the facts given please try to immerse yourself in this character and then consider the questions with those around you. Don't worry, a cheat sheet of answers is also provided ... don't look until after the discussion though!

My intention for this is that you could print more copies of this and run through the scenarios one at a time at your own board meetings over a series of months. It would get each person thinking and talking about what governance really is.

To complement this masterclass, we have a lot more free resources on our website, such as the Charities Legal Handbook, and Social Enterprises in New Zealand: A Legal Toolkit.

Our law firm has a particular specialty in this area and does a lot of work supporting purpose driven organisations, with around 80 staff across four offices. We work with clients across the country and with 75 years of experience we can provide input for charities on property purchases and leases, structuring of new initiatives, disputes, employment, privacy and more.

Should you have any questions or comments about the topics here feel free to reach out.



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What is Governance?

You may have joined a board – but what does that really mean? Being on a board means being part of the governance of the organisation. Governance has been defined in many ways but a simple one is “...*the way in which an organisation is managed at the highest level, and the systems for doing this*”.

If you are on a governance board then you should think about what this will mean for you. How can you add the most value to your board?

Governance is in contrast to management. Management is about the details of how the organisation operates and runs – it is concerned with the practical side of what needs to be done. You have to be careful not to let your governance go too far and get concerned with management.

A metaphor ...

When we think about our roles in governance it is helpful to think of pictures, so here is one - picture a boat and a helicopter. The boat is the organisation. The Captain of the boat is the management steering the organisation forward. Management are looking around them but can only see a limited way ahead – icebergs may be coming up but unseen. That is why the helicopter is there – that represents the governance which is in a helicopter flying high above looking out for the icebergs and plotting the course ahead through stormy seas.

Sometimes governance can go too far the other way too and be too removed. It is important to understand, for example, how are employees feeling, what the long-term maintenance obligations are, the level of debt carried, legislation changes that may face the organisation. That is not management, it is governance.

So, how can governance go wrong?

There are several ways in which things can go wrong:

1. Blurring of lines – between governance and management
2. Decision making - without full set of information
3. Conflicts of interest - that are undeclared
4. Not understanding - the purpose of the organisation
5. Roles and scope of work - being confused
6. Not asking questions - wrongful subordination to the head pastor or Chair
7. Passivity - Don't just say “yes” – ask questions
8. Strategy – or lack of it
9. Failing to ask ‘what does success look like’?
10. Passive board members who aren't engaged with the real issues

When should you seek legal input?

In our experience community groups – as part of their governance tool kit – should engage with legal advice more often than they do. So, when should a group seek input from a lawyer?

We see that many issues get escalated to a point where legal advice is only sought after the house is on fire. In fact, if input were sought earlier the blaze might not even have started. This may sound self-serving to say, but is confirmed by experience and conversations with many others on this point. Why is that? What is the stigma around seeking legal advice? Let's consider this a bit more.

We think it might be a little like going to the dentist or a doctor – you know getting a check-up is probably a good idea, but want to avoid the cost involved and so often wait until there is a pain or problem that you really do need their help with.

The scenarios where it is almost certain early legal input would have helped include: privacy breaches, employment issues, governance issues, legal structuring for new initiatives such as setting up trusts, conflict of interest issues, fundraising from your members to support projects including how loan arrangements with members are documented, volunteer relationships, increasing donations offshore which could impact tax donee status of the entity, control by a group of related trusts/trustees, reregistering incorporated societies, review of founding documents, taking over of other groups which are winding up, health & safety breaches and public hiring of your facilities. And that is just a few!

It is also worth mentioning that there are many types of specialty (an eye doctor will not be the best choice to do your foot surgery). So, on behalf of fellow lawyers in your groups, don't assume they will have expertise in governance, charity law or legal structures just because they are a lawyer, and you want to lean on them for some free advice. It puts them in an awkward position and ultimately isn't going to give the best results.

Don't forget, there is a lot of free material out there – see the next page for a list just to start. Also, we know that cost is often a barrier to seeking input – to help alleviate that concern, we offer 20-30 minute conversations at no cost, to work out if we can even help. If we cannot help, then we will always steer you to who we think can help.

