



## **Unambiguous advice on the liabilities of trusteeship:**

Qualitative research and analysis  
by  
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**Research Findings  
June 2006**

This research aims to:

- To build on the scoping report produced by the Charity Trustee Networks and associated documents, in order to develop learning to inform the production of advice to trustees.
- Through qualitative research with trustees, professionals, stakeholders, and insurers; gather and collate views on advice and information about trustee liability, identifying gaps; identify real and perceived barriers and the extent to which they affect the recruitment of trustees and the management of risk;
- To identify case studies from which learning can be drawn in order to dispel myths and barriers.
- To produce recommendations on content, style and format for effective and realistic delivery of advice to trustees that are useful for the specific needs of the Hubs priority audiences.
- To assess policy, practice and attitude of insurers and the Charity Commission towards Trustee Indemnity Insurance.

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## **Unambiguous advice on the liabilities of trusteeship: Qualitative research and analysis**

### **Introduction**

Trustees of voluntary and community sector (VCS) organisations are individuals who commit, on a voluntary basis, to be collectively responsible for the legal and financial management of the organisation. They need to govern with confidence. Many individuals become trustees 'because they were asked' or 'they wanted to be helpful' and 'were told not to worry' about their liabilities. Recent reports that staff in the voluntary sector bring 6% of tribunal cases and that 1 in 4 charities had faced a tribunal will only raise trustees' fears. This, and difficulties purchasing appropriate and affordable insurance cover, has the impact of undermining organisations, limiting both service delivery and the recruitment and deployment of staff and volunteers.

The purpose of this study is:

- To build on the scoping report produced by the Charity Trustee Networks and associated documents, in order to develop learning to inform the production of advice to trustees.
- Through qualitative research with trustees, professionals, stakeholders, and insurers; gather and collate views on advice and information about trustee liability, identifying gaps; identify real and perceived barriers and the extent to which they affect the recruitment of trustees and the management of risk;
- To identify case studies from which learning can be drawn in order to dispel myths and barriers.
- To produce recommendations on content, style and format for effective and realistic delivery of advice to trustees that are useful for the specific needs of the Hubs priority audiences.
- To assess policy, practice and attitude of insurers and the Charity Commission towards Trustee Indemnity Insurance.

### **The research context**

This research has taken place in the context of a wider concern about the risks associated with volunteering and the costs incurred by VCS organisations in protecting themselves against those risks. In the last few years there have been two initiatives in particular that address these issues.

#### The Insurance Cover Working Group (ICWG)

The ICWG was formed in July 2002 in response to a large amount of Ministerial correspondence from the VCS regarding difficulties to do with insurance cover in the sector. Alison Millward Associates were commissioned to undertake a 'snapshot' survey of the problems facing the VCS.

The insurance problems experienced by the sector, as summarised in the report, included:

- Average increase in premiums of between 30 and 100% per annum
- Withdrawal of cover and often at very short notice
- Increasing number of exclusions, especially for care work, youth work and outdoor activities

- Disproportionately negative effect on small organisations and organisers of one-off events, where the claims history is small
- Inconsistent approach by insurance companies in assessing risks and pricing premiums, even for similar VCS organisations
- Lack of accessible and competitive insurance in the market place
- Transfer of excessive insurance requirements from local authorities onto VCS service providers and hirers of local authority premises and equipment.

The report also looked at the issue from the perspective of the insurance industry. Many insurers lack an understanding of the sector, preferring to involve themselves in risks with a higher degree of uniformity. Insurers are attracted to businesses where risk management is maintained to a very high standard. Good working practices, effective training, and supervision are considered of paramount importance.

The report concluded that most local authorities distanced themselves from the problems faced by the VCS. Local authorities too face spiralling insurance costs and wish to minimise the number of claims made of their insurers.

As a result of the report a 'Programme of Action' was put to the Home Office Minister and was made public in July 2004.

The Action Points agreed were:

1. The Home Office Minister for Communities to champion the cause of insurance for the VCS
2. Taking forward work on employers' liability insurance, legal costs and full cost recovery, ensuring the interests of the VCS are taken into account
3. Drawing together practical advice and expertise in order to increase the capacity of the sector to deal with insurance issues
4. Making better practical arrangements for working with local government
5. An ongoing dialogue between the VCS, insurance industry and government, facilitated by the Home Office.

The ICWG agreed to continue to meet (six monthly) and act as an 'honest broker' on behalf of the VCS. The ICWG assists in disseminating best practice and acts as a focal point for insurance issues on behalf of the VCS and insurance industry. The ABI has agreed to host some seminars or conferences to inform the sector more widely.

#### Risk, risk management and volunteering in England

The Home Office commissioned Volunteering England to examine risk and risk management as it applies to volunteering. This was linked with the work of the Volunteering Hub in a year long project.

The objectives of the research include identifying:

- Whether or not insurance premiums have risen in relation to volunteering and if so in what sectors, and for what activities;
- Whether or not there has been an increase in negligence claims being brought against volunteers, if so in what sectors and for what activities;
- What policies and procedures are currently in place for managing risk within the volunteering sector.

There are now three reports emerging from the research, available on the Volunteering England website:

- Getting a Grip (literature review, October 2005)
- Reasonable Care (report of survey of organisations and individuals, November 2005)
- Cautionary Tales (case studies, April 2006)

A toolkit for practitioners is currently in draft. It will provide practical assistance to VCS organisations. It includes an explanation of the potential risks and liabilities of volunteers, the importance of risk management and record keeping, and the relevant insurance options. The emphasis is on volunteers who are engaged in the service delivery functions of the organisations, rather than volunteer trustees.

## **Methodology**

For this research study the following methodology has been adopted:

A Project Advisory Group was convened to ensure that the work met the needs of the different interest groups. Given the tight timescale for the project, the Advisory Group only met twice: once as a Round Table discussion, to bring together its areas of expertise, share information and identify contentious issues; and then at the end of the project to receive and comment on the final report. However, individual members were approached through email and telephone for advice and information throughout the duration of the work. Members of the Advisory Group are listed in Appendix 1.

A review of current advice to trustees was undertaken and used to plan the schedule of topics for the focus groups, interviews, and case study interviews. Information obtained from this has been integrated into this report.

We held focus groups with a total of 25 trustees who have encountered liability problems, with trustees of small and medium sized voluntary and community sector organisations. In addition, two face-to-face interviews were held with trustees who could not attend the focus groups. Issues covered by the focus groups included their initial concerns about personal liability as a trustee; where they go for advice or information about liability; in reality whether any of their concerns have been realised; what their insurance covers them for; what advice should be made available to trustees about liability, and in what form. Composition of the focus groups is given in Appendix 2 and the schedule of questions is given in Appendix 3.

We held a focus group with managers or their representatives from local infrastructure organisations (LIOs) and small and medium sized VCS organisations, to explore the real and perceived barriers around trustee recruitment and liabilities. There were six participants altogether; two were managers of medium sized charities; two were managers of LIOs, which were also charities; one was a development worker for a large LIO; and one was a regional advisor for a national charity that delivers its services through local branches across the country. The schedule of questions is given in Appendix 4.

A Round Table discussion was held with legal and insurance 'experts' to provide information about the real legal issues around trustee liability and how these can be minimised. A list of participants is given in Appendix 5.

Trustees who had encountered liability issues were interviewed and case study reports were prepared, giving the context, actions that led to liability, outcome, and lessons learned. The final wording of the each report has been agreed with its subject. The extent of detail provided has depended entirely on the willingness of the subjects to reflect on and discuss their experience in depth. In three of the case studies more than one person has been interviewed, to gain a wider perspective. The findings from the case studies are presented in the body of the report. Individual reports are presented in Appendix 6. For one case study we have been unable to include the report because of a confidentiality clause signed by the subject as part of the case settlement, but we have been able to incorporate the key lesson into the body of this report.

A review of the current policy and practice of insurers was conducted with eight representatives from the insurance industry regarding their policy, practice and attitudes towards providing Trustee Indemnity Insurance (TII). Of these, four were from insurance companies, three were from brokers, and one was an insurance consultant with technical expertise in TII. Of the four insurance company representatives, three were specialists in charity insurance. All three brokers were specialists in charity insurance. The schedules of questions are given in Appendices 7 and 8.

Finally, we interviewed the Charity Commission to clarify its attitude towards trustee liability and assess its policy, practice and attitude towards organisations seeking to purchase Trustee Indemnity Insurance on behalf of their trustees. The schedule of questions is given in Appendix 9.

In all of the focus groups and interviews (except for the one with the Charity Commission) we gave an undertaking that the contributors would remain anonymous and that nothing in this report would enable any experiences or comments to be attributed to the individuals or organisations concerned. We believe that this was essential, ensuring that people spoke freely and in detail, to enrich and strengthen the study findings.

### **Structure of this report**

Part A of this report addresses the liabilities of trusteeship. In the first section it sets out the legal situation, including defining who is a trustee; the role of the Charity Commission; the responsibilities of trustees and their duty of care; specific issues relating to employing staff; the legal status of the charities and how this affects trustee liability; how trustees can minimise the risks; and taking legal action. The information presented in this section is drawn principally from the desk review, Round Table discussion, the interview with the Charity Commission and additional information provided by members of the Project Advisory Group.

The second section of Part A addresses the concerns and experiences of trustees in relation to their responsibilities and liabilities. This includes their understanding of their role; initial concerns when becoming trustees; emerging concerns; liability as a barrier to recruiting trustees; experiences of formal proceedings and liability concerns; the relationship between trustees and their manager and staff; and risk management in the sector. The information presented in this section is drawn from the focus group discussions with trustees and professionals, and from the case studies.

The third section of Part A addresses the information to trustees relating to the responsibilities and liabilities of trusteeship. This includes an overview of the

information that is available to them; their initial needs and what was provided, the gatekeepers of advice and information; keeping abreast of changes that affect liability; getting advice when problems arise; identifying the gaps in advice; and making information and advice available. The information presented in this section is also drawn from the focus group discussions with trustees and professionals, and from the case studies.

Part A concludes with recommendations on the content, style and format for effective and realistic delivery of advice to trustees that are useful for the specific needs of the Hub's priority audiences.

Part B of the report addresses the issue of insurance, and in particular Trustee Indemnity Insurance. The first section includes the range of insurance options that are available, insurance relating to employees and volunteers, and risk management and insurance. The information in this section is drawn principally from the desk review.

The second section of Part B addresses Trustee Indemnity Insurance (TII). This includes purchasing TII and who pays; what it does and does not cover; the cost and how premiums are set; claims made against TII; providing advice to the sector; and attitudes towards TII from the Charity Commission and the insurance industry. The information in this section is drawn from interviews with insurance companies and brokers, and with the Charity Commission.

The third section of Part B reports on the experiences and views of trustees and managers in relation to insurance, and especially TII. The information in this section is drawn from the focus group discussions with trustees and professionals, and from case studies.

## **Part A: The liabilities of trusteeship**

### **A1 The legal situation**

Information in this section is drawn from the desk review, Round Table of experts, interview with the Charity Commission, and additional information provided by members of the Project Advisory Group.

#### **Who is a trustee?**

Normally the trustee body is defined (what they are called, how they are elected etc) in the governing document of the charity.

The trustees of a charity are defined by what they **do**, not what they call themselves. Anyone who is one of the persons having the general control and management of the administration of the charity, whether or not the charity is registered and whatever its legal status, is a charity trustee.

The term 'trustee' is used in the context of this research and generally in the sector as shorthand for 'charity trustee'. The term 'trustee' (as opposed to 'charity trustee') includes a trustee of a family trust or a pension fund (ie a trust with no charitable purpose). Trustees (charitable and other) are governed by the Trustee Act 1925. Charity trustees are also governed by the Charities Act 1993.

Directors of charitable limited companies are charity trustees and are governed by the Charity law and Company law.

If the charity is registered, one person fills in the registration form but each trustee has to sign a declaration, so they should know that they are trustees. Each year there is an annual return that has to be completed, and this is signed by one trustee on behalf of all. This lists any trustees that have left and those that are new. The trustee who signs makes a declaration to the effect that the information they have given has been brought to the attention of all the trustees.

#### Young trustees (ie under 18)

Trustees of unincorporated charities have to be over eighteen to act. In the case of charitable companies it is possible in certain circumstances for persons under eighteen years of age to act as charity trustees. In some circumstances parents can be liable for the actions of their children. This would normally only arise where the parent has become involved with the running of the charitable company by encouraging the child/charity trustee in certain actions.

#### The risk of the shadow trustee

The shadow director is not formally a trustee, but someone who exerts influence and even control over a charitable company. This might include a spouse of a trustee who gets involved, an observer at meetings who becomes involved in making decisions, or a member of an Advisory Committee that exceeds its remit. In such circumstances, these may be found liable in the event of things going wrong.

#### Disqualification from trusteeship

Section 72 of the Charities Act 1993 states that some people are legally disqualified from acting as trustees (by reason of, for example, criminal conviction, bankruptcy or removal as a trustee). It is a criminal offence to serve as a trustee while disqualified from doing so. Charities are expected to carry out eligibility checks, and more vigorous checks are expected when trustees have direct contact with vulnerable service users.

Section 72(1) of the 1993 Act empowers the Charity Commission to grant a waiver and allow a person disqualified from trusteeship to accept a trustee post. However, this is only likely when it would be 'in the interests' of the charity.

### **The role of the Charity Commission**

The Charity Commission's general statutory function is to promote the effective use of charitable resources. Their powers of regulation are set out in the Charities Act 1993. The Commissioners are empowered by statute to give advice and, provided such advice is given in response to full disclosure of relevant information, trustees who act in good faith in accordance with the advice are protected by statute against allegations of breach of trust. The Charity Commissioners (and the courts) have very wide powers of investigation into mismanagement, removal of offending trustees, and cancellation of registration.

Most routine correspondence is between the Commission and the named correspondent of the charity. This is administratively convenient to both the Commission and the charity. Contact with trustees other than the named correspondent normally only occurs when that trustee initiates it or if there is some other reason that requires it.

The Commission does not keep statistics on the number of approaches it gets from trustees regarding legal proceedings as these approaches may be part of wider ranging issues. A charity has to ask the Commission for permission to take proceedings that a court would deal with under jurisdiction over charities rather than contract or tort<sup>1</sup>. It estimates that these requests for permission probably total not more than 20 per year.

Queries from small charities are normally dealt with by the Advice and Orders section of the Commission, and those from large charities by the Large Charities Unit. The Commission has recently set up 'Charity Commission Direct', a one-stop-shop for all enquiries and requests for service. This acts as a reception point so that enquires can be checked for importance and channelled to the appropriate part of the Commission.

The general rule regarding the Commission's role as advisor and regulator is that any trustee or charity can seek its advice, but if they have acted in bad faith (dishonestly) the Commission may have to take a regulatory interest. **Cooperation** (meaning that the trustees are concerned to get the affairs of the charity onto a proper footing) is key. The Commission's priority is to safeguard the interests of the charity's beneficiaries and to ensure that the charity is operating properly. It is important that trustees understand their role and duties.

If trustees take an honest and open approach to the Commission then it can help them to put things right. The only exceptions would be if there has been a crime committed (in which case they would have no alternative but to report the matter to the appropriate authority) or where there has been a substantial loss of funds due to a significant breach of duty by trustees.

The Charity Commission draws a distinction between its regulatory and advisory roles in its publications. It refers to legal obligations (regulatory) and good practice (advisory). A lot of its work is advisory and it generally only uses its statutory powers in situations where it does not have the full cooperation of the trustees (see section on Inquiries below).

### **Formal Inquiries conducted by the Charity Commission**

The Charity Commission opened 325 formal Inquiries during 2005. Most were prompted by complaints, but some arose from queries or discrepancies in the annual accounts supplied by the charity itself. Complaints often come from other members of the charity (employees, trustees of volunteers) or sometimes from beneficiaries.

The Commission has reviewed the circumstances in which it might open a formal Inquiry. It will only do so if it cannot get the cooperation of the trustees and will therefore need to open an Inquiry in order to exercise its powers under the Charities Act 1993 Section 18 (for example to freeze a bank account). The number of formal Inquiries will thus reduce considerably, and the Commission believes this is a better use of its resources.

### **The responsibilities of charity trustees**

The duties and responsibilities of a charity trustee are set out in the Charity Commission publication *The Essential Trustee CC31* and include:

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<sup>1</sup> A tort is a civil wrong that causes injury to another

- Setting the strategic aims, objectives and directions for the charity
- Acting as a 'prudent person of business'
- Protecting the assets – the property and the name of the charity
- Identifying and managing risk
- Complying with the governing document, statutory duties and trust law

Charity trustees are responsible for:

- Their own conduct;
- The conduct of others which they have authorised or ratified; and
- Conduct which, though not authorised or delegated/ratified, takes place in the course of the charity's normal business and is what the employee or volunteer was employed to do.

