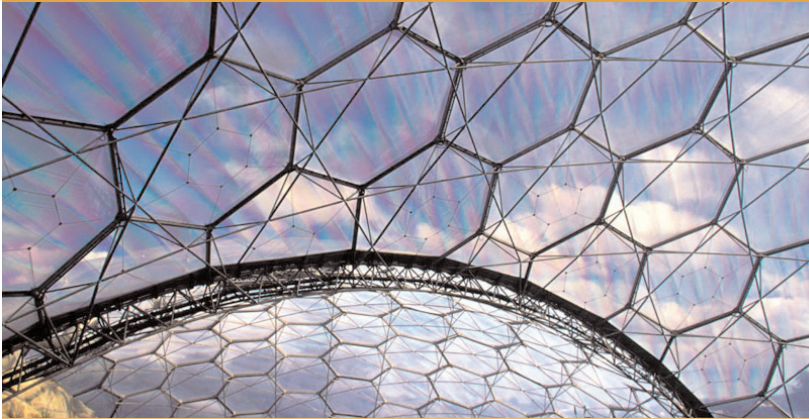


# DUTIES OF CHARITY TRUSTEES



This guide is designed as a simple introduction to trusteeship. We aim to demystify the duties and responsibilities involved in being a charity trustee and to point trustees in the direction of more detailed guidance where they need it.



Bates Wells & Braithwaite

SOLICITORS



## About Bates Wells & Braithwaite

Bates Wells & Braithwaite is one of the leading charity law firms in the country. We give a range of advice on charity, employment, property, immigration and dispute resolution law to charities and social enterprises. We have extensive knowledge and experience of the voluntary sector.

Many of our staff are involved in writing publications for charities, delivering lectures and training courses, and serving on trustee boards. Our OnBoard consultancy offers bespoke training and support to trustees through training courses, problem-solving sessions, workshops and networking events.

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## **DUTIES OF CHARITY TRUSTEES**

### **INTRODUCTION**

Thousands of individuals across the UK serve as trustees of charities. The Charity Commission estimates that there are 900,000 charity trustees in England and Wales alone. Charity trusteeship is valuable, exciting and rewarding, but with it come responsibilities that trustees need to be aware of.

This guide is a simple introduction to trusteeship. We aim to demystify the duties and responsibilities involved in being a charity trustee and to point trustees in the direction of more detailed guidance where they need it.<sup>1</sup>

Note that this booklet is written with reference to the law of England and Wales. Different rules apply to charities in Scotland and Northern Ireland.<sup>2</sup>

### **WHAT IS A CHARITY TRUSTEE?**

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.

They may also be known as the board, the management committee, or the directors. The title 'trustee' is helpful because it gives a sense of the trust that the law places in them.

### **RECRUITING CHARITY TRUSTEES<sup>3</sup>**

A charity's governing document (often referred to as its constitution) will explain how trustees can be appointed, as well as when they may be removed, or resign.<sup>4</sup> For instance, some constitutions allow outside bodies, such as stakeholders, to appoint trustees. Others allow the members of the charity, or the trustees themselves, to appoint new trustees.

When recruiting trustees, consideration should be given to the balance of skills on the trustee board. It is important that new trustees are aware of the responsibilities of charity trusteeship, and are given a proper induction.<sup>5</sup>

There are some limits on who may or may not be a charity trustee. The charity's constitution may impose restrictions. Some people are legally disqualified from acting as charity trustees, including people who have been convicted of an offence involving dishonesty or deception, and undischarged bankrupts. If trustees are not 'fit and proper persons' in the eyes of HM Revenue & Customs, the charity's tax reliefs can be affected.<sup>6</sup>

Charities working with children or vulnerable adults should carry out checks on potential trustees with the Criminal Records Bureau: in some cases these checks are compulsory and in others they are strongly recommended.

It is good practice to obtain a declaration from new trustees confirming that they are eligible to act, and to ask them to sign a declaration provided by HMRC to establish that they are 'fit and proper persons'.<sup>7</sup>

## **PRIMARY RESPONSIBILITIES OF CHARITY TRUSTEES**

The overriding duty of all charity trustees is to advance the purposes of their charity. In doing so they have several basic responsibilities. We explain these below and elaborate on them in later sections.<sup>8</sup>

### **1. Trustees are responsible for the proper administration of the charity**

Trustees must make sure that the charity's assets and resources are used only for the purposes of the charity. They must make sure that the charity is run in accordance with its constitution, charity law and all other laws and regulations which affect its activities.

### **2. Trustees must accept ultimate responsibility for everything the charity does**

The trustees are responsible for the vision, mission and management of the charity. They are accountable if things go wrong.

We explore below the circumstances in which charity trustees can delegate.

### **3. Trustees have to act reasonably and prudently in all matters relating to their charity**

The law imposes a duty of care on the trustees of charities. This is sometimes expressed as a duty 'to exercise such care and skill as is reasonable in the circumstances'.

