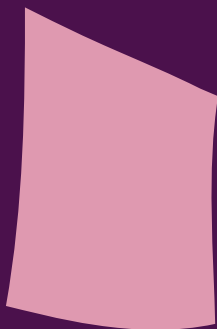


Charity and social enterprise update: trustees in the spotlight

Summer 2021



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A focus on charity trustees

The recent Kids Company case – in which the Official Receiver challenged the actions of the trustees and CEO of insolvent charitable company Kids Company – shone a very public spotlight on the position of charity trustees and senior managers.

The High Court dismissed the Official Receiver's bid to disqualify the former trustees and CEO from serving as company directors. But what lessons does the case hold for the sector? And how can charities meet some of the challenges faced by their trustees today?

Philip Kirkpatrick and Lucy Rhodes, who represented some of the former trustees of Kids Company, explore the broad impact of the case on charity trustees (page 4).

Victoria Schneider looks at the implications of the case for CEOs, and how they can avoid being seen as 'de facto' directors, on page 7.

Delegation by the board was a key issue in the Kids Company judgment: Leona Roche unpicks the principles of effective delegation, page 10.

New trustees need to be equipped with the information they need to carry out their duties effectively. Keya Advani and Rachael Southern provide a useful guide to trustee induction, page 13.

Often the only way of resolving a board dispute is for a trustee to be removed from the board, Lawrence Simanowitz looks at the issues which can arise, page 17.

Tesse Akpeki focuses on resilience and wellbeing for boards, page 20.

Finally we look at the issue of trustee liability – Laura Soley, page 23 – and the potential protections of indemnity insurance cover – Rob Oakley and Charlie Miller, page 26.

The impact of the Kids Company case



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Kids Company case

In February 2021 the High Court handed down its much-anticipated judgment in the Kids Company case, dismissing the Official Receiver's disqualification application against the charity's former trustee directors and CEO, Camila Batmanghelidjh. Bates Wells acted for five of the seven former trustees.

The proceedings resulted from the high-profile collapse of charitable company Kids Company in August 2015 after the Metropolitan police launched an investigation into what turned out to be unfounded allegations of physical and sexual abuse at the charity.

Two years later, the Official Receiver sought to disqualify the defendants as directors on the basis that they caused or allowed the charity to operate an unsustainable business model and their conduct made them unfit to be concerned in the management of a company. This could have prevented them from serving as company directors or charity trustees, or from holding certain professional offices, for periods of up to six years.

Cases like this do not usually come to trial. Even if you know right is on your side, there are uncertainties in litigation and, if you lose, the costs are immense and potentially ruinous. So most people accept disqualification regardless of whether they consider it to be justified. It is to their credit that our clients, five of the former trustees, and the other defendants did not do so.

“The most important lesson for volunteer trustees... is that the courts will stand with them when they make honest, reasonable decisions”

These proceedings have been of particular interest to the charity sector because they challenged key principles on which charities operate – including whether the ‘donation-reliant’ business model (a model operated by thousands of other charities) is essentially ‘unsustainable’ and if many charity CEOs have inadvertently assumed the role of directors.

After a ten-week trial and careful consideration of thousands of pages of evidence and the authorities, the judge concluded that, far from being unfit, the Kids Company trustees were ‘highly impressive and dedicated individuals who selflessly gave enormous amounts of their time to what was clearly a highly challenging trusteeship’; that they had made honest judgements in difficult circumstances in what they thought were the charity’s best interests; and that the public needed no protection from them.

The judge also found that Camila Batmanghelidjh had not been a de facto director of Kids Company as had been alleged.

As the judge recognised, disqualification proceedings like these, based on allegations of incompetence rather than any want of probity, carry a high risk of having a chilling effect on people’s willingness to serve as trustees, particularly for professionals and individuals involved in the management of businesses, on whom charities depend.

The courts have always been clear that the public interest demands only the very clearest cases should

be pursued against charity trustees. This outcome is a resounding victory for the defendants who have spent over five years defending the decisions they took as volunteers at a time of crisis in their charity and in the child protection system.

There are lessons that can be learned from this case about the governance of charities generally. Some of these are addressed in other articles in this update, and you can [read more in our FAQs](#). But perhaps the most important lesson for volunteer trustees, shouldering a burden on behalf of us all, is that the courts will stand with them when they make honest, reasonable judgements under difficult circumstances.

Chief executives and de facto directors



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I'm a CEO, get me out of here!

