Village Hall Information Sheet 35

Trustee liability and trustee indemnity insurance

This information sheet aims to help village hall management committees understand how they can limit personal risk and decide whether they need to purchase trustee liability insurance.

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Introduction

Village hall charities are unincorporated trusts registered under the Recreational Charities Act 1958 and, because they hold assets in the form of land and property, concerns are often raised about personal liability. Members of the village hall management committee are charity trustees and they are responsible for the general control and management of the administration of the charity. Charity trustees have duties and responsibilities under law and may incur liabilities as a result of their management of the village hall.

The Charities Act 2006 introduced the right of trustees to buy trustee indemnity insurance out of charity assets without an explicit power from the Charity Commission or from their governing document.

This information sheet aims to help village hall management committees understand how they can limit personal risk and decide whether they need to purchase trustee liability insurance.

1. Trustee liability

Charity trustees have powers, duties and responsibilities that derive from the charity's constitution or trust deed or from statute and common law, and from the contracts they enter into. Failure to comply with such duties and responsibilities or to fulfill contractual undertakings can result in the charity trustees being personally liable.

1.1 How does such personal liability arise?

Personal liability of charity trustees arises because, as they are the persons having control of the administration and assets of a charity, they are the ones who the law recognises as having ultimate responsibility for any loss that accrues.

Personal liability can arise in contract, tort, breach of trust and breach of statutory duty e.g. failure to comply with the Health and Safety at Work etc Act 1974. Most of such liability can be covered by public liability insurance and, where staff are employed, by employers' liability insurance. No insurance is available to cover a charity trustee against criminal liability e.g. payment of a fine for breaching the Health and Safety at Work etc Act 1974 because this would be against public policy.

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In order to understand what is meant by 'liability arising in contract, tort, breach of trust and breach of statutory duty' each situation needs to be examined in turn:

Contract
When a charitable unincorporated association enters into a contract, it is not entering into it in its own name (this would be invalid); instead it 'borrows' the legal identity of some or all of its management committee members to enter into that contract on behalf of the charity. If the charity is in breach of the contract, it is the members of the management committee who are liable. Breaches of contract arise most commonly where a charity:

- in the case of a contract of purchase of goods or services, cannot or does not pay the amount due
- fails to provide a service it has agreed to provide, e.g. the charity shuts down a day care centre it has contracted with a local authority to provide
- fails to provide services to the required standards
- breaches the terms of a lease for property, e.g. fails to repair or re-decorate.

Tort
Tort is the term that covers a range of actions or inaction by which a person suffers loss, injury or damage as a result of someone else's negligence, recklessness or nuisance. An example, in the context of a community building or village hall, might be failure by the management committee to maintain the building floor and a visitor breaks their leg as a result. In these circumstances, public liability insurance should cover any liability.

Breach of trust
A charity trustee commits a breach of trust where he or she acts in a way that is not authorised by the constitution or neglects to fulfill his or her duties as a trustee. They therefore cover a wide variety of misconduct and include actions, which can be regarded as purely technical breaches such as investing charity assets in an unauthorised manner. A grave breach of trust will arise if a charity trustee, instead of only acting in the best interests of the charity, deals with charity assets in such a way as to derive some personal benefit.

The most common failures in trustees' duty of trust are:

- spending money on activities that are not charitable or outside the charity constitutional objects
- making unauthorised payments to trustees
- failure to declare a conflict of interest
- spending money on unlawful political activities.

Breach of statutory duty
This is breach of any requirement of statue that affects charity trustees, e.g. failure to comply with the Charities Act requirements on accounts or breach of the Data Protection Act 1998.

The charity trustees need to consider what would happen if a trustee, acting honestly and reasonably, is nevertheless sued for breach of contract, tort or for breach of trust or of statutory duty.

The charity trustees should consider, honestly, whether any of the circumstances described above would happen in the normal, day-to-day business of the charity, if the village hall management committee act reasonably, honestly and in the best interests of the charity. Let us look at some possibilities.

Contract
If an unincorporated charity undertakes a large contract, e.g. a contract to build or alter a community building, it is the individual members of the management committee who enter into such a contract and assume responsibility. Hopefully, such contract will run smoothly and all amounts due to the building contractor paid on time. Unfortunately, these contracts rarely run smoothly and there can be cost overruns. If the charity has insufficient reserves or cannot fundraise in time, the contractor may decide to sue the management committee for monies outstanding. In view of this possibility the Charity Commission explain that charity trustees should try to have inserted into the contract a suitable limitation of liability clause. Unfortunately, it is often the case that the contractor refuses to accept any such limitation.

If the contractor in these circumstances successfully sues the management committee, the charity trustees may have the right to an indemnity out of the charity's funds: it is normal for charity constitutions to include such right. If there are insufficient charity assets available, the Charity Commission may sanction the use of permanent endowment, i.e. the community building.