The duty will be greater if a trustee has (or claims to have) any special knowledge or experience, or if their business or profession means they can reasonably be expected to have special knowledge or experience. In matters where trustees are not expert, they will be expected to take appropriate advice.

This duty is very significant. Essentially, provided trustees can show that they are acting reasonably, in a way which furthers the legal objectives of the charity, it is unlikely that they can be criticised under charity law.

#### **4. Trustees must safeguard and protect the assets of the charity**

A charity's assets include its investments, cash, land, intellectual property, staff and reputation. We look at particular assets below.

#### **5. Trustees have a duty to act collectively**

Decisions and responsibilities are shared, so all trustees should take an active role. Trustees can act by majority (unless the constitution says otherwise), but all the trustees are collectively responsible for decisions made by the trustees (unless they make it clear that they disagree with a particular decision, but they are overruled).

Some trustees will have particular roles. For instance, the chair is likely to be a figurehead for the organisation, and to have a special relationship with senior members of staff. The treasurer will be responsible for explaining the financial situation to the rest of the trustees.<sup>9</sup> But responsibility for decision-making still lies with the board as a whole.

#### **6. Trustees must act in the best interests of their charity**

The interests of the charity are paramount. Trustees should not allow their personal interests or views to override this: they must exercise independent judgement.

## **7. Trustees must avoid any conflict between their personal interests and those of the charity**

The main implication of this is that, unless there is specific legal authority, charity trustees cannot receive any benefit from the charity. The law is very strict about ensuring that trustees cannot influence decisions in their favour. This is dealt with in more detail below.

Conflict of interest is a very wide term and also includes a duty of loyalty to another organisation.

## **RUNNING A CHARITY**

This section gives more detail about the primary responsibilities outlined above.

### **1. Using resources for the purposes of the charity**

The trustees' job is to ensure that the charity's resources are used to further its charitable aims. The charity's legal aims (called its 'objects') will be set out in its constitution. All trustees should have an up-to-date copy of the constitution and should be clear about what the objects are.

- All resources must be used in a way which the trustees reasonably believe will advance the objects.
- If trustees use resources for purposes outside the objects, they can be made personally liable to reimburse the charity for the amount which has been wrongly spent.
- It is important to make sure that the objects are up to date.<sup>10</sup>
- All expenditure should be kept under review. The trustees should consider at regular intervals whether there are more effective ways of furthering the charity's objects.



Note that it is the legal objects set out in the constitution that are important. Charities will usually have a mission statement in more user-friendly language. This must reflect the objects, to avoid confusion.

## **Public Benefit**

All charities must have purposes which are recognised as being exclusively charitable *and* which are for the public benefit.<sup>11</sup>

The Charity Commission has published guidance which gives more detail about the so-called 'public-benefit requirement'.<sup>12</sup> The guidance identifies two key principles of public benefit:

- there must be an identifiable benefit or benefits; and
- the benefit must be to the public or a section of the public.

All charity trustees have an obligation, set out in the Charities Act 2006, to have regard to this guidance when exercising any powers or duties to which the guidance is relevant.

This means that all trustees should:

- Be briefed on the guidance. There is a useful four-page summary of the main guidance available from the Charity Commission. Charities should also look at any relevant sub-sector guidance, currently available for poverty, education, religious and fee-charging charities.
- Understand how the guidance is relevant to their particular charity. For most charities, it will be obvious that they are for the public benefit, but some, such as charities which charge high fees, will need to look at this more closely.<sup>13</sup>
- Review their existing activities in the light of the guidance, and bear the guidance in mind when planning future activities.

Charity trustees are obliged to detail in their annual report the activities undertaken by the charity in pursuing its aims for the public benefit.

## **2. Safeguarding and protecting the charity's resources**

A resource is anything that a charity has rights to, such as investments, cash, intellectual property or reputation.

The first step is for trustees to be aware of what the charity's property is. New trustees should be given a copy of the latest accounts.

### **Financial procedures<sup>14</sup>**

To guard against fraud and mismanagement, a charity should put proper financial procedures in place, covering everything from budgeting to cheque authorisation. The trustees should monitor the implementation of these procedures – if money is lost as a result of staff fraud, the trustees will be expected to explain to the Charity Commission what steps were taken to prevent fraud, and why they broke down.

### **Investment<sup>15</sup>**

Where charities are retaining funds for investment, rather than spending them, the trustees must make sure that they are acting within their investment powers.<sup>16</sup> The constitution may well contain powers to invest. These may be supplemented by powers in the Trustee Act 2000 (which applies to charitable trusts and unincorporated associations).

Trustees must act reasonably when investing charity funds, complying with the general duty of care referred to above. They have certain responsibilities regarding the suitability and range of investments, and seeking advice from professionals. If trustees wish to invest 'ethically', they must generally be sure that this will not affect the financial return on their

investments, although there are exceptions to this rule. Improper investment can give rise to a loss of tax relief.

