

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.

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About us

Bates Wells Braithwaite is one of the country's leading law firms. We give a range of advice on charity, employment, property, immigration, commercial, dispute resolution and public 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.

In addition to our standard services, our Impact and Advisory team goes beyond legal advice in meeting the needs of our clients. Our Impact team works with clients to identify, optimise and deliver their impact targets. Advisory helps clients to create and realise value through mergers, acquisitions, disposals and restructuring by strategic planning, finding buyers, sellers or funders, and managing, negotiating and reporting upon those transactions.

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Introduction

Thousands of individuals across the UK serve as trustees of charities. It is estimated that there over 1 million 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.¹

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.²

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 trustees³

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.⁴ For instance, some constitutions allow outside bodies, such as stakeholders, to appoint trustees. Often the members of the charity, or the trustees themselves, may appoint new trustees.

When recruiting trustees, it is recommended that consideration is 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.⁵

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.⁶ If trustees are not 'fit and proper persons' in the eyes of HM Revenue & Customs (HMRC), the charity's tax reliefs can be affected.⁷ Charities working with children or vulnerable adults should carry out checks on potential trustees with the Disclosure and Barring Service.⁸

All new trustees should be asked to make a declaration confirming that they are eligible to act, and to sign a declaration provided by HMRC confirming that they are 'fit and proper persons', having read the relevant HMRC guidance.⁹

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.¹⁰

1. Trustees are responsible for the proper administration of their 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 that affect its activities.

2. Trustees must accept ultimate responsibility for everything their 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 and meeting it will require time, thought and energy. However, 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 their 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.¹¹

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 usually take the lead on financial matters.¹² However, overall responsibility 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 the scope for trustees to receive personal benefit from their charity is very limited. Trustees must deal appropriately with any conflicts which arise between their own personal interests and those of the charity.

Trustees must also be alert to possible conflicts between duties they may owe to other organisations and the duties they have to the charity.

These issues are dealt with in more detail below.

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 or support its charitable aims. The charity's legal aims and activities (called its 'purposes' or '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, or carry out activities which do not support 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.¹³
- All activities and 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.

Charity trustees must carry out their charity's purposes for the public benefit.

The Charity Commission has published benefit guidance which explains in more detail what this means. All charity trustees have a legal obligation to have regard to the public benefit guidance when exercising any powers or duties to which it is relevant.¹⁴

The guidance explains that public benefit means, in summary, that a purpose must be beneficial and must benefit the public in general or a sufficient section of the public. In most cases, it will be straightforward for the trustees to demonstrate that they are carrying out the charity's purposes for the public benefit, but in some situations, such as where charities charge high fees, or restrict access to their facilities, the trustees will need to look at the guidance closely. Where benefits are restricted to a particular

group of people, the trustees will need to be aware of the requirements of equality legislation.¹⁵

All charity trustees must be aware of the guidance, understand how it is relevant to their charity, and bear it in mind when reviewing and planning activities.

They are obliged to provide details about the activities undertaken by the charity in pursuing its aims for the public benefit, and a statement as to whether they have had regard to the public benefit guidance, in their annual report.

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.

Trustees must be aware of the nature and extent of the charity's property. The trustees must look after the assets properly and should not allow the charity to become insolvent. New trustees should be given a copy of the latest accounts.

*Financial procedures*¹⁶

To guard against fraud and mismanagement, a charity should put proper financial procedures in place, covering everything from budgeting to authorisation of payments. The trustees should monitor the implementation of these procedures – if money is lost as a result of fraud, the trustees will be expected to explain to the Charity Commission what steps were taken to prevent fraud, and why they broke down. Although extremely rare, it is possible for trustees to be held personally liable for any losses (see Liabilities of trustees, below, for more about this).

*Investment*¹⁷

Where charities are retaining funds for investment, rather than spending them, the trustees must make sure that they are acting within their investment powers.¹⁶ 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. Note that improper investment can give rise to a loss of tax relief.

Charities are becoming increasingly interested in so-called 'social investment', where capital is invested in projects which generate a social as well as financial return.¹⁹

*Charity land*²⁰

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 that 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 be careful about possible risk to their reputation when aligning themselves with commercial companies.