The legal relationship between a charity and its volunteers is governed by the overall matrix of law. For example, if trustees occupy premises, there are duties to volunteers coming on to it. If they are operating activities, they will owe them a duty of care under the normal rules of negligence and in a multitude of other areas (eg duties under Health & Safety and Data Protection legislation).

The law of 'vicarious liability' arises where there is a wrongful action or omission by an employee during the course of their work. While the action or omission was not that of the trustees, the law holds them responsible for the misconduct of those whom they control. Some volunteers become employees through their actions, without trustees realising it. Liability might arise if trustees directed or authorised a volunteer to do something which later turned out to create a liability or if the volunteer was the agent (ie acted on behalf) of the charity.

Vicarious liability does not apply in relation to people who were working for the charity but not liable to be controlled by the trustees in the performance of their work (such as independent contractors).

A particular problem for trustees is the extent to which they can be cognisant of all that is being done by the charity and its staff. As one commentator observed '*good corporate governance is about the checks and balances charities have in place when things go wrong. Some are to do with the quality of information that is fed to trustees*'.

Trustee duties are derived from the deed or document governing the trust, from statute and common law.

Trustees cannot delegate their powers unless the constitution of their charity contains a power of delegation or they are entitled to make use of the statutory power to delegate set out in the Trustee Act 2000. If there is a power of delegation, trustees continue to be responsible for supervising how those delegated powers are exercised. Trustees could be held personally liable if they have been negligent in the way the power of delegation has been implemented or monitored. Delegating powers does not relieve trustees from responsibility for the solvency or proper administration of the charity.

A charity with an income or expenditure of more than £10,000 is required to have its accounts assessed and approved by an independent financial examiner.

A charity which is incorporated with an annual turnover of £90,000 or more is required to have its accounts audited by a registered auditor, as does one with a gross income of £100,000 or more.

### **Types of liability**

There are two types of potential liability for trustees:

- Liabilities to third parties which occur in the course of running the charity. Personal liability of trustees depends on the legal form of the charity.
- Liabilities to the charity either for breach of trust, fraud or wrongful trading.

### Liability to third parties

All legal relationships – with suppliers, funders, staff and possibly volunteers – carry the risk of legal liability. The liability that trustees have in relation to volunteers may depend on the degree of control that the trustees have (for example in selecting volunteers, controlling how tasks are performed, and suspending or terminating the arrangement).

The position of the trustees when a claim is made differs depending on the legal status of the charity (an incorporated charity, a trust, or an unincorporated association, as explained below).

### Liability as charity trustees

There are certain duties placed on charity trustees. If a breach of duty gives rise to a loss to the charity, the trustees are vulnerable to a claim to reimburse the charity for the loss caused. Such a claim may be instigated by those trustees who are not in breach, or in certain circumstances by the Charity Commission or the Attorney General.

Any charity trustees (whatever the legal form of the charity) run the risk of financial penalties and/or personal liability if they:

- Cause loss to the charity by acting unlawfully or beyond its objects or powers
- Commit the charity to debts which amount to more than its assets
- Commit the charity to act fraudulently
- Act negligently (which can be a negligent act or a negligent omission to act)
- Allow a conflict of interest to develop where personal gain, or gain for a family member or friend, is obtained at the expense of the charity
- Carry out unpermitted political activity
- Act as a charity trustee when disqualified
- Fail to comply with relevant statutory requirements in areas such as health and safety, trades descriptions and financial services
- Fail to deduct an employee's PAYE or national insurance contributions.

### Indemnity from trust funds

Trustees of unincorporated charities, if acting properly, have a statutory right to an indemnity out of the funds of their trust. That is often buttressed by explicit indemnity provisions in the governing documents. The extent of that indemnity will depend on the particular circumstances and the wording of the particular document, so they are not so much excused liability, as recompensed for any liability they incur.

The liabilities of incorporated charities will generally be the responsibility of the charity rather than the individual trustees. An incorporated charity is a legal entity which can incur debts in its own name.

### **The duty of care**

Under the Trustee Act 2000 a trustee's duty of care is to exercise such care and skill as is reasonable in the circumstances. This applies to all trustees without any specialist knowledge. However, if a trustee claims to have any specialist knowledge, then that additional level of knowledge or skill will in effect raise the level of their personal duty of care. Similarly, if they are a professional person, the level of their duty of care will be that which it is reasonable to expect of someone from their profession.

This statutory duty of care replaces the common law duty, with the aim of providing certainty and consistency, and making it more difficult to ignore or overlook.

### **The responsibilities and liabilities associated with employing staff**

The main areas that ACAS<sup>2</sup> have calls from charities (both trustees and workers/possibly volunteers) are around:

- Fixed term contracts
- Termination of contracts
- Dealing with part time staff
- Holiday allocation

ACAS observe that there is often a lack of Human Resources expertise in charities (especially small ones), and no legal professional knowledge. People often struggle and make bad decisions.

There are various rules around fixed term contracts, e.g. they can only be issued for up to 4 years, unless objectively justified. Usually they are for 6 to 12 months.

ACAS recognise that the nature of a charity as an employer is different to other organisations in that they are often 'living week by week' and sometimes they cannot employ someone to the end of their contract and do not have contingencies to pay for redundancy (for example). They advise them to apply to the Redundancy Payment Fund which will interview them and may pay outstanding holiday pay, redundancy etc. Employment law relating to fixed term contracts and redundancy is subject to changes in the law and trustees would be advised to regularly check on the ACAS website.

In general trustees should ensure that they do not take on ongoing liabilities for which they do not have sufficient funds. If the funds are under threat, the trustees should take legal advice about terminating their ongoing liabilities.

The pitfalls for charities as employers are identified by ACAS as:

- Not issuing employment contracts / written statements

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<sup>2</sup> The Advisory, Conciliation and Arbitration Service that works to improve organisations and working life through better employment relations. It has a help line.

- Not have disciplinary and grievance procedures in place and up to date
- Health and safety regulations not being followed to comply with the 'duty of care'.

ACAS can only give advice on best practice; if people wanted specialist employment information they would direct them to Citizens Advice. They also give out Health and Safety and Inland Revenue numbers to people and the redundancy payments office. They sometimes refer people to Business Link.

From a conciliation point of view they realise that trustees are involved in dismissal decisions and have to attend tribunals to defend them. Management Boards are part of the appeals process and make decisions on employment rights. Tribunals are expanding their awards to include 'hurt feelings'. This would not be covered by insurance and has a lower burden of proof.

The perception of ACAS is that the sector is different to others in that in other professions people would move on but people become entrenched in charities. They try and get agreement about developing professional working relationships.

ACAS class small organisations as those that employ from 10 – 50 employees. They are not able to quantify how many they refer for legal advice.

### **Legal status and its effect on liability**

#### Registration as a charity

The Charity Commission is the registrar and regulator of charities. Registration is compulsory for a large number of charities but it also brings advantages, for instance:

- Many charitable foundations will only give to registered charities
- Increased credibility in asking for donations
- Automatic entitlement to rates relief

The main disadvantages appear to be the bureaucracy involved, the requirements imposed by the Charity Commission, and the Charity Commission's powers if an organisation is abusing its charitable status.

An organisation that is charitable in nature and with an annual turnover of over £1,000 is generally obliged to register unless it is a community interest company. Campaigning is a proper interest of a charity provided that it is not of a nature nor on a scale that undermines the charitable nature of the organisation. There is information regarding this in the Charity Commission's publication *Campaigning and Political Activities by Charities CC9*.

The liabilities of trusteeship are the same irrespective of whether the charity is registered or not.

#### Incorporated charities

The commonest form for large charities is a company limited by guarantee, which does not have shares or shareholders and the liability of whose members is limited by a specified sum of money guaranteed by them, usually a nominal £1 each. Should the funds of the charity be insufficient to meet the liabilities, then generally the charity will be put into insolvent liquidation but the trustees' personal assets will not be at risk.

Incorporated charities are subject to two separate regulatory regimes: those relating to charities and to limited companies. In the Companies Act alone there are more than 200 provisions for imposing fines and penalties upon directors. The directors are also treated in law as charity trustees, whether or not they are called that.

A company can enter into contracts and legal relationships in its own name, which means that on the whole it is the company that is liable for its debts, not the individual trustees.

If a member of the public sues an incorporated charity, it is the charity that is liable. The loss may be covered by the charity's insurance policy, but if not it is borne by the charity's own funds. If the charity is unable to pay (ie if its assets cannot cover it), then it will be insolvent.

If an employee or volunteer harms someone during the course of their work, then the charity (not the trustees individually) may be liable to compensate them. This is additional to the employee or volunteer's individual liability.

Trustees may be personally liable to the full extent of their personal financial resources if they commit any breach of trust or any of their many statutory obligations. An often quoted example of this is if they allow the charity to continue to carry on business when they know or should know that it is insolvent. If this is the case, they may be held personally liable for debts incurred during the period when they knew or ought to have known that insolvent liquidation was inevitable.

The Directors of an incorporated charity are the charity trustees.

### Trusts

A trust is a legal arrangement but has no separate 'personality'. It operates by the trustees acting in their own name, but using charity funds.

If a charitable trust buys a building, the trustees buy it but it does not belong to them. If it enters into a contract, the trustees remain responsible for performing the terms of the contract. If the charity runs out of funds, they may be liable to make payments from their own finances.

If a charitable trust leases a building, it is the trustees who sign the lease. Trustees have the right to be indemnified by the charity against any liabilities that may arise (eg for repairs). Normally these would be paid by the charity when they are due. However, if the lessor makes a claim for unpaid rent or any damage caused by the charity's staff, the trustees will be liable but will be entitled to an indemnity from the charity's assets. If the charity has insufficient funds, it will be for the trustees to cover this sum from their own resources.

The advice of the Charity Commission is that trustees may be personally liable if they:

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

*If trustees act unlawfully, imprudently or outside the terms of the governing document, they may be personally liable for liabilities incurred by the charity, or for*

making good any loss to the charity. Since trustees act collectively in running a charity, they will usually be collectively responsible to meet the liability.

The Charity Commission or the Attorney General can take proceedings in court for the recovery, from trustees personally, of funds lost to a charity as a result of a breach of trust by the trustees. Usually, however, the Charity Commission will expect those trustees who are not liable to take appropriate action against the defaulting trustees in order to recover the lost assets.

The Charity Commission's guidance says 'there is only a small likelihood that trustees will have to pay out of their own pocket towards a financial loss suffered by a charity, or towards compensating a third party who has suffered a financial loss'. This is because '*if they act lawfully, prudently and in accordance with the governing document*', then any liabilities (ie debts or financial obligations) that they incur as trustees can 'normally' be met from the charity's resources. However, if the liabilities or debts exceed the charity's total assets, then they may not be able to be reimbursed in full by the charity, even though the liabilities have been properly incurred.

#### Unincorporated association

This is similar to a trust, in that it has no legal personality. The trustees enter into contracts and assume responsibilities on behalf of the charity. The trustees are liable for any debts of the organisation but are entitled to an indemnity from the assets of the charity.

Trustees may have unlimited personal liability in the event that the charity's assets are insufficient to meet any claim.

Broadly, the duties of trustees of trusts and those of unincorporated charities are the same and therefore their liabilities are the same.

#### **Personal liability of trustees**

A breach of trust occurs when a charity trustee fails in his or her duties. This can arise from an action or a failure to take an action. Personal liability only comes into play if the breach also results in a loss to the charity. Trustees liable are those in office at the time of the breach. Subsequent trustees may be liable if they know or should have known about the breach but failed to rectify matters.

The law recognises that sometimes 'things will go wrong' and there is 'a mechanism to allow innocent trustees to be excused liability'. Thus if a trustee has committed a breach of trust but has acted honestly and in what she or he believes to be in the best interest of the charity, the court has a power to direct that the trustee is not liable to the charity. This does not assist in cases where a trustee is personally liable to a third party and there are insufficient assets in the funds of the charity to meet the liability.

Personal liability is when the trustee is required to pay out of their own pocket to (a) make good a financial loss suffered by the charity or (b) to compensate a third party who has suffered a financial loss as a result of their dealings with the charity.

The key messages that the Charity Commission would like to get across to trustees are:

- The Commission is there to ensure that charities act properly and to protect charitable funds
- A trustee who acts in good faith is unlikely to be found personally liable
- Only where a trustee or trustees have acted dishonestly or recklessly are they likely to be found personally liable.

A common concern of trustees who contact the Commission about fears of personal liability is where funding is late and the charity has ongoing liabilities without assets to cover them. The advice of the Charity Commission is that trustees should make sure that the liabilities can be brought to an end in good time. These will be contractual liabilities, which are uninsurable.

If there has been a substantial loss of funds, the Commission may have to consider the case for the trustees replacing some or all of these. It may ask the trustees to make a 'proportionate' repayment. The good faith of the trustees would be the most important factor in considering whether to require reparation, and if so how much. If the trustees do not repay any of the loss, then it has to be borne by the charity. If the charity has no assets, then the worst case scenario is that the trustees could become personally liable, and there would be nothing the Charity Commission could do to assist. However, this only occurs rarely.

There have been some instances (though few) where the trustees have behaved improperly and had to repay the charity. In these cases the Commission's main concern is that the charity should not bear the loss.

It is the courts that ultimately make the decision over personal liability. The Charity Commission may make a judgment but if the trustees are not willing to accept their decision then the Commission can take legal proceedings. This rarely happens. If one trustee is behaving in a way that causes the others to incur loss, the Commission would expect the other trustees to take the case.

If a trustee who is found personally liable is convicted of a criminal offence involving dishonesty or deception, then they will be disqualified from trusteeship. If their act was in good faith, then they are unlikely to be convicted and disqualified. The Commission has the power to remove trustees under Section 18, in cases of misconduct or mismanagement where it is necessary to remove them.

The Charity Commission has to balance its regulatory role and its role in promoting good governance generally with trying not to discourage people from taking on trusteeship in the process. The Commission encourages good induction training for trustees, and recommends that familiarity with the governing document should be top of the agenda. Its publications *The Essential Trustee* and *Hallmarks of an Effective Charity* are written in everyday language, and are intended to assist trustees.

### **Minimising the risk of personal liability**

It was generally agreed that the problems of personal liability commonly arise for trustees as a result of the charity growing rapidly (for example as a result of taking on contracts which require recruitment of additional staff). Other (or associated) risk factors for personal liability were identified by the Round Table of experts as:

- Charities which have outgrown their objects or whose objects are now redundant;

- Charities which establish themselves as a trust or unincorporated association, the activities of which subsequently attract significant potential liabilities such as leases, staff and trading contracts, and which have not become incorporated;
- Trustees who have been paid for services which have been provided to the charity, eg trustees who are also solicitors;
- Trustees who have made an ex gratia payment without proper authority to do so;
- Charities which trade outside their objects and/or powers;
- Litigation.

The following advice for minimising risk of personal liability emerged from the Round Table discussion.

#### Effective and proper management

- Know the duties and responsibilities of trustees and ensure that you abide by them.
- Ensure that your governing document is up to date and that the charity complies with it.
- Ensure that you have regular trustee meetings with appropriate papers from senior management.
- Record all material decisions and the reasons for them.
- Ensure that sub committees report properly to the Board and are scrutinised.
- Clarify powers to delegate authority to an agent or employee.
- Implement effective internal management and financial controls.
- Avoid conflicts of interest unless they are properly managed (ie declared in the first place).

#### Entering contracts

- Take care on entering contracts and check that the charity can meet the obligations of them. Avoid agreeing grant terms and conditions that are too onerous. Make sure that you have the appropriate capacity before agreeing to deliver grant conditions or a project.
- Avoid depleting the charity's asset base by agreeing contracts for services that do not provide for full cost recovery. Or, if you are prepared for that to happen, make sure it is a conscious decision.

#### Use of the charity's funds

- When making grants into the community make sure that you have appropriate monitoring and evaluation procedures in place.
- Avoid making unauthorised payments (eg payments not made in accordance with the governing document).
- Do not enter into guarantees or indemnities.
- Avoid litigation if possible.

#### Knowing the law

- Be aware of the areas of law that impact on you (eg health and safety) and keep up to date with new legislation.
- Some law refers to workers whilst other refers to employees, so it is critical to establish the employment status of volunteers. If volunteers are injured in the course of volunteering the charity could be legally liable under employment law.

## Trading

- If your charity trades, avoid wrongful or fraudulent trading.
- If your charity trades, make sure the trading falls within the charity's objects and powers, and that it is not carrying out taxable trading. Many trustees do not consider their liability in relation to the Inland Revenue. There may be ambiguity around whether an organisation is undertaking trading or not trading, e.g. letting out community buildings for purposes other than the core purposes of the charity could be seen as trading rather than following the charitable aims. This appears to be a big problem for small/medium sized charities.
- Establish subsidiary companies for trading and other activities that might put the charity's assets at risk
- Ensure the charity's brand is adequately protected and managed – it is a badge of the charity's reputation and charitable status and damage to it might adversely affect fundraising opportunities

## Incorporation

- If organisations are small with no staff or property and not interested in taking on contracts then they should not need incorporation. If they are going to do any of these things then it would be best that they were incorporated.