### **Charity land<sup>17</sup>**

Charities that own land are under an obligation to care for, maintain and insure it. Special rules apply to the sale, letting and mortgaging of land by charities, including a requirement for a surveyor's report on most sales of land by charities. The rules are detailed and complex, and professional advice must be taken from a person who is fully abreast of the rules that apply to charities.

### **Employment**

Charity trustees must manage their staff, and volunteers, properly, both for reasons of good practice and to comply with employment law, a breach of which may result in a claim from a disgruntled employee.

### **Reputation**

A charity must recognise that its name and reputation are valuable. The trustees must make sure that they avoid activity which might damage their charity's reputation, for example, by accepting funds from a disreputable or inappropriate source. They should consider legal protection of the charity's name and logo and any other intellectual property rights. Guidance from the Charity Commission makes it clear that charities should not sell themselves short when negotiating with commercial companies about, say, fundraising campaigns.

### **Risk management**

It is sensible for charity trustees to consider the potential risks of any activity the charity undertakes. Risk is not bad – there is an element of risk in almost everything. And many in the charity sector believe that in some situations charities,

working as they do on the cutting edge of many social problems, have a duty to take risks. Often no-one else will. But trustees will be expected to identify risks and decide how they should be managed. Will they be eliminated, mitigated (say by taking out insurance), or simply accepted – perhaps as part and parcel of the charity's mission?<sup>18</sup>

### **3. Complying with the law**

We have seen how trustees must make sure that their charity is run in accordance with its constitution and with other laws and rules. Here, we deal with the rules in areas that are of particular relevance to charities.

#### **Fundraising**

Many charities actively seek to raise funds through a variety of fundraising activities, including soliciting donations, selling products, service delivery or fundraising events. The rules about fundraising can be detailed and complex and trustees should have access to sufficient information and/or expertise to ensure that the rules are being complied with.<sup>19</sup>

A detailed analysis of the rules is beyond the scope of this note, but areas which need to be watched include:

- Data protection: does the charity comply with data protection rules when using its database of supporters for fundraising?
- Professional fundraisers: does the charity have written agreements with external professional fundraisers?
- Public collections: are the rules on public collections (house-to-house or street collections) and lotteries (which will apply to raffles) being complied with?

- Are procedures in place to ensure that funds given for specific purposes are actually used for those purposes?
- Charity trading: does the charity have a proper structure in place, possibly involving a separate trading subsidiary, to handle any fundraising trading activities, which may include partnerships with commercial companies?
- Tax and VAT: are the tax and VAT implications of the charity's fundraising activities understood and organised to the charity's best advantage? (For instance, does the charity make the most of the rules allowing it to recover tax on donations under gift aid?)

Generally, trustees should choose fundraising methods carefully, and should keep them under review.<sup>20</sup>

### **Campaigning and political activity**

Charities are allowed to engage in campaigning, in order to further their purposes. There are few limits under charity law on carrying out campaigning activity where it involves simply education, awareness-raising, mobilising public support or influencing or changing attitudes.<sup>21</sup>

But where the activity becomes political – that is, where it is aimed at securing, or opposing, a change in the law or government policy – trustees need to be careful that this activity does not become the only way in which the charity fulfils its purposes. And while a charity can express support for a policy advocated by a particular political party, it cannot give general support to any one party.<sup>22</sup>

## **Reporting and accounting**

All charities in England and Wales are regulated by the Charity Commission. Most need to register with the Commission, and provide it with annual returns, trustees' reports and accounts.<sup>23</sup> Many charities also owe duties to other regulators: for instance charitable companies must report to Companies House, and housing associations are accountable to the Tenant Services Authority.

## **4. Administration**

This section covers issues which frequently come up in relation to a charity's administration.

### **Meetings<sup>24</sup>**

How often should trustees meet? The constitution may deal with this, but otherwise there is no absolute legal requirement. Trustees simply need to meet often enough to ensure that they are carrying out their responsibilities properly. The Charity Commission would expect the trustees of even the smallest charity to meet at least twice a year.

The charity's governing document may specify how many trustees constitute a quorum at trustees' meetings, and should give details of the procedure for calling and running meetings. The governing document should also contain procedures about declaring interests and managing conflicts of interest: even if it does not, steps should be taken to avoid a conflict (this is dealt with in more detail below).

### **Delegation**

While charity trustees have ultimate responsibility for the charity, they may well wish to delegate to others. The extent to which they delegate will depend on the nature and size of the charity. Many smaller charities have no staff, so work at all

levels is done by the trustees. Some larger charities employ hundreds of staff, so the trustees delegate day-to-day management to them and to sub-committees composed of trustees and others.

There are no restrictions on delegating the *implementation* of decisions, nor on seeking recommendations from others in areas where the trustees make the ultimate decisions. However, where the trustees wish to delegate *decision-making* powers, they must have power to do so.