Director disqualification? That's just for trustees, right? Not so for the CEO of charitable company Kids Company. In common with the vast majority of charity CEOs, Camila Batmanghelidjh was a member of staff, not a member of the board (who were both company directors and charity trustees). But she found herself in a court room when the Official Receiver argued she was a 'de facto' director.

Read on for some practical tips that come from the case.

What is 'de facto'?

Originally this term described directors who had carried on after their appointment ended, or people who had not been validly appointed. It's since been extended to someone who has never been appointed but, broadly, has taken on that director role.

There isn't a single test for when someone is a de facto director. Charity CEOs can (and should) advise the board. They can be consulted on board decisions and they can make decisions under delegated authority (Leona's article on page 10 of this update looks at board delegation in detail). But they should not be on an equal footing with the board when it comes to directing the affairs of the company.

If Camila Batmanghelidjh had been found to be a de facto director, she could have been disqualified under the Company Directors Disqualification Act 1986, and

been exposed to other liabilities that accompany directorship.

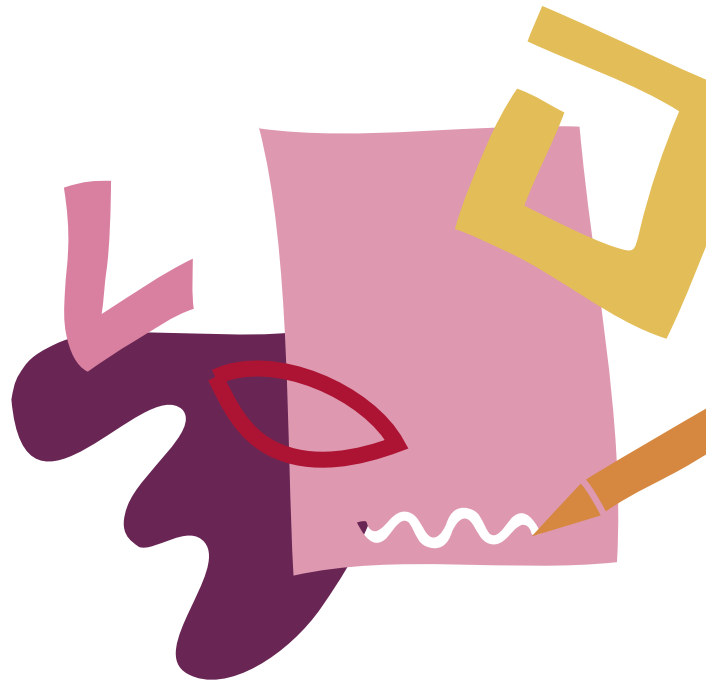
So how do other Chief Executives of charitable companies protect themselves?

You need to look at the context your charitable company is operating in: a CEO of a small local organisation will have a different role to the CEO of a large national charity. You also have to look at the activities in the round.

1. Is it clear that the board is responsible for the management of the charitable company, subject to its delegation powers? Look at:
 - The governing document: how is the board described and are there powers to delegate to staff?
 - The employment contract – how are the CEO's responsibilities described? For example, 'CEO presents a strategy, for consideration and approval by the board.'
 - Policies – are there clear role descriptions for different areas of the business, showing the executive accountable to the board? Although, remember that you won't be able to rely on a policy setting out limits if these aren't followed in practice.

2. Ensure that the CEO is not making decisions at board level. Are your board minutes clear about how decisions have been made and who is involved in them (e.g. by a formal vote of the trustees, making it clear that the CEO and other staff weren't actually taking part in the decision)?
3. Put in place a scheme of delegation. This usually covers matters that are reserved to the board, matters that are delegated and limits on the powers delegated.
4. The board has a duty to supervise any delegation. How is the board discharging this? Are there regular meetings with the CEO and a clear understanding of what will be reported and when?
5. Make sure that the CEO is not being 'held out' as a director. Consider how people both inside and outside the organisation would perceive the role.

We can conduct a health check on the role of the CEO, to give you peace of mind that you have the appropriate governance arrangements in place. For further details please [see here](#) or [get in touch](#).



Delegation and charity trustees



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Delegation

Delegation by the board is essential for the effective operation of most charities, large and small. So for charity trustees the question is not whether to delegate, but what can be delegated? To whom? And how?

What can we delegate?