Note that trustee indemnity insurance does not cover breach of contract.

Tort
Most liability in tort will be covered by public liability insurance. Of course, liability in tort can arise in any number of situations, even in circumstances when public liability insurance cover is not available. For example, if a charity trustee of a village hall gave negligent legal advice to a third party, he or she would be liable in tort. Such liability can be insured against by the appropriate professional liability insurance. But this does beg the question, what is a charity trustee of a village hall doing giving legal advice?

If liability in tort does arise the position described above for breach of contract should apply provided they have acted reasonably and honestly and in the best interests of the charity, i.e. the charity trustees will almost certainly have the right to an indemnity out of the charity's funds.

Breach of trust
It is difficult to provide comfort in the case of breach of trust. All charity trustees should make themselves aware of the terms of their trust and act accordingly. It could be said that charity trustees should accept liability for breach of trust without complaint, but there is always the possibility of a technical breach in circumstances where a charity trustee acted reasonably and honestly.

As explained in Section 2 of this information sheet, trustee indemnity insurance will cover a breach of trust. However, if a charity trustee acts in breach of trust attributable to any act or omission which he or she knew to be a breach of trust or which was committed in reckless disregard of whether it was a breach of trust or not, they will not have the benefit of any insurance cover, including indemnity insurance, because this would be a standard exclusion from insurance cover.

The charity trustees may have the right to an indemnity out of the charity's funds: it is normal for charity constitutions to include such right. If there are insufficient charity assets available, the Charity Commission may sanction the use of permanent endowment, i.e. the community building.

In the event of neither charity assets nor the realisation of permanent endowment being sufficient to satisfy the demand, the charity trustees may petition the court for relief from the court under s.61 of the Trustee Act 1925. Provided the charity trustees have acted reasonably and honestly, the court will grant such relief. However, it is no longer necessary to go to the courts. The Charities Act 2006 grants the Charity Commission the power to relieve charity trustees from personal liability where the trustees have acted honestly and reasonably and ought fairly to be excused for the breach of trust or duty.

Breach of statutory duty
The comments above on breach of trust apply.

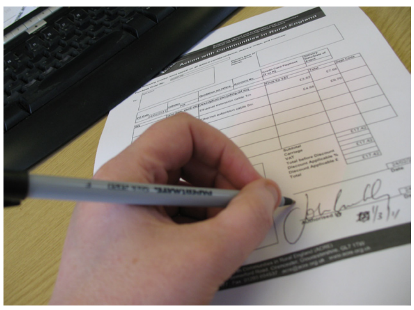
Breaches of criminal law
Many of the statutory responsibilities placed on trustees involve criminal sanction in the event of breaking the law. For example, failure to provide a safe working employment for staff is a criminal offence. Most offences are punishable by fine but, in serious cases, imprisonment may result.

There is no insurance cover available for breaches of criminal law.

1.2 Limiting the risk of personal liability

The best way of protecting trustees from personal liability is to make sure such liabilities are not incurred. This can be achieved by ensuring that the charity is well managed and that good practice is followed at all times. The Charity Commission, ACRE and the Rural Community Action Network, through its village hall advisers, and Community Matters all issue good practice guidelines. For further details see 'Further information' at the end of this document. Trustees who need professional advice are allowed to pay for such advice out of charity funds.

Another method is to incorporate as a company limited by guarantee. Members of such a company assume liability that is limited to a set amount, usually £1. The directors of such a company will not incur personal liability provided they act reasonably and honestly and only in the best interests of the company and do not act fraudulently or engage in wrongful trading. This method should not, however, be seen as an opportunity to limit liability without having to ensure that the charity is well managed and good practice is followed.



The Charities Act 2006 has introduced a new legal structure, the Charitable Incorporated Organisation created specifically for charities. This will have the same limited liability as a company but will be registered with and regulated by the Charity Commission. Secondary legislation is needed to complete the legal framework of this. It is not expected to be in place until late 2009.

If trustees are not reassured by the idea of 'good practice', especially as society is becoming increasingly litigious, they can minimise the risk. The risk of personal liability can be minimised by including in the charity's constitution or trust deed a provision to the effect that the charity will indemnify (compensate) the trustees from the charity's assets should they suffer a personal loss as a result of the charity's activities despite acting with proper authority and due care.

If there are insufficient charity assets available, the Charity Commission may sanction the use of permanent endowment, i.e. the community building. In the event of neither the charity assets nor the realisation of permanent endowment being sufficient to satisfy the demand, the charity trustees may petition the Charity Commission under the Charities Act 2006 or the court for relief under s.61 of the Trustee Act 1925. Provided the charity trustees have acted reasonably and honestly and ought fairly to be excused, such relief will be granted.

Insurance cover is available for many types of liability as explained above.