The constitution may contain a power to delegate: a properly drafted constitution will contain powers to delegate to staff, committees and agents or investment managers. In some cases, power to delegate is conferred by law (for instance, the Trustee Act 2000 allows trustees of charitable trusts and unincorporated associations to delegate investment decisions to investment managers). If there are still gaps in their powers to delegate, trustees may wish to consider seeking to change the constitution.

Where trustees delegate, they should set out the terms of the delegation in writing, perhaps in the minutes of a trustees' meeting, or in a policy document or job description.

This should cover:

- What powers are being delegated?
- To whom is power delegated? Eg: staff, a committee or an agent. The trustees should be satisfied that the person or group concerned is capable of bearing the responsibility and fulfilling the remit. How will any committees be constituted?

- Details about the timing and nature of reporting back to the trustees. All minutes of committee meetings and details of decisions made under delegated authority should be passed to the trustees.
- Particular attention should be paid to financial issues: the budget to be followed, whether specific approval is needed for expenditure over a certain amount, and so on.

The trustees must keep the delegation under regular review.

## **Policies**

Policies in key areas help trustees to manage the charity and any delegation of responsibility. Some policies are required by law.

Policies should be 'living' aspects of a charity's management. They should be followed by trustees and staff, reviewed regularly and kept up to date. Policy overload should not detract from the real business of managing the charity.

Where relevant, details of certain policies should be recorded in the charity's annual report. These include the investment policy, the grant-making policy and the reserves<sup>25</sup> policy, as well as the statement about risk management referred to above.



**Key policy areas are:**

- Health and safety
- Safeguarding (for charities working with children or vulnerable adults)
- Internal financial procedures
- Data protection/confidentiality
- Fundraising
- E-mail & internet access
- Brand guidelines
- Fraud
- Equal opportunities
- Volunteers
- Whistleblowing
- Complaints
- Conflicts of interest
- Contract management
- Reserves
- Investment
- Risk management
- Grant making
- Human resources

## CONFLICTS OF INTEREST<sup>26</sup>

### Benefits to trustees

One of the fundamental principles of charity law is that, in the absence of express legal authority, trustees cannot receive any benefit from the charity. This includes, for example, payment for acting as a trustee, payment for any services the trustee or his or her firm performs for the charity and rent on property the trustee lets to the charity.<sup>27</sup>

There are three possible sources of legal authority for trustee benefits: a recently introduced statutory power, the charity's constitution or specific agreement from the Charity Commission:

#### *The statutory power*

The Charities Act 2006 has introduced a new power for charities to pay their trustees for providing services to the charity. This applies, for example, where a trustee who has fundraising expertise gives advice to the charity about a particular fundraising campaign. The new power will not allow a trustee to be paid for performing his or her duties as a trustee, such as participating in board meetings. Nor will it allow a trustee to take up paid employment with the charity. In both of these cases permission would need to be contained in the charity's constitution, or obtained from the Charity Commission. This is not common, particularly for smaller charities.

The statutory power also allows benefits to be conferred on those 'connected' with a trustee in some way, such as spouses or business partners.

The power is subject to safeguards and restrictions. Importantly, it will not apply where there is a restriction in the charity's constitution on payments to trustees. Many constitutions do contain such a restriction, so the constitution

should be checked and changed if necessary (the change may require Charity Commission consent). The payment must be no more than is reasonable and must be confirmed by written agreement. Only a minority of the trustees can benefit at any time, under the statutory power.

### *Constitutional power*

New charities now generally include in their constitution specific powers to confer certain benefits on trustees, such as power to rent or borrow from trustees, provided certain safeguards are observed, and power to pay professional trustees for services, much like the new statutory power. If existing charities wish to include such powers in their constitution they will generally need to apply to the Charity Commission for consent.

### *Charity Commission agreement*

The Charity Commission does sometimes grant consent for one-off payments to be made to trustees, without a constitutional change.

Trustees can be reimbursed for reasonable out of pocket expenses.

Note that the Charity Commission considers that if a trustee wishes to take up a paid position within the charity, the conflict of interest cannot generally be overcome by that person resigning from their trusteeship in order to take up the paid post.<sup>28</sup>

If a charity is in any doubt about whether it can pay its trustees, it should seek legal advice: the Charity Commission takes the rules about trustee benefits very seriously. If trustees have received unauthorised benefits, they can be ordered to reimburse the charity, even if they were not aware that they were not allowed to be paid and even if what they did for the charity represented good value for money.

## **Procedures**

Charities should always follow appropriate procedures when conferring benefits on trustees. When relying on the statutory power, charities must follow the procedures set out in the Charities Act 2006. The constitution may contain rules about appropriate procedures to be followed and, if not, the trustees should consider having a conflicts of interest policy.<sup>29</sup>

Where there is any potential conflict of interest, it will generally be appropriate for the trustee concerned to declare it.<sup>30</sup> He or she should not vote nor form part of the quorum voting on the issue. It may be appropriate for the trustee to leave the meeting when the issue is under discussion. Conflicts of interest policies and registers of trustee interests are becoming increasingly common.<sup>31</sup>

Appropriate records should be kept so that trustees can demonstrate that the procedures were followed.