Always start with your governing document. Check if the board has a power to delegate. Is it subject to any limitations? Trustees must have a constitutional (or statutory) power to delegate certain decision-making responsibilities.

Often trustees will have a broad general power to delegate decisions to any person as they see fit. Even so, there are certain decisions that shouldn't be delegated. As a matter of good governance, these 'reserved matters' should stay with the board to enable it to maintain effective control and oversight over the charity. There is no definitive list of reserved matters, but it would normally include:

- Setting the charity's overarching strategy and annual budget
- Adopting key governance policies, such as accounting policies, safeguarding policies, investment and reserves policies
- Decisions around serious incidents and reporting them to the Charity Commission

Trustee duties

'The trustee board is ultimately responsible for the decisions and actions of the charity but cannot and should not do everything.' From Principle 4 of the Charity Governance Code.

For comprehensive guidance on the duties of charity trustees, the Charity Commission's introduction to trusteeship: 'The essential trustee: what you need to know, what you need to do' is a key resource.

Charities are required to take account of a wide range of guidance issued by the Charity Commission and other regulators in relation to different aspects of their activities. We can help by conducting a [charity governance health check](#).

- Approving substantial new contracts (usually setting a value above which the decision is reserved for the trustees)
- Approving new high-risk or novel activities
- Acquiring or disposing of freehold and leasehold land

Beyond this, exactly what should and should not be delegated will depend on the scale and risk profile of your charity's work, the skillset of your executive team and board, and your organisational culture. There are no hard and fast rules around this. Rather, this is a question for your board to determine and to regularly revisit.

To whom can we delegate?

Again, check your governing document first. But charity trustees usually delegate to:

- one particular trustee (for example, to honorary officers, such as the chair or treasurer)
- board sub-committees (such as an audit and risk committee, research committee)
- staff member(s) or volunteers (chief executive officer or senior manager)

How can we delegate well?

Comply with your legal duties – trustees must comply with their duty to exercise reasonable care, skill and diligence – and so must select delegates prudently and manage the delegation itself prudently.

Promote your charity's success – before delegating powers or functions, trustees must carefully consider whether this would be most likely to promote the success of their charity in achieving its charitable purposes.

Comply with your governing document – meet any constitutional requirements. For instance, often at least one trustee must be on a sub-committee of the board.

Put it in writing – clearly record what is being delegated, to whom, whether the delegate has the authority to incur expenditure, and how often/in what format reports to the board are required. Depending on the circumstances, you might include the details in a formal scheme of delegation, or in a job description or sub-committee terms of reference.

Supervise – trustees must ensure that any delegated authority is being properly exercised, through appropriate monitoring and reporting procedures. Mrs Justice Falk emphasises this in the Kids Company judgment: 'Proper delegation does not involve abdication. There is always an overall duty to supervise.'

Trustees have significant scope to determine the extent of their delegation. The key is to ensure you manage delegation well.

Trustee induction



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What your new trustees need to know

Recruiting the right trustees is crucial for the success of your charity. But recruitment is only the beginning of the story. An effective induction process can help to make sure that new trustees are empowered to contribute fully and confidently to your charity's journey.

Getting to know the charity

As a starting point, ensure your new trustees have copies of some of the charity's key documents:

- Governing document – and in particular your charity's objects/purposes. The trustees must always make sure that their charity is carrying out its objects for the public benefit.
- Scheme of delegation – there's more about delegation in Leona's article on page 10.
- Key policies – such as conflicts of interest, safeguarding, investment, financial controls and risk management, and any trustee code of conduct.
- The latest annual report and accounts, and the most recent management accounts.
- Documents setting out your charity's vision, mission or strategy.

Understanding the regulatory landscape

New trustees need to understand the regulatory

landscape within which charities operate. You should draw their attention to the following Charity Commission guidance:

- [The Essential Trustee](#) – this sets out the key legal duties on trustees
- [Safeguarding and protecting people for charities and trustees](#)
- [It's your decision: charity trustees and decision making](#)
- [Managing conflicts of interest in a charity](#)
- [How to report a serious incident in your charity](#)
- [Any other guidance](#) that is relevant to your charity's work: for example, there is specific guidance around political activity, connections with non-charities, public service delivery and working internationally

We also suggest sharing the [Charity Governance Code](#), the [Charity Digital Code](#) and the [Fundraising Regulator's Code of Fundraising Practice](#) with new trustees.

You might also like to share the [Charity Commission's new Five Minute Guides](#) as a good introduction.

