

Trustee liability guide

Summary of the potential personal liabilities associated with becoming the trustee of a charity



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For more information see the Charity Commission guide "The Essential Trustee", the BWB guide to "Duties and responsibilities of charity trustees", available for free online at www.bwbllp.com or the NCVO guide "Reducing the Risks".

Risk

The prosecution of trustees who have acted in good faith is a rare event. Hundreds of thousands of people have acted as trustees to charities and other civil society organisations for many decades without incident and where something has gone wrong, the law generally seeks to protect individual trustees from personal risk where they have acted in good faith and complied with their trustees' duties.

The table of liabilities that follows is intended to inform, reduce risk and help trustees to decide on the best course of action with regard to the legal form of their organisation and the insurance cover required.

Introduction

Charity trustees are the people who have the general control and management of a charity's administration: in short, they are ultimately responsible for the charity. Charity trustees can have a number of names including governors, board members, directors and members of the management committee. Some charities may make a false distinction between trustees and other committee members but any individual engaged in the governance of the charity is de-facto a trustee, whether or not the Charity Commission has been notified of their appointment.

Becoming a charity trustee for the first time can be both an exciting opportunity and a daunting prospect when it comes to understanding your duties and responsibilities.

This guide is intended to be an illustrative summary of the potential **personal** liabilities associated with becoming the trustee of a charity, and the extent to which such liabilities might be covered by company incorporation and insurance. This is only a summary, and it deals with complex issues. If you have queries, we have signposted you to further reading or you could seek professional advice.

There will be other **organisational** liabilities to consider when you are a trustee, but this guide does not consider these.

Types of personal liability

There are the following types of potential personal liability for the trustees of charities:

- Liabilities to third parties that occur in the course of running the charity. Most charities will have legal relationships with third parties, such as funders, staff or suppliers and all legal relationships carry the risk of legal liability. The extent to which the trustees are personally liable in these circumstances will depend on the legal form of the charity;
- All charity trustees are, in principle, also vulnerable to legal action instigated by the Charity Commission or the Attorney General (or the other trustees) in the case of a breach of trust. This action is not affected by the legal form of the charity;
- Liabilities associated with the charity trading while it is insolvent or close to insolvency; and
- There are a limited number of specific circumstances where a trustee could be found criminally liable.

Legal form

The potential liabilities of charity trustees to third parties depend to a great extent on the legal form of the charity. If you are thinking about becoming the trustee of a charity, one of the first questions you should be asking is "*what is the charity's legal form?*".

All charities incur liabilities: they are referred to above as **organisational** liabilities. Liabilities which might be expected to arise in the course of a charity's everyday work might include debts to suppliers, staff wages, utility bills and so on. Some liabilities are unexpected: a claim from someone who has been injured on charity premises, for example, or a fine because the health and safety rules have been breached.

What trustees will want to know is whether they can be made personally liable for those liabilities. The

answer depends to a very great extent on the legal form of the charity:

- *Incorporated legal forms*

A charitable company limited by guarantee, Charitable Incorporated Organisation, Royal Charter body or a community benefit society (Industrial and Provident Society, IPS) are all incorporated legal forms. This means that the charity has a “legal personality”. The charity can enter into legal relationships, such as relationships with staff, suppliers and the general public, in its own name. In most situations, if the charity is incorporated, it is the charity itself, rather than the members or the trustees, which is responsible for the charity’s debts or for any other liabilities which might arise from its legal relationships. This will generally be the case even if the charity has no funds to meet the liabilities: the charity will become insolvent but the trustees are usually protected from personal liability.

There are some exceptions. First, where an incorporated charity is insolvent, the courts can, in principle, impose liability on the trustees in some circumstances. See more on this under “insolvency” below. It would be very rare indeed for a trustee to be made liable in this way. Second, in some specific situations trustees can be held responsible for some liabilities alongside the charity. These are outlined below: they are also rare and generally involve an element of fault on the part of the trustee concerned.

- *Unincorporated legal forms*

A trust or an unincorporated association are unincorporated legal forms. This means that the charity does not have its own legal personality. It is the trustees personally who enter into any legal relationships with third parties. The trustees are able to meet the charity’s liabilities using charity funds, so this is not usually a problem. The difficulty arises if the charity runs out of funds and is unable to meet its liabilities. Here the trustees are potentially exposed to personal liability for any outstanding liabilities. (It is possible for the trustees of an unincorporated charity to try to agree, when entering into a contract, that their liability will be limited to the level of the charity’s assets, but this is not always possible.) For this reason, many unincorporated charities often consider changing their legal status and become incorporated. If the charity is entering into contracts, employs staff or has premises then its trustees should seriously consider incorporation as an option.