Risk management

Charity trustees should consider the risks which their charity may face. 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 at 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?²¹

3. Complying with the law

We have seen how trustees must make sure that their charity is run in accordance with its constitution and other laws and rules. Charities are affected by the same laws as other organisations, such as data protection and health and safety. 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.²²

A detailed analysis of the rules is beyond the scope of this note, but areas that 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?

- Fundraising ventures with commercial organisations: is the charity receiving a reasonable deal from the relationship?
- Fundraising events: are they planned appropriately, with due regard for any relevant legislation?
- 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 organisations?
- 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.²³

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.²⁴

However, 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.²⁵

Reporting and accounting

All charities in England and Wales are subject to some form of regulation by the Charity Commission. Most charities with an annual income of more than £5,000, and all charitable incorporated organisations (CIOs), need to register with the Commission. All charities must prepare accounts: charities registered with the Charity Commission will, depending on their size, need to provide it with their accounts, a trustees' report and an annual return.²⁶ The Charity Commission also expect immediate reporting of what it calls 'serious incidents'. Many charities also owe duties to other regulators: for instance charitable companies must report to Companies House.

4. Administration

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

Meetings and decision making²⁷

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's governing document may contain details about how trustees' meetings should be called and held: covering notice requirements, how many trustees are needed to make up a quorum, and whether trustees can attend by telephone or by electronic means. It may be possible for decisions to be made by email, although meetings generally provide a better opportunity for discussion. The governing document should also contain procedures about declaring interests and managing conflicts of interest (this is covered in more detail below).

Decision making is obviously a crucial part of a trustee's role. The Charity Commission has issued guidance on decision making which may provide a useful framework for trustees when making decisions. Trustees should feel able to challenge proposals and

talk issues through properly. This may entail discussing a range of options and having a robust conversation before arriving at a decision.²⁸

The trustees should keep proper minutes of their discussions and decisions.

Delegation

While charity trustees have ultimate responsibility for the charity, they may 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 the 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, unincorporated associations and charitable incorporated organisations 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? For example, staff or a committee. 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 may need to be recorded in the charity's annual report. These include the investment policy, the grant-making policy and the reserves²⁹ 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
- Email & internet access
- Brand guidelines
- Social media
- Fraud
- Equal opportunities
- Volunteers
- Human resources
- Whistleblowing
- Complaints
- Contract management
- Reserves
- Investment (including ethical investment)
- Risk management
- Grant making
- Conflicts of interest
- Trustee code of conduct
- Board development and training
- Trustee expenses
- Bribery Act compliance
- Overseas payments (for charities funding activity overseas)

Benefits to trustees³⁰

One of the fundamental principles of charity law is that, in the absence of express legal authority, trustees cannot receive any benefit from their charity. This means that they cannot generally be paid for acting as a trustee. Indeed, in most cases, trustees act in a voluntary capacity, although they can recover reasonable expenses, such as the cost of travel to attend trustee meetings.

In addition, trustees should not receive any other financial benefit from their connection with the charity, such as payment for services the trustee or his or her firm may perform for the charity, or rent on property he or she lets to the charity.³¹

There are some exceptions to this rule, but they are limited.

- Charity legislation contains some provisions that allow trustees, or others with connections to them, to be paid for providing services (and in some cases goods) to the charity in certain circumstances. They might apply, for example, where a trustee who has fundraising expertise gives advice to the charity about a particular fundraising campaign. They do not allow a trustee to be paid for performing his or her duties as a trustee, such as participating in board meetings. Nor do they allow a trustee to take up paid employment with the charity.

The powers are subject to safeguards and restrictions. Importantly, they do not apply where there is a restriction in the charity's constitution on payments to trustees: many constitutions do contain such a restriction.

- Many charities have specific powers 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), power to pay trustees for services (much like the power described above) and power to make payments to trustees in their capacity as beneficiaries of the charity. If existing charities wish to include powers along these

lines in their constitution, the Charity Commission will usually need to agree.

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

Note that the Charity Commission considers that if a trustee wishes to take up a paid position within the charity they cannot simply resign from their trusteeship in order to take up a paid post.³²

The Charity Commission recommends transparency around payments to trustees.³³

If a charity is in any doubt as to 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.