## **Trustees appointed by third parties**

As we have seen, charity trustees must act in the best interests of the charity. They should not allow themselves to be swayed by any conflicting interests. Thus, where a trustee has been appointed to the board by a third party, he or she must act in the best interests of the charity, even if this is bad news for the person or body nominating him or her.

## LIABILITIES OF TRUSTEES

We are often asked about trustee liability. The potential liabilities of charity trustees to third parties depend to a great extent on the legal form of the charity. At the moment, there are three main legal forms used by charities.<sup>32</sup> It is therefore worth outlining their key features.

### *Company*<sup>33</sup>

Many charities are set up as companies limited by guarantee. The charity trustees will be the directors of the company, in the eyes of company law.

As a company, the charity will have its own separate legal personality, which means it can enter into contracts and other legal relationships in its own name. It is the company/charity, rather than the members or the directors/trustees, which is liable for the company's debts, except in certain circumstances referred to below.

### *Trust*

A trust has no separate legal personality and is therefore fundamentally different from a company.

A trust operates by the trustees acting in their own name, but using charity funds. For instance, if a charitable trust buys a building, the building will be held in the names of the individual trustees (or by a nominee acting on their behalf). But the property does not belong to the individual trustees (and would not be available to the creditors of any trustee who became bankrupt).

Equally, if a charitable trust enters into a contract, it is the trustees who remain responsible for performing the terms of the contract, even though they may have recourse to the charity's resources.

This is important: unless the contract expressly restricts the trustees' liability, they will remain responsible under it *even if the charity runs out of funds*, and may thus be liable to make payments from their own pocket. They have – potentially – unlimited liability.

### *Unincorporated association*

An unincorporated association operates a little like a trust, in that it has no legal personality. The trustees enter into contracts, and assume responsibility, on behalf of the charity. They may have recourse to charity funds in the first instance, but they are personally liable on contracts and other legal relationships if the charity runs out of funds. Their potential liability, too, is unlimited.

### **Personal liability**

Trustees are naturally concerned about the liabilities they assume on becoming a charity trustee. There are two types of potential liability:

- Liabilities to third parties that occur in the course of running the charity. 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, vulnerable to claims instigated by the Charity Commission or the Attorney General (or the other trustees) in the case of a breach of trust. These claims are not affected by the legal form of the charity.

### *Claims from third parties*

Most charities have legal relationships, for instance with suppliers, funders and staff. All legal relationships carry the risk of legal liability.

As we have seen, a charitable company is a separate legal entity and the legal relationships entered into by a corporate charity are legal relationships of the charity rather than the trustees. Thus, if a member of the public trips on a mat at the premises of a charitable company, and sues the charity, it is the charity that is potentially liable. This type of claim should be covered by the charity's insurance policy, but, if it is not, the charity must find the funds to meet the claim. If the charity does not have sufficient funds, the member of the public will generally lose out, as if a company's liabilities exceed its assets, or it is unable to pay its debts as they fall due, it will be insolvent.

There are some circumstances, however, where trustees of a charitable company may be personally liable, including liability for wrongful or fraudulent trading if the charity is insolvent.<sup>34</sup>

The position is different where a trust is concerned. As explained above, a trust does not have separate legal personality, but all of the trust's contracts and relationships are in fact the relationships of the trustees.

In the example given above of a member of the public sustaining an injury on charity premises, if the charity was a trust, the trustees would be named in the legal action, but they could meet the claim with the charity's assets, including the proceeds of any relevant insurance policy. If the charity had insufficient funds to meet the claim, then the trustees would generally be jointly and severally responsible for the shortfall, meaning that any trustee could be sued for the whole amount due. A trustee who is out of pocket may then seek to apportion the liability amongst his or her co-trustees. Similar principles apply to unincorporated associations.<sup>35</sup>

Trustees of charitable trusts and unincorporated associations are therefore more at risk of personal liability than trustees of

charitable companies. For this reason, many unincorporated charities seek to become charitable companies as their activities and legal relationships expand.<sup>36</sup>

### *Liability as charity trustees*

We have seen that certain duties are imposed on charity trustees. If a breach of duty (often called a breach of trust) gives rise to a loss to the charity, the trustees are vulnerable to a claim to reimburse the charity for the loss caused. Such a claim will be instigated by the Charity Commission or the Attorney General, or indeed by the other trustees.

Examples might include where the trustees allow funds to be spent for a purpose that is outside the charity's objects or fail to ensure that charity property is insured. Liability along these lines is not affected by whether or not the charity is incorporated.

It must be stressed that, in practice, it is very rare indeed for charity trustees to be held personally liable for breach of trust where they have acted in good faith. The constitution may well say that the trustees are not liable in these circumstances. The Charity Commission and the court also have power to relieve a trustee from personal liability in circumstances where he or she has acted in good faith. Thus it is highly unlikely for a charity trustee to be held personally liable for breach of trust unless he or she has acted in deliberate contravention of the rules, or has been grossly irresponsible.<sup>37</sup> But trustees need to be aware of the implications of acting imprudently or improperly.