## Taking advice

- Take professional advice when needed or required by statute (eg Trustee Act 2000).
- Take advice from the Charity Commission or a professional expert when unsure about duties. Be aware, however, that this may be a lengthy process.

## **Charities Bill**

The Bill is expected to be enacted at the beginning of 2007 at the earliest. It contains a power, delegated from the courts, which will allow the Charity Commission to make an order relieving trustees from liability for a breach of trust or duty, where they have acted honestly and reasonably.

The Charities Bill contains a provision to relieve trustees of personal liability in very limited and defined circumstances. As things currently stand, a trustee is not entitled without authority from the governing document, or the courts or Charity Commission to receive any remuneration for any services to the charity (such as legal or accountancy). If a payment were challenged they would have to repay any remuneration, unless relieved from doing so by a court. If the Bill is enacted there would be a statutory right to remunerate trustees for the services they provide to the charity in certain defined circumstances.

## **Taking legal action**

If an incorporated charity is planning legal action it can issue proceedings in the name of the company, which then stands liable for costs. For an unincorporated charity, trustees would normally be entitled to indemnity from the charity to cover the costs. Trustees would only be liable to cover their own costs if they had exceeded their authority as trustees or behaved unreasonably in terms of their duties as trustees.

Trustees can safeguard against being held liable for their own costs by going to the Charity Commission for advice before taking any action. This happens quite frequently, and the Commission often gives advice under Section 29 of the Charities Act 2000.

If the Commission declines to give advice to the effect that it is reasonable for the trustees to recover the costs of proposed legal action from the assets of the charity (perhaps because the case is so complex that it believes it to be a matter that only a court should decide) the charity can go to court for a Beddoe Order. This Order would entitle the trustees to an indemnity from the charity for their costs. However, this is not normally necessary and in most cases the Commission can 'give comfort' from its Section 29 powers. Applying for a Beddoe Order is itself charitable proceedings and requires the Commission to authorise it. However, if the Commission refuses to do so the charity can still apply to the court for the Order, and the Commission can provide a letter which can be shown to the court setting out the reason it has refused.

## **A2 The concerns and experiences of trustees**

The information presented in this section is drawn from the focus group discussions with trustees and managers, and from the case studies.

### **Clarity of role and responsibilities**

Many trustees had a lack of clarity as to the legal structure of their organisation, their role within it and therefore their responsibility. A range of titles were used - trainee trustee; trustee; director; committee member; executive member; co-optee; council representative; and there was a varying understanding as to the responsibility and liability each of these titles carried, and when that responsibility began. Despite being a trustee for years someone believed they only became a trustee when the organisation was an incorporated charity. Others were directors of incorporated charities without recognising they were trustees. Some served as committee members or trainee trustees, and although contributing to decision making, believed they were not trustees until voted on at an AGM. Many local authority councillors believe they were only representing the council and could not be trustees.

Many joined the organisation to contribute to a particular cause, or their community, as was the case of some black and minority ethnic participants. They thought they were joining a committee, are often unaware that they may be regarded as a trustee, and did not know what was involved in being a trustee:

*"I am not sure what the label was. There is a lot of ambiguity at the point of appointment...I signed up for it".*

It was not uncommon for people to find themselves named as a trustee by the organisation yet not informed of this.

Some were co-opted onto committees or sub-committees and were unsure of their responsibility and liability:

*"A very grey area is when you are co-opted onto a committee, does that make you a trustee or not? The whole thing is a minefield".*

Another participant described how she was co-opted onto the committee but was not officially elected for some time and then *“I was told that I was a trustee...there is a lot of ambiguity. When you are a trustee, you are not told how much of what you are responsible for is mandatory and how much is discretionary”*.

### **Initial concerns of trustees**

This lack of clarity is reflected in many participants' lack of concern about their responsibilities and liabilities on becoming a trustee: some did not realise the extent to which they would be responsible. For many their motivation was to help, or they were pleased to be asked to join, they *“didn't look too deeply”* and they *“sometimes go in for it and hope that it will be OK”*. People were voted onto executive groups or told that all they would need to do was *“to come to meetings”*. This was particularly so for participants who were service users who felt they were there because the organisation wanted service users on the committee. They had little insight into their role, responsibilities and liabilities.

This lack of clarity and understanding remained with some trustees even when taking up office as Chair or Treasurer. One Treasurer of an organisation believed she could not be a trustee as she *“worked full time”*.

Almost all trustees in this study said they were given no particular advice about their personal liability when they became trustees. Whilst some trustees had no concerns others felt confused and would have liked to have known more but were either not told, did not like to ask or did not know what to ask for. The information that was received was often unclear, did not inform people about their rights and responsibilities as a trustee and did not give sufficient information about the operation and health of the organisation.

Some trustees had little or no concerns, as they were well informed either from previous experience as a trustee or because of the nature of their employment, usually in management within the VCS:

*“I work for a voluntary organisation and that means that I know what all of this means from the other side and I had no concerns about being a trustee”*.

Others were pragmatic:

*“I understood from the start that if you paid attention to things, to what was going on in the organisation and if you did not deliberately screw up, then the trustees will not be liable”*.

Similarly trustees working for organisations that provide good information had no concerns, although it was felt that it had to be the right information at the right time otherwise it could be overwhelming.

Managers and LIOs agreed that trustees' concerns were the same across all types of organisations, including the Hub's priority groups. They did though raise concerns about the need to support service user trustees from vulnerable groups. They should be coached and supported to understand their responsibilities, act with confidence and participate fully, and it was recognised that organisations had to commit a lot of time to this.

Knowing that the charity was a company limited by guarantee allayed some trustees' concerns:

*"I think it always feels safer to be a limited company that does give you some protection".*

*"I was not concerned at the beginning. I knew it was a company limited by guarantee and I knew that my liability was £1".*

Many though were not clear that they were trustees of a charity as well as a director of a company with responsibilities both under the Charities Act and the Companies Act.

LIOs though expressed concern that registering as a company limited by guarantee was treated by trustees as a panacea, as could insurance such as Trustee Indemnity Insurance, and could be used by trustees as a reason for not engaging fully with their responsibilities. In the case of incorporation there can be onerous reporting.

### **Emerging concerns of trustees**

For many trustees their sense of concern arose as they became more familiar with the organisation:

*"As you start and get into being a Trustee, the possible problems start to unfold but then it can be almost too late!"*

Trustees were concerned about how they managed their liability in relation to activities they had delegated to their manager. Concerns emerged as to how to remain legal, particularly if they employed staff or had signed contracts:

*"I did not really have concerns at the start. I don't think that people do. It has taken time for those concerns to develop and to realise that we may be operating illegally"*

For some this awareness transferred into fear of personal liability and they felt the advice was not clear cut:

*"I have heard that we could be liable but I do not know how true this is. I find it all quite scary. That's the problem that we do not know and are not told".*

*"It was an eye opener to me to realise that trustees can be personally liable. That happened three or four months ago, I didn't realise that people could be personally liable".*

Trustees who were professional (such as solicitors) and might draw on this expertise in decision making as a trustee, were not clear if they had any increased level of liability. Some had been told that they had.

The formality of trustee meetings, language, terminology and attitude was felt to be intimidating and a barrier to some service users to either participate in decision making or enquire about their responsibilities and liabilities:

*"if people feel intimidated, they will go back into themselves and not really participate in meetings".*

It was felt this may impact on service users' health.

## Liability as a barrier to recruiting trustees

For some trustees liability is not a barrier as they are unaware:

*"I was not worried about personal liability because when I first became a trustee years ago, we knew nothing about it, I think that goes for most of us".*

Others felt the attitude of people in general had changed and the culture was more litigious.

A number of trustees suggested that the changes in some laws, for example Health and Safety made trustees more vulnerable, also that people now were more willing to sue:

*"Back in the 1970s, I don't think there were any real dangers then but that has changed over the years. People are into litigation now".*

An LIO had heard of a volunteer that wanted to take a grievance, which would have been unheard of five years ago. People knew of trustees that had given up due to concern over personal liability, and parallels were drawn with the present day risks of being a school governor.

Even though limited liability status was suggested as a safeguard, there was a sense of the enormity of responsibility as a trustee and it was hard to recruit new ones:

*"It is very difficult nowadays to find trustees and a lot of that is to do with the liability issue. What trustees often do not realise is that you cannot walk away from it when things get difficult, they do not realise that you remain liable. You are responsible for life, people are not aware of that".*

Managers and LIOs unanimously said it was "terrible" and "dreadful" trying to recruit trustees. There is a move by some charities participating in this research not to recruit local councillors (because of issues about who they represent and the commitment they bring), and local authorities were questioning the appropriateness of their councillors representing them as trustees. Although managers and LIOs felt trustees' responsibilities and liabilities had not changed, what had changed was the climate that they now operated in. This was not only making trustees' work more onerous but would impact on numbers coming forward. Organisations are taking on larger contracts from the statutory sector and growing financially; legislation is constantly changing; paid staff are being employed rather than deploying volunteers; it is more important that proper legal procedures are followed; and there is an increasing focus on business planning, outcome monitoring, and evaluation.

Voluntary trustees were finding it difficult to keep abreast of the changes and produce the expected professional outcomes. Managers and LIOs suggested that *"the fun has gone out of being a trustee – they spend all the meetings looking at policies and procedures and things like multiple funding streams"*.

They said the role of trustee had grown; it was no longer enough to believe in the cause of the charity. There is a drive to recruit more trustees from a diverse background and from the professions and this is causing tension for long standing trustees.

There was evidence from trustees, managers and LIOs that there was also difficulty in recruiting officers for the charity, with trustees refusing to take on the role of Chair

or Treasurer. Some organisations had been operating without a Chair for over a year; in effect the manager is the Chair and has no support.

Organisations dealing with problems found it difficult to recruit trustees and when they did these trustees left once understanding the situation more fully, often for fear of personal liability. It was felt important that organisations in difficulty should be transparent, letting potential trustees know the situation and the implications for personal liability.

### **Experiences of formal proceedings and concerns about liability**

Trustees' experiences of formal proceedings and liability concerns ranged from one or more of the following: employment issues; trading whilst insolvent; financial difficulty or irregularity; leasing agreements; and irregular contracts. In only one case were trustees found personally liable, and this was of an unincorporated charity. Other situations were resolved by compromise agreements and/or financial packages; members of staff withdrawing from the industrial tribunal; and the loss of the service with transfer of staff. Three are still involved in ongoing proceedings.

The majority of problems occurred at a time of growth, and therefore change, within the organisation but people identified that the root of problems could also be traced back over years.

Many initial problems spiralled causing trustees to work many months, even years, to resolve them. They spiralled due to procedures and processes not being closely adhered to or understood; policies which led to ambiguity or were no longer appropriate for an organisation that had grown rapidly; governing documents not being understood or followed; trustees being divided, some acting unilaterally; the intervention of solicitors on behalf of aggrieved parties; robust union activity; aggrieved parties not accepting the findings of expert or legal investigations; concerns of funders; and the amount of time trustees had to deal with them.

In only a minority of cases were staff (including the manager) said to have contributed to keeping the organisation stable and credible with funders during times of difficulty. In many cases, staff (including the manager) were not only part of the problem but caused the solution to be protracted. The staff contributed to the issue by not following procedures; acting from personal motivation; not accepting decisions by trustees and appointed professionals; refusing mediation; and reporting the charity to funders and the Charity Commission.

The actions of many trustees contributed to the original issue becoming protracted by not being fully engaged with their role and responsibilities: not knowing the detail of their governing documents, policies and procedures; not regularly reviewing and updating policies and procedures; allowing a small group of trustees to take responsibility for the work; leaking information to protagonists; being divided and influenced by loyalty to their community, members of staff or other trustees; or resigning as trustees reducing the organisation to being inoperative. Other trustees contributed to keeping the organisation as stable and legal as possible by: focusing on their governing documents and policies; taking and following expert and legal advice; staying focused; liaising with stakeholders and funders; and preparing for arbitrations and tribunals and challenging trustees who acted unilaterally.

The action of external organisations impacted on the complexity of the issues, weakened the organisation, and left some charities feeling disregarded. Some funders prematurely withdrew support, imposed additional reporting regimes,

requested specific actions to resolve the issues, employed investigators and/or withdrew their contracts. Some unions were said to act *“aggressively’ in pursuit of their clients’ claims”*, and some contacted the charity’s stakeholders and Charity Commission undermining the trustees and in one instance they were personally derogatory about a legal advisor. If the Charity Commission instigated an investigation this created more pressure and work. Additionally, dealing with organisations like the Inland Revenue may get overlooked: one charity received a large bill for unpaid tax two years after the initial liability issues were settled.

Registering a charity as a company limited by guarantee offered people a sense of security against personal liability, to varying degrees. Some trustees believed, as a limited company, they had no risk of personal liability, unlike an unincorporated organisation. Others though still had concerns about the cost of dealing with litigation and with behaving properly and being able to legally justify their actions. They felt *“one step removed, yet if you take the wrong step as an individual...you become liable personally, this is my understanding of charity law”*.

Some sought their own legal advice due to fear of personal liability.

If the charity was financially secure, trustees felt some comfort in knowing they could afford legal advice, particularly over a long period. Other used informal advice or *“set up a fighting fund”*.

Threat of or actual formal proceedings created a large workload, in many cases lasting around a year. Even those lasting only a shorter time, and where the trustees knew their responsibilities, *“gave the trustees a salutary lesson”*. Many trustees found the experience overwhelming. People felt trapped by their responsibility feeling they had to stay until matters were resolved and knew resigning would not remove their involvement or responsibilities:

*“I have had it, it’s all so awful, but I have got to get through it to make sure the charity is safe”*.

The experience was tinged in many cases with the fear of liability. Whilst knowing the Charity Commission’s advice that trustees are not personally liable as long as they do not act recklessly, people worried about how to interpret this and felt it was always a balancing act:

*“we were utterly walking this balance, walking a tightrope to stay out of personal liability”*,

*“constantly checking individual actions as to whether I had crossed that fine line yet not knowing exactly what it was”*.

There were different interpretations of what was acting responsibly and this was made more complex by ‘grey areas’, contradictions, and differences in the detail of advice. It was suggested that knowing what the law says and putting it into practice is very different. People wanted to know what the boundaries were so they could make safe decisions:

*“it is so complex. If you put a foot slightly wrong or outside the boundaries, then you get into trouble”*.

Yet at times when they felt certain of their facts they could make proactive decisions rather than reactive, which was preferable and some trustees felt they emerged from the process a much stronger person.

Many felt that they “*were living through a nightmare*” and were concerned about making sensible decisions under pressure and with limited time as volunteers. It was described as a very isolating experience:

*“in the end, you are on your own”.*

*“I think when things go wrong you are literally hitting yourself against a brick wall”.*

Some trustees felt personally threatened. Those who had been with the organisation a long time felt they may have more personal liability at times of trouble, and some were personally harassed. One was reported to the police by a litigant for something that was unfounded, in another case an accountant was harassed to such an extent they refused to do the accounts anymore.

It was suggested that given the complexity of the issues, “*you could end up getting so bogged down in the detail that you wouldn’t be able to see the issues clearly*” and it was the responsibility of Trustees to “*weigh up what they know as a fact and what they feel as a feeling or sense for what is right*”.

## **The relationship between trustees, managers and staff**

### Between trustees

Once dealing with difficulties many trustees became aware that they were jointly responsible and liable for the charity and that they should act collectively and confidently “*having confidence in themselves as a body*”. Some trustees had developed a culture of sharing information.

At times of threatened, or actual, formal proceedings the working relationship of the trustees was tested. It was common for trustees to resign, reducing the trustees to a minimum quorate number. A number of trustees acted independently, for example not informing other trustees of the receipt of grievances from staff; having ‘off the record conversations’; colluding with protagonists and disclosing confidential information; and signing financial contracts with providers. Disagreements at times of threatened liability led to one trustee having to check old minutes to create a record of those who influenced decision making and hence were liable. If the organisation has no Chair or Secretary, or these officers do not act competently, other trustees could feel burdened with the responsibility of keeping everything correct ensuring there are accurate records and being the liaison point with legal advice.

### Between trustees and manager

The management and quality of these relationships, and the power balance between them, were important; once these broke down enormous difficulty was caused for the organisation and the case studies demonstrate “*a them and us situation*” developing.

Of particular importance is the balance between the leadership role of the manager and that of the trustees. It was felt trustees’ expertise should balance that of the manager. The manager is employed by the trustees yet relied upon to keep them up

to date with service delivery, training needs and legislation. Some trustees were uncertain as to a manager's level of liability at times of risk.

