

# Ryedale Voluntary Action

## Factsheet

### What are the Risks of Becoming a Charity Trustee?

#### Trustees' Duties

Becoming a Trustee of a voluntary and community organisation is very rewarding, however you might be worrying about the risks that are involved and any potential liabilities that may arise.

By becoming a trustee, you are agreeing to do the job properly, and the law and the organisation's governing document set out the minimum that you need to do to achieve this. Falling below this minimum may result in the charity itself or the Charity Commission taking action which may result in personal liability. Action is normally however fairly rare, and personal liability generally only arises if the trustee has failed to discharge duties that cause loss to the organisation or improper gain to the trustee.

Key duties include:

- Managing conflicts of interest - a trustee must act with integrity and must disclose any conflict of interest to the organisation
- Not accepting personal benefits - a trustee can not accept or direct any benefit from being a trustee unless it is authorised by the organisation's governing document or by the Charity Commission
- Acting within the objects and the powers of the organisation's governing document
- Safeguarding the assets - this means ensuring that money is invested prudently
- Acting with care - using specialists and advisers when required
- Acting collectively - trustees must act as a group despite any dominant individuals on the Board

If a trustee does not fulfil the above duties, they may be personally liable to replace the loss, be liable to criminal prosecutions or be barred from being a trustee in the future.

One of the main duties of a trustee is not to receive any personal benefits or payments, be they direct or indirect, unless the governing document or the Charity Commission has authorised it. Any such benefit that a trustee does receive could result in the trustee being obliged to repay the benefit he received. This is why individuals cannot be paid for carrying out their duties as trustees.

#### Duties of Company Directors

If you are a trustee of a charitable company you have additional statutory duties. As a trustee of a charitable company you are also a director. Company directors have a series of duties under the Companies Act 2006 which are very similar to those of trustees. Like trustee duties, these arise because they are directors of an incorporated body and can be enforced against them personally.

Your duties as a company director are:

- duty to act within the powers of the governing document
- duty to achieve the charitable purposes of the company but having regard to other factors such as the consequences for employees
- duty to exercise independent judgement
- duty to exercise reasonable care, skill and diligence - this means not just being careful, but using the general knowledge, skill and experience that would be reasonably expected of someone carrying out your functions as well as any special skills or knowledge that you had
- duty to avoid conflicts of interest

- duty not to accept benefits from third parties by reason of being a director and doing or not doing something
- duty to declare an interest in any proposed transaction or arrangements

### **Where do liabilities come from?**

Liabilities fall into the two categories of governance liabilities and operational liabilities. Governance liabilities arise from the duties that a trustee has. For example, where a trustee has entered into a contract with an organisation that benefited the trustee. The trustee has to repay the improperly obtained profit.

### **Operational liabilities**

Operational liabilities are liabilities incurred by the organisation because of what the organisation does. For example, where the trustee of an unincorporated charity signed a lease for the organisation and it fails to pay the rent. Unlike governance duties, they do not arise from the trustees' personal duties. Where operational liabilities ultimately fall will depend upon whether the organisation is incorporated i.e. whether it was established as (or has become) a company limited by guarantee or other corporate entity. If the charity is incorporated then operational liabilities generally fall on the organisation.

Incorporation will reduce the risks trustees will face as the charity has its own legal personality and therefore the charity is able to enter into contracts in the name of the charity rather than in the trustees' names. The trustees and the members will have limited liability and therefore the charity itself will be responsible predominantly for the liabilities of the charity. Members' liability is limited to the amount of their guarantee for a company limited by guarantee. If the charity is not incorporated and cannot meet its obligations, the trustees are personally liable and the members of an association may be liable as the charity does not have its own separate legal personality.

If an incorporated organisation cannot meet the liability, it may have to be wound up. But the trustees are not themselves personally liable except for in circumstances where they have breached their trustees' duties or where, for example, they have been involved in wrongful trading. Wrongful trading is the criminal offence of carrying on running the operation and incurring debts once it becomes clear or should have become clear to a reasonable person that there is no prospect of the organisation being able to meet those obligations. Once an incorporated body becomes insolvent, the duties of its trustees are to ensure that creditors are protected and that no steps are taken which would prejudice creditors or increase their losses.

As operational liabilities arise out of what the charity does or does not do, there is an enormous range of acts or omissions that could cause liability. The services you provide, the property you own, the staff you employ, the statements and publications you produce, the people you interact with, the co-operations and collaborative relationships you enter into, the contracts you sign, the funding agreements you enter into and the advice your organisations give all carry potential liability for the organisation and may in certain cases cause potential liability for the trustees.

Remember incorporation alone will not protect you from all liabilities. Even if you are incorporated, there are some pieces of law under which a trustee may still be liable if they have contravened the law, e.g. health and safety. Similarly, if a trustee directly authorises a wrong, for example libels someone or instructs someone to act in a way that leads to loss being caused by trespass, then a trustee as well as the organisation may also be liable.

By registering at Companies House you receive the protection of limited liability, but registration requires a number of obligations such as filing annual returns and keeping proper registers of who are the members and who are the directors. If you fail in these duties, the company and you may be fined or in extreme cases imprisoned.

### **Insuring the Organisation**

Insurance of the organisation and its activities and assets is always an important duty for trustees and trustee indemnity insurance can offer protection for trustees. The Charities Act 2006 permits charities to pay for trustee indemnity insurance unless the governing document prevents it, but remember although such insurance does provide some cover, trustees may be surprised at how limited a range of cover they will get for their premium and many charities do not for that reason take out such insurance.