Community groups need to engage with legal advice more than they do. Our hope is that this guide will stimulate your thinking about key issues and give permission to approach for legal input earlier, when issues can be mitigated, rather than when it is too late.

Resources on Governance

Board Matters podcast from IOD hosted by Steven Moe
<https://www.iod.org.nz/news/articles/board-matters-podcast/#>

Institute of Directors of New Zealand NFP hub -
<https://www.iod.org.nz/nfp/#>

Lots of resources on governance from [Community Governance NZ](#) including [this resource](#) with sample agendas, financial statements and more

A helpful overview of [Corporate Governance Principles from the UK](#)

Good tips from Charities Services for new Officers of a charity
https://www.charities.govt.nz/assets/Congratulations-you-are-the-officer-of-a-registered-charity_updated-july-21.pdf –

Nine steps to effective governance from Sport NZ:
<https://sportnz.org.nz/sector-guidance/nine-steps-to-effective-governance/>

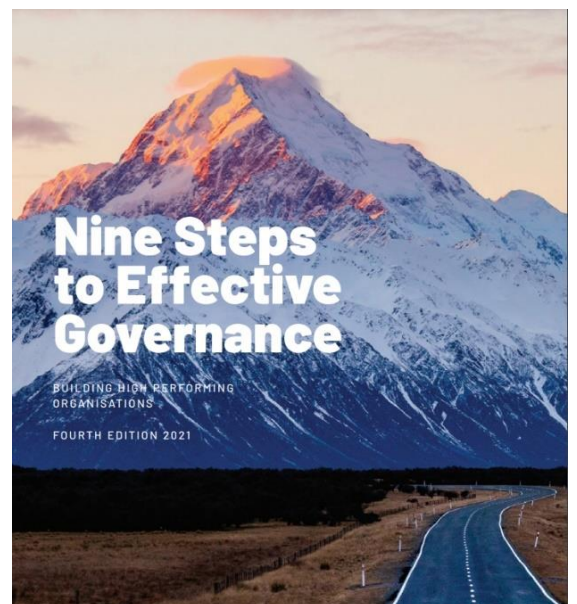
Sample board charter
<https://www.iod.org.nz/resources-and-insights/guides-and-resources/board-charter-sample/#>

Charities Handbook from Charities Services
https://www.charities.govt.nz/assets/Uploads/Resources/Charity-Handbook_16-July-2021.pdf

NZ Navigator information assessment
<https://nznavigator.org.nz/>

Community Net Aotearoa resources
<https://community.net.nz/> Community Networks Aotearoa – Tick for Governance online course
<https://www.communitynetworksaotearoa.org.nz/tick-for-governance>

Governance often comes up on Seeds Podcast now with 330+ conversations www.theseeds.nz



Part 1: Before you join a board

You have recently been asked if you would be interested in becoming a board member of a charity. You are excited by this because you have been involved as a volunteer for more than 10 years and think there are a lot of opportunities to serve others by taking on this role. The group has faced recent challenges but has made it through Covid and also has some new initiatives which will further support your local community including considering setting up a preschool, café and counselling service. After talking with others about it you feel like this is the right step to take.

- What questions should you be asking before you join a board of any kind?

- What documents should you be asking to see?

- What sort of duties are you subject to as a trustee and what liabilities might result if they are breached?

Part 1: Before you join a board (answers)

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- What questions should you be asking before you join a board of any kind?
 - What is my motivation for joining?
 - What is the expected time commitment?
 - Are there specific expertise/skills that the board is seeking?
 - If I was not there, who else might be?
 - Can I attend a meeting ahead of being appointed to see how they run?
 - Who else is on the board – Google them.
 - Talk to the Chair – what is their leadership style?
- What documents should you be asking to see?
 - Charitable Trust Deed
 - Rules of the board or Board Charter, if there is one
 - Previous meeting minutes to get a sense of common topics and tone
 - Confirmation of any insurance that is in place and level of cover
- What sort of duties are you subject to as a trustee and what liabilities might result if they are breached?
 - Duties include:
 - to act honestly and in good faith,
 - to know and act in accordance with terms of the trust,
 - act to further the trust's purpose,
 - Other duties spelled out in the trust deed
 - Personal liability for losses sustained due to breach of trustee's duties
 - More on duties is [here](#) and on liabilities is [here](#).