Managers work with their trustees in different ways and some managers were aware that this situation could be exploited and that it was quite easy to *"lead the Board by the nose"*. Some trustees felt that *"the manager ran things"*. This was particularly so if a founder of the organisation or a former trustee became paid managers, or still operated the charity from their own premises. In some instances managers were said to have signed documents on behalf of trustees; registered people as trustees without them knowing; and threatened trustees with lack of duty of care to staff they had befriended. Some trustees felt they had little power and were overwhelmed by their managers suggesting they were *"too big for their boots and over confident"* and that *"you need strong trustees to control this"*.

There was a strong feeling that the Treasurer is a key post but often very difficult to fill.

Trustees felt it was difficult to voice concerns about a manager's competence either because they did not feel confident enough, due to other trustees' loyalty to the manager or because *"they did not want to rock the boat. I think most trustees assume that the manager knows best"*. This was especially the case when current or ex service users are trustees. In some instances it took a Charity Commission investigation to expose and deal with any incompetence.

Interestingly, some managers felt their trustees depended on them too much; did not meet often enough; needed directing; did not take up office as Chair or Treasurer; and did not offer line management. This created a great burden of responsibility for the manager.

When the relationship between trustees and the manager breaks down, and if the manager is a party to grievance issues, it is a time of great difficulty for trustees, particularly those who relied heavily on their manager or who had previously been prevented by the manager from having too much involvement.

#### Between trustees and staff

Some trustees felt that the staff did not always recognise that trustees are ultimately responsible for the organisation and not the manager. Staff have more interaction with the manager, are sometimes more loyal to them, and personal relationships may develop between the manager and staff. The relationship between staff and trustees can be a difficult one and the opportunities for interactions are less.

It was felt that, particularly in smaller organisations, there was more potential for conflict as the staff *"live and work the charity everyday and the trustees may see things in a different way, and that causes tensions"*.

Some trustees felt the staff saw them as *"interfering do-gooders"* that *"knew nothing"* and the staff *"always know best in some situation"*. In some instances this had led to disputes within organisations, for example, staff bringing collective grievances against the manager and trustees; not taking direction from managers or trustees; refusing to accept the decision of managers and trustees; encouraging a number of friends to become trustees and oust the current ones; and trying to run the charity themselves.

The case studies highlighted the need for clear procedures and protocols when trustees then become employed by the organisation, and similarly when volunteers get paid positions.

It was accepted that some times problems arose because of “*difficult people*” and the conflict they generated was harder to manage within a small organisation:

*“If there is a wrong person in there, this will result in problems. That is the potential weakness, and people do not know how to get over this”.*

The research highlights the importance of making the right appointment: someone who has the skills (including the interpersonal skills) for the job, and not just a commitment to the cause.

Trustees may also have little contact with service users, which causes difficulty for service users who become trustees, as they feel there is a gulf between them. When service users become trustees, they need support to see the organisation objectively, rather than feeling beholden to it as it has helped them in the past.

### **Risk and risk management by the charity**

The most common area of risk identified was that of employing staff with its need for recruitment processes, personnel management and complying with employment law. This was described as “*a classic, as a source of problems*”. The employment of staff was invariably associated with an increase in income and therefore a period of growth and change for the organisation; also both areas of risk.

Understanding and complying with contracts, developing adequate financial systems, and meeting the requirements of funders gave rise to risk. During a period of potential or actual litigation, organisations faced the additional risk of losing their income streams when funders become concerned, as experienced by some of the case studies.

Risk also arose when founders and trustees entered into legal contracts with the charity or developed unclear financial arrangements with it. In a number of instances the Charity Commission have investigated an organisation, made recommendations, and replaced the board but that new board then encountered even more risks arising out of the original difficulty.

There was little risk management undertaken, rather trustees reacted to “*crunch events*” that were seen as a “*wake up call*”. In one instance this was trustees attending a training course and realising the extent of their responsibility, another was the responsibility of an increasing income. But for many it was when things went wrong, for example staff grievances.

Activities considered to reduce risk were to:

- have proper recruitment, induction and probationary processes for staff and trustees, which also considers any specific needs of service user trustees;
- use a quality assessment model, for example PQASSO, which identifies key policies, documentation and processes;
- ensure these documents and governing documents are known, respected and used as working documents by all in the organisation;
- make clear everyone’s complementary roles and responsibility;

- appoint a manager that has management skills and a professional approach; knows and operates the organisation's policies and procedures; can establish robust procedures; works to and with the trustees; and keeps them updated on key issues;
- ensure the organisation stays up to date on relevant information and that trustees are updated so they can act with confidence when issues first emerge
- minute everything;
- carry out a skills audit of trustees and recruit to fill the gaps;
- appoint trustees with a professional approach that understand their role to ensure the organisation operates within the law; putting loyalties and friendships aside;
- be transparent to potential trustees about the health of the charity;
- provide trustees with training to ensure they insist on being properly informed and scrutinise the detail;
- have a strong and competent chair;
- establish systems in preparation for issues, for example ensuring a proportion of trustees do not know the detail of problems so they are available for an appeal;
- establish clear communication systems between everyone;
- include the cost of organisational administration in funding proposals.

### **A3 Information about liabilities of trusteeship**

The information in this section is drawn from the desk review, focus group discussions with trustees and professionals, and from the case studies.

There is much existing literature and a number of websites that provide information and advice relating to the responsibilities and potential for personal liability of trustees. However, most of it only provides part of the picture, much of it leaves room for doubt (using words such as 'generally' or 'likely'), and in some cases there is lack of clarity. Some of the advice does not make the clear distinction between the liabilities of incorporated charities, trusts and unincorporated associations.

An example of a clear summary of personal liability is the article in the Governance Journal (volume 5), but this is a very limited piece that still leaves many unanswered questions.

A number of the documents refer to legal terms that they do not define for the lay reader. For example the term 'breach of trust' is frequently used but is often not clarified, so that the reader is not told whether it is a broad catch-all term or whether it has specific and limited meaning. Similarly, the term 'insolvent' is often referred to but rarely defined, and only in some places are its very serious implications spelt out.

There is a substantial amount of good practice guidance, and while some (including that provided by the Charity Commission) distinguishes between the essential (which could lead to personal liability if not followed) and the 'good to have', much does not make this distinction.

#### **Where do trustees get their information from?**

Whilst trustees knew that information or advice on their responsibilities and liabilities existed, few knew how to access it:

*"There is not a lot of information available for trustees unless you know where to look for it".*

Trustees gained most of their information from managers in the form of face to face information: induction packs and Charity Commission publications. Some though accessed the NCVO via its website; Charity Commission; Local Development Agencies; the local authority; and some had access to 'parent' or umbrella organisations that provided either regional or national support.

Trustees' experience of this advice was varied. The Charity Commission booklets and leaflets were found to be useful to some but "*heavy reading*" to others. Trustees' capacity to absorb information was limited both by the amount of information and by their skills to understand it:

*"there's a lot of information out there, but people do not have the time to digest it all. It is like going through a minefield really...also not everyone has the skills to understand the information that is given out"*.

*"the legal side of it all was a no goer for me and I think is for a lot of people"*.

Those that had access to national and regional support and training through 'parent' organisations, really appreciated it, particularly the model documents provided on website and having a direct contact. These services are not always taken up though as the charity has to initiate the contact. The experience of using LDAs was varied and the type of information and support trustees received depended on the LDA's location, capacity and if they had funding for capacity building programmes which included governance. Staff change over in some of the organisations led to inconsistency in advice.

Managers and LIOs unanimously said they took their information from the Charity Commission, and directed trustees to their publications, website and online updates and used this information in trustee induction packs. They also cited many other sources, for example Volunteering England; Third Sector magazine; NCVO website, legal updates by Sandy Adirondack; employment updates by Daniel Barnet, and Peninsular, which provides HR advice; and the Chamber of Commerce. It was usually the manager that first accessed information and support made available by the 'parent' organisation.

### **Initial information needs and provision**

Trustees indicated that initially they had very little clear information about their roles, responsibilities, liabilities, the process of governance (e.g. the protocol of meetings) or the organisation itself. Some felt that "*the staff of organisations are not always clear themselves what they want from the trustees*".

Trustees wanted to receive information in a balanced, systematic way, over a relevant time period. Whilst not wanting to be overwhelmed, they wanted essential information at the beginning in order to feel informed and capable of contributing to decision making. The different needs of trustees should be taken into account, for example some service users and black and minority ethnic trustees indicated they were put off by the formality of trustee meetings:

*"It is assumed that everyone knows what an agenda is, what minutes are. But people don't and why should they"*.

*"It can be overwhelming and intimidating and the training and information available to trustees needs to take account of this"*.

It was suggested that organisations should provide:

- An initial briefing session before trustees and the organisation commit themselves;
- a simple starter pack with relevant core information and providing links to websites and further reading to prevent it being bulky and overwhelming;
- a checklist of information they will need to know and when, with signposting to additional sources of information;
- information on training, for example on the protocol of meetings

The information trustees receive should not be restricted to their role and responsibilities. They also needed clear information about all aspects of the organisation and this too should be delivered in a balanced way over a relevant period of time.

It was suggested that potential trustees should have a period with the organisation as an observer before becoming a trustee;

### **Gatekeepers of advice and information**

The gatekeepers of advice and information were predominantly the managers. As outlined above managers were aware of, and accessed, far more sources of information than trustees. Trustees were aware that there was a range of sources but had little direct contact with them. A large infrastructure organisation indicated that most trustees would not know they existed as they work mainly with managers. One LIO indicated that training and a free legal advice help-line were available but said, *“how many trustees know about that?”*

The managers interviewed believed their role was to find information but not to give specific advice. Many trustees felt the manager had a key role in keeping them informed about relevant legislation and providing information and training in governance:

*“they should continually seek to educate their trustees...it is one of their responsibilities to guide trustees in adopting appropriate procedures”.*

Some trustees were concerned that *“the manager may make sure that you only get the very basics of the situation”* and that *“the manager is not giving the relevant information to the committee...”*

This gatekeeping of information can leave trustees dependent, and both trustees and managers vulnerable. The power relationship between them is open to exploitation on both sides and complex issues have been shown to arise for the organisation when this relationship breaks down.

Chairs, sometimes in conjunction with the manager, were also regarded as gatekeepers by some trustees, *“if the booklets only go to the chair and the manager, then the rest of the committee and the trustees don’t get it”*. A regional advisor indicated that *“if they (the Chair and manager) do not tell the rest of the committee that there is training on offer, then they will not know and I will not be asked in to do the training”*.

Some trustees felt this gatekeeping preventing them having information and rendered them powerless. When there were problems in the organisation some trustees felt

they were not party to the professional and legal advice as it was channelled through the chair and not shared with them.

### **Keeping abreast of changes that affect liability**

Trustees indicated they wanted to be kept informed about changes that affected liability and, as indicated above, many saw this as the role of the manager. However, one trustee, who had experienced more than one litigious situation now regularly checked the ACAS website for changes in employment law.

It was felt particularly important to stay up to date with employment legislation “as soon as you start employing people that is when the problems start”. People recognised that this was difficult for small organisations, but suggested that even large charities found it difficult to stay up to date.

### **Getting advice when problems arise**

When problems arose some trustees felt helpless:

*“we were at a complete loss, we were all just running about and we did not know where to go or how to start”.*

Many thought their problem was unique and *“happen to people once in a lifetime and you cannot expect people to know what to do”.*

The majority sought both informal and formal professional and legal advice.

Informally, trustees turned to friends and relatives, larger organisations delivering similar services, or the legal and human resource departments in the organisation they worked for. Formal advice was sought from local solicitors; larger firms of solicitors; larger LIOs with specialist legal teams; a union’s employment law advisors; legal advisors recommended by insurance companies; and the Charity Commission. Some charities were dealing with more than one issue requiring legal advice from different sources on company law at the same time as employment law.

Cost was a deciding factor for accessing advice: some organisations were financially sound, others had little money, some had none. The cost of employing solicitors was a worry, particularly if the issue was protracted and led, for example, to tribunal. Yet trustees were concerned that by not accessing legal advice they would be deemed negligent and therefore liable. Those that accessed solicitors found that if company law and employment law advice were accessed from the same organisation, two different solicitors were deployed and a double fee was charged. In one charity, which became insolvent, the local authority paid for legal advice for their councillors who were trustees. In another that was insolvent the trustees formed a ‘fighting fund’.

Formal advice was usually sought once problems became more complex. LIOs indicated that organisations approached them too late having exhausted all the easy possibilities; they can then only advise the organisation to get legal help. Some trustees though felt the LIOs were not equipped to help with the complexity of their situation.

The legal advice trustees received often appeared complex and rarely clear cut

*“There are many grey areas in the advice”.*

Some were concerned that whilst a local firm of solicitors may be cheaper than a larger company, they would not have a broad experience of employment, charity and company law, or know about the voluntary sector.

There were mixed views on the role of the Charity Commission regarding advice. A number of trustees said they had not contacted the Commission when they encountered difficulties and would only approach them *“with an issue on charity law but not on anything else”*. Those that accessed the Commission for advice via their phone line had different experiences. Some had positive experiences:

*“I found that the Charity Commission came across as very keen to help and their attitude is that if you are doing your best, then the feeling that they give out is that it will be OK”*.

Others had a negative response:

*“Our experience is that the Charity Commission was not helpful, they were not supportive. They are very quick to say when you are going wrong but they will not provide any specific help or advice”*.

Organisations were told they would have to close, for example for not having the correct number of trustees, and they should have prevented trustees leaving. Others were told that if they stopped being a trustee and left the organisation inoperative they may find themselves personally liable for leaving the charity vulnerable. When staff arranged for their friends to take over as trustees of one charity, and the majority of the board was replaced, the Commission advised that this was acceptable.

One trustee felt intimidated by the Commission during their investigation, although later recognised the benefits of their advice.

When problems arose trustees not only wanted quick access to accurate, unambiguous advice but they wanted to know how to act on this advice:

*“the problem was, how to implement the advice”*.

Those who accessed hands-on legal advice appreciated the benefits.

### **Identifying the gaps in advice**

The following gaps in advice for trustees were identified:

- Explanations of terminology so that people are clear what their responsibilities are and when these begin. In particular knowing which actions can lead them to being regarded as a trustee by the Charity Commission; and understanding the relationship between being a trustee and a director and the legal responsibilities of each.
- Explanations of the different legal structures available: unregistered charity, registered charity, trust, unincorporated, incorporated, and which is best for what type of organisation, when and why should the legal structure change and what impact that has on trustees' responsibilities and liabilities.
- What is legally required of an organisation through its stages of growth, e.g. when should it register as a charity, have the accounts audited, comply with health and safety regulations.

- When thinking of joining an organisation, the questions a trustee should get answered that will reveal the health of the charity and the breadth of their responsibilities and liabilities.
- The specific needs of service users joining a trustee board.
- Understanding meetings.
- Guidelines on basic business management including an understanding of grants; contracts; employment of staff; personnel management; the 'duty of care to staff; risk management; change management; monitoring and evaluation; and business plans.
- How to behave as trustees and develop working relationships with each other, the manager and staff.
- How to deal promptly and properly with serious issues to prevent them spiralling out of control. Examples could be drawn from a range of common issues that occur, including where things have gone wrong and 'near misses'.
- The costs of legal action and the advantages/disadvantages of reaching a settlement.
- Definitions and examples of personal liability together with examples of acting both responsibly and irresponsibly in certain common scenarios.
- Where, when and who to go to when problems arise and at what stages.
- Free or cheap legal advice giving updates on changes in the law; and hands-on advice when problems arise, for example, a body of solicitors who could be contacted for instant legal advice which charities pay for by yearly subscription.
- Advice and guidance on developing arrangements with statutory organisations and local businesses to negotiate accessing the advice of their human resource and legal teams.
- Clear information on trustee indemnity insurance and what it provides in relation to being incorporated, unincorporated,
- Something outlining the benefits of trusteeship.

While some of this advice and information already exists, it is clear from the research that many trustees either do not know about it or do not feel that it entirely meets their needs.

#### **A4 Delivering advice to trustees**

##### **Is unambiguous advice possible?**

The issue of trustee liability is enormously complex and is dependent on matters such as the legal status of the organisation; the legislation to which it is subject as a consequence; the terms of the trust's governing document; the circumstances of the case; and the extent to which the trustee acted (or failed to act) deliberately, knowingly, recklessly, or reasonably and innocently.

Given the bewilderment and confusion amongst professionals and trustees in relation to the subject, there is an evident need for information about trustee liability. The challenge will be to make this sufficiently clear that trustees can proceed with confidence, without being so simple as to lose some of the small but important distinctions.