The Charity Commission has far reaching powers to supervise and intervene in charity activity. If trustees have been acting imprudently, but not fraudulently, it is much more likely that the Commission will seek to put the charity back on track than spend time pursuing the errant trustees personally. Where there has been fraudulent activity, however, the Commission will take steps to bring the wrongdoers to justice, in the interests of preserving the public integrity of charity.<sup>38</sup>



## Trustee indemnity insurance

It is worth mentioning trustee indemnity insurance, as it is frequently misunderstood. This is an insurance policy that protects the trustees in the event of claims against them personally. The precise scope of the cover will depend on the terms of the individual policy, but generally speaking, this type of insurance will cover breach of trust claims and wrongful trading. It often covers associated legal costs. The personal liability of trustees of charitable trusts and unincorporated associations for debts to third parties will not be covered. The policy will almost certainly be restricted to cases where the trustees have acted in good faith.

Given that trustees are less at risk from a breach of trust claim if they have been acting in good faith, consideration needs to be given as to whether the insurance policy represents good value for money.

Trustee indemnity insurance is regarded as a benefit to the trustees, since it protects the trustees personally rather than the charity. It can be funded from charity resources if there is express power to this effect in the constitution. The Charities Act 2006 has also introduced a statutory power for charities to buy trustee indemnity insurance even if there is no power in the constitution, subject to certain safeguards.<sup>39</sup>

CaSE Insurance, a partnership between BWB and the Charities Aid Foundation, provides specialist insurance services to charities.<sup>40</sup>

The information in this booklet is believed to be correct at the time of publication. It is however not intended to be exhaustive nor to provide legal advice in relation to any particular situation, and should not be acted or relied upon without taking specific advice.

## INDEX POINTS

<sup>1</sup> There is a wealth of guidance and information available on the Charity Commission's website [www.charity-commission.gov.uk](http://www.charity-commission.gov.uk). See also Resources, page 31 onwards.

<sup>2</sup> The Office of the Scottish Charity Regulator (OSCR) provides more information on Scottish law: [www.oscr.org.uk](http://www.oscr.org.uk). The Charity Commission for Northern Ireland has recently been established and the Charities Act (NI) 2008 is in the process of being implemented. For more information see [www.dsdni.gov.uk/ccni.htm](http://www.dsdni.gov.uk/ccni.htm).

<sup>3</sup> Detailed guidance and information is available in the Charity Commission publication CC30 *Finding New Trustees – What charities need to know*.

<sup>4</sup> Charity constitutions often include some sort of automatic retirement mechanism, such as providing for one third of the trustees to retire automatically each year. The constitution may include restrictions on reappointing retiring trustees.

<sup>5</sup> Some charities are required to give details of their policies and procedures for induction and training of trustees in the trustees' annual report.

<sup>6</sup> For guidance on the 'fit and proper persons' requirement see [www.hmrc.gov.uk/charities/guidance-notes/chapter2/model-dec-fp-persons.pdf](http://www.hmrc.gov.uk/charities/guidance-notes/chapter2/model-dec-fp-persons.pdf).

<sup>7</sup> A model declaration prepared by HMRC can be found at the end of the guidance mentioned at footnote [6] above.

<sup>8</sup> The duties of charity trustees derive from case law and from statute. The source of the duties can vary depending on the charity's legal form. For instance, the duties of trustees of charitable companies have been codified in the Companies Act 2006: they have explicit duties regarding the interests of the charity's employees and the impact of the charity's operations on the environment. But, for the most part, the duties of trustees will be largely the same, regardless of the legal form of the charity.

<sup>9</sup> Organisations such as NCVO and ICSA (see Resources, page 31) provide model 'job descriptions' for chairs and treasurers.

<sup>10</sup> For instance a charity whose objects allow it to work in a particular location may now wish to carry out work elsewhere. Changing a charity's objects is not always straightforward, and the Charity Commission's consent is usually required, so trustees may want to seek specialist advice.

<sup>11</sup> Prior to 1 April 2008, it was presumed that relieving poverty, advancing education and promoting religion were for the public benefit; this presumption no longer applies.

<sup>12</sup> *Charities and Public Benefit*, from the Charity Commission, or at [www.charity-commission.gov.uk/charity\\_requirements\\_guidance/charity\\_essentials/Public\\_benefit/default.aspx](http://www.charity-commission.gov.uk/charity_requirements_guidance/charity_essentials/Public_benefit/default.aspx). As well as the main guidance, which is relevant for all charities, the Commission has published sub-sector guidance on public benefit for poverty, education, religious and fee-charging charities.

<sup>13</sup> If the trustees feel that the guidance may cause the charity any difficulties they should seek specialist advice.