It is worth saying that if a community group is established relatively informally, and has not made an active application to register as an incorporated body of the kind described above, it will be unincorporated.

Insurance

Many of a charity’s unexpected liabilities can be met by insurance, taken out in the name of the charity. It is appropriate for any charity to consider what sort of insurance policies it needs: insurance against liability for damage to premises and equipment for example, or insurance against liability from members of the public using its premises. This type of insurance protects the charity.

There is another type of insurance which can protect charity trustees personally. This is called trustee indemnity insurance. It is important to understand what this is. While the scope of the cover will depend on the terms of the individual policy, generally speaking, this type of insurance will cover breach of trust claims and wrongful trading and covers associated legal costs. It is very important for trustees of charitable trusts and unincorporated associations to note that this type of insurance does not cover their potential liability for debts to third parties, as described above. TI policies should cover trustees where they have acted wrongfully but not recklessly or dishonestly. Most Trustee Indemnity policies will also cover the legal fees of trustees who are under investigation or who have actions brought against them that are later dropped or ultimately unproven.

Trustee indemnity insurance is regarded as a benefit to you, since it protects you personally rather than the charity. However it can usually be funded from charity resources, subject to certain safeguards.

Indemnity

Most charities are permitted to indemnify its trustees who have acted in good faith and in accordance with their duties. The indemnity can cover proceedings brought by third parties. In charitable companies, for example, under company law this indemnity will cover both legal costs and the financial costs of any adverse judgment. However it would not extend to the legal costs of unsuccessful defence of criminal proceedings, fines imposed in criminal proceedings, penalties imposed by regulatory bodies or situations where they have knowingly or deliberately acted wrongfully.

Trustees may still be personally liable if the assets of the charity are not sufficient to meet the indemnity.

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Liabilities to third parties					
Risk/liability	Examples	Examples of preventative actions	Will incorporation protect the trustees from personal liability?	Can the liability be covered by insurance?	Further reading
Contract to deliver goods or services	Failure to deliver services under contract.	Some liabilities can be limited through the wording of the "limitation of liability" provision in the contract. Certain losses, such as those associated with death or personal injury cannot be limited in this way.	Yes, provided no personal guarantees given – if the charity is incorporated, the legal relationship will be with the charity and not the trustees personally, and so the protection of limited liability applies. See also "Insolvency" section.	Not covered by Trustee Indemnity insurance. Some Professional Indemnity Insurance policies may cover this.	Charity Commission CC37 - Charities and Public Service Delivery
	Failure to pay for services under contract.	Proper financial management and appropriate supervision of staff (including levels at which financial commitments require trustee approval) can help avoid failure to meet contractual obligations. The trustees can delegate responsibility for expenditure, but it is good practice to have limit at which a manager or member of staff must seek trustee approval before exceeding.	Yes, provided no personal guarantees given- Any claim for unpaid debts will be against the incorporated charity itself and not its trustees. The trustees of an incorporated charity may be liable if the charity trades when it is insolvent and cannot then pay its debts when they fall due (see below). See also "Insolvency" section.	Trustee Indemnity Insurance will not provide protection against financial claims or debt which the organisation cannot meet unless as a result of fraud or where the trustees have been held liable for their financial mismanagement but have not acted recklessly, where cover is available. The Charity may also arrange cover to meet losses arising out of fraudulent and dishonest acts by its employees and trustees.	Charity Commission CC12 - Managing Financial Difficulties and Insolvency in Charities
Staff	Breach of a worker's terms and conditions Claim for unfair dismissal, wrongful dismissal or discrimination by the charity	Putting proper policies and procedures in place, such as a comprehensive and accessible employee handbook which is kept up to date, and sticking to them.	Yes – if the charity is incorporated, the legal relationship will be with the charity and not the trustees personally.	Can be covered under legal expenses (employment disputes) of a Trustee Indemnity policy or an Employment practice liability policy.	
	Discrimination against a staff member or trustee in relation to a 'protected characteristic' (such as race, gender, sexual orientation etc.) by a trustee personally	Equality awareness policies, training and monitoring.	No – If a tribunal finds a trustee has been discriminatory towards a staff member or another trustee, the tribunal can order the trustee to personally pay compensation to the victim as well as or instead of the charity.	Some Trustee Indemnity policies will cover for this as it's a trustee as an individual making the error, and a breach of their statutory duty. It will cover damages but not fines or penalties Employment Protection Liability will provide protection for employment claims of discrimination even if made against an individual trustee	Charity Commission - Charities and The Equality Act
Property	Trustees (if unincorporated) or the trustees on behalf of the charity (if incorporated) sign a lease for premises and there are insufficient funds to pay the rent	Some personal liabilities can be excluded in leases	Yes, unless there are personal guarantees, to an extent – the protection of limited liability usually applies in respect of any debts, unless there is an insolvency situation (see below).	Not usually covered by Trustee Indemnity insurance.	Charity Commission CC33 - Acquiring Land
	Breach of covenants,	The trustees should be	Yes – provided no personal	Some Trustee Indemnity	

