Interlink

Your local county voluntary council

5. Trustees and governance

5.8 Trustee indemnity insurance

Trustee indemnity insurance (TII) provides cover that indemnifies charity trustees for liability incurred when innocently or negligently acting in breach of their duties as trustees, otherwise trustees may be in breach of trust and personally liable to make good any loss to the charity or a third party.

NB. This information sheet should be read in conjunction with *5.7 Liability of trustees and governing body members*.

The restrictions on purchasing TII have been relaxed by the Charities Act 2006 and this is likely to become the most common source of authority where there is no express prohibition against purchase in the governing document.

Authority to purchase TII

As a matter of law, charities require authority to purchase TII. This can be obtained from:

- the governing document
- under the Charities Act 1993, s.73F (as inserted by Charities Act 2006, s.39) where the trustees believe it is in the best interests of the charity and there is no express prohibition against purchase in the governing document
- by a Charity Commission Order, or Scheme where there is an express prohibition in the governing document
- by an Order of the Court.

The relevant Charity Commission Operational guidance (OG100) states:

‘Provided that trustees have authority, they are entitled to be insured against claims that may arise from their legitimate actions as trustees, and will be covered against liability as long as they have acted honestly and reasonably......
The main difference between TII and other types of insurance taken out for the benefit of the charity is that TII directly protects an individual trustee, rather than the charity itself.

Provided the cost is reasonable, TII may be paid for out of charity funds. But, because TII paid for in this way is regarded as a personal benefit, it must have proper authorisation before the charity can purchase it......

This principle applies even where a trustee purchases TII out of his or her own pocket, and wishes to claim a refund from the charity as a legitimate expense - the money can't be refunded unless there is a specific authority in place.

Ensuring there is proper authority is important. Without it, any policy is unlikely to be effective, with the result that insurance companies may not pay out on an otherwise valid claim. The charity would have wasted its money, and the trustees would technically be in "breach of trust", and could be held liable to repay the cost to the charity.' (OG100 C4)

The new powers inserted by the Charities Act 2006 permit the purchase of TII subject to certain requirements and restrictions:

- The decision to purchase must be in the best interests of the charity - that is giving a clear advantage to the charity – and the decisions should be properly minuted to support this.
- The decision is subject to the 'duty of care' under the Trustee Act 2000, s.1(1) which effectively requires the trustees to exercise reasonable skill and care, utilise any specialist knowledge and experience they may have, and take advice where necessary.
- The policy cover can only extend to certain types of liability.
- There should be a suitable limitation clause in the policy documents to reflect the statutory restrictions.

What TII can cover

Trustees can therefore arrange insurance cover for:

- any personal liability for breach of trust or duty in their capacity as trustees or holding trustees, and
- any negligence, default, breach of duty or breach of trust committed by them while acting as directors or officers of a charitable company, or of any company carrying out activities on behalf of the charity (including cover for 'wrongful' but not 'fraudulent', trading as defined by the Insolvency Act 1986).

But TII is not available to protect trustees from liability for an act which they knew was in breach of trust or duty, or committed in reckless disregard of whether it was a breach of trust or duty. The TII policy **must** include a clause to ensure that it will **not** cover:

- liability in respect of fines imposed in criminal proceedings, or penalties arising from regulatory action
- liability arising from defending criminal proceedings in which the trustee is convicted of fraud, dishonesty, or wilful or reckless misconduct
- liability arising out of conduct which the trustee knew, or should have known, was not in the interests of the charity.

NB. Although an express power is no longer required if one is included in a new governing document it cannot extend beyond the limitations set out in Section 73(F), but it can be more restrictive.

Practical considerations

As TII is intended to insure against the personal liability of the trustees in relation to any breaches of trust (i.e. duties they owe to the charity itself), it is not an insurance against the liability of the charity as a whole to third parties - other forms of insurance are required for this.

So, it will not cover:
- liability to third parties for breach of contract; redundancy payments, or torts such as negligence and nuisance
- vicarious liability for the acts of your employees
- liability for 'fraudulent trading' by company directors
- losses arising from a failure to insure.

TII is often sold as a combined policy with other types of cover which may include:
- Professional liability insurance (e.g. for negligent advice)
- Fidelity or 'theft by employee' insurance
- Trustee Reimbursement insurance (covers shortfall in charity assets where indemnity is permitted – see below)

NB. TII is typically a 'claims made' policy. This means that relevant insurance relates to the period when the claim is made, not when the precipitating act occurred. For example, if an investment decision was made without taking proper advice which resulted in a loss last year when TII was in place, but an action for recovery form the trustees was not commenced until this year, the relevant policy to claim against would be this year's one (the year the claim is made). If last year's policy was not renewed then no cover is available to meet the claim. You may be able to buy retrospective cover but this can be difficult for TII. So, a long-term view should be taken when planning for and arranging this type of insurance cover.

Should we purchase TII?

Regardless of insurance cover, charity trustees have a right to be indemnified out of the assets of their charity in respect of liabilities, costs and expenses if it can be shown that they have been properly incurred in connection with the due performance of their duties and the proper exercise of their trusts and discretions. Where the assets are insufficient to cover the full extent of the liability, protection can be obtained via Trustee Reimbursement Insurance. Failing sufficient assets or insurance cover, any shortfall will have to be met by the liable trustees.

But it is important to remember that TII is not a complete protection against liability, and trustees who have behaved honestly very rarely suffer financial loss as a result of being trustees - dishonest and reckless trustees cannot be covered by insurance in any event.

A charity may feel that it needs to purchase TII as a means of alleviating the fear of liability for prospective trustees, but the decision should always be made against the criteria set out above. The Charity Commission does recognise that the availability of TII can help with trustee recruitment but is of the view that a sound risk management policy which is properly implemented should be the first step in protecting against liability. Detailed information and guidance can be obtained from the Charity Commission publications:

- *Charities and Insurance* (CC49)
- *Trustee Indemnity Insurance* (OG 100)

Further information

Charity Commission for England & Wales
Tel: 0870 333 0123
www.charity-commission.gov.uk

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The information provided in this sheet is intended for guidance only. It is not a substitute for professional advice and we cannot accept any responsibility for loss occasioned as a result of any person acting or refraining from acting upon it.

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