<sup>14</sup> See Charity Commission publication CC8 *Internal Financial Controls for Charities* and the accompanying internal financial controls checklist.

<sup>15</sup> BWB can provide you with more detailed information about the investment powers of trustees. The Charity Commission has issued CC14 *Investment of Charitable Funds: Basic Principles* and more detailed technical guidance, aimed at sector professionals with specialist knowledge.

<sup>16</sup> Note that an injection of funds into a charity's trading subsidiary counts as an investment.

<sup>17</sup> See Charity Commission publications CC28 *Sales, leases, transfers or mortgages: what trustees need to know about disposing of charity land* and CC33 *Acquiring Land*.

<sup>18</sup> Trustees of larger charities are required to include in their annual reports a statement confirming that the major risks to the charity have been reviewed, and that systems are in place to manage them. The Charity Commission encourages smaller charities to make a similar statement as a matter of best practice. See the Charity Commission paper *Charities and Risk Management* available at [www.charity-commission.gov.uk/charity\\_requirements\\_guidance/charity\\_governance/managing\\_risk/charrisk.aspx](http://www.charity-commission.gov.uk/charity_requirements_guidance/charity_governance/managing_risk/charrisk.aspx).

<sup>19</sup> See Charity Commission publications CC20 *Charities and Fundraising* and CC35 *Trustees, Trading and Tax*, and other guidance available at [www.charity-commission.gov.uk/charity\\_requirements\\_guidance/your\\_charitys\\_activities/Fundraising/default.aspx](http://www.charity-commission.gov.uk/charity_requirements_guidance/your_charitys_activities/Fundraising/default.aspx). HMRC's website also contains guidance on the tax implications of fundraising.

<sup>20</sup> Many charities have to include details of their fundraising costs in their accounts.

<sup>21</sup> Charities must, however, comply with the general law on campaigning, including relevant advertising standards, the rules on defamation and legislation on broadcasting and demonstrations.

<sup>22</sup> The Charity Commission publication CC9 *Speaking Out – Guidance on Campaigning and Political Activity by Charities* contains more information.

<sup>23</sup> See Charity Commission publications CC21 *Registering as a Charity*, CC15 and CC15b *Charity Reporting and Accounting: The Essentials*. See also Charity Commission guidance on *Reporting Serious Incidents*.

<sup>24</sup> Charity Commission publication CC48 *Charities and Meetings* provides guidance in this area.

<sup>25</sup> See Charity Commission publications CC19 *Charities' Reserves* and RS13 *Tell It Like It Is*.

<sup>26</sup> See Charity Commission publications *A Guide to Conflicts of Interest for Charity Trustees*, CC11 *Trustee expenses and payments* and CC24 *Users on Board: Beneficiaries who become trustees*.

<sup>27</sup> In many cases, this also includes the spouse or partner of a trustee and other so-called 'connected persons'.

<sup>28</sup> The situation may be different, however, if the trustee was not involved in any aspect of the decision to create or retain the post nor in devising the recruitment process, and resigned before receiving a formal job offer.

<sup>29</sup> The Companies Act 2006 has introduced new conflict of interest provisions and amendments to constitutions to reflect this may be advisable for charitable companies. Further advice can be obtained from BWB.

<sup>30</sup> In the case of charitable companies this may be a legal requirement.

<sup>31</sup> Larger charities are required to disclose details of trustee benefits in their accounts.

<sup>32</sup> Further advice can be obtained from BWB. The Charities Act 2006 includes provision for a new legal form for charities – the charitable incorporated organisation (CIO). This will be like a company, in that liability for third-party claims will be limited, but it will only need to be registered with the Charity Commission and not with Companies House. The CIO is not expected to become available before early 2011.

<sup>33</sup> More advice on structuring and running a charitable company is available from BWB.

<sup>34</sup> Trustees of an insolvent corporate charity may be personally liable where they have carried out ‘fraudulent’ or ‘wrongful’ trading under the insolvency rules. Wrongful trading is where the directors allowed the company to trade at a time when they knew, or should have known, that it was, or would inevitably become, insolvent. Fraudulent trading includes where the business of a company is carried on with intent to defraud creditors. There may also be personal liability for failing to file documents at Companies House on time, and under health and safety, environmental, tax and discrimination laws. More information is available from BWB.

<sup>35</sup> The personal liability of trustees of charitable trusts or unincorporated associations does not necessarily come to an end on retirement. A trustee who signed or approved a contract with a third party may remain liable to the third party, albeit with a right of indemnity against the assets of the charity. This can clearly cause problems if the charity has no more assets.

<sup>36</sup> Further advice on incorporation is available from BWB.

<sup>37</sup> But see the conflicts of interest section in relation to unauthorised trustee benefits.

<sup>38</sup> If charity trustees are concerned about a proposed course of action, there are special procedures under the Charities Act 1993 under which they can seek advice or approval from the Charity Commission on the proposals. If the proposals are sanctioned by the Commission, the trustees are protected in the event of a subsequent allegation of breach of trust. For more information contact BWB.