	obligations or mortgages affecting land or other property	satisfied that there are effective procedures in place to manage the charity's property and finances.	guarantee given, the protection of limited liability applies	policies may cover this but many will exclude it	
Funders	Spending a grant from a foundation or public body in a way that is not compliant with its terms and conditions.	<p>Ensure that grants for restricted purposes are clearly labelled as such in the charity's budget and accounts.</p> <p>The trustees should be satisfied that there are effective procedures for ensuring that restricted funds are only used for the correct purposes, and that this can be documented.</p>	<p>The terms and conditions may include a "claw back" provision, which allows the funder to re-claim any improperly used funds.</p> <p>The protection of limited liability in respect of any debts may apply, unless there is an insolvency situation.</p> <p>However, a trustee might be personally liable if they authorise the use of a restricted fund for some other purposes, without the funder's consent.</p>	Trustee Indemnity insurance may cover this depending upon the circumstances. There must be an actual claim from the third party, the loss must not be recoverable and for most policies, it must be an honest mistake	Charity Commission SORP 2005 - Appendix 3

Breach of trust or trustees' / directors' duties

Risk/liability	Examples	Examples of preventative actions	Will incorporation protect the trustees from personal liability?	Can the liability be covered by insurance?	Further reading
Breach of trust	Spending the organisation's money on activities or otherwise acting outside the charity's objects and/ or not for the public benefit, as defined in the objects	<p>The charity's funds must be applied for the limited and particular objects of the charity.</p> <p>The trustees must understand what they are, and how funds can be applied accordingly.</p> <p>If in doubt, seek professional advice.</p>	<p>No – Incorporation does not give trustees any better protection from breach of trust claims.</p> <p>The Charity Commission has a statutory power to relieve an individual from his or her personal liability for breach of trust, provided he or she has acted honestly and reasonably.</p>	Can be covered by Trustee Indemnity Insurance, provided the trustee acted in good faith.	<p>"Duties and responsibilities of charity trustees", a BWB guide.</p> <p>Charity Commission CC11: Payment of Trustees</p> <p>Charity Commission CC24: Users on the Board, Beneficiaries who become Trustees</p> <p>Charity Commission CC7: Ex gratia payments by charities</p>
	Reimbursing expenses to a trustee which are over and above the amount that the trustee is out of pocket	Develop and implement an expenses policy which includes a requirement to provide receipts.		Generally would not be covered under Trustee Indemnity policy as the financial loss is to the charity, rather than a third party	
Acting in breach of trustees' / directors duties	The organisation's funds are not invested prudently.	<p>Trustees have a number of duties including a duty to act prudently and with reasonable skill, care and diligence, to exercise independent judgment and a duty to safeguard the charity's assets.</p> <p>Undertake training on the nature and extent of trustees' duties.</p> <p>Maintain a register of assets, which is regularly reviewed.</p> <p>Take professional advice.</p>	<p>No. Where trustees act in breach of their obligation to look after the charity's resources, and the charity suffers a loss, the trustees are potentially exposed to personal liability.</p> <p>The Charity Commission, the charity itself or the courts can enforce breaches of trustees' duties. The Charity Commission emphasises that it is only likely to enforce personal liability where a trustee has acted dishonestly or recklessly.</p>	Trustee Indemnity policies can provide an indemnity if the policy does not have an Insured vs Insured exclusion. Many policies will exclude claims from the charity against their trustees or vice versa. Claims from third parties may also be covered if shown to be wrongful. It would not provide cover where the funds were invested with consideration, but value reduces outside of control of the charity.	<p>"Duties and responsibilities of charity trustees", a BWB guide.</p> <p>Charity Commission CC3: The Essential Trustee.</p> <p>Charity Commission CC60: Hallmarks of an Effective Charity.</p> <p>"Good Governance, a code for the Voluntary and Community sector".</p>