Part 2: A well-run meeting ...

Your appointment has gone through, and you are excited to have people congratulate you! You are excited to attend your first meeting and wait for some information about it. Nothing comes. About an hour before the start there is a hastily written note from the Chair by email which says “See you soon – here are some financials...”. There is no agenda, no papers on strategy, no briefings or reports. You arrive for the 7:30pm start and find the first 30 minutes is spent waiting for others to arrive and it turns out 3 of the 7 “are busy” so cannot attend. The meeting drifts from topic to topic seemingly without structure until you finish late but without any real decisions – is this how meetings always go?

- What is best practise on attendance, agendas, minutes, communications, timing?
- What are some ways to ensure meetings keep on track?
- What should be covered in each meeting – looking at the past, thinking about the present or imagining the future?

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- What is best practise on attendance, agendas, minutes, communications, timing?
 - You should attend every meeting – you represent a voice that needs to be heard
 - Set a recurring time for board meetings (first Thursday of every month, etc...)
 - Circulation of agenda ahead of time along with board papers a week or more before meeting – too often they are only sent the day before
 - Circulation of last meeting’s minutes (ideally as soon as possible after the meeting)
 - Confirmation of attendees ahead of meeting (1-2 days before meeting) – check to see if quorum is met
 - Appoint someone to keep minutes (at next meeting and at next meeting confirm they are accurate)

- What are some ways to ensure meetings keep on track?
 - Appoint chairperson to oversee meeting
 - Indicate time set aside for each discussion point within the agenda (can run over if necessary)
 - Ensure discussions do not ‘stray’ – trustees and chairperson to work together on this but primarily the role of a good chair
 - Leave a “miscellaneous” time slot at end of agenda to allow trustees to raise other topics. It can be helpful to have “board only” time as well.

- What should be covered in each meeting – looking at the past, thinking about the present or imagining the future?
 - A combination of all three but as a general rule, we focus too much on the past and not enough on the future – consider devoting 25% to the past, 25% to the present and 50% to the future.
 - This sounds like a lot to have focused on the future but that is the primary role of a board – to be setting strategy and plotting the course forward.
 - Past – confirmation of past minutes, review of performance (financial, social impact, etc...)
 - Present – current/anticipated challenges and opportunities. Review of current management of the Entity. Keep “Risk / Opportunities” register
 - Future – What is the long-term mission/purpose/strategy?

Part 3: Governance ... or Management?

Your Chair has attended an evening masterclass on governance and things improve greatly at your second meeting. One item on the agenda is raised by another Trustee who mentions that they want to look at how the organisation uses its resources and deploys them as good stewards. One area she wants your input on as trustees is whether you should switch the printing of the monthly notices from being on white paper (which costs \$0.01 per sheet) or to a new recycled paper (which costs \$0.02 per sheet). It turns out there are a lot of different views on this, and you notice the time flying by – pretty soon 40 minutes have been spent, but you realise it is an important issue. Next on the agenda: should the group switch power provider.

- What is the difference between governance and management?

- How do you ensure your board stays focused on what matters?

- What is strategy and when should a board set that?