One lawyer who specialises in charity law concluded that there cannot be unambiguous advice on the liabilities of trusteeship. Firstly, each case depends on its facts. Secondly, many of the remedies for breach of duties are 'equitable' and so discretionary. And thirdly, trustees have fiduciary duties, which are different for trusts

and for companies. This means that there are different expectations for different situations. Duties have to be managed practically and sensibly in order to ensure that the charity is pragmatically managed while remaining within the law.

Another went further, saying that unambiguous advice could carry the risk of misleading trustees. He referred to:

*'the factual matrix of the particular situation ..... where it would be dangerous to give emphatic advice.'*

Others pointed out that, while this may be true, information that sets out the broad legal framework for trustee liability would be welcomed.

### **Making information and advice available**

Trustees and managers wanted information to be clear and co-ordinated. They recognised that a lot of information may already exist but was not accessed by trustees. They suggested information and advice should be available:

- Directly to trustees by using the details known to the Charity Commission.
- In a clear, quick, accurate format that demystified legal terms.
- Using simple language and in a format that was accessible to those with particular needs, for example where English is not the first language, or those with dyslexia or limited sight.
- That is co-ordinated at a central point, all the different types of information available, identifying from which organisation and including specialists who offered good website information and free services, for example ACAS, and free legal seminars offered by large firms of solicitors.
- In the form of checklists, with signposting and linkages that told people what they needed to know, at what stage and where to get it from, for example local providers, web pages, national organisations.
- In bite size chunks of balanced information, over a relevant time period.
- At workshops, training events and refresher events, held at times to suit trustees lifestyle, for example in the evening to fit in with work commitments.
- Via helplines.
- Practical, hands on, and face to face when the organisation was in difficulty.
- Access to agencies with managerial and admin skills to take care of operational issues at times of problems.
- Access to trustees that might come into organisation that has become inoperative to help them problem-solve
- As easy to access models of documents, for example constitutions and disciplinary procedures, possibly through national or regional 'parent' or umbrella organisation, as, for example, provided by Community Matters.
- In email updates or newsletters of key issues, with links to relevant WebPages from, for example the Charity Commission or NCVO.
- Locally, through providers, such as LIOs by building their capacity and funding to deliver.
- As professional development programmes.
- Via self help support in the form of networking, mentoring or buddying from experienced trustees.

The Round Table discussion concluded that medium size to larger organisations face much the same sort of issues as the smaller ones; but the advice needs to be presented in such a way that the messages are got across to them.

## **Part B: Insurance**

### **B1 What are the options for insurance?**

A review of the information readily available on the internet reveals the range of insurance policies available to charities. While this report will focus on Trustee Indemnity Insurance (TII), the following are the other policies that may also be of interest to charities to reduce their risks more widely.

#### Executive liability

This provides indemnity to trustees for personal liabilities incurred while acting as trustees, arising from a 'wrongful act'. It includes cover for damages, own and third party costs, and expenses. Where the charity is under an obligation to indemnify the trustee, the policy will reimburse the charity. Cover may extend to include the costs and expenses incurred by attending official investigations.

#### Professional indemnity

This indemnifies the trustee against damages, own and third party costs and expenses which arise from a 'wrongful act' committed in the conduct of the charity's 'professional services'. A broad definition of 'wrongful act' includes any act or omission resulting in a civil liability.

#### Directors and Officers (D&O)

This covers claims against one of the organisation's directors individually (as opposed to claims against the organisation as a whole). It includes managers and committee members.

#### Public liability

This provides cover for injuries to the public or damage to or loss of their property caused by the negligence of the organisation, including the actions of employees and volunteers. The 'public' includes anyone not an employee.

#### Product liability

This covers personal injury and property damage caused by a fault in the design or production of a product.

#### Documents

This indemnifies against the cost and expense of replacing or restoring documents destroyed, damaged, lost or mislaid in the conduct of the charity's 'professional services'.

#### Employers' liability

This covers liability for work related injuries to employees. This insurance is compulsory by law. The policy should cover conventional employees, contract, casual and seasonal staff, including workplace students.

#### Employment practices liability

This provides protection for employment disputes, including costs incurred at official investigations, inquiries and other proceedings. Cover includes all types of employees but not volunteers.

#### Fidelity

This indemnifies the charity or association against losses caused by dishonest, fraudulent, criminal or malicious acts of managers or employees committed for personal gain.

There is a difference between the liability of a trustee and the liability of the charity. The charity, as an organisation, will have insurances such as Employers Liability and Public Liability insurance protecting them against legal liability for injury or damage arising from its activities. The liability of the trustees on the other hand will normally be in respect of the running of the charity and the losses will normally be financial, not physical (such as physical injury or material damage to property).

It is important for organisations with no paid staff to access advice on which insurance that is essential, e.g. public liability.

Several insurance company websites provide useful explanations of what the policies cover, sometimes with examples of claims which provide a useful illustration.

### **Insurance relating to employees and volunteers**

Tribunal awards are not insured but Legal Expenses insurance would provide cover for Tribunal cases. The traditional liability covers would not respond because there has not been any injury or damage.

There is a new 'employment practices liability' insurance being introduced to cover problems in the employment process but lots of small charities would not be suitable for this as their procedures would not be adequate. Employment Practices Liability, while relatively new, has been around for a number of years. It is a cover which has been imported from the US. Generally speaking an insurer would probably wish to audit the employment procedures before offering cover. The costs of this audit tend to make the initial costs of the cover quite expensive and so it might well be more than a smaller charity could afford. The take up of EPL across the commercial sector has been low, and it anticipated that the charity sector to be no different.

Some companies include volunteers as employees, some see them as a third party. Charities should look out for this and decide which insurance is best for them. It will depend on the nature of what the volunteer is doing. They may be regarded by others to be an employee because of the activity they are undertaking.

### **Risk management and insurance**

The Association of British Insurers (ABI) has published a document 'Living with risk' to raise awareness of risk management in the VCS. The document points out that awards for damages have increased by 30% over the past 5 years. It gives examples of some of the activities that might give rise to risks: exhibitions, fetes, excursions, buildings and premises, and charity shops.

The document says that risk management should be an integral part of planning for any event, and that the organisation should have a risk management policy. It goes through what such a policy should include. It points readers in the direction of the Management of Health and Safety at Work Regulations 1999, which place a duty on employers to assess the risks to employees and anyone else (including volunteers) who may be affected by the work activities. The Health and Safety Executive considers it good practice to provide the same level of health and safety protection to volunteers as to employees.

The ABI points out to VCS organisations that having a risk management policy will make it easier to obtain liability insurance. They advise that if an organisation is having difficulty in obtaining insurance, they should visit the British Insurance Brokers' Association for details of specialist insurance brokers who may be able to help.

## **B2 Trustee Indemnity Insurance**

The information in this section is drawn predominantly from interviews with the insurance industry, with some from the interview with the Charity Commission.

### **Purchasing Trustee Indemnity Insurance**

TII is a relatively new type of insurance and is still a very small part of the insurance business. The number of companies and brokers that offer TII is said to be relatively small, although it was said by some to be increasing. It appears that companies new to the market often make use of and adapt the wording of the existing policies of companies already providing cover.

One insurance company that is seen as a specialist in charity business nonetheless estimated that it represents less than 1% of its total business. Another estimated this to be less than 5%. This was felt by several interviewed to be a result of trustees simply not fully appreciating the risks of trusteeship, and being unaware of TII as an option for limiting those risks. It was also said by several that there is growing awareness of and interest in TII.

To put numbers to these percentages, one company sold 1,250 charity policies in the last year and estimated that all or most of these would have included TII as part of a package. Another company estimated that it had about 5,000 TII policies on its books.

TII is sold either as a stand alone policy or part of a package. Different insurance companies provide slightly differing packages, with the potential to add on specific policies depending on the needs of the charity. As one broker described a particular package, 'it is designed on a modular basis so that charities can take the cover they need'. Some insurers have included as standard within their package policy with the proviso that the cover will only operate if the governing document allows or permission has been granted by the Charity Commission.

It appears that either the trustees themselves or a designated member of staff normally negotiates with the broker rather than the insurance company direct, and purchases the policy on behalf of the group of trustees. Although it varies depending on the size of the charity and its staffing resources, it appears that it is most commonly a member of staff rather than a trustee, and that this is usually the Finance Manager or Finance Director. That person completes the proposal form and submits this with the charity's Annual Report and Accounts.

Trustee liability is joint and several, which for an individual trustee means in effect that someone can make a claim against them for a portion or the whole of the loss. Trustees can buy insurance collectively or individually in their own right and using their own money. If a trustee buys their own individual cover, there is some question as to whether courts would apportion the blame equally or so as to ensure that trustees who were insured would pick up the cost on his insurance.

Trustees are normally covered as a group by the policy. One broker said that the policy normally covers 'trustees for the time being' and that the policy is on a 'claims made basis'. This means that in order to make a claim a trustee must have been a trustee at the time of the incident or when it was notified.

All those from the insurance industry interviewed felt that it was significantly preferable for trustees to be insured as a group rather than individually, for one or more of the following reasons:

- The administrative costs of cover would make it uneconomical for the insurance company to insure separately;
- Some people are trustees of several organisations and it would be very complex and costly for the insurance company to calculate the risks involved in each;
- A single trustee with insurance cover could be the target for a claim if the other trustees did not have cover;
- If all the trustees purchased cover for £250,000 (for example) each, the total exposure for the insurance company could be extremely high;
- If trustees were insured with different insurance companies there may be a problem in defending a claim. One insurance company may wish to defend the claim and another may prefer to settle, and the trustees could get caught in the middle.

### **Who pays for TII**

Trustees may purchase TII from the charity's funds without seeking permission from the Charity Commission provided that the constitution specifically enables the charity to pay such premiums from its resources. They may also purchase it out of their own pockets with no authority necessary.

If the charity's governing document does not include the power to obtain TII, it will be necessary to seek authority from the Commissioners to amend the governing document so as to include such a power. Until recently, applying for Trustee Indemnity Insurance was considered to be a complex procedure, with the trustees having to put forward a detailed case to the Charity Commission in order for them to authorise the purchase of indemnity insurance from charity funds. A working party of interested insurance companies, chaired by Lord Rix, was formed in 2002 and lobbied the Charity Commission to persuade them to allow charities to pay for TII from their funds.

The Charity Commission has now adopted a streamlined method for authorising purchase of TII and has developed a 'self certification' approach, making authorising the purchase of this type of insurance simpler. The Charity Commission has issued guidance for charities and their trustees purchasing all types of insurance in *Charities and Insurance CC49*.

One important reason, apart from adopting a proportional risk-based approach, for the Commission establishing a more streamlined system to authorise trustees to pay for TII from the charity's funds, is to remove any barrier to trusteeship caused by fears regarding personal liability. Furthermore, there is a possibility that a trustee could be found personally liable for a negligent breach of trust, where they were not entitled to indemnity from the charity but could make a claim under TII. Because this possibility cannot be ruled out the Commission is prepared to authorise TII in certain circumstances. That said, they take the view that trustees should arguably not be covered for negligence.

The Commission will generally authorise purchase once the charity has certified that all the risks have been identified and the trustees consider that it is in the interests of the charity to purchase the insurance. It is for the trustees to determine whether TII is in the interests of the charity, and there is only one form to complete.

While the Commission may refuse to authorise the charity to purchase TII from the charity's funds, it is unlikely to do so. It may do so if authority has been granted on the basis of untrue or misleading information, and may rescind the permission if this is discovered later to be the case. If an Inquiry were opened on the charity, this may cause the Commission to question the application.

The Charity Commission has never had any problem with the *charity* protecting itself through insurance, and paying for this from its own funds. However, their view is that TII does not protect the charity, and if paid for from the charity's funds, is a personal benefit for the individual trustees.

The Commission believes that the activities of certain types of charity, for example small grant making trusts, carry no risk so TII is unnecessary. The Commission understands that in general TII excludes contractual liabilities, which perhaps present the biggest risk to trustees in terms of personal liability. The Charity Commission has not come across any cases in its day to day work where successful claims have been made against TII policies, but the outcome of successful or unsuccessful insurance claims would not normally be a matter for the Commission.

The Commission's only remaining policy interest in TII cover is to stipulate that it should have exclusions:

- Fines (eg for breach of Health and Safety regulations)
- Costs of unsuccessful criminal proceedings
- Where trustees have acted fraudulently, dishonestly or recklessly.

The authorisation given by the Commission clearly states this. The Commission believes that to authorise insurance that covers trustees personally against these things would be an improper use of charity funds.

The Charities Bill introduces a new default power allowing trustees to buy TII. If the Bill is not enacted, the Commission will continue with this process of self certification.

### **What TII does and does not cover**

A number of those interviewed from the insurance industry likened TII to D&O insurance for the private sector. Apparently TII was originally almost entirely based on D&O, with some of the wording changed to make it more relevant to the charitable sector.

The cover includes any wrongful act, error or misstatement that does not comply with the law, however inadvertently. It generally covers:

1. the trustee, and
2. the charity if it is allowed or obliged to reimburse the trustee.

The latter is said to be where many of the payments are made. However, it was pointed out that it is the trustee who benefits, because if the charity did not have the funds the trustees would not be able to be reimbursed.

It was pointed out by several interviewed that a trustee could find themselves to have acted illegally – albeit in good faith – as a result of the enormous amount of legislation relating to such things as health and safety, charity regulation, human rights, employment rights etc. A trustee could be doing their best but may be unaware of changes in the legislation. The mistake, though innocent, could find them liable in a court or tribunal.

Several of those interviewed identified the ‘*real benefit*’ of TII as not being the cover for the loss, but the legal defence costs in the event of a person issuing a writ. Going to court is costly, and whether or not a trustee wins or loses they will incur costs. Even if they have not committed any wrongful act they need to defend themselves, and if they are not insured this will have to come from their own pocket. Although it has been argued by others that trustees could take their legal costs as a loan from the charity, the reality is that many charities do not have sufficient unrestricted funds to make such a loan, and even if they did, is this a proper use of charitable funds?

As explained earlier, the Charity Commission states that a TII policy must exclude cover for fines, the costs of unsuccessfully defending a criminal prosecution, and dishonest or reckless behaviour. These exceptions are all felt by the Charity Commission to be not unreasonable. However, one interviewee from the insurance industry pointed out – in relation to the second of these – that this is ‘*exactly what the Legal Aid fund will pay*’.

The general response from the representatives from the insurance industry to the question of what is not covered by TII is ‘loss caused knowingly or recklessly’. Several pointed out that this was a restriction imposed on them by the Charity Commission, not one that they would necessarily impose themselves. As several identified, there is not such restriction on D&O insurance.

One insurance company also identified the exclusion, if the charity is incorporated, of claims brought against the charity as an entity rather than against the trustees.

### **The cost of TII and how premiums are set**

Annual premiums for TII appear to start at around £200 (the smallest quoted was £170 but generally £250 was quoted as the starting point) for a small charity and can go up to £4-5,000 for larger ones.

The most important factors taken into account when setting the premium appear to be the income and assets of the organisation, and the level of indemnity provided. These are all seen as indicators of the level of risk. Other factors mentioned by those interviewed include:

- The profile of the charity and/or its trustees. Some felt that high profile charities or trustees are in the public eye and more likely to attract the attention of the Charity Commission and/or potential litigants.
- The internal audits and control of the organisation.
- Number of staff employed.
- Oversees operations and activities, which will expose the organisation to other legislation and regulatory regimes.

- Previous financial deficit and staff turnover, which may be seen as indicators of instability or poor management.
- Previous claims made.
- Charities that offer professional services and in particular those that offer fee earning consultancy may be seen as incurring a higher risk.

The level of indemnity appears to vary from £25,000 for small charities to £1,000,000 for larger ones, and even up to £10,000,000 on occasion. Some insurance companies have a minimum indemnity of £250,000. One broker explained that the indemnity level is geared towards the charity's assets.

One broker said that charities providing nursing or care would be seen as high risk, and exclusions relating to medical activities would probably be imposed by the insurance company. An exclusion may also be imposed in relation to investments made by the trustees without professional advice.

There is some overlap between D&O and TII. There may be occasions when the risk might be referred to the D&O market because of the size of the charity or the nature of what they do. For example they may be very high profile, have very high profile trustees, they may engage in unusual fund raising activities, or they may have some involvement in areas which the market has tended to be cautious about because of specific potential problems, such as pension fund trustees.

None of the insurance companies interviewed would put a condition or 'warranty' on the policy. As one said, *'we don't get involved in telling people how to do things'*.

It appears that cover is seldom refused completely. However, several insurance company representatives were emphatic that they would refuse to provide cover, albeit rarely. Charities that are engaged in high risk activities that it may choose not to cover include those that are 'very activist with controversial stunts' and non-mainstream religions. However, as one person pointed out, the insurance company 'is a business and seeks to write as much business as possible'. Another interviewee could only think of refusing cover for a trustee who had been convicted for fraud or another relevant offence.