Where benefits to trustees are permitted, any discussions about conferring a benefit on a particular trustee involve a conflict between the interests of the trustee and those of the charity and should be managed in the way described below.

Conflicts of interest³⁴

All charity trustees have a duty to act in the best interests of their charity.

If there is a potential conflict between a trustee's personal interests and those of the charity, such as where a trustee might be paid for a particular service which he or she performs for the charity, the situation must be properly managed.

The starting point is to check the charity's constitution. The constitution may contain rules about procedures which should be followed in these circumstances. These may require the trustee concerned to declare the interest, leave the relevant part of the meeting and/or not vote nor form part of the quorum voting on the issue.³⁵

If the charity is a charitable incorporated organisation there are very clear obligations to declare interests and refrain from taking part in decisions if there is a potential conflict.³⁶ Particular rules also apply to charitable companies.³⁷

Even if there are no constitutional or legal requirements about how to manage conflicts of interest, it is good practice for trustees to follow similar procedures. It is also a good idea for charities to have a conflicts of interest policy, and a register of trustees' interests.

Similar procedures may be appropriate where a trustee has any other interests which may conflict with those of the charity, such as duties of loyalty which he or she may owe to another organisation.

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 means doing something which does not coincide with the interests of 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. There are four main legal forms available to charities: these are their key features.

Company

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

A company is a 'corporate' or 'incorporated' legal form. As a company, the charity has 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.

Charitable incorporated organisation (CIO)³⁸

A CIO is similar to a company. It has its own legal personality, so will be liable for its own debts. In most situations, its trustees will be protected from liability.

Trust

A trust has no separate legal personality and is therefore fundamentally different from a company or CIO. It is 'unincorporated'.

A charitable 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). However, 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 legal 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 may 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 or duty. 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 or a CIO is a separate legal entity and the legal relationships entered into by a charitable

company or CIO 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 or CIO 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, because if a company's or CIO'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 or CIO may be personally liable, including liability for wrongful or fraudulent trading if the charity is insolvent.³⁹

The position is different where a trust is concerned. As explained above, a trust does not have separate legal personality, so 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.⁴⁰

Trustees of charitable trusts and unincorporated associations are therefore more at risk of personal liability than trustees of charitable companies or CIOs. For this reason, many unincorporated charities seek to become charitable companies or CIOs as their activities and legal relationships expand.⁴¹

Breach of trust or duty

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 can 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 the legal form of the charity.

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 that a charity trustee will 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.⁴² But trustees do need to be aware of the implications of acting imprudently or improperly.

As the regulator of charities in England and Wales, the Charity Commission has far reaching powers to supervise and intervene in charity activity and will act when there is misconduct or mismanagement or a risk to charity property. In most cases, 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 deliberate wrongdoing or fraudulent activity, however, the Commission will take steps to preserve charity assets and may refer wrongdoers to the appropriate authorities to take further action.⁴³

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.

Although trustee indemnity insurance is regarded as a benefit to the trustees, since it protects the trustees personally rather than the charity, it can usually be funded from charity resources.⁴⁴

CaSE Insurance, a partnership between BWB, NCVO and others, provides specialist insurance services to charities.⁴⁵

Index points

- 1 There is a wealth of guidance and information available on the Charity Commission's website.
www.gov.uk/government/organisations/charity-commission.
See also Resources, page ?? onwards.
- 2 The Office of the Scottish Charity Regulator (OSCR) provides more information on Scottish law: www.oscr.org.uk and the Charity Commission for Northern Ireland provides more information about the position in Northern Ireland where charity legislation is in the process of being implemented: www.charitycommissionni.org.uk
- 3 Detailed guidance and information is available in Charity Commission publication CC30 *Finding New Trustees* and at www.gov.uk/trustee-board-people-and-skills#how-to-new-trustees
- 4 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.
- 5 Some charities are required to give details of their policies and procedures for induction and training of trustees in the trustees' annual report.
- 6 See www.gov.uk-charity-trustee-disqualification for more information.
- 7 For guidance on the 'fit and proper persons' requirement see www.gov.uk/uploads/system/attach/date/title/3929-model-dec-ff-persons.pdf
- 8 See the references at footnote 3 or contact BWB for more information.
- 9 A model declaration prepared by HMRC can be found at the end of the guidance.
- 10 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 Charities Act 2011 imposes statutory duties on the trustees of charitable incorporated organisations (or CIOs). The Companies Act 2006, which applies to trustees of charitable companies, includes 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.

