

Advice Note 7: Charity Trustees' Duties

WHAT IS A CHARITY TRUSTEE?

There is no definition in the Charities Act (NI) 1964 but persons having the 'general control and management of the administration of a charity' are considered to be charity trustees in the legal sense, whether they are aware of it or not, and regardless of what they are called (eg committee member, executive committee member, board member, etc).

You are a charity trustee if you are:

- a trustee of a charitable trust;
- a director of a charitable company;
- a member of the management committee of a charitable unincorporated association.

WHAT IS A HOLDING TRUSTEE?

An unincorporated organisation does not exist like a 'person' in the legal sense, so it cannot legally hold property in its own name. Property belonging to such an organisation must therefore be held in the name of a real person or persons. Sometimes, the charity trustees will act in this role, perhaps unwittingly.

The governing document of an unincorporated body usually contains a clause called 'Trust Property' which says how the property of the charity is to be held by a separate body of individuals or a corporate body acting as a custodian trustee. These individuals or the corporate body are called 'holding trustees'. They hold property in their own names on behalf of a charity. Management of the charity and its property is usually still a responsibility of the charity trustees (managing trustees). Holding trustees are not usually required to manage but instead are required to follow all the lawful instructions of the charity trustees.

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WHO CAN BECOME A CHARITY TRUSTEE?

Anyone may become a charity trustee provided they are over 18 and are not disqualified under the Companies (Northern Ireland) Order if the charity is incorporated. Usually the power to appoint or elect someone as a charity trustee lies within the governing document of the charity. In an association or a company, the management committee will usually be elected from among the members. In a trust, there are no members, just charity trustees who are usually self-appointed and have the power to appoint a new trustee if a vacancy arises.

LEGAL DUTIES OF CHARITY TRUSTEES

Charity trustees have full responsibility for managing their charity and must:

- (1) Act together and in person and not delegate control of the charity to others (they may be able to delegate aspects of the work to others, but these others must remain under the charity trustees' control).
- (2) Act strictly in accordance with the charity's governing document (ie its constitution/Memorandum and Articles of Association/trust deed/ rules).
- (3) Act in the charity's interests only and without regard to their own personal interests.
- (4) Manage the charity's affairs prudently and take a long-term as well as a short-term view.
- (5) Not (without explicit authority) derive any personal benefit or gain from the charity of which they are charity trustees.
- (6) Take proper professional advice on matters on which they are not competent.

In managing the charity's finances, charity trustees must:

- (1) Make sure that bank accounts have at least two signatories.
- (2) Make sure that effective systems are in place for the handling of monies and the operation of bank accounts.
- (3) Make sure that all the charity's property is under the control of the charity trustees.
- (4) Make sure that the charity's accounting records show clearly at all times the amount of funds held for different purposes.

- (5) Make sure that full and accurate accounting records and the state of the finances are reported regularly to the meetings of the charity trustees.
- (6) Remember that all the charity trustees are responsible for the finances of the charity and not just the Treasurer – charity trustees should know and understand the financial position of the charity.
- (7) Collect in full all money owed or due to the charity, including tax and rates relief.
- (8) Charity trustees must spend the charity's income solely for the purposes (objects) set out in the charity's governing document.

If the charity has land or buildings, the charity trustees must:

- (1) Either occupy and use it for the charity's purposes or let it for the maximum possible return.
- (2) Make sure it is maintained in good condition.
- (3) Consider the need for insurance.
- (4) Regularly consider whether it is being used to the best advantage of the charity.
- (5) If the charity is unincorporated, make sure that the charity property is vested in holding trustees. This should be reflected in a written document – usually called a deed – setting out the terms in which the property is being held in the names of the holding trustees.

If the charity has funds to invest:

- (1) Invest only within the limits of the powers granted by the charity's governing document or, failing that, the Trustee Act (Northern Ireland) 2001.
- (2) Constantly monitor the performance of the investments.
- (3) Avoid speculation and invest prudently to achieve both income and capital growth.
- (4) Seek professional advice about what investments are most suitable for the charity.

If the charity needs to employ staff:

- (1) Each employee should be given a proper contract of employment and a written job description making clear the extent of his or her authority to act on behalf of the charity.

- (2) Ensure that the charity complies fully with employment law. Advice is available from the Department of Enterprise, Trade and Investment (DETI), the Equality Commission, NICVA, the Labour Relations Agency and Trade Unions.

If the charity raises funds by appealing to the public, in the interests of good practice, it should:

- (1) Make sure that the appeal properly describes what the donations will be used for.
- (2) Be open and honest if asked about the costs of the appeal.
- (3) Not use fundraising methods which exert undue pressure on people to give.
- (4) Approve in advance any fundraising or advertising campaign carried out on the charity's behalf by a commercial organisation.
- (5) Require fundraisers to hand over money raised or collected by them before deducting their fees or expenses.