### **Claims against TII**

One insurance company representative described the number of claims as 'relatively low when compared with more volatile accounts'. However, the same person could recall when D&O claims were low, but now they are not, and wondered how long it would be before the same thing happens to TII. Several felt that the traditional public view against suing a charity is changing, and that claims are likely to increase: 'claims will grow and settle at a higher level'. One insurance company said that it has built up reserves against future claims, so that it can be prepared for that increase and be able to keep prices stable.

One insurance company representative said that most claims against TII are to indemnify the trust.

It was said that many claims against TII are for 'low amounts' but it was pointed out that to a small charity and its trustees £10,000 can be a big sum.

One insurance company, new to the business of TII, said it had not had any claims in the last year. It attributed that to the care it had taken in providing cover, and the interviewee said that as they went forward they would expect more.

In response to the question of how many claims were paid out in the last year, none of those interviewed provided any figures. One insurance company representative said that *'most claims are accepted'*. Only very few are refused, and this is normally because they are covered by a different policy (for example where the charity is incorporated and the claim is against the entity rather than the trustees). One person explained that what often happens is that the insurance company receives notification of a claim (required by the terms of the policy, whereby the policy holder alerts them to a possible claim) but that ultimately the matter is dropped and so no claim is made.

One interviewee was particularly offended by the question and the implication that few or no claims may actually be paid out by insurers. As one broker said, *'the insurance industry delivers the goods'*. Several interviewees reiterated the fact that the restrictions that are imposed on cover are there because the Charity Commission imposes them, not because the insurance industry wants them.

#### Claims examples

The following are examples of claims which had been notified, provided by some of those interviewed:

- Two separate claims were made by former employees claiming racial discrimination. The trustee named states that no such discriminatory action occurred and that the employees were dismissed due to their sub-standard performance and unacceptable behaviour in the workplace, and that both were still within their probationary period. Although it was felt unlikely that the case would have succeeded, a settlement was agreed with the parties. Total costs incurred were just under £20,000.
- The neighbouring landowner to the trust claims that recent constructions carried out by the trust infringed on their property. The trust claims that documents from the 18<sup>th</sup> century show that the previous owner passed the land over to them, whereas the claimant declares that the land never legally belonged to the previous owner. It appears that the claim will be upheld and that the claimant is indeed the legal owner of the disputed property. The trustees will be responsible for damages and restoring the land to its former condition. To date £20,000 has been paid in legal costs with an outstanding estimate of a further £20,000.
- Following publication of an article, the charity trustees were sued for defamation by another charity with similar objectives. The claimant stated that certain statements made in the article were untrue and gave false representation of the charity. The matter was settled out of court with fees of £8,500 being paid.
- A claim was made against the trustees as they had sub-let a section of their premises to another organisation. This had been done without consultation with the landlord and broke the conditions of the charity's lease of the property, and subsequently he ordered the eviction of the sub-tenants. The evictees

brought a successful claim against the trustees for denial of access. Over £12,000 was paid out under the policy.

- A claim was made by a charity which had suffered a loss of over £12,000. Due to poor internal controls one of its trustees managed to fraudulently withdraw £11,000 in a single transaction, then a further £1,500 at a later date. The claim was settled for 80% of the total amount plus fees, totalling over £9,500.
- A claim was made against the trustees for alleged slander. After initial discussions the allegations were retracted and an apology offered. The solicitor's fees which had been incurred were settled for over £1,500.
- An investigation by the Charity Commission led to allegations of the charity using its charitable status for avoidance of tax on its trading subsidiary. The charity was required to restructure its operation at its own cost, but the legal fees and other costs in their investigations and defending the allegations were covered, coming to a total of £1,200.
- A claim for wrongful dismissal and providing a negligent reference to another potential employer resulted in payments totalling over £20,000 to the insured in defending the allegations and in payment of costs and damages.
- A claim was made against a trustee by the other trustees, alleging that the defendant had broken the governing document of the trust in receiving fees and making improper investments. A subsequent Charity Commission investigation and the costs of recovering fees and investments amounted to £52,000.
- Owing to an administrative error by an employee of the charity, a resident of a rehabilitative project did not receive the correct living allowance to which he was entitled. The shortfall amounts to approximately £4,000. A severe disability allowance should have been claimed at the same time, but completion of renewal papers was handled poorly and further benefit was lost. This shortfall amounts to £4,500. Although the charity is confident that these shortfalls can be reclaimed from the government, there is nevertheless a possibility of a claim by the resident for mishandling his affairs.
- Upon sale of land to another company, the trustee stated that permission had been granted to develop the land for residential use. Upon completion of the sale, the purchasers discovered that planning permission had not been granted and that the land was subsequently useless to the developers. The claim is still in process, with thousands of pounds costs already incurred, and has the potential to reach over a million pounds.
- Upon the liquidation of the charity it was alleged that the trustees had mis-handled the winding up and distribution of remaining assets. Though the charity was limited by guarantee, claims have been made by creditors alleging that the trustees' mis-handling resulted in the charity's inability to pay all of its creditors. To date the claim has incurred costs of £6,000 though this figure has the potential to reach the policy limit of £250,000.
- Alleged breach of authority by a trustee in having indicated employees would receive enhanced redundancy payments.

The Charity Commission's view is that most of these examples it is the charity that benefits rather than the trustees personally. Only in the last three might the trustees not be entitled to an indemnity from the charity.

Insurers who provided these examples confirmed that, although some might have been paid against other aspects of the insurance policy, most of these were claims against the TII element specifically. Most will have been paid to the charity rather than the trustees, but even in these cases the trustees will have been the ultimate beneficiary since without the insurance payment the charity may not have had the funds to indemnify the trustees.

### **Attitudes to TII from the Charity Commission and insurance industry**

Interviews with representatives from the Charity Commission and the insurance industry revealed that each holds sincere and strong – but opposing - views on the value of TII.

The Charity Commission's primary concern is to ensure that the charity is acting properly and to protect its funds. Only in very limited circumstances would a trustee find themselves personally liable, such as if a trustee deliberately set out to do something wrong, or incurred a liability that the charity could not cover.

The Commission believes that certain types of charity, depending on their activities, carry less risk so insurance is unnecessary. TII excludes contractual liabilities, which the Commission believes present the biggest risk to trustees in terms of personal liability.

Not surprisingly perhaps, all those interviewed from the insurance industry felt that TII offers real protection to trustees. It was felt that many trustees (unlike their Director counterparts in the private sector) lack a proper understanding of their risks. Those interviewed held a strong and sincere belief that TII is necessary to protect people who are giving their time for no reward from the very real risks associated with trusteeship.

Several referred to the argument put forward by the Charity Commission that TII is unnecessary because if an act or omission is made in good faith, the trustees will not in any case be found personally liable. They felt that while the Charity Commission may take a sympathetic attitude towards trustees who act in good faith, the same cannot necessarily be said for other government departments. An example given was that of a charity that had wrongfully (but in good faith) claimed tax relief. The Inland Revenue sought to reclaim it but the charity did not have the funds to pay, and so the Inland Revenue went after the trustees. One had to mortgage their property. This, it was said, was a case that would have been covered by TII. The Charity Commission point out, however, that in such a case the trustees would be entitled to indemnity from the charity's funds. The insurers would argue that this is only possible if the charity has sufficient funds.

Several acknowledged that the risk of personal liability is small, but pointed out that the impact could be enormous:

*'The risks may be small in terms of likelihood, but so is the risk of your house burning down, but nobody would dream of not insuring for that.'*

As one interviewee pointed out, insurance does not actually benefit anyone, it just puts them back in the position they were previously: *'all that trustees are asking for is for the charity to look after them if things go wrong'*.

One interviewee was concerned that some trustees of incorporated charities believe they do not need TII because of their limited liability.

Several interviewees in particular felt that the Charity Commission should do more to actively support and promote TII:

*'Trustees give their time freely and deserve to be protected from that risk....I would not become a trustee without it'*.

### **Providing insurance advice to the sector**

Information about the policy itself is given to the purchaser. One interviewee referred to these as 'key facts' which act as guidance, and which policy holders should read as sensible business practice.

On the whole those interviewed did not believe it was the proper role of insurance companies or brokers to give advice about minimising risk of personal liability, such as by risk management. One felt that their status under the Financial Services Authority as a 'non advised company' would preclude this. Another felt that there would be a danger of them being drawn into giving individual advice about management decisions that the charity should make.

Several of those interviewed felt that the best way of explaining the policy is to give claims examples. These are available from some insurance companies on their websites and in their brochures.

One representative of an insurance company commented that many people do not understand insurance, and recommended that charities should use a broker who understands the sector. One problem is that the voluntary sector encompasses such a wide range of charities, from the very small to the very large, where the charity may operate like a commercial organisation. It is important for people to understand what is on offer to meet their specific needs.

One broker offers insurance seminars at no charge, saying that they find the seminars useful in getting feedback on what the issues are for the sector.

There are market associations for some types of insurance cover, but not as yet for TII. One interviewee pointed out that their company rarely converses with other insurance companies for fear of falling foul of the Competition Act.

One insurance company, as a member of the Association of British Insurers, are members of its Liability Insurance Committee which meets four times a year. Several years ago, in response to concerns from the sector about high premiums, the ABI held an open day designed to educate charities about approaching insurance. This was followed up by an Action Day.

## **B3 The views and experiences of managers and trustees**

### **The views of managers**

None of the managers in the professionals focus group had explored Trustee Indemnity Insurance in any depth, but on the whole had formed negative views as to its value. There was general agreement that people do not fully understand it but know that some trustees buy it.

In one small VCS organisation the trustees had been alerted to the risk of personal liability by a course that some had attended, and as a consequence had investigated TII. They concluded that it was 'not worth the paper it was written on'. The conclusion the trustees reached was that as long as they acted in good faith they did not need it.

One LIO manager investigated TII through NACVS and was advised to be cautious. Since then she has heard – although it is only 'hearsay' – that no organisation has claimed successfully – so she has not purchased it for her trustees.

One participant observed that there is a 'logical problem' with TII. If you are prudent and reasonable you would be covered by TII, but then why would you need it? It was also said that TII contributes to a 'false illusion of protection'.

The policy of one LIO is to advise people to go to their local insurance broker, rather than give advice themselves about insurance. Another LIO manager does not actively advise on insurance, but if people ask, tells them who they insure with.

They agreed that most advice is biased, and that people would welcome impartial advice.

### **The views of trustees**

The focus group discussions with trustees, and case study interviews, also revealed mixed views and experiences, and a good deal of uncertainty about the value of TII.

On the whole, those that have Trustee Indemnity Insurance felt greatly reassured by it:

*"if there's insurance trustees can act with confidence and know that they are not going to lose their homes".*

A number of participants did not appear to be aware whether or not their organisation had insurance or what it covered. There was a strong reliance amongst some on the manager to deal with such matters as cover was usually organised by them and trustees were unaware of its content:

*"We have to take the word of the Chief Executive whether we have insurance or not and what is covered".*

Some trustees believed that their organisations had indemnity insurance for officers but did not have cover for the trustees.

The cost of TII was perceived by some trustees as a barrier to purchasing it:

*"I think trustee liability insurance could be very useful but we do not have it. I think it is just the cost involved and we have never had the resources to meet the cost but I could see that in a situation where things go wrong, it could help the trustees to know that there is insurance"*

*“Insurance can be expensive but I think that voluntary groups are in some ways over insured but under insured in others – like for indemnity in situations where you need legal advice or to tackle employment issues”*

Affordability appeared to be a particular issue for very small charities who received their income on a quarterly basis.

Those trustees who did not think that TII was worth having, either believed that insurance companies never pay out; that they were not at risk because the charity was incorporated, care was taken and legal advice sought; that they did not want to be tied to the insurance company’s legal advisor; or that the Charity commission had given an indication that they did not endorse it.

None said that there was any difficulty in getting insurance:

*“We get people from the insurance companies who want to come into the groups and give talks about insurance. We get that about once a year and sometimes by companies that we are not insured with.”*

Some participants spoke of the *“terrible difficulties in making a claim.”* This was said to arise from the problems of proving that the trustees were not negligent.

#### Awareness of policy terms

Those who knew they were insured did on the whole see it as a possible safety net, although they did not appear to know precisely which actions or omissions were covered and which were not.

*“Most trustees do not know or are given the information of what they are covered for”*

Again, the implication is that the managers have this information and the trustees rely on them to know.

Several trustees referred to having signed the form of TII without being fully aware of what they were signing. One trustee who was also a service user said:

*“Trustees were asked to sign for Trustee Indemnity and I asked what this was for but I was not told and just signed.”*

Some trustees were aware of the limitations in general terms but appeared uncertain as to how they operated in practice.

*“It is not explained that trustee liability does not cover trustees for the negligence of staff and that is where the problems often occur.”*

A number of participants were aware of the importance of the policy terms in ensuring that any claim would be likely to succeed:

*“You have to take and follow through all the advice.....because if you don’t then the insurance does not cover you”*

*“You have to use the legal resource of the insurance company to be covered – on liability issues, looking to someone else for legal advice is pointless and a waste of money because you have to follow the free legal advice provided.....or you won’t be covered”*

There was an awareness that some areas were not covered by the insurance, an example given was the costs of an employment tribunal. However, many referred to this as '*in the small print*'.

Some of those who were insured were aware of the need to go to the insurance company and their lawyers before proceeding with any action, in order to make sure that what you were doing would be covered by the policy. It was felt by some that this could cause problems when you needed to make decisions or take action swiftly.

#### Other insurance policies

One case study had Employment Practices Liability Insurance. The insurance paid out for legal fees dealing with a worker who had left. The insurance company also recommended specific legal advice which was found to be useful.

## **Appendix 1**

### **Project Advisory Group**

Stephen Bourne, Active Communities Unit, Home Office

Justin Davis-Smith, Institute for Volunteer Research

Karen Heenan, Charity Trustee Networks

Sally Hiscock, Governance Hub

Tim Humphreys, Association of British Insurers

Debbie Nunn, Charity Commission

Robert Porter, Harbottle and Lewis Solicitors

James Sinclair Taylor , Russell Cooke Solicitors

## Appendix 2

### Profile of participants of trustee focus groups

	Type of organisation	Main group of clients served	Urban/rural catchment area	Annual income (approx)	Whether has TII <sup>3</sup>
1	Incorporated charities	<ul style="list-style-type: none"> <li>Community centre and services</li> <li>Social enterprise for the community</li> <li>Animal welfare</li> <li>Local history museum</li> </ul>	Urban	More than £250,000  £100,000 to £250,000  Under £50,000	None at any the charities where participant is a trustee
2	Incorporated charity	Advice and support for families	Urban/Rural	£100,000 to £250,000	None
3	Unincorporated charity	Advice and services for vulnerable people	Urban	Under £50,000	None
4	Unincorporated charity	Community association and services for the community	Urban	£50,000 to £100,000	None
5	Incorporated charity	Community centre and services, including for children - serving area with diverse ethnic and faith communities	Urban	More than £250,000	Has TII
6	Incorporated charity	Community financial assistance - serving area with diverse ethnic and faith communities	Urban	More than £250,000	Has TII
7	Incorporated charity	Services for children and young people - serving area with diverse ethnic and faith communities	Urban	£50,000 to £100,000	None
8	Incorporated charity	Community centre and services, including for children - serving area with diverse ethnic and faith communities	Urban	More than £250,000	Has TII
9	Incorporated charities	<ul style="list-style-type: none"> <li>Services for older people</li> <li>Services for vulnerable people</li> <li>Support and services for young people</li> </ul>	Urban	£100,000 to £250,000	None at any the charities where participant is a trustee
10	Unincorporated charity	Services for vulnerable people	Urban	£50,000 to £100,000	Has TII
11	Unincorporated charity	Services for vulnerable/disabled people	Urban/Rural	£50,000 to £100,000	Has TII

<sup>3</sup> Trustee Indemnity Insurance

12	Unincorporated charity	Services for vulnerable/ disabled people	Urban	£50,000 to £100,000	Has TII
13	Unincorporated charity	Services for vulnerable/ disabled people	Urban/ Rural	£50,000 to £100,000	Has TII
14	Unincorporated charity	Services for vulnerable/ disabled people	Urban	£100,000 to £250,000	Has TII
15	Unincorporated charity	Services for vulnerable/ disabled people	Urban/ Rural	£100,000 to £250,000	Has TII
16	Unincorporated charity	Services for vulnerable/ disabled people	Urban	£50,000 to £100,000	Has TII
17	Unincorporated associations with charitable purposes	<ul style="list-style-type: none"> <li>• Services for black and minority ethnic and faith groups</li> <li>• Cultural and social association for Sikh community</li> </ul>	Urban	Less than £50,000	None
18	Unincorporated associations with charitable purposes	<ul style="list-style-type: none"> <li>• Services for black and minority ethnic and faith groups</li> <li>• Cultural and social association for Muslim community</li> </ul>	Urban	Less than £50,000	None
19	Unincorporated associations with charitable purposes	<ul style="list-style-type: none"> <li>• Services for black and minority ethnic and faith groups</li> <li>• Cultural and social association for African Caribbean community</li> </ul>	Urban	Less than £50,000	None
20	Incorporated charities	<ul style="list-style-type: none"> <li>• Services for families, children and child carers</li> <li>• Services for older people</li> </ul>	Rural / Urban	£50,000 to £100,000  More than £250,000	Has TII at both
21	Incorporated charities	<ul style="list-style-type: none"> <li>• Services for older people</li> <li>• Voluntary and community sector support</li> <li>• Health and social care</li> </ul>	Rural / Urban	£100,000 to £250,000  More than £250,000	Believe has TII but not certain
22	Incorporated charity	<ul style="list-style-type: none"> <li>• Voluntary and community sector support</li> <li>• Community transport</li> </ul>	Urban/ Rural	£100,000 to £250,000	None
23	Incorporated charity	Housing and welfare advice, tackling homelessness	Urban / Rural	£100,000 to £250,000	None
24	Incorporated charities	<ul style="list-style-type: none"> <li>• VCS support</li> <li>• Social Centre</li> </ul>	Urban/ Rural	£100,000 to £250,000	Uncertain

25	Incorporated charity	<ul style="list-style-type: none"> <li>• Services for older people</li> <li>• Infrastructure organisation</li> </ul>	Rural / Urban	Over £250,000	Has TII
26	Incorporated charity Unincorporated charity	<ul style="list-style-type: none"> <li>• Services for older people</li> <li>• Community association/support</li> </ul>	Urban/ Rural	Over £250,000  Under £50,000	Has TII for services with older people
27	Incorporated charities	<ul style="list-style-type: none"> <li>• Community based housing and therapy</li> <li>• Local community centre</li> </ul>	Urban	Over £250,000  £50,000 to £100,000	None

### **Notes**

Five focus group discussions were held with trustees at Basingstoke, Leicester, London, Worcester and Worthing. In addition, two face to face interviews were held with trustees who could not attend the groups – making a total of 27 contacts with trustees and one participant who worked to provide training and support to trustees.