			<p>The Charity Commission has a statutory power to relieve an individual from his or her personal liability for breach of a charity law duty, provided he or she has acted honestly and reasonably. However, the Charity Commission cannot relieve a trustee from liability for breach of a company law duty.</p> <p>Where there is a breach of the duty to avoid conflicts of interest, a trustee may be required to account for any profit or loss or may be unable to enforce the agreement with the charity.</p>		
	The charity exceeds the threshold for trading that is not in accordance with its objects (non-primary purpose trading), and the charity incurs a tax liability.	The trustees should be aware of the limits on the charity's ability to undertake trading, and if the limits on non-primary purpose trading may be exceeded, explore establishing a trading subsidiary.		Most Trustee Indemnity policies will not cover for losses to the charity.	
	The trustees fail to appropriately manage a conflict of interest (i.e. a situation where a trustee has a personal financial interest in a proposed arrangement with the charity).	<p>Follow the conflict of interest provisions set out in the constitution.</p> <p>Develop a conflicts of interest policy.</p>		The Charity Commission will investigate conflicts of interest and may impose a change of structure. Trustee Indemnity insurance will normally cover investigation costs but not re-structuring.	
	The trustees delegate their powers to a CEO and do not meet regularly to review the charity's affairs. The CEO embezzles funds from the charity.	The trustees should meet regularly (at least quarterly) to review the charity's affairs, including the activities of any CEO.		Trustee Indemnity insurance will not usually cover this.	

Insolvency (incorporated charity)

Risk/liability	Examples	Examples of preventative actions	Will incorporation protect the trustees from personal liability?	Can the liability be covered by insurance?	Further reading
Wrongful trading (operating and spending) whilst insolvent	<p>Once an incorporated charity becomes or is inevitably going to become insolvent, the trustees' duties change to ensure creditors are protected.</p> <p>Wrongful trading is where the trustees of a charitable company allowed the company to trade at a time when they knew, or should have known, that it was, or would inevitably become, insolvent.</p>	<p>Keep the accounts, business plan and budget under regular review.</p> <p>Receive regular up-to-date financial reports. Make sure you understand them!</p> <p>If insolvency is a risk, seek professional advice.</p>	No – Trustees personally liable	Can be covered by Trustee Indemnity Insurance, provided the trustees acted in good faith.	Charity Commission CC12 - Managing Financial Difficulties and Insolvency in Charities.

Fraudulent trading	Fraudulent trading includes where the business of a charitable company is carried on with intent to defraud creditors.		No – Trustees personally liable.	Cannot be covered by insurance, (except for defence costs of trustees found to be innocent).	
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Health and safety

Risk/liability	Examples	Examples of preventative actions	Will incorporation protect the trustees from personal liability?	Can the liability be covered by insurance?	Further reading
Health and safety	Failure to provide a safe working environment or proper safety equipment, and trustees are aware of the risk.	Develop a health and safety policy including written risk assessments and regular reviews. Ensure staff, volunteers and services users know who to report health and safety concerns to, including up to board level if serious enough.	No – Trustees may still be personally liable as well as organisation: where a charitable company commits a health and safety offence, and the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, any trustee then that person is potentially personally liable.	Trustee Indemnity policies will not cover for any actual injury, although civil claims for financial loss may be covered. Injuries are covered under an Employers' Liability policy as is defence of an action by the Health and Safety Executive but any fines imposed would not be covered by any form of insurance.	

Serving as a trustee while disqualified

Risk/liability	Examples	Examples of preventative actions	Will incorporation protect the trustees from personal liability?	Can the liability be covered by insurance?	Further reading
Serving as a trustee while disqualified	There are restrictions on who can act as a trustee of a charity. For example, a person who has an unspent conviction of any offence involving dishonesty or deception is disqualified from acting as a charity trustee.	Ask each new trustee to sign a declaration of eligibility, which confirms that they are not disqualified from acting.	Charity Commission can require repayment of any payments received or expenses claimed while serving as a disqualified trustee. It is a criminal offence (punishable by a custodial sentence and/or a fine) committed by the individual, to act as a charity trustee whilst disqualified.	Trustee Indemnity insurance should cover Charity Commission investigation costs and defence costs of innocent trustees. The actions of a disqualified trustee are not insurable. Claims made against the other trustees for the failure to vet a rogue trustees may be insurable providing they have acted in good faith and taken reasonable steps in the vetting process.	Charity Commission CC30: Finding new trustees.