Part 3: Governance ... or Management? (answers)

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- What is the difference between governance and management?
 - Governance – leadership/direction/steering/strategy
 - Management – day-to-day running/operations
 - In smaller organisation, individuals sometimes wear both ‘hats’ – e.g. the senior pastor (management) who is also a trustee (governance)
 - Where boards go wrong is when they get too concerned with management

- How do you ensure your board stays focused on what matters?
 - Effective Chair
 - Creation of sub-committees comprised of both governance and management people to discuss in further detail – Audit/risk, People, Health & Safety
 - Fostering mutual trust in the capabilities of management to understand and implement the direction of governance

- What is strategy and when should a board set that?
 - Strategy is a plan to achieve a goal
 - Board should set strategy at beginning of each ‘cycle’ – e.g. financial year but also have long term horizons – 10 years? 100 years?
 - Board should set a strategy for short-term goals, medium-term goals, and long-term goals and update the strategy at appropriate and regular intervals (e.g. shorter intervals for short-term strategy)
 - Board should also pay attention to interplay of short/medium/long term strategies and how they support/enhance or conflict/detract from each other.

Part 4: “This is the way we do things around here”

You are feeling pretty confident now – on to your third meeting already! A question is raised about a noticeable dip in giving during a recent lockdown and whether enough money will come in to actually pay staff – you hadn't realised things were running so close to the edge or that this was an issue before but another Trustee, who is also an accountant, seems quite concerned. They are about to talk about some ideas such as launching a fundraising drive when the Chair raises their hand and stops the other person in their tracks with, “We don't need to talk about this more, there is a certain way we do things around here. Everything is fine – we need to move on.”

- What are the characteristics of a good Chair?
- Why is board culture important and how do you help it improve?
- What is your key role on a board?

Part 4: “This is the way we do things around here” (answers)

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- What are the characteristics of a good Chair?
 - Fosters frank discussions where all voices are heard, and seeks input from those who may not have spoken yet
 - Streamlines the flow of the meeting – including by ensuring that discussions are restricted to the topic at hand and helping to keep the meeting ‘on-time’.
 - Being Chair is significantly more responsibility – you also need to connect management with board and communicate clearly

- Why is board culture important and how do you help it improve?
 - Organisations tend to reflect the culture of their leadership – the board helps to set the tone.
 - To foster the right culture in the organisation, the desired culture and traits should be modelled in the board.
 - Improving board culture requires mutual respect, including the acceptance and celebration of differing viewpoints (subject to everyone’s deep commitment to the organisation’s core values).
 - There may be differing opinions on how to achieve the same desired goal, but trustees should always strive to give each other the benefit of doubt.
 - Board Charters can help too
 - Ongoing training will help to foster a good culture on the board.

- What is your key role on a board?
 - Humbly serve while remaining confident in the value of your input.
 - Respect the views and opinions of fellow trustees
 - Remind trustees of the larger picture and share your perspective
 - Be willing to ask hard questions

Part 5: What Conflict of Interest? (answers)

As well as being involved in this group you also run a small catering business. You provide a high-quality experience for your clients preparing delicious cakes and platters for events. You are not the cheapest option but the quality you offer far surpasses your competitors (well, you think so).

The group will be celebrating its 50th anniversary and will be inviting a number of guests to attend a ceremony including local politicians, leaders and others. As trustees you engage in a discussion about the day and you suggest that perhaps providing some food for those attending would be a good idea.

Someone else suggests that it's not a good idea – it's a great idea – and asks if you can price up the cost. Before you can respond the Chair says they don't need to see a quote and asks if you would like to second a motion that your company be chosen for the catering.

- Is there a conflict here?
 - Yes
 - We each wear multiple hats so conflicts are to be expected – it is how we deal with them that is important.

- What should you do if there is a conflict?
 - Depends on the trust deed which may set out a process
 - Best practice is to declare the conflict – disclosure is the sanitiser that cleans out conflicts
 - If you have a conflict, excuse yourself from the discussions and voting of any matter which may result in a conflict of interest

- What should you do if you disagree with a decision that is being made?
 - Ask that your disagreement (and reason for it) be noted in the minutes – this can be important later on if a decision was taken that you consistently spoke up against the decision.
 - If you consistently object and disagree then at some point you maybe will need to resign.

Part 6: Structure options and Strategy

At your next meeting a proposal comes to the board to endorse the setting up of a counselling service which will focus on people recovering from drug addictions. The plan is for this to come under the banner of the Trust and so the Chair explains that they have talked with their local GP who identified there was a need for more counsellors. It is just an oral report without any analysis on the market or the details of what this might involve.