The participants included six from black and minority ethnic communities; eleven were trustees of groups that worked with rural communities; five were trustees providing services or activities for children and young people; ten were trustees of organisations providing support and advice to vulnerable people and disabled people (including those with mental health needs); and two were trustees of social enterprises.

## Appendix 3

### Schedule of issues for trustee focus groups

Participants would be welcomed and the purpose of the group explained, how the information will be used and the anticipated time span of the group. Participants would be given assurance about individual confidentiality. They would be reassured that they were under no obligation to name the organisation.

- 1) As an opening session, each participant will be asked to describe briefly the kind of organisation where they are or have been a trustee (including whether incorporated organisation, trust or unincorporated association, and whether in addition they are a registered charity), and the length of time they served as a trustee (they would not be asked at this opening stage for their experiences of liability problems).
- 2) What concerns did they have *initially* about their personal or collective liability as a trustee?
- 3) What information were they given initially by the organisation on their responsibilities and liability as a trustee? How useful and relevant was this information? Was the advice written or verbal? Was it fully explained?
- 4) Did they get their information direct – for example through interaction with an infrastructure organisation, literature from the NCVO – or was relayed to them by somebody else – for example, the manager?  
Important to probe with participants what are the issues around organisational gatekeepers and the impact that this can have on trustees' awareness and understanding of and access to information/support. The point of contact for getting information /support/training is usually a staff member and this can make it difficult for the trustees to get information etc direct – what are their thoughts on this and possible ways around it.
- 5) What were the key elements of advice or information that they needed at this initial stage? Does this vary between participants – that is some may be more aware and experienced about the VCS than others and how does this influence their need for information?
- 6) How did they stay up to date with advice on liabilities? (for example, following changes in employment law and health and safety legislation)
- 7) Ask each to describe briefly their experience of liability problems. In the light of these problems, did their concerns about personal or collective liability change over time?
- 8) Where or to whom did they go for advice or information about liability when the problems arose? What written advice or information did they access and how useful did they find it? What other kinds of advice did they access and how useful was it? Were they any clearer after getting the advice or information about their liability?
- 9) What were the key elements of advice or information that they needed at this stage? How difficult was it to access these key elements of advice? Was anything unclear about this advice? Did it differ between sources?

- 10) If the problem became more protracted did the advice change? Did it become more or less clear, if so how?
- 11) How do they consider from their experience that the risks to trustees are managed by VCOs? Do they think that trustees are protected?
- 12) What do they think are the main issues today that make trustees vulnerable or at risk in terms of liability?
- 13) Do they or did they have insurance cover? What does or did it cover them for? What were/are the limitations of the cover? Was this information readily available and understandable? Did it *in the event* cover them for their liability? Who organised getting the insurance cover?
- 14) Did they experience any challenges in obtaining insurance? – for example, did they have to amend their constitution so that they had the power to purchase insurance (given the perceived benefits)?
- 15) What did the insurance cover cost the organisation? Were they responsible for any of the cost? Did they feel that they had a real say in choosing this policy? Was the cost of the insurance a factor in selecting the type or extent of the policy?
- 16) What information and advice should be made available to trustees about liability? What are the key issues that it needs to cover? What there any gaps in the advice currently available?
- 17) How would this information be best made available to trustees? What format is most useful – paper or internet? Is there anything about the presentation that would make it easier to get to grips with? Who should deliver it? How should it be updated?
- 18) What one piece of advice in relation to liability would they give to a person considering becoming a trustee?

## Appendix 4

### Schedule of issues for professional focus group

#### *Advice, information and barriers*

- Where do trustee, and potential trustees, get information and advice about their responsibilities and liabilities?
- What information and/or advice do you give trustees on their responsibilities and personal liabilities as a trustee? Is this advice written or verbal? Can you give any examples of when you have been asked for advice and the kind of advice you gave?
- At what stages in the course of their trusteeship have trustees asked you for information?
- Where do you get this advice from?
- What advice have you given to trustees that may be experiencing issues that have gone as far as formal proceedings?
- As managers, when recruiting trustees do you experience any difficulties? Why do you think this is? Is your experience different between those being asked in a personal capacity and those who are representing another agency/organisation?
- What concerns about liability do prospective trustees have when as managers you are trying to recruit? Have these concerns changed over the years?
- Do trustees express concerns about taking a specific office, for example Chair, Secretary or Treasurer?
- How much do you feel that any of these concerns are a barrier to them becoming, or continuing as, a trustee?
- The Hub's priority groups to reach are BME organisations; faith based; rural and social enterprise; organisations working with young people; people with disabilities, and local infrastructure organisations. Do trustees from these organisations/communities raise different or similar concerns to each other?
- What advice do you give to trustees as to how they can minimise the risk of personal liability?
- As managers and advisors, working to develop the governance of organisations, what would strengthen your work with trustees?

#### *Insurance*

- What options for insurance have you investigated? With what outcome?
- What advice do you give to trustees about insurance, particularly trustee indemnity insurance, and where do you get this advice from?

- What feedback – if any – have you had from the sector about the availability, affordability and appropriateness of insurance to their needs?

*Communication and dissemination*

- How can information be most effectively communicated to trustees and potential trustees? Are there any specific issues that should be borne in mind when reaching the Hub's priority groups?

## **Appendix 5**

### **Round table participants**

Sally Hiscock, Governance Hun

Robert Porter, Harbottle & Lewis

Justin Davis-Smith, Institute for Volunteer Research

Debbie Nunn, Charity Commission

Tim Humphreys, Association of British Insurers

Niall McIntosh, Ecclesiastical Insurance

Helen Rice, Community Matters

Frank Toombs, ACAS London

Trevor Mendez, ACAS London

Karen Heenan, Charity Trustee Networks

## **Appendix 6**

### **Case studies**

#### **Case study: employment issues (1)**

##### **The case and its history**

This case study relates to an organisation with an annual income of less than £150,000 a year. It is a registered charity and company limited by guarantee.

Problems began shortly after the appointment of a new manager, who was well received except by the longest serving member of staff who did not want to work with them. Whilst the manager was settling in a complaint was received from a major funder about the performance of this member of staff. The manager arranged an extra supervision meeting with the worker to talk through the issue, and proposed measures to address the problem.

The worker insisted that this had been a disciplinary hearing and they had not had adequate notice or the opportunity to have an advisor. They took union advice and submitted a formal appeal against the management decision. The appeal panel found in favour of the worker.

The worker refused to cooperate with the manager. Mediation was organised but the worker refused to attend. The worker resigned, claiming constructive dismissal, and took the trustees to an Industrial Tribunal. The manager also resigned.

The Union adopted a robust style in its interaction with the charity.

The major funder became concerned about the organisation's ability to deliver, investigated the organisation and removed its funding. This badly affected their service delivery almost closing the organisation.

The trustee board became divided and some of them acted unilaterally. A number of them resigned over the next few months, reducing numbers to almost inquorate. The Chair, having been involved with the issues from the beginning felt trapped by his responsibilities and felt it only fair to stay a trustee until the matter was resolved.

After months of preparing the case for Tribunal, the worker withdrew their case and the matter was closed.

##### **Advice received**

Legal advice was sought from an infrastructure organisation offering specialist legal advice on employment law and this was found to be invaluable, supportive, and more available and hands on than a firm of solicitors.

This advice found that their employment policies were out of date and could give rise to problems but they felt the situation was rather 'being driven by personality'. As the situation escalated all decisions were made with reference to this legal advice, which was very onerous and time consuming.

##### **Lessons learned**

- When in this situation try and find the same style of legal advice they accessed; someone from the sector, who is hands on and has a working understanding of up to date employment law.
- Make sure that all policies and procedures are up to date. Have the important employment policies reviewed by a relevant legal expert after significant changes are made.
- Keep up to date with all employment legislation so as not to be vulnerable; it is easy to lose track of what is current
- Make use of any free seminars given by larger firms of solicitors.

### **Case study: employment issues (2)**

#### **The case and its history**

The organisation has twelve staff and an annual income of over £250,000. It is a registered charity and a company limited by guarantee.

The organisation has been in existence for more than ten years although its functions and responsibilities have grown and changed significantly over that time. Disagreements arose between staff and the manager mostly over operational issues and tensions developed. The deteriorating relationships resulted in a number of formal grievances from staff about the manager referring mainly to an unpleasant style of management and of bullying.

The trustees dealt with these grievances by appointing some of their number to investigate the grievances in detail and this panel of trustees saw the written submissions, held individual hearings and came to a decision. They found faults on both sides and identified a possible way forward that included the employment of an assistant manager to relieve some of the pressure on the manager. However, recruitment for this post was never undertaken by the manager and instead the work was allocated to existing staff who objected to the additional workload.

Subsequently, almost the whole staff team submitted a joint grievance against the manager, who denied any wrong doing and made counter claims against the staff. An independent consultant was employed to devise an action plan to resolve the conflict but the staff refused to cooperate and with the support of their union took out a grievance against the trustees.

Some of the staff left and the manager had periods of prolonged sick leave. Some trustees left, reducing their numbers to almost inquorate.

The matter went to arbitration which found in favour of the trustees. It was realised, however, by the trustees that the staff and manager could not work together. A financial agreement was reached with the manager who resigned from the organisation. The organisation's service delivery contract and the trustees (following advice from the Charity Commission) decided that they could not continue to run a viable service.

#### **Advice received**

The sources of advice used by this organisation were ACAS, a local solicitor, a larger firm of solicitors and the solicitor who was attached to the local voluntary service council. The trustees were concerned about personal liability issues but were reassured by their legal advisor that they had acted reasonably throughout and that their incorporated status would give them limited liability, as individuals and collectively.

### **Lessons learned**

- It takes a lot of time and commitment to be an effective and responsible trustee and people appointed as trustees need to be aware of this and have the capacity. Those taking on the role of trustee should be made aware that it is a very important position and should not be entered into lightly because in the event of any problems, it is the trustees who are responsible for the organisation.
- Organisations that undergo change, especially those that expand quickly or where the services provided change rapidly, may need extra help and support in ensuring appropriate policies and procedures are in place. This can be especially the case when the numbers of staff employed increases or their role changes significantly.
- There should be a formal period of induction training that includes practical detail on the role, responsibilities and liability of the trustees. People should only be formally signed up as a trustee after they have had an appropriate level of information and training about the role and its responsibilities.
- It would be good to have access to agencies with managerial and administrative skills that you could tap into and they could send somebody in to manage staff etc.
- ACAS and a local voluntary service council with specialist legal services can be good sources of advice, especially for trustees facing action. It would be most helpful to get advice from experienced trustees who know the kind of difficulties that trustees can face and how to resolve them.

### **Case study: employment issues (3)**

#### **The case and its history**

This case study relates to an independent association that is autonomous but linked to national charity. It is a registered charity but not incorporated.

The organisation has been in existence for many years and initially it relied solely on volunteers. It now has a dozen staff, several of them part time.

The origins of the dispute are said to have been when the manager and a member of staff developed a friendship that perceived by other members of staff to affect their work responsibilities. An incident between two members of staff, including the one who was close to the manager, brought matters to a head. A number of trustees, including the Chair, felt that there was a power struggle in progress and resigned. A temporary Chair was appointed but, other commitments, meant that he was unwilling to take any wider responsibility for the management of the organisation.

The trustees were uncertain on how to proceed and none had experience of grievance procedures nor knew about the operation of employment law. Although the trustees had Trustee Indemnity Insurance, they were not aware at that time that they could and should approach their insurance company for advice (although this was used later).

Some of the new trustees who had been appointed at the organisation's AGM resigned when they learnt of the internal difficulties. All of the trustees were very concerned about their personal liability. The Charity Commission explained that, whether they attended meetings or not, these trustees would still be responsible for the organisation's actions. The number of active trustees was now very small and the Charity Commission instructed the organisation to appoint more trustees. However, given local awareness of the situation, it was impossible to find people willing to stand as trustees.

### **Advice received**

Access to the employment law advisors at the insurance company was helpful, although the trustees did not realise initially that such advice was available to them. However, the trustees needed more than advice but also practical help with correspondence and how to conduct investigations and hearings.

### **Lessons learned**

- Service users and some volunteers can feel so obligated to an organisation that they cannot always see things constructively or appreciate that the organisation can make mistakes. Service users and ex-users may be reluctant to say that the organisation is 'not doing a good job' or is poorly managed.
- Trustees should be recruited and then interviewed for their suitability and only after a form of screening should they be put forward for election.
- Trustees need to know who to approach especially on employment law and grievance procedures and that support/advice needs to be hands on and detailed.
- Trustees should have robust procedures in place to ensure that they are given full information about the operation and management of an organisation and have the tools to supervise the chief executive or manager. They may need advice and support to take on that role effectively.
- Trustees need to know that they can get advice from their insurance company on issues like employment law.

## **Case study: employment issues (4)**

### **The case and its history**

The organisation is an incorporated charity with a small staff of six providing services for the local community.

The organisation received funding from the local authority and the Director appointed a freelance finance worker rather than a member of staff to maintain the

organisation's accounts. The quality and detail of the financial information made available to the trustees declined sharply. The organisation then received a substantial injection of government funding for IT development, which tended to mask the state of the organisation's base finances. The trustees became increasingly worried that with the end of this source of finance, the core finances for the organisation were in a poor state.

For health reasons, the Director then went on a period of extended leave and a locum was brought in. Within a short space of time the locum expressed serious concerns about the organisation, its staff management and finances. Trustees were increasingly concerned about the scale of unauthorised payments, often wrongly written off against the government funding, including contracts issued to outside companies to undertake work that was never brought to or agreed by the trustees.

There was an investigative meeting with the outcome that legal procedures were begun. The trustees took legal advice and were told that they had an excellent case. However the trustees were also advised that if they proceeded with the employment tribunal this could cost the organisation a substantial sum with barrister's fees and other legal costs. The trustees were advised to settle.

It was a very lengthy and exhausting period for the trustees that extended over more than 18 months. It was costly for the organisation in the settlement and legal fees and the need rebuild the reputation of the organisation. The trustees subsequently reviewed all the organisation's policies and procedures.

### **Advice received**

The organisation obtained legal advice through a firm of solicitors. They are now aware that there is a human resource company that will handle any such cases, for payment of an annual fee. This company will provide representation at tribunals and, if the trustees follow their advice to the letter, the company will cover the cost. The trustees were not aware of this at the time when they went for legal advice, but had they know would have brought into this service.