Wrongdoing under civil law (a tort)

Risk/liability	Examples	Examples of preventative actions	Will incorporation protect the trustees from personal liability?	Can the liability be covered by insurance?	Further reading
Libel	Publishing an untruth about someone or authorising someone else to do the same.	Ensure trustees' are aware of the risk and, if relevant, develop a media engagement policy, which could provide for social media.	No – Anyone who has responsibility for a defamatory publication can be liable.	Some Public Liability and Trustee Indemnity Policies automatically provide cover for Libel and Slander in some others it can be included as an optional extension. Most policies won't cover cases between trustees.	Charity Commission CC9 - Speaking Out on Campaigning and Political Activity by Charities.
Personal injury	A service user trips on a mat at the charity's premises and injures themselves.	Develop a health and safety policy including written risk assessments and regular reviews.	Yes - limited liability applies unless a trustee is personally involved in the negligence that caused the injury.	Can be covered by Public Liability Insurance. Some Trustee Indemnity policies will include personal injury.	Charity Commission CC49 - Charities and Insurance

Vicarious liability	<p>Charity trustees may be liable for the wrongful actions or omissions of employees, volunteers or others which they have sanctioned.</p> <p>Occasionally they will even be liable for the acts or omissions of employees and volunteers which they have not expressly sanctioned.</p>		Yes - limited liability applies.	Covered under Employers Liability, Public Liability or Trustee Indemnity depending on the circumstances	Charity Commission - "Vicarious Liability"
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Criminal liability

Risk/ liability	Examples	Examples of preventative actions	Will incorporation protect the trustees from personal liability?	Can the liability be covered by insurance?	Further reading
Criminal offence	Fraud by other trustees or staff. Including false accounting or borrowing against knowingly inaccurate growth projections	The trustees should satisfy themselves that they have robust and proper systems in place.	No – Trustees may still be personally liable as well as organisation	Trustee Indemnity insurance would cover the defence costs for trustees found to be innocent of wrongdoing. No other cover would be provided under this type of policy	Charity Commission CC8 - Internal Financial Controls for Charities. Charity Finance Group - Charity Fraud: A guide for the trustees and managers of charities. Charity Commission - "The Public Interest Disclosure Act" Charity Commission - "Protecting Vulnerable Groups including Children"
	Knowingly accepting funds that are the proceeds of crime or failing to report suspicion of money laundering		No – Trustees may still be personally liable as well as organisation		
	Knowingly or recklessly obtaining or disclosing personal data or failing to comply with an enforcement notice issued by the Information Commissioner.	Develop and implement a data protection policy.	Yes – if the charity is the data controller and the trustees have acted in accordance with their duties. Where a charity committed an offence and it is proved to have been committed with the consent or connivance of, or due to any neglect on the part of, the trustee concerned, that trustee will be guilty of the offence in addition to the company itself.		
	Employing or engaging a person that is on the barred list to undertake regulated activity (usually close, unsupervised and regular contact) with a child or vulnerable adult.	Identify whether your organisation is undertaking any regulated activities. Develop and implement a safeguarding policy. Conduct appropriate checks.	The protection of limited liability can apply. It is an offence committed by the charity to permit individuals to engage in regulated activity from which they know, or have reason to believe, that the individual is barred. Where an offence is proved to have been committed by the charity with either the "consent or connivance" of, or to be attributable to neglect on the part of a trustee, that individual (as well as the charity) commits the offence.	Trustee Indemnity insurance may cover investigation costs from the relevant authorities and possibly a civil claim if proven that the trustees were negligent in recruiting people. It won't cover any physical damage which may have occurred	

	Failure to manage health and safety properly	See Health and Safety above		Covered under an Employers Liability or Public Liability policy, depending on the circumstances. Liability policies will also cover defence against a case brought by the Health and Safety Executive but not any fines imposed. TI may cover investigation costs.	
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Liabilities of a company director or committee member of a community benefit society (IPS)

Risk/liability	Examples	Examples of preventative actions	Will incorporation protect the trustees from personal liability?	Can the liability be covered by insurance?	Further reading
Duties related to companies and Industrial and Provident Societies which, if neglected can create personal liability	<p>Failure to follow the rules relating to registration. For example, delivering accounts, filing annual returns with the time limits or not notifying Companies House within the time limits of change of directors / secretary.</p> <p>Failure to comply with the duties that arise when organisation faces insolvency (see Insolvency above).</p> <p>Failure to comply with directors' statutory duties (see Breach of Trustees' duties above).</p>	Appoint a company secretary or nominate a trustee to have responsibility for administrative matters.	No – Trustees may still be personally liable as well as organisation.	Yes, usually covered unless the Director/Trustee has acted recklessly.	Companies House GP5 - Late Filing Penalties, GP08 - Liquidation and Insolvency. Charity Commission - "The Companies Act 2006"