

A TRUSTEE'S ROLE AND RESPONSIBILITIES

PART THREE TRANSCRIPT

Trustee liability and legal forms

Welcome to part three of this course on trustee role and responsibilities. In parts one and two we looked at an introduction to the voluntary sector, its breath, how it's funded and how it's regulated as well as challenges facing the sector. Then the role of trustees and how boards should operate to meet their legal responsibilities of trustees.

In this section we will look at the various legal forms which charities can take and what this means for trustees. We will then explore areas where trustees are exposed to liability and how this can be limited. We will finish this section, like the others, by suggesting some key questions which any trustee should ask.

Charitable status is given to organisations to provide reassurance to the public that an organisation provides public benefit. Charities are expected to comply with particular laws and regulations in order to provide this reassurance.

However organisations with charitable status can take a number of different legal structures.

Trusts and unincorporated associations are legal forms which mean that the organisation is not incorporated. This means that the trustees are personally responsible for the contracts and their liability to third parties is unlimited. The organisation itself is not a distinct legal entity and so that responsibility rests with trustees.

Many charities choose to limit the liability of their trustees through incorporation. Two common structures for this are companies limited by guarantee and charitable incorporated organisations. These structures create a legal identity for the charity which is separate from the individual trustees. In doing so the charity holds the contracts and liability can be limited within the governing document. There are however additional regulations for these two legal structures, with annual reporting to either Companies House or the Charity Commission.

If you are a trustee or thinking about joining a board – it's important that you are familiar with the organisation's legal structure and understand the rationale as to why a particular approach has been taken.

We are now going to explore liability in a little more depth.

There are three key areas in which trustees are exposed to personal liability:

- The first is governance – by this we mean some kind of failure to comply with charity law, most likely in relation to the six core legal duties we outlined in part two of this course. For example, where a board chooses to spend the charity's money on something which sits outside of the charity's purpose, they could be held personally liable.
- The second set of key liabilities are operational. These could be claims from third parties or general expenditure which relates to the work of the organisation. If for example, the charity spends more money than it has in the bank on a major project, the resulting deficit would be an operational liability.
- The final set of liabilities are failure to comply with other relevant statutory requirements such as health and safety, PAYE or data protection. These liabilities are normally mitigated by ensuring that the right policies are in place and that they are followed.

Limiting liability and mitigating risks are important ways of protecting trustees' personal exposure.

I have already outlined how incorporation can help limit liability. However even in incorporated organisations, trustees are still expected to act responsibly and could be held personally liable if they have failed to comply with their duties.

Trustees should also ensure that the charity has:

- Indemnity insurance – paid for by the charity
- Good management practices
- A clear approach to risk management – so that trustees are able to manage the most significant risks
- Clear roles and responsibilities
- Good records of decisions taken
- Provisions in the governing document
- Healthy contingency funds or reserves
- Professional advice for the board, where necessary
- Regular self-reviews by the board – where the board reviews its own performance and seeks to continually improve

Any activity which involves risk, naturally involves some level of liability. In short trustees need to be assured that this risk is being managed, take action where it isn't and ensure that they are compliant with the law.

The Charity Commission has outlined its view on the liability of trustees in The Essential Trustee.

The commission says:

The Charity Commission expects trustees to take their responsibilities seriously... The commission recognises that most trustees are volunteers who sometimes make honest mistakes. Trustees are not expected to be perfect – they are expected to do their best to comply with their duties. Charity law generally protects trustees who have acted honestly and reasonably.

This should reassure trustees that so long as they act in good faith and take their roles seriously then they should not have anything to worry about.

In this section we have offered you an introduction to legal structures, an overview of the kinds of liability to which trustees could be exposed and how this liability can be limited.

The key questions that any trustee or prospective trustee should be asking are:

- What legal structure does the organisation have and why?
- How does the board make sure that trustees are protected from liability?
- How does the organisation manage risks and is this information used to inform decisions?

That's it for part three. Join me for part four, where we'll look at leadership responsibilities of trustees and the relationship between governance and management.