- 11 If a trustee disagrees with a particular decision, they should make sure that this is recorded in the minutes.
- 12 Organisations such as NCVO and ICSA (see Resources, page 31) provide model role descriptions for chairs and treasurers.
- 13 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.
- 14 See <https://www.gov.uk/government/publications/public-benefit-an-overview>. This document has links to the three guides: Public benefit: the public benefit requirement (PB1); Public benefit: running a charity (PB2) and Public benefit: reporting (PB3) which trustees are legally obliged to have regard to.
- 15 If the trustees have any particular concerns about the guidance, they should seek specialist advice. For more information on equality legislation, see the Charity Commission guidance Public benefit: the public benefit requirement (PB1) or contact BWB.
- 16 See Charity Commission publication CC8 *Internal Financial Controls for Charities* with its accompanying checklist, and the Commission's online toolkit *Protecting Charities from Harm*.
- 17 BWB can provide more detailed information about the investment powers of trustees. See also Charity Commission publication CC14 *Charities and Investment Matters: A Guide for Trustees*.
- 18 BWB can provide more information and advice about social investments.
- 19 Note that an injection of funds into a charity's trading subsidiary usually counts as an investment.
- 20 See Charity Commission publications CC28 *Sales, Leases, Transfers or Mortgages: What Trustees Need to Know About Disposing of Charity Land* and CC33 *Acquiring Land*.
- 21 In many cases, the trustees are required to include information about the charity's risk management in their annual report. See Charity Commission publication CC26 *Charities and Risk Management*.
- 22 See Charity Commission publications CC20 *Charities and Fundraising* and CC35 *Trustees Trading and Tax*, and other guidance available at www.charitycommission.gov.uk/running-a-charity/fundraising. HMRC's website also contains guidance on the tax implications of fundraising.

- 23 Many charities have to include details of their fundraising costs in their accounts.
- 24 Charities must, however, comply with the general law on campaigning, including relevant advertising standards, the rules on defamation and legislation on broadcasting and demonstrations. They should also observe Electoral Law, where it is relevant
- 25 The Charity Commission publication CC9 *Speaking Out – Guidance on Campaigning and Political Activity by Charities* contains more information.
- 26 See Charity Commission publications CC21b *How to register as a charity*, CC15b *Charity Reporting and Accounting: The Essentials and Reporting Serious Incidents*.
- 27 Charity Commission publication CC48 *Charities and Meetings* provides guidance in this area.
- 28 See Charity Commission publication CC19 *Charities and Reserves*.
- 29 *It's your decision: charity trustees and decision making*.
- 30 See Charity Commission publications CC11 *Trustee Expenses and Payments* and CC24 *Users on Board: Beneficiaries Who Become Trustees*.
- 31 In many cases, this also includes the spouse or partner of a trustee and other so-called 'connected persons'.
- 32 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.
- 33 Some charities are legally obliged to disclose details of trustee benefits in their accounts.
- 34 Charity Commission guidance on managing conflicts of interest can be accessed at www.manage-a/conflict-of-interest-in-your-charity
- 35 Ideally, the constitution should include tailored provisions dealing with the sort of conflicts of interest the particular charity is likely to face.
- 36 If a trustee of a CIO is to benefit personally from a proposed transaction or arrangement with the CIO, he or she must disclose the interest in advance and must not take part in the relevant trustees' (or members') decision or be counted in the quorum.

