

Voluntary Action Merthyr Tydfil

Your local county voluntary council



VOLUNTARY ACTION
MERTHYR TYDFIL
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5. Trustees and governance

5.8 Trustee indemnity insurance

Trustee Indemnity Insurance (TII) indemnifies trustees from personal liability for claims made against them for breach of trust, negligence or default, as long as the mistake was honestly made and was not the result of wilful misconduct.

NB. This information sheet should be read in conjunction with [5.7 Liability of trustees and governing body members](#).

Authority to purchase TII

For some time there has been a general rule that TII should not be purchased using charity funds, as this would amount to a benefit to the individual trustees and therefore breach the trustee remuneration rules. Authority to purchase TII from charity funds could, however, be obtained from:

- the governing document;
- relevant legislation;
- by a Charity Commission Order; or
- by an Order of the Court.

These restrictions on purchasing TII were relaxed by the Charities Act 2006 which provided a statutory authority for trustees to purchase TII out of the charity's own resources without the prior permission of the Charity Commission, so long as the trustees were:

- satisfied that it was in the best interests of the charity to do so;
- satisfied that there was no provision in the charity's governing document which specifically forbids the purchase; and
- the decision is made in accordance with the 'duty of care' set out in s.1(1) of the Trustee Act 2000, 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The provisions relating to this are now contained in [s.189 of the Charities Act 2011](#) (which repealed much of the Charities Act 2006), and trustees should ensure that any TII is purchased in line with the provisions set out in s.189.

What TII can cover

Trustees can, therefore, arrange insurance cover for:

- any personal liability for breach of trust or duty committed by them 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.

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 giving negligent advice)
- Fidelity or 'theft by employee' insurance

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 from the trustees was not commenced until this year, the relevant policy to claim against would be this year's one

(i.e. 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. 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 \(OG 100 A1\)*](#)

Further information

Charity Commission for England & Wales
www.charity-commission.gov.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.

For further information contact

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Produced by WCVA, County Voluntary Councils and Volunteer Centres.

Last Updated:03/02/2014



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