No one on the board has any experience in counselling or addictions but they all have a desire to help others and it seems like a kind thing to do. The Chair explains that you will now be directly overseeing this new initiative as a board with new premises leased (somewhere, not yet decided), staff employed (well, not yet decided) and policies developed (well, not yet decided).

For simplicity, the new initiative will not come under a separate entity. Everyone nods at this and raises their hand to signal approval, but you wonder if it is the best way. You hesitate and you can tell the Chair sees that hesitation.

- Should you speak up?

- What are the dangers of this sort of approach?

- What are the options when it comes to legal structures for new initiatives?

Part 6: Structure options and Strategy (answers)

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- Should you speak up?
 - Yes
- What are the dangers of this sort of approach?
 - At the extreme end, personal liability for breach of trust/breach of trustee's duties
 - The board has not been adequately informed prior to taking a decision – there are numerous risks, such as Breaching terms of the trust and/or Not acting diligently or reasonably
 - The board is designed to be a safe space for leaders to debate and discuss, if decisions are to be made in such a manner, the board really serves little purpose.
 - For the legal structure itself there is a risk is that all of the assets will be liable for this initiative's obligations (rent, wages, breach of legal regulations – e.g. privacy, medical standards)
 - There is also question here about the competency of the board to assess this proposal – likely a third party input with expertise would be wise to have
- What are the options when it comes to legal structures for new initiatives?
 - Create a separate entity to ring-fence liability
 - Wholly-owned charitable company
 - Separate trust – associated with the charitable trust
 - Limited Partnership – may facilitate outside funding
 - Incorporated joint venture (LLC) – if partnering with a hospital, for example.
 - Have a look at resources such as "[Social Enterprises in New Zealand: A Legal handbook](#)" for more on the move to combination of profit and purpose.

Part 7: It was signed when?

Someone mentions the “Trust Deed” during your next meeting and it makes you curious about what that is – you are surprised to find you can download it for free from Charities Services where you also see your name listed as an Officer of the Trust. When you open the Trust Deed you see that it was signed in 1972 and appears to have been prepared on a typewriter. You laugh to yourself thinking of that era before computers – so much has changed since then. But reading the language it does make you wonder if it is still up to date?

It starts like this: *“In witness whereof, the parties hereunto have set their hands to these presents as a deed on the day month and year hereinbefore mentioned...”*. You smile at that, but then you look through and realise the entire document is similar, and you cannot see a reference to things like trustee liability or indemnities. You recall attending an evening masterclass on governance - wasn't there mention of a Trusts Act 2019 which reformed this area of law? You feel a tightening in your stomach and wonder if your Trust Deed is still even adequate.

- Should you ask questions of the Chair about the Trust Deed?

- Are documents like Trust Deeds fixed moments in time, or can they be updated? What other documents should a board ensure are kept up to date?

- What are the key points you would want to ensure are covered in a revised Trust Deed?

Part 7: It was signed when? (answers)

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- Should you ask questions of the Chair about the Trust Deed?
 - Yes – you need to ensure that the document governing the board's powers and functions is fit for purpose
- Are documents like Trust Deeds fixed moments in time, or can they be updated? What other documents should a board ensure are kept up to date?
 - They can be updated – most trust deeds (even very old ones) will contain the rules for how to amend and update the trust deed. Rarely it is best to start a new Trust and transfer assets across.
 - The book of minutes for the trust should be kept up to date, as well as the record of financial reporting and different policies (privacy, health and safety, child protection, volunteers policy etc), board charter.
- What are the key points you would want to ensure are covered in a revised Trust Deed?
 - That it reflects how you actually operate...
 - Purpose of the Trust
 - Powers and duties of trustees and how these are different from the default powers/duties under the Trusts Act 2019
 - How to appoint/remove trustees
 - Rules for the board (decision-making/quorum/etc...)
 - Amending the Trust Deed
 - Dissolution/wind-up of the Trust