

# Cardiff Third Sector Council

Your local county voluntary council



## 5. Trustees and governance

### 5.7 Liability of trustees and governing body members

#### Liability generally

##### What does liability mean?

Liability means being held legally responsible for actions taken and for defaults (actions not taken which should have been).

##### Who can be liable?

Depending upon the legal status of an organisation, and the circumstances in which liability comes about, liability may rest with:

- a corporate body (company, Community Interest Company, Charitable Incorporated Organisation, etc)
- the members of a governing body (GB) - GB members in voluntary organisations are often referred to as trustees, board members or members of the management committee. It is, however, important to understand that anyone who controls an organisation is legally regarded as being a GB member, regardless of what their title might be (see below for more detail on the liability of charity trustees)employees of an organisation
- the members of an organisation (rarely happens)
- people authorised to act on behalf of an organisation (agent)
- people claiming to act on behalf of an organisation (even if not authorised to do so)
- volunteers (rarely happens).

##### How does liability come about?

Liabilities arise where individuals or organisations:

- are in breach of criminal law
- are in breach of statutory duty
- are in breach of trust
- are in breach of contract
- are in breach of covenants or other property rights
- are in breach of duties under an insolvency
- cause a tort to be committed (a tort is a wrongful act or an infringement of a right that causes someone else to suffer loss or harm).

## Personal liability

Personal liability arises where a member of the GB, an organisation member, an employee, a volunteer or other person associated with an organisation is required to use their own money to:

- meet the organisation's obligations
- make repayment to it for losses that the organisation incurs as a result of the behaviour of the person in question
- repay unauthorised personal benefits, or
- pay penalties imposed upon the organisation for breaches of the law. Liability of companies and other incorporated legal forms
- Liability of members is limited to the amount of guarantee they have made (i.e. the sum that they have guaranteed to pay should the organisation be unable to meet its debts in full – this is often a nominal sum such as £1 or £10), or the unpaid shares that they hold
- All other liabilities generally rest with the company, but in some situations it can rest with the directors, company secretary and senior employees (generally where they have failed to act as they should do)
- Other legal forms that enjoy limited liability are Industrial and Provident Societies, Limited Liability Partnerships, Community Interest Companies and the Charitable Incorporated Organisations.

## Liability of unincorporated associations and trusts

- Liability is joint and several, and generally rests with the members of the GB. Under joint and several liability, someone can pursue a claim against a group of people as if that group were all jointly liable, and it becomes the responsibility of that group to sort out their respective proportions of liability and payment
- No limited liability protection is available, so any debts that cannot be met by the organisation are likely to have to be paid out of the personal finances of the members of the GB.

## How is it decided who is liable?

Where liability rests will depend upon:

- whether or not the organisation is incorporated
- who authorised an action and whether they were authorised to do so
- who carried out an action and whether they were authorised to do so
- who omitted to do something that they had a duty to do.

## Apportionment of liability

Where members of an organisation or the GB are held liable for the organisation's financial obligations, the liability is **joint and several**. As explained above, this means that each member could be held liable for all or any part of the obligation. But, a distinction should be drawn between:

- those people who are judged to be held liable, and

- those people who are sued to recover a loss or compensation for damage.

Where 2 or more members are held liable for the same tort or contractual loss/damage, but only selected individuals are sued, they can seek to recover a contribution from the other liable individuals under the [Civil Liability \(Contribution\) Act 1978](#).

### **Can individuals be held liable for acts of others?**

In general the answer to this question is no; people are only liable for their own actions or failures to act. But there are some exceptions in both criminal and civil law, for example:

- An employer has **vicarious liability** for acts of negligence and other torts committed by its employees during the course of their employment
- Trustees may be liable for losses caused to the charity by people acting on their behalf who were not properly supervised, etc (see delegation powers and duty of care under [Trustee Act 2000](#))
- A person (the **agent**) can enter into a contract on behalf and with the authority of another (the **principal**), but the principal remains liable for the contract
- Statute law can impose civil and criminal liability, particularly in the areas of employment and health & safety (e.g. discrimination, unsafe working premises, etc)
- A person may be liable if they authorise, instruct or allow another person to commit a criminal act.