Supporting new voices

There are a number of steps you can take to help your new trustees settle into their role. The Equality, Diversity and Inclusion Principle in the Charity Governance Code encourages boards to recruit diverse trustees ([you can read more about this here](#)). But once new trustees are recruited, the induction process is crucial to set the tone and demonstrate that the board is creating a genuinely inclusive space.

- Schedule individual pre-meetings between the new trustee(s) and the Chair/CEO. This allows trustees to understand the organisation's history, identify areas of interest, and flag any concerns.
- Aim for new trustees to meet with other members of the senior management team to find out about the work they are doing and what their priorities are.
- Check whether the existing board meeting schedules work for your new trustees. Are your board meetings scheduled during typical childcare hours, or on days of religious/cultural significance? Do meetings fall within study schedules for trustees in education?
- Make accessibility arrangements such as translators, braille or audio support, or disabled access to premises.
- Ensure the new trustee is invited to speak at their first board meeting.

Trustees Unlimited

[Trustees Unlimited](#) offers a solution to the issue many organisations face – trying to recruit high quality trustees and non-executives in a rigorous and yet cost-effective way.

Whether you are looking to serve on a board yourself, or are looking to strengthen your board, Trustees Unlimited can:

- Find people with great and relevant experience
- Develop the skills of potential and existing trustees and connect them with boards
- Help individuals and boards thrive through coaching, development and support

- Consider whether training for the whole board is appropriate, so the onus is not on new trustees who might feel “different” to those already at the board table to assimilate to the existing board culture.
- Seek feedback on the induction process.

Practical tips

Some practical steps we’ve found useful as new trustees of charities ourselves are:

- Working with a fellow ‘trustee buddy’ or ‘trustee mentor’ during the first year as a new trustee
- Setting up informal individual chats with fellow trustees
- Identifying allies on the board whose support might make you more comfortable to voice difficult or challenging opinions
- Engaging in trustee team-building activities – Rachael took part in a Zoom puppet-making workshop with fellow trustees of an arts education charity!



Trustee and leadership team development training

Bates Wells can work with your executive team, chair or board to deliver bespoke in-house training suitable for all of your trustees: whether in their first trustee role, new to your charity or just in need of

a refresher of their duties. For more information, see our [Trustee and Leadership Team Development training](#) or get in touch with your usual contact or partner [Simon Steeden](#).

Removing a trustee



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In the lifecycle of every charity, disputes between trustees are bound to arise. Sometimes these can become very bitter, with trustees locked in position. Ultimately the only way forward may be for some trustees to leave, but what if they don't want to go?

A charity's governing document will often provide a mechanism for trustees to be removed by resolution of their fellow trustees. But even this seemingly clear route may not be straightforward. Trustees may be squeamish about voting to remove a colleague, particularly in their presence at a meeting. Trustees threatened with removal usually have to be given notice, and have a right to have their case heard.

To avoid confrontation in a meeting, a written board resolution may be possible, but this won't always be the case, and may require unanimous approval by the other trustees. Sometimes removal may be conditional on specific grounds set out in the governing document – such as when a trustee has failed to attend three meetings in a row.

And there are many potential bear traps.

A trustee may be able to claim that a decision to remove them is invalid if they are not given notice of the meeting where the resolution is passed. They may argue that they've been denied information which has been used to make the decision about them (though in some circumstances it can be withheld on grounds of confidentiality).

“There are many potential bear traps. A trustee may be able to claim that a decision to remove them is invalid...”

An outdated governing document may need changing to make the removal possible (or easier), but this can be difficult. We always suggest that charities include workable powers of removal before the worst happens.

While employment law doesn't apply to volunteer trustees, so there's no risk of an unfair dismissal claim, you should still try to follow a fair process.

In membership organisations, the challenges can often be greater still. A trustee may run amok, but retain the support of most voting members. In many membership organisations the power to remove a trustee may rest with the membership, and so to achieve removal, the members must be persuaded. If the trustee is also a member, do they need to be removed from membership too? That could raise other issues.

Only very rarely will the Charity Commission intervene. That said, in a recent case it held that trustees' failure to resolve their differences amounted to mismanagement /misconduct. Following a statutory inquiry, the newly appointed trustees were instructed to consider whether the former trustees should be made to pay personally to cover losses caused to the charity through their misconduct. But in the vast majority of cases the Commission is not interested in intervening in what it perceives as private disputes between individuals, and does not provide a means of recourse to resolve a trustee dispute.