<sup>39</sup> See Charity Commission publication CC49 *Charities and Insurance*.

<sup>40</sup> For more information see [www.caseinsurance.co.uk](http://www.caseinsurance.co.uk).

## RESOURCES

### **Association of Chief Executives of Voluntary Organisations (ACEVO)**

[www.acevo.org.uk](http://www.acevo.org.uk)

Provides support, advice and development opportunities to voluntary sector leaders.

020 7280 4960

### **CaSE Insurance**

[www.caseinsurance.co.uk](http://www.caseinsurance.co.uk)

A partnership between BWB, Charities Aid Foundation, ABG Insurance Services and aQmen Limited which provides specialist insurance services to charities.

0845 225 2288

### **Charity Commission for Northern Ireland**

[www.dsdni.gov.uk/ccni.htm](http://www.dsdni.gov.uk/ccni.htm)

A new body which is taking on responsibility for regulating charities in Northern Ireland.

028 9051 5490

### **Charity Commission of England and Wales**

[www.charity-commission.gov.uk](http://www.charity-commission.gov.uk)

Regulates charities in England and Wales. Provides advice, information and publications on many charity law issues.

0845 300 0218

### **Charity Tribunal**

[www.charity.tribunals.gov.uk](http://www.charity.tribunals.gov.uk)

Hears appeals from decisions of the Charity Commission.

0845 600 0877

### **Charity Trustee Networks**

[www.trusteenet.org.uk](http://www.trusteenet.org.uk)

Provides mutual support among and information to charity trustees.

01483 230 280

**Companies House**

[www.companieshouse.gov.uk](http://www.companieshouse.gov.uk)

Regulates companies and provides information and advice.

0303 1234 500

**Directory of Social Change (DSC)**

[www.dsc.org.uk](http://www.dsc.org.uk)

Assists voluntary organisations by providing handbooks, training and conferences.

020 7391 4800

**Fundraising Standards Board**

[www.frsb.org.uk](http://www.frsb.org.uk)

Runs an independent scheme regulating fundraising.

0845 402 5442

**HM Revenue & Customs Charities Unit**

[www.hmrc.gov.uk/charities](http://www.hmrc.gov.uk/charities)

Information on forms and procedures relevant to charities and taxation.

0845 302 0203

**Institute of Chartered Secretaries and  
Administrators (ICSA)**

[www.icsa.org.uk](http://www.icsa.org.uk)

Professional body for chartered secretaries. Produces best practice guides and guidance notes.

T: 020 7580 4741

**Institute of Fundraising**

[www.institute-of-fundraising.org.uk](http://www.institute-of-fundraising.org.uk)

Professional body supporting and representing fundraisers.

Promotes standards of fundraising practice.

020 7840 1000



**National Council for Voluntary Organisations (NCVO)**

[www.ncvo-vol.org.uk](http://www.ncvo-vol.org.uk)

Provides information, advice and publications on issues affecting the voluntary sector.

0800 279 8798 or 020 7713 6161

**Office of the Scottish Charity Regulator (OSCR)**

[www.oscr.org.uk](http://www.oscr.org.uk)

Regulates the charity sector in Scotland.

01382 220 446

## **OnBoard**

[www.on-board.org](http://www.on-board.org)

OnBoard is a governance development, training and support consultancy set up by BWB in collaboration with David Carrington and Tesse Akpeki. Other consultants include Philip Kirkpatrick, Stephen Lloyd, Linda Laurance, Lindsay Driscoll, Soiya Gecaga and Marta Maretich. OnBoard works to dispel myths, demystify trusteeship and enable boards to lead and govern better.

BWB and OnBoard offer a variety of bespoke training sessions for trustees on legal duties, governance, and board development ranging from two hours to a full day in length - and residential weekends. OnBoard also runs more general discussion groups and training for trustees.

For more information about OnBoard events please visit [www.on-board.org](http://www.on-board.org) or contact Mona Rahman by email at [info@on-board.org](mailto:info@on-board.org) or by calling 020 7551 7724.

## **Trustees Unlimited**

[www.trustees-unlimited.co.uk](http://www.trustees-unlimited.co.uk)

A joint venture between BWB, NCVO and Russam GMS, launched in November 2009. Many not-for-profit organisations face the problem of trying to recruit high quality trustees in a rigorous and yet cost effective way. Trustees Unlimited provides a professional trustee recruitment service, matching organisations seeking trustees with those wishing to be trustees.

The aim is to create a wider and more diverse pool of available trustees for charities and other non-profit bodies and also to simplify the complex process of trustee recruitment - a shortlist of pre-screened candidates is offered within 10 days of agreeing the assignment.

For further information please visit [www.trustees-unlimited.co.uk](http://www.trustees-unlimited.co.uk), email [info@trustees-unlimited.co.uk](mailto:info@trustees-unlimited.co.uk) or call 0845 371 0899.

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