### **Who are charity trustees?**

As explained above, GB members in voluntary organisations are often referred to as trustees, board members or members of the management committee, but it is important to remember that anyone who controls an organisation is legally regarded as being a GB member, regardless of what their title might be.

**Section 177 of the Charities Act 2011** defines charity trustees as ‘... the persons having the general control and management of the administration of a charity’. Those who fit this description are trustees regardless of what they are actually called in practice. In general terms trustees are responsible for the proper administration of the charity in accordance with the law, and its trusts as set out in its governing document. Their overriding duty is to pursue the objects of the charity, and they must apply the income and property of the charity exclusively for these objects.

### **Some specific trustee liability points**

- Trustees remain liable - even after retirement - for the actions taken during their period of office
- New trustees are not generally liable for acts taken before their period of office, but must seek to put irregularities right on discovery of those irregularities, otherwise the new trustees could become liable for them
- Generally a board of trustees will not be liable for the unauthorised/ultra vires actions of ‘rogue’ trustees, but they must ensure that all steps are taken to avoid such an

occurrence (such as having policies and procedures in place which trustees can follow when acting on behalf of the organisation)

- Do not forget that trustees have specific responsibilities under charity law and regulation (e.g. SORP, personal benefit, etc).

## **Specific areas of liability**

### **Breach of criminal law and statutory duties**

- Criminal law is breached when someone commits an offence against other persons, property or the public interest. Prosecution is normally brought by the State rather than by individuals (although private prosecutions are made sometimes)
- Penalties for failing to comply with statutory duties are technically criminal because they are enforced by the State (e.g. health & safety)
- Normally a person who commits a criminal act is liable for their own actions, but a corporate body can be liable for its criminal actions (e.g. corporate manslaughter) and employers can be vicariously liable for the criminal acts of employees
- GB members are personally liable for their own criminal acts as individuals or as a body
- Individuals are always liable for their own criminal acts, regardless of whether committed as an individual, employee, volunteer, governing body member, etc.

Incorporated organisations normally attract criminal liability directly, but in certain situations the governing body members can be personally liable, including failure to operate PAYE or failure to comply with statutory duties.

### **Breach of contract**

A contract is a legal agreement that is enforceable by the courts. Usually an organisation's liability under contract arises if:

- the organisation cannot pay sums that are due under a contract
- it is unable to, or fails to, supply goods or services that it has committed itself to provide under a contract
- it has supplied goods or services which do not meet the standards specified by the contract or required by law
- it breaches other conditions of a contract (e.g. failing to comply with reporting obligations).

Questions of liability under contract depend on whether an organisation is incorporated or not.

**Corporate bodies** (e.g, companies) are regarded as **legal persons**, and can be parties to legally enforceable agreements in their own right. The members of the company and its GB act as agents of the company, and are not direct parties to the contract. They are protected from personal liability for breach of contract provided that:

- the contract is within the objects and powers of the organisation
- those who agreed to the contract had authority to do so

- those who agreed to the contract were not disqualified from acting as directors of a company
- they do not allow the company to contract fraudulently or whilst insolvent.

**Unincorporated organisations** are not regarded as legal persons and therefore cannot enter into contracts in their own right. Individuals (usually members of the GB) must act on behalf of the organisation, and the liability of those contracting individuals is **unlimited**. Primary liability rests with the **principals**, i.e. those who authorised a contract or action. Those who merely enter into a contract with authority are **agents**. The principals are typically the GB members directly, or they can authorise delegation of authority, but individual trustees can be liable if they act independently of the GB or outside their authority. It is important to note the following:

- Principals, including trustees, remain liable for contracts after leaving office (i.e. when they stop being a trustee for that organisation), and that liability passes to a trustee's estate on death unless it is passed over by a novation agreement
- The [Contracts \(Rights of Third Parties\) Act 1999](#) gives third parties a right to enforce terms that benefit them in contracts to which they are not a direct party or are usually excluded.