- 37 The Companies Act 2006 imposes specific duties in relation to disclosing interests and managing conflicts. Further advice can be obtained from BWB.
- 38 The charitable incorporated organisation (also known as the CIO) is a new incorporated legal form, only available for charities, which was introduced in early 2013. CIOs are regulated by the Charity Commission (unlike charitable companies, CIOs are not regulated by Companies House). For more information on CIOs, see the Charity Commission's website or contact BWB.
- 39 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 trustees allowed the company or CIO 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 or CIO is carried on with intent to defraud creditors. There may also be personal liability in other areas: for example, under health and safety, environmental, tax and discrimination laws and, in the case of charitable companies, liability for failing to file documents at Companies House on time. More information is available from BWB.
- 40 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 rights to be reimbursed from the assets of the charity: clearly this can cause problems if the charity has no more assets.
- 41 Further advice on incorporation is available from BWB.
- 42 But see the Benefits to trustees section of this guide in relation to unauthorised trustee benefits.
- 43 If charity trustees are concerned about a proposed course of action, there are special procedures under the Charities Act 2011 under which they can seek advice or approval from the Charity Commission in advance. 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.
- 44 See Charity Commission publication CC49 *Charities and Insurance*.
- 45 For more information see www.caseinsurance.co.uk

Resources

Association for Research in the Voluntary and Community Sector

www.arvac.org.uk

Provides resources for people interested in research in or on community organisations.

Association of Chairs

www.associationofchairs.org.uk

Provides support to chairs of charities and non-profit organisations.

Association of Chief Executives of Voluntary Organisations (ACEVO)

www.acevo.org.uk

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

020 7014 4600

CaSE Insurance

www.caseinsurance.co.uk

A joint venture between BWB and NCVO which provides specialist insurance services to charities.

0333 800 9838

Charity Commission for England and Wales

www.gov.uk/government/organisations/charity-commission

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

0300 066 9197

Charity Commission for Northern Ireland

www.charitycommissionni.org.uk

The independent regulator of charities in Northern Ireland.

028 3832 0220

Charity Tribunal

www.justice.gov.uk/tribunals/charity

Hears appeals from decisions of the Charity Commission.

0300 123 4504

Small Charities Coalition

www.smallcharities.org.uk

Provides support and information to small charities, their trustees, staff and volunteers.

020 7358 6490

Companies House

www.companieshouse.gov.uk

Regulates companies and provides information and advice.

0303 1234 500

Directory of Social Change (DSC)

www.dsc.org.uk

Assists voluntary organisations by providing handbooks, training and conferences.

0845 077 7707

Electoral Commission

www.electoralcommission.org.uk

The independent elections watchdog and regulator of party and election finance.

020 7271 500

Fundraising Standards Board

www.frsb.org.uk

Runs an independent scheme regulating fundraising.

0333 321 8803

HM Revenue & Customs Charities Unit

www.hmrc.gov.uk/charities

Information on forms and procedures relevant to charities and taxation.

0300 123 1073

Institute of Chartered Secretaries and Administrators (ICSA)

www.icsa.org.uk

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

020 7580 4741

Institute of Fundraising

www.institute-of-fundraising.org.uk

Professional body supporting and representing fundraisers. Promotes standards of fundraising practice via its code of fundraising practice.

020 7840 1000

National Council for Voluntary Organisations (NCVO)

www.ncvo-vol.org.uk

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

020 7713 6161

Office of the Scottish Charity Regulator (OSCR)

www.oscr.org.uk

Regulates the charity sector in Scotland.

01382 220 446

Onboard

www.on-board.org

Onboard is a governance development, training and support consultancy set up by BWB in collaboration with leading experts in the field. Onboard works to dispel myths, demystify trusteeship and enable boards to lead and govern better.

BWB and Onboard offer a variety of bespoke trustee training sessions and development packages. Onboard also facilitates meetings, offers coaching sessions for trustees and runs more general discussion groups and training for trustees and managers.

For more information about Onboard events please visit www.on-board.org or contact Onboard at info@on-board.org or by calling 020 7551 7724.

Public Fundraising Regulatory Association

www.pfra.org.uk

Membership body for charities and agencies carrying out street and doorstep fundraising.

020 7401 8452

Trustees Unlimited

www.trustees-unlimited.co.uk

A joint venture between BWB, NCVO and Russam GMS. Many charities 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 also to simplify the complex process of trustee recruitment – a shortlist of pre-screened candidates is offered within 10 days of agreeing the assignment.

A sister service 'Non-executives Unlimited' offers a similar service for social enterprises and not-for-profits.

For further information please visit www.trustees-unlimited.co.uk, email info@trustees-unlimited.co.uk or call 0845 371 0899.

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