Given the potential damage that can be caused by a trustee dispute, persuasion is generally better than force. Remember that trustees have a legal duty to act in the interests of the charity – on several occasions I have seen trustees persuaded to accept that, despite their strongly held views, insisting on doing things their way would be contrary to the charity's interests.

If you do remain convinced that removal is the only way, then pay attention to your governing document, seek to apply principles of fairness as far as possible, and prepare your case carefully.

Resilience, wellbeing and boards



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Nurturing resilience and wellbeing

In the face of the impact of Covid-19, isolation and loneliness is at an all time high. Life events such as death, relationship break-up and physical illness, and a rise in poor mental health, have led to people feeling anxious, stressed, worried, sad, bored and frustrated. Resilience and wellbeing are vital leadership competencies and are at the core of trusteeship.

Psychological resilience is the ability and capacity to withstand and adapt to uncertainty, challenges and adversity, and emotionally cope with a crisis. Attributes include coping, control, competence, confidence, connection, character and contribution. Finding meaning and building optimism involves accepting the past, realistically assessing the present and focusing on the future.

Wellness is a dynamic process of change and growth that enables flourishing, nourishing and thriving. Wellbeing delivers a sense of meaning and an ability to manage stress and embrace life positivity. Trustee boards committed to wellbeing treat people with kindness and achieve sustainable results.

The Charity Governance Code recognises that boards work with executives to shape a supportive culture focusing on the wellbeing of the staff and the board.

“The board, through the relationship with the senior members of staff, creates conditions in which the charity’s staff are confident and enabled to provide the information, advice and feedback necessary to the board.”

With boards working remotely, trustees need to stay connected while maintaining healthy, trusting relationships that enhance wellbeing.

Top tips to nurture wellbeing

1. Trustees create environments where there is **psychological safety**. People at every level in the organisation talk about their concerns, and plan appropriately. Board members have difficult conversations and make tough decisions.
2. **Mutual support** and help is provided by board members to each other and to the Chief Executive. Role modelling to support staff in this era of uncertainty and scenario planning is key. Board preparation and participation boosts confidence, competence and planning for the future. Board members acknowledge that people are experiencing intense anxiety. They build in time for online social activities before or after board meetings for team working and to share what is on their minds.
3. **Inclusion, diversity and equality** provide creative and innovative spaces to tackle today's challenges.
4. **Work at different levels**. Strategies or interventions work on three levels – individual, executive and board – to deliver sustainable results.

5. **Compassionate accountability** ensures that board members and the executive feel heard, seen and understood. Engagement goes up as everyone feels involved in shaping solutions that affect them.
6. **Collaboration** increases accountability, identifies goals that are achieved and identifies alternative ways to perceive and respond to situations.
7. Boards are **agile, responsive, proactive** and situationally aware.
8. The **chief executive** avoids any surprises, experiments with alternative solutions and has regular check-ins with staff.

Poignantly, resilience is here to stay. An effective board will do well to embrace it to lead in an emerging normal.

And remember that hope underpins wellbeing. In the words of Charlie Mackesy, 'We all have to find ways to be hopeful.'

Personal liability



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Personal liability: how worried should we be?

This question inevitably crosses the mind of anyone contemplating charity trusteeship. And while personal liability for charity trustees is rare, it's important to be aware of how it might arise.

There are two main types of liability: potential liability to third parties and potential liability to the charity itself for breach of duty.

Third party liability

Charities exist in a variety of different forms. Often charities are set up with a corporate form, such as companies limited by guarantee or CIOs, which have 'limited liability'. Many, frequently older charities, have an unincorporated form such as trusts or unincorporated associations (membership associations and the like), which do not.

Limited liability status gives protection for the trustees of corporate charities against liability to third parties other than in exceptional circumstances, such as where there has been wrongful trading by the trustees. A corporate charity has separate legal personality, which means it can hold assets, be sued and take on liabilities in the charity's own name.



In contrast, trustees of trusts and other unincorporated charities are potentially exposed to more risk because these charities have no limited liability and no separate legal personality. This means that assets and liabilities, such as commitments under contracts, must be taken on by the trustees in their own name. While the trustees have a right to meet liabilities from the charity's funds, if there are insufficient funds to meet those liabilities, the trustees have to meet any shortfall from their own pocket.