### **Breach of trust and fiduciary duty**

- Breach of trust, or fiduciary duty (i.e. a duty to act in good faith), occurs when someone in a position of trust breaks that trust
- Trustees are those people who hold assets in trust for defined beneficiaries to be administered in accordance with specified objects, so they have a duty of trust (e.g. charity trustees)
- GB members of non-charitable organisations also have a fiduciary duty to their organisation. A fiduciary duty is similar to the duty of trust, but is of a lower standard in non-charitable companies and other incorporated organisations than it is in charitable organisations
- Fiduciary duties of company directors are set out in the **Companies Acts**.

Breaches of trust and fiduciary duty by an individual generally result in personal liability of the individual to the organisation. These may arise where all or some of the GB members:

- Carry out, or use charity money/property for, activities which are outside the scope of the organisation's objects, area of benefit, or are not charitable (e.g. political campaigning, trading, etc)
- Exercise powers or carry out activities which are not permitted in the organisation's governing document, or fail to obtain consent of the Charity Commission/Court where consent is required
- Cause loss to the organisation through mismanagement, or a failure to exercise a proper duty of care or take professional advice
- Steal from the organisation or make an unauthorised personal gain/benefit
- Misuse information obtained through their position as a GB member.

GB members are liable for their own acts and defaults, and are jointly and severally liable for decisions made by the GB in which they have participated. But they are not liable for breaches by former GB members, although they are expected to take remedial action to recover losses once they are discovered. Where trustees believe that a breach is likely to be committed by a fellow GB member(s) they must take positive action to raise their concerns, and if they retire before the breach occurs they should seek relief of liability in writing. GB members who retire, and the estate of GB members who die, remain liable for breaches committed by them whilst in office.

**NB.** Limited liability does not protect GB members against breach of trust or fiduciary duty.

## Tort

As explained above, a **tort** is a wrongful act or an infringement of a right that causes someone else to suffer loss or harm. Generally a tort requires the intention to commit the act, or negligence; however, committing some torts attracts **strict liability** where no intent or negligence is required. Common torts include negligence, defamation, nuisance and trespass.

Torts can be committed by a variety of people:

- Individuals or corporate bodies can commit torts
- Individuals are liable for their own tortious acts and for those they authorise, but employers also have vicarious liability for the torts of their employees when the tort is carried out in the course of their employment. This is the case even if the employer did not authorise or know about the act(s)
- Organisations can be vicariously liable for the acts of volunteers where they are effectively treating them as employees, or directly liable if they have failed to properly train and supervise them
- Members of a GB are liable for their own torts, those of the GB, those of the organisation, and/or other acts that they authorised or allowed to happen
- GB members will not generally be liable for torts of the GB or organisation where he/she did not know of the decision or action at the time it was taken, or knew about but did not participate in it
- Ordinary members of an unincorporated organisation may all be liable in tort where;
  - they all authorised or carried it out
  - are in overall control of the activity
  - are deemed to be the de facto occupiers of premises, or
  - are deemed to be the de facto employer.

## Protecting against liability

Charities and voluntary organisations can guard against, or minimise, personal and organisational liability in a number of ways, including **incorporation**. Incorporating an organisation creates a separate legal entity with limited liability which can then enter into contracts, hold land etc, and thus be legally liable in its own right distinct from its members.

Incorporation does not protect the members of the governing body against:

- fines or penalties for their own or the organisation's criminal acts, or breaches of statutory duty
- liability to the organisation for their own breaches of trust or fiduciary duty
- liability on contracts which are beyond the objects or powers of the organisation i.e. acting **ultra vires** (unless subsequently ratified by the company members in a non-charitable company only)
- liability for debts incurred whilst the company is insolvent, or is heading for insolvency – this would be classed as **wrongful** and/or **fraudulent trading**.