### **Lessons learned**

- The importance of looking at the detail, especially in financial reports and ensuring that any queries are followed up and answered.
- The relationship between the trustees and the Director/Chief Executive is a crucial one. The trustees relied on their Director and because of that may not have questioned as much as they should in the early stages. Trustees should question and probe and not allow their feelings of trust to convince them that nothing serious is going wrong.
- Awareness that you can buy into schemes to have legal and other support, including representation at tribunals, is important. The cost of representation and other legal fees can be a significant factor in making the trustees decide to settle and not to pursue wrong-doing, even when they have been told that their case is very strong.

## **Case study: employment issues (5)**

### **The case and its history**

This case study relates to an organisation with an income of just under £250,000. It is a company limited by guarantee and a registered charity.

A key background event was that the organisation secured a large amount of funding from an external funder enabling it to expand its services and take on new members of staff. An initial employment issue triggered a sequence of spiralling actions over a period of a year. Firstly, as part of the expansion, a new worker was appointed. Once employed, the worker indicated dissatisfaction over a number of issues. They were dismissed and not only challenged the decision but also raised a large number of objections against the organisation and made accusations of improper conduct against the manager, resulting in the suspension of the manager.

Legal advice suggested the sacking of the worker was improper procedure: they were reinstated but immediately suspended whilst the issues were investigated. An interim manager was appointed to oversee the organisation, an investigator appointed to explore the actions of the manager and a hearing held to investigate the worker. The hearing endorsed the dismissal of the worker who, with union backing, threatened industrial tribunal and pursued compensation. The manager also brought action against the organisation. The union adopted a robust approach towards the organisation.

The appointment and calibre of the interim manager was believed to have kept the organisation stable and credible with funders, allowing the trustees to deal with the actions.

The trustee board became divided, some being influenced by loyalty to some of the staff, and some trustees acted unilaterally.

The Chair and some trustees, after taking advice and gaining the backing of the Executive body, took responsibility for most of the key decisions. The majority felt great strain, one threatened to resign and another actually resigned under the pressure. Another, who had experienced a similar situation in another charity, used his knowledge from this to keep focused.

The Chair, although persistently worried about behaving properly, continued to maintain good relationships with all key partner organisations, undertook radio and newspaper interviews, established a series of public meetings to maintain the integrity of the charity and handled an annual review by a core funder.

The outcome of the case was that the charity agreed a financial settlement with each of the employees.

### **Advice received**

As the problems became complex legal advice was sought, as and when necessary, including that provided by their insurance company. Advice was sought from the Charity Commission on the settlement payments.

### **Lessons learned**

- When appointing a manager employ someone who can manage and behave professionally, not someone only driven by the aims of the charity. Their job is to promote the interests of the organisation, run it as a business and follow the organisation's procedures.

- It is important for trustees to be familiar with and understand the adequacy of the charity's constitution, policies and procedures so as to be prepared at times of difficulty.
- It may be challenging to work with other trustees, who may have differing views, and important to stay focused on the actual issues; and take advice. Keep clear, open communication on relevant matters between those that need to know.
- It is important for trustees to have a professional business approach and experience of organisational management.
- The Government and Charity Commission should actively encourage large organisations, for example the PCT, to make their services available to charities, in a way that engages with that charity. This could be an important resource for small and medium charities that trustees need to access with confidence.
- Trustees need to behave in such a way that puts loyalties and friendships aside and to understand that their role is to make sure the organisation operates within the law.
- Ideally trustees should form specialist sub groups that stay up to date on specific areas of the organisation's operation. The organisation, through the manager needs to be aware of the value of specialist's web sites, like ACAS to get up to date information on employment law for example, and look up high profile charities to learn from their ideas.
- When the organisation develops personnel problems ensure at least 4 of the trustees, whilst informed are not involved in all of the detail so they can be made available for any appeals etc.

### **Case study: employment and financial issues**

#### **The case and its history**

The organisation has an annual income of just under £200,000. It is an unincorporated charity.

The organisation had been successful in obtaining a sizable grant that enabled it to expand its activities and recruit a general manager.

There were two independent issues that initially impacted on the organisations, and then others arose out of the events that unfolded. The process of dealing with the actions covered a two year period.

Firstly, an individual was taking the organisation to industrial tribunal for non appointment at interview. Alongside, yet independent of this, the trustees were made aware that one of the organisation's activities was running at a loss, and this was affecting the financial stability of the whole organisation. On investigation it was discovered that this project had entered into contracts for capital items and these could not now be honoured. At the same time a complaint made about operational practices of one of its sub-projects, which led to an external inquiry into its activities.

Subsequently two members of staff began industrial tribunal proceedings, a finance company brought a legal action to reclaim outstanding debts, and the Charity Commission announced they were going to undertake an investigation into mismanagement of its funds. National and local funders became aware that the organisation was in difficulty: the national funder withheld their funding and the local funders did not renew funding in the new financial year. The organisation was thus forced to cease trading.

Members of staff had sensed the problems but had not raised them with the trustees. Instead they hoped the group would sense something was wrong and ask.

Many of the trustees were representing their organisation on the organisation's management group, and had thought they had joined a general networking committee rather than as trustees.

Some trustees, particularly the Treasurer, worked independently of their colleagues and did not share information before and during these legal actions. Concern was expressed as to the competence of the Chair.

The claimant challenging the organisation's recruitment process won £14,000 as the organisation had kept no record of the selection process or interviews. The trustees, some of whom had left the organisation twelve months previously and were different to those involved with the later actions, were personally liable for this amount.

The financial claim was proven with the trustees having a shared personal liability of approximately £16,000.

With regard to the other two industrial tribunals, one employee agreed a £2,000 settlement and this liability was shared between the trustees. The other case was dropped.

Two years after the payment of the liability the Inland Revenue sought payment of £7,000 from the ex trustees for unpaid national insurance, PAYE and interest. This was shared between those trustees deemed personally liable.

### **Advice received**

A legal expert, who worked within a large infrastructure organisation, was initially identified and appointed by the Chair. They were chosen as inexpensive advice compared to a firm of solicitors. The legal advisor dealt with the employment issues and advised on the process of closing down the whole organisation.

Whilst the initial legal advice dealt with the employment issues, the advisor was not deemed sufficiently skilled to deal with the later financial claim. The organisations represented by the trustees agreed to appoint, and pay for, a firm of solicitors. Two years later, when the Inland Revenue made their claim, they did not contest it and all agreed to pay. This belated Inland Revenue claim for £7,000

### **Lessons learned**

- A strong Chair is important to help an organisation avoid and deal with organisational issues.
- Unincorporated organisations should be cautious when entering into contracts.

- New trustees need to make sure the organisation they are joining is well run; and that all trustees are actively engaged and not just 'turning up'.

### **Case study: financial issues (1)**

#### **The case and its history**

The organisation provided services to the local community and employed eight staff. It was a charity and company limited by guarantee.

Due to poor management of its affairs, it was in serious financial difficulties. It had lost a substantial grant because of complaints about how it operated. No member of staff had responsibility for fund raising. The organisation was running a large deficit and its creditors included the Inland Revenue.

A financial advisor was appointed at the funder's request. Without her consent, the advisor was listed as a trustee in returns to the Charity Commission, although they only learned this later.

Initially, the trustees were not aware that the organisation had been taken to court for unpaid bills and that the bailiffs were due to attend. They became very worried about their liability and some resigned in the wrongly held belief that this would end their personal liability. No trustees attended the organisation's AGM and an emergency meeting was subsequently held. New trustees did come on to the committee but could not cope with the situation. The financial advisor had to take decisions on behalf of the trustees because of the seriousness of the situation.

The organisation had to close because of its substantial deficit and because the Directors of the company would have been personally liable had the organisation continued to operate while insolvent. The organisation had been in deficit for over a year and accumulating debts.

The organisation's manager is now suing the financial advisor for loss of earnings as she was not paid her last month's salary.

#### **Lessons learned**

- The trustees should carry out a skills audit for the committee – a list of what skills are wanted and identify ways of encouraging trustees with the required skills to join the committee.
- It is valuable to have a solicitor on the management committee.
- Trustees should be aware of the community lawyers' scheme. These are usually retired solicitors who are willing to work free of charge for charities.
- It is important to know the responsibilities of being a trustee through induction materials and training. Trustees have to know and understand their role. Funders (such as local authorities) should make a condition of funding that all new trustees receive appropriate advice and information, and induction training.
- Trustees should know that their appointment has to be ratified and recorded in the minutes of the committee for it to be valid. New trustees should be required by the Charity Commission to sign that they understand and agree to

the responsibilities of trusteeship. This would prevent people being wrongly listed as a trustee without their knowledge.

### **Case study: financial (2)**

#### **The case and its history**

This was an organisation with nine staff, most of whom were employed on a part-time basis. It was a charity but not a company with limited liability.

Over a period of months, the Treasurer took over £25,000 from the organisation's account. The money was withdrawn in small amounts and by cheque at the bank. The trustees were unaware that the theft was taking place because the Treasurer was intercepting the posted bank statements.

The organisation took a case to court against the bank because it had not followed correct procedures but had allowed cheques to be cashed with one signatory only – their bank mandate stated that there had to be two signatories. The organisation won the case and the bank repaid half of the stolen amount.

#### **Lessons learned**

As a consequence of the theft, the organisation completely reviewed its financial procedures. This meant that finance was always an item on the agenda of the committee and cheques were signed at the meeting with the invoices available for scrutiny.

### **Case study: property issues**

#### **The case and its history**

The organisation had more than twenty staff. It was a registered charity run initially by the founder who ran the charity. The organisation operated successfully for some years but then faced financial difficulties and there were some complaints. The organisation was put into receivership and then, as many trustees resigned, some new trustees were appointed to run the charity, with the trustees who remained. As there were issues that could not be resolved, on legal advice it was decided to set up a new incorporated charity and transfer the assets of the original charity to it. The new trustees would become Directors of the new charity.

The founder still owned some of the buildings that were used by the charity and negotiations stalled over the transfer of the leases and the other matters. Eventually the new charity was advised to stop paying rent in order to bring matters to a head, and litigation followed. It was the trustees of the original charity, still holding the leases, who were sued as individuals. As a good deal of time had passed, two of these had resigned before the litigation started.

It was the two who had resigned who became concerned about their liability and sought legal advice on an individual basis. Eventually the litigation was settled by a mediated compromise which, among other things, gave the new charity leases falling in at agreed intervals.

#### **Advice received**

The incorporated charity sought private legal advice and the trustees concerned attended the mediation sessions that eventually reached a compromise settlement.

### **Lessons learned**

- It is helpful to have a network of mentors whom chief executives or managers could approach for independent support and advice.
- For legal advice, it is important for charities to know of and have access to legal advisors who know charity law and have experience of the voluntary sector.
- The aftermath of mergers between voluntary organisations can generate difficulties over styles of governance and management, as projects previously independent and trustees associated with them tend to resist too rapid centralisation. Help in finding the right governance systems and style to balance encouraging initiative and promoting togetherness would be valuable.

### **Case study: action between trustees**

#### **The case and its history**

This case study relates to a small organisation in that it has no staff and only 5 trustees, but it has a high income level through legacies and donates all its income to community projects each year, giving approximately £750,000 in the current year. It is a registered charity and a limited company.

In the late 1990s the Charity Commission investigated the organisation after a donor had raised concerns. It discovered more than £1million had been transferred out of the country. The trustees were first suspended and then removed by the Commission. The Charity Commission invited an independent Chair to come in with the aim of recovering the money and re-establishing the charity.

The founders had previously been dismissed from an organisation with similar aims before setting up this charity. One has died but the other was prosecuted subsequently and given a suspended sentence. Later they instigated a number of separate charges, through the high court against various organisations, two of which were against the charity and two against the Charity Commission.

Against the charity, firstly they are claiming that the charity owes them many thousands of pounds in legal fees, and additional funds that they claim to have paid out personally to previous workers of the charity.

On becoming Chair measures were put in place to take out Trustee Indemnity Insurance. The Charity Commission allowed them to change their trust deeds to allow for the taking out of trustee liability insurance. The only exceptions to this policy are that it will not cover anything to do with the previous case. They are attempting to claim the costs of fighting the current case against the ex trustee having been told by legal advisors that they can do this now the case has been decided. The insurance company is questioning this and therefore they are in negotiation.

The founder has subsequently reported the Chair to the police for certain actions, and the Chair has been investigated. After investigating the circumstances the police have decided to take no further action.

#### **Advice received**

The Chair had an excellent receiver/manager in place when initially sorting out where the money was and getting it back. This person is an expert in charity accounting and has been supportive throughout.

#### **Lessons learned**

- The job of being a trustee needs to be 'sold properly', with people being asked if they would like to put their experience and knowledge into practice and in return they will get the necessary training and support. If asked in this way most would be willing.

## Appendix 7

### Schedule of issues for interviews with insurance companies

1. Does the company have Trustee Indemnity Insurance (TII)? Is this part of a package or stand alone?
2. Who usually negotiates the insurance policy on behalf of the trustees – the Chief Executive, Chair of trustees or other?
3. Is it usual for trustees to get cover individually or as a group? Does the company have a view on this?
4. What does the insurance cover and what are its limitations?
5. How is the premium set – on what criteria? What is the current range?
6. What does the company view as high risk charities or activities?
7. Would the company ever refuse to cover an individual or group of trustees?
8. Would the company ever impose conditions of such insurance? What might these be?
9. How many TII policies does the company currently have on its books? What is this as a proportion of the total? For TII policies, what is the level of risk covered on average?
10. How many claims under TII did it receive last year? How does this compare with, for example, claims under Public Liability/Employer's Liability Insurance policies?
11. How many claims under TII did it pay out last year. How many claims were made that were not paid out? What were the main reasons for not meeting claims?
12. Does the company provide any materials or other support to trustees or organisations (a) explaining the policy and (b) advising on steps that can be taken to avoid personal liability?
13. Does the company collaborate with other insurance companies and/or the ABI over advice to trustees/charities on insurance issues?
14. Is there anything else you would like to add that has not been covered by these questions?

## Appendix 8

### Schedule of issues for interviews with insurance brokers

1. Roughly what proportion of the insurance industry provides Trustee Indemnity Insurance (TII)? Is this usually part of a package or stand alone?
2. Who usually negotiates the insurance policy on behalf of the trustees – the Chief Executive, Chair of trustees or other?
3. Is it usual for trustees to get cover individually or as a group? Do you have a view on this?
4. What does the insurance generally cover and what are its limitations?
5. If the insurance only covers behaviour that is 'reasonable' how is reasonableness tested – objectively or subjectively?
6. How is the premium usually set – on what criteria? What is the current range?
7. What does the insurance industry view as high risk charities or activities?
8. Do you know of any instances where a company has refused to cover an individual or group of trustees?
9. Would a company ever impose conditions of such insurance? What might these be?
10. For TII policies, what is the level of risk covered on average?
11. Does the insurance industry provide any materials or other support to trustees or organisations (a) explaining the policy and (b) advising on steps that can be taken to avoid personal liability?
12. Do companies collaborate with other insurance companies and/or the ABI over advice to trustees/charities on insurance issues?
13. Is there anything else you would wish to add that has not been covered by these questions?

## Appendix 9

### Schedule for interview with Charity Commission

1. How are trustees registered with the Charity Commission? Could it be possible for an individual to be registered as a trustee without their knowledge?
2. Does the Commission have any direct contact with individual trustees, or is it all through a named correspondent in the charity?
3. For incorporated charities, are all the Directors automatically trustees and what is the potential for their personal liability?
4. How many formal Inquiries does the Charity Commission conduct each year? What are these usually prompted by?
5. How many approaches for advice from trustees relating to legal proceedings (including involving their personal liability) does the Charity Commission receive each year? Which section of the Commission deals with these queries and what is typically the nature of the interaction?
6. Does the Commission have any other statistics that may be of relevance and use to this study?
7. What assurance (if any) does the Commission give to callers in order to encourage them to be completely open about the circumstances? How does the Commission draw the line between acting as advisor and regulator?
8. How do cases of personal liability usually come to the attention of the Commission?
9. Under what circumstances might a trustee be personally liable? Who decides and on what basis?
10. What happens from the point of view of the Commission if a trustee is found personally liable?
11. Given that trustees may be collectively liable, what advice would the Commission give to trustees about making sure that their trustee colleagues behave in such a way as to not incur personal liability?
12. What is the Commission's current formal policy in relation to paying for Trustee Indemnity Insurance from the charity's funds? Are there any circumstances in which an application (through self certification) would be refused?
13. What is the Commission's view about the arguments against Trustee Indemnity Insurance (ie because of all that it will not cover)? Are they concerned about the difference between the public support it gives to TII and the reservations that are privately expressed about the value of TII?
14. Is the Commission planning anything (other than the Bill) to allay the fears of trustees about potential personal liability?



**The Governance Hub** exists to improve governance within the voluntary and community sector in England by:

- increasing the supply of trustees
- enhancing trustee learning and development
- strengthening and extending support services for trustees.

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