This can of course be worrying. But, trustees of trusts and other unincorporated charities can take steps to minimise this risk; they can take care to take on liabilities which are comfortably covered by the charity's funds, they can limit their liability in contracts and they can take out appropriate insurance such as public liability insurance to cover risk at events and so on. They can also think about converting the charity to a corporate form!

Breach of duty

However, the benefits of limited liability shouldn't be overstated. Trustees of all charities, corporate and unincorporated, are in the same position in relation to their potential liability to the charity itself. All trustees, regardless of their charity's legal form, can potentially be personally liable for loss to the charity caused by their breach of duty in acting as trustee, such as negligent investment, application of funds outside the charity's objects or loss caused by fraud.

Trustees can mitigate risk by having robust governance processes, taking appropriate advice and so on.

Trustees can also take out trustee indemnity insurance, although insurance will not cover all losses – the article on page 26 of this update looks at trustee indemnity insurance in more detail. In particular, insurance will not cover loss caused by a trustee's own fraud or dishonesty.

The Charity Commission has power to relieve trustees from liability where they have acted honestly and reasonably.

Thankfully it is rare for trustees to be found to be personally liable, although it does happen. In one recent example, which was the [subject of a Charity Commission inquiry](#), trustees of a charity had to repay £2 million in respect of loans inappropriately paid to a private company linked to one of the trustees and unauthorised payments made to trustees.

Trustee indemnity insurance



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Trustee indemnity insurance – what you need to know

What is Trustee Indemnity Insurance (TII) and do I need it?

TII provides charity trustees with cover for claims brought against them in their personal capacity while acting as trustees. This is in contrast to claims brought against the charity itself.

Why is it important?

As Laura explains in her article on page 23 of this update, from time to time, charity trustees can find themselves the subject of legal claims in their personal capacity. This can happen if the charity is unincorporated, as it will have no ‘legal personality’ of its own. Claims can also be brought against the trustees of incorporated charities in their personal capacity. And trustees may find themselves the subject of investigations by the Charity Commission and/or other regulatory authorities. They may run the risk of facing personal liability and significant legal costs.

A charity trustee will normally be entitled to be indemnified from the charity’s funds for costs reasonably incurred in the discharge of their duty. But if the charity’s funds are insufficient, the trustees may be exposed.

Does my charity have TII?

Many – but certainly not all – charities will have TII as part of a wider insurance policy covering other risks which the charity is required by law to have insurance for. It might be called ‘Directors & Officers Liability Insurance’ – but the important thing is what it covers. Standalone policies can be bought from many insurers.

Can my charity buy TII for me and my fellow trustees?

Many charities’ governing documents will contain specific authority for the charity’s funds to be used for TII. But even if those documents are silent, the Charities Act 2011 provides a general power to buy TII using charity funds.

Once I’ve got TII, what do I need to do?

Trustees should check their TII regularly to make sure that it is fit for purpose. If the charity is renewing its general policy, check that the wording hasn’t changed.

So what do I need to look for?

As with all insurance policies, the devil is in the detail and what trustees need cover for will depend on the nature of the charity. But some of the main areas to make sure you are covered for include:

- Claims relating to insolvency
- Charity Commission and other regulatory inquiries
- Breaches of duty or trust
- Negligence
- Defamation
- Employment tribunals and disputes
- Health and safety issues (including corporate manslaughter)

You will want to ensure that, at a minimum, the insurer will pay defence costs, awards of damages (compensation) and the claimant's costs. You should check that the limit of liability, which is the maximum that the insurer agrees to pay out, is sufficient.

It's also important for the trustees to check what the insurers have been told about the charity, particularly making sure that the insurers are aware of all the charity's main activities.

Your broker should be able to help ensure that the risks are adequately covered, but if you are in any doubt, consider seeking external advice. If you think you may face a claim, let your insurer know as soon as possible.

Once the cover is in place, make sure that the policy requirements are strictly complied with, noting especially the obligations to notify the insurers if

there's an event that might give rise to a claim. It's also a good idea for the trustees to check that the premiums are actually paid.

There will always be limits to what's covered. Not all of the potential liabilities facing the trustees of an unincorporated charity will necessarily be covered, for instance. And claims for breach of trust won't be insured unless the trustees have been acting in good faith. But knowing there is appropriate insurance cover in place should help trustees who are already shouldering a heavy burden sleep better at night.



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The information in this update is necessarily of a general nature. Specific advice should be sought for specific situations.