Charity trustees will put themselves at risk of personal liability only if they:

- (1) Cause loss to the charity by acting unlawfully, imprudently or outside the terms of the charity's governing document.
- (2) Commit the charity to debts which amount to more than its assets.

FOR PERSONS THINKING OF BECOMING CHARITY TRUSTEES

You should become a charity trustee only if you:

- (1) Are prepared to give the necessary time and effort to the management of the charity.
- (2) Can help the charity achieve its aims through your expertise or commitment.
- (3) Understand and accept that trusteeship carries legal duties and responsibilities.
- (4) Are over 18 years of age.

Before you first become a charity trustee you should:

- (1) Study the charity's governing document to learn about its purposes and administrative procedures.

- (2) Ask your fellow charity trustees to give you full details of the charity's property, investments and income.
- (3) Study recent accounts and minutes of meetings to learn about the charity's finances and policies.

CHARITY TRUSTEES' POWERS

Charity trustees' powers are derived from general law and from the governing document of their charity (for example, its trust deed, its constitution, or its Memorandum and Articles if the charity is a company).

LEGAL DUTIES OF CHARITY TRUSTEES - SUMMARY

In general terms, the duty of a charity trustee is to promote the interests of the charity and to ensure that its assets are applied for the charitable purposes authorised by its governing document and for no other purpose. The charity trustees must ensure that the charity's income is spent solely for the charitable purposes set out in the charity's governing instrument. They must make appropriate distributions with absolute fairness between those persons qualified to benefit under the terms of the charity. Income should not normally be accumulated without good reason. Where the existing purposes cannot be carried out, the charity trustees should apply to the High Court or Charities Branch of the Voluntary and Community Unit (Department for Social Development) for permission to change them.

Charity trustees should never allow their activities to overstep the terms of their charitable objects. Charity trustees should be aware, for example, of the distinction between education and propaganda, and should confine any 'political' activities to those which are reasonable and which educate the public and the decision-makers about the charity's beneficiaries.

Charity trustees should also be aware that the responsibility for the management and organisation of the charity and for its decisions lies with them. Charities may employ officers and give them a high degree of responsibility but the ultimate responsibility lies with the charity trustees and they have a duty not to delegate this. Charity trustees must establish proper administrative controls and make themselves aware of how the charity is run on a day to day basis.

A charity trustee can never avoid her/his responsibilities because she/he should not by law delegate those responsibilities to others. In certain circumstances, a charity trustee can be held personally liable, where the fault lies not with the charity trustee but in the activities of a co-charity trustee eg if a charity trustee has unquestioningly allowed her/his co-charity trustee to deal with charity property in a way which has resulted in a loss to the charity.

In larger charities which have employees, charity trustees themselves cannot personally handle every document or every day to day administrative arrangement. What the charity trustees must ensure is that proper systems are in place so that the conduct of the charity's business is subject to sufficient checks to avoid the problems outlined above. Many of the precautions are straightforward such as the requirement that funds held in charity bank accounts are drawn by two signatories or that the charity's finances should never be allowed to be solely in the hands of a single person.

Charity trustees have a responsibility to ensure that their charity maintains adequate insurance cover. For further information on insurance see NICVA's *Advice Note 12: Insurance*, which is available free of charge from NICVA Member Services.

CHARITY TRUSTEES – REMUNERATION

A charity trustee is expected to act without any payment. The law expects that trusteeship of a charity is an entirely voluntary activity motivated by altruism. Occasionally, the Inland Revenue may allow a clause to be put into a charity's governing document allowing payment to be made to a charity trustee for services rendered to his/her charity (other than trusteeship). In such circumstances, the charity would have to show that the arrangements were in the interests of the charity, not the individuals concerned, and checks and balances would have to be put into the governing document to ensure this power is limited and is not open to abuse.

Unless the governing instrument contains an authority for such payments, a charity trustee engaged to supply goods and services to the charity by their co-charity trustees should not make a profit at the expense of the charity. The goods and services should be provided free of charge or at or below cost.

Charity trustees are entitled to be reimbursed for their out of pocket expenses such as postage, stationery, telephone calls and travelling expenses.

CAN EMPLOYEES OF A CHARITY ACT AS CHARITY TRUSTEES?

The Charity Commission's publication *CC3 Responsibilities of Charity Trustees* states the legal principle that a charity trustee cannot be an employee of the charity: "A trustee cannot be an employee of their charity (nor can an employee be a trustee of the charity) unless there is either an express provision in the governing document of the charity to authorise it, or if the employment is authorised either by us or by the Courts. This is a legal rule and breaching it may constitute a breach of trust. A person who commits a breach of trust may have to repay to the charity any benefits (such as a salary) which they have received."