### Charity Commission

Charity trustees may seek **advice in writing** from the Charity Commission under [section 110 of the Charities Act 2011](#) before carrying out an act which they are uncertain about, or about the proper administration of the charity generally. Trustees cannot subsequently be held liable for any breach of trust that arises provided:

- they revealed all material facts to the Commission at the time of seeking advice, and/or
- they act strictly in keeping with the advice they are given.

**NB.** [Section 38 of the Charities Act 2006](#) gives the Charity Commission power to grant relief for a breach of trust or duty where it is considered that the trustee has acted honestly and reasonably.

### Limiting liability in the governing document

It is possible to include a clause in the governing document of an unincorporated organisation saying that ordinary members are not liable for the organisation's debts or actions. This does not protect them if they:

- are members of the organisation's GB
- are principals to a contract
- commit a criminal or tortious act.

Similarly, the governing document of a trust may seek to limit the liability of trustees for losses caused to the trust/charity where proper advice has been taken (e.g. poor performance of investments).



## **Contractual clauses limiting liability**

Unincorporated organisations and trusts should consider including a clause in contracts that limits the liability of members and GB members to the extent of the assets of the organisation (please note, however, that such clauses are often resisted).

To avoid the contract being subject to other agreements/correspondence etc that you may have forgotten about or are unaware of, it is always sensible to include an 'entire agreement' clause specifying that the present document is the only binding contract.

## **Exclusion of liability**

In some instances liability may be limited by an **exclusion of liability** or **disclaimer clause** in a contract, lease etc, or a notice, but legal advice should be sought before trying to limit or exclude liability in this manner. Liability cannot be excluded in cases where a clear duty of care can be proven, or where there is a legal requirement or statutory duty to protect. Reasonable steps have to be taken to meet these obligations, and liability for death or personal injury can never be excluded (see [Unfair Contract Terms Act 1977, s.2](#)).

## **Indemnity**

**To indemnify someone means to compensate them for a loss suffered;** however, this right is worthless if the assets or insurance cover of the organisation do not meet the total liability. There is no right to be indemnified for fines or penalties, or where the individual is liable to the organisation itself (e.g. breach of trust).

Individuals in voluntary organisations and charities may have a right to indemnity under:

- **Statute:**
  - Trustees of a trust or charity are entitled to be reimbursed out of trust funds for expenses properly incurred on behalf of the trust if acting with authority and due care ([Trustee Act 2000, s.31](#))
  - A company can provide loans and pay the legal fees of a director, company secretary, senior employee or auditor for the successful defence of an action relating to offences against the company (but cannot indemnify for penalties in a successful action)
- **Common law:** if a member of the GB of a non-charitable association, or an ordinary member of any association, is successfully sued by a third party they are entitled to be indemnified for damages and costs if they were sued as a representative of all the members, or they were carrying out activities for and with the approval of the association and its members. The right to indemnity is limited to the assets of the organisation, and indemnity cannot be sought from the other members unless permitted by the governing document
- **Governing document:** can give additional rights of indemnity to ordinary and GB members out of organisational funds for liabilities properly incurred in managing the organisation's affairs. However, such a clause typically set out a number of exclusions such as acting ultra vires.



**NB.** If the organisation has holding trustees, provisions should be made to indemnify them for losses incurred in the discharge of their duties.

## Contribution

- Where two or more GB members are jointly and severally liable for a tort or contractual claim, but only some are sued, they can seek a contribution from the others to be assessed by the court against their relative responsibility under the [Civil Liability \(Contribution\) Act 1978](#)
- In common law, if some or all of the members of a GB are liable for a contract and one or more pay a disproportionate share, they are entitled to a contribution from the others.

## Further information

Charity Commission for England & Wales  
[www.charity-commission.gov.uk](http://www.charity-commission.gov.uk)

[Reducing the Risks - A Guide to Trustee Liabilities](#)  
[www.ncvo-vol.org.uk](http://www.ncvo-vol.org.uk)

## Disclaimer

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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