CHARITY TRUSTEES – POTENTIAL LIABILITIES

Charity trustees can incur personal liability in the course of their work for a charity. The exact circumstances when personal liability will be incurred depend to some extent upon the legal structure of the charity itself, ie whether it is a trust, company or an unincorporated association. In general terms, a charitable company offers more protection to charity trustees (its directors) in dealing with third parties, eg in relation to contracts for goods and services provided to the charity, than a trust or an unincorporated association. Please note however that the protection offered by incorporation is more limited than is often supposed (see NICVA's *Advice Note 5: Companies*, which is available free of charge from NICVA Member Services).

Examples of situations where charity trustees could find themselves personally liable for breach of their charitable trust and could be called upon to make up a loss to the charity and account for any profits include the following:

- (1) Where the charity trustees act outside the authority given by the charity's governing document, eg by making speculative investments or distributing charity assets to those not within the definition of the charity's beneficiaries.
- (2) Where the charity trustees do not exercise proper care in carrying out their duties.
- (3) Where the charity trustees benefit personally from the charity, ie by furthering their own interests rather than those of the charity by arranging an indirect benefit to themselves.
- (4) The use of a charity's assets by the charity trustees for personal gain.
- (5) In addition the charity trustees often enter into personally binding legal obligations. Examples include:
 - (i) When a charity trustee enters into a lease or a contract without specifically limiting the liability of that charity trustee to the assets of the charity.
 - (ii) When a charity trustee acting as employer fails in her/his statutory obligations.
 - (iii) When a charity trustee personally guarantees a loan on behalf of a charity.

HOW CAN CHARITY TRUSTEES PROTECT THEMSELVES?

Where charity trustees are uncertain about any decision affecting the charity, they can apply to Charities Branch of the Voluntary and Community Unit, Department for Social Development, for written advice. The address is given at the end of this pamphlet. Action taken in accordance with this advice could help to protect a trustee against any accusation of breach of trust. Where a charity trustee is in doubt about the activities of their co-charity trustees, they could discuss their concerns with Charities Branch.

Charity trustees can be held personally responsible for breaching their trust, as noted above. Charity trustees should not retire in the knowledge that a breach of trust may be about to take place as they may be held equally responsible with the charity trustees who actually commit the breach. However if the charity trustee has acted honestly, reasonably and in good faith, she/he is entitled to have any liabilities incurred met out of the charity's assets.

If the charity trustee does not act honestly, reasonably and in good faith, she/he may be in breach of trust and could be made personally liable in a court of law, to make good any loss to the charity. What is reasonable in the circumstances will be different in each case.

TRUSTEE INDEMNITY INSURANCE

There is an increasing trend to seek insurance to indemnify individuals against liabilities they incur in acting as charity trustee of their charities. This is insurance which is in addition to Property, Employers', Public Liability Insurance, etc. A typical Charity Trustee Indemnity Policy covers losses incurred by the charity trustees in relation to breach of duty, breach of trust, breach of warranty of authority, negligence, error or omission and making misleading statements.

Please note however that an illegal act (such as a deliberate breach of trust or deliberate negligence) cannot be insured against.

If a charity wishes to use charity funds to take out insurance to protect the charity trustees from personal liability, it will need an explicit power to do so written in its governing document. The areas of risk should be identified, the amount of cover assessed and this should be balanced with the number of charity trustees and the size of premium quoted. If the risk of incurring liabilities justifies taking out Trustee Indemnity Insurance, charity trustees should ensure that the cover includes:

- (1) Insurance against breaches of trust made as a result of honest mistakes.
- (2) Protection in respect of claims for wrongful advice or information (Professional Indemnity Insurance).
- (3) Insurance to protect the charity against fraud or dishonesty by employees or charity trustees.

FOR FURTHER INFORMATION, PLEASE CONTACT:

NICVA Governance and Charity Advice Service
61 Duncairn Gardens
Belfast BT15 2GB

Tel: 028 9087 7777
Fax: 028 9087 7799
Email: charityadviceofficer@nicva.org
Website: www.nicva.org

Charities Branch (Voluntary and Community Unit)
Department for Social Development (DSD)
3rd Floor, Lighthouse Building
1 Cromac Place
Belfast BT7 2JB

Tel: 028 9082 9414
Fax: 028 9056 9327
Website: www.dsdni.gov.uk

Volunteer Development Agency
129 Ormeau Rd
Belfast BT7 1SH

Tel: 028 9023 6100
Fax: 028 9023 7570
Email: info@volunteering-ni.org
Website: www.volunteering-ni.org

Community Change
Philip House
123-137 York Street
Belfast BT15 1AB

Tel: 028 9023 2587
Fax: 028 9031 2216
Email: info@communitychange-ni.org
Website: www.communitychange-ni.org