2. Trustee indemnity insurance

The Charity Commission describes trustee indemnity insurance, in its leaflet CC 49, as personal insurance for trustees (which is sometimes known as "liability insurance") which protects (or indemnifies) trustees against the risk of personal liability arising from their breach of trust. The Charities Act 2006 introduced the right of trustees to buy this insurance out of charity assets without an explicit power from the Charity Commission or from their governing document. This is providing that the trustees are satisfied that it is in the charity's best interests to buy this with the charity's money and that the governing document does not expressly prohibit the purchase.

Typical indemnity insurance policies tend to follow the pattern of directors and officers insurance and cover the payment of damages, plus most costs and expenses flowing from, an actual or alleged breach of duty, breach of trust, neglect, error, omission, misstatement, libel, slander and any other act committed by a trustee solely in the course of the activities of the charity. The reach may extend to include everyone working for the charity, even employees and voluntary helpers, although the policy exclusions may impact on this. Cover is never offered in respect of intentional wrongdoing or the making of improper profits and even when liabilities are negligence-based, many kinds of damage will be excluded. Great care should be taken in assessing and negotiating the exact type and extent of cover, and such policies should always be reviewed whenever there are significant organisational changes.

Trustee indemnity insurance will not cover:

- acts, criminal or not, which the charity trustees know to be wrong
- liability to third parties, e.g. for breach of contract or lease
- redundancy payments to employees
- penalties for breaches of statutory duties or fines
- injury to members of the public whilst on the charity's property (this is covered by public liability insurance)
- fraud or dishonesty of employees
- faulty, inaccurate or wrongful advice given either under fee or contract. This will require specific indemnity cover e.g. legal advice indemnity insurance
- losses from failure to insure the charity's assets, where the failure to insure would be regarded as a breach of trust, or
- liabilities arising from wrongful trading, i.e. where the trustees allow the charity to continue trading when they knew or ought reasonably to have known that the charity was insolvent.

Most trustee indemnity insurance will cover the costs of successfully defending legal action brought against a trustee for breach of trust or breach of duty. However, the Charity Commission will not allow trustees to be indemnified for the costs of an unsuccessful defence.

Note that fraud and dishonesty may be covered under fidelity guarantee insurance. Other insurance may be available to cover specific concerns, e.g. legal expenses.

2.1 Trustee indemnity insurance and public liability insurance

Trustee indemnity insurance is not the same as public liability insurance. Public liability or third party insurance covers charity trustees against liability for injury to persons or damage to property caused during the course of the charity's activities. Thus, if a third party is injured whilst attending an event in a community centre or a village hall, their claim for damages will be against the charity trustees who will be protected by the charity's public liability insurance. Such insurance would also cover the situation where a member of the management committee suffers an injury and seeks compensation from the other charity trustees.

The problem for charity trustees is that these types of insurance do not protect them against a claim for pecuniary (i.e. monetary) loss otherwise than by reason of personal injury or damage to property.

Public liability insurance does not cover liability for breach of contract. It is possible to insure against intervening events which result in a charity becoming unable to complete its contractual commitments, e.g. the holding of a fete prevented by bad weather, but otherwise charity trustees are personally liable. However, trustees who have acted reasonably and properly in carrying out the objects of their charity will normally be entitled to reimbursement from the charity's funds. However, if these funds are insufficient, the trustees may be liable to make up any shortfall. In this case, the charity trustees may petition the Charity Commission for relief under the Charities Act 2006 or the court under s.61 of the Trustee Act 1925.

Trustee indemnity insurance is designed to cover only those circumstances where a third party sues individual charity trustees for pecuniary loss resulting from breach of duty, breach of trust, neglect, error, omission, misstatement, libel, slander and any other act committed by a trustee solely in the course of the activities of the charity.

2.2 Breach of the lease

A lease is a contract. There is no insurance cover available for breach of a lease - certainly indemnity insurance will not cover it. If charity or holding trustees are sued by a landlord for breach of the lease they will have to rely on their right to indemnity out of charity assets. You should ensure that the lease contains a clause which (a) limits liability under the lease to the net realisable value of the charity's assets and (b) excludes all personal liability of the trustees.

2.3 Taking out trustee indemnity insurance– making the decision

Trustees' primary concern is that if they do not take out trustee indemnity insurance, they could be personally liable and lose their assets including their home. Whilst this is possible it is very unlikely. Over the last 10 years or so, particularly since the passing of the Charities Acts 1992 and 1993, managing trustees in the voluntary and community sector are increasingly concerned about the apparently increasing regulation and control of voluntary activity and the growing need for legal compliance by charity trustees. In fact, the duties of charity trustees have not increased significantly, it is only a perception. What has increased is the amount of law covering areas of work traditionally undertaken by community organisations and village halls. Health and safety, employment rights, the national minimum wage, working time regulations - all have contributed to the general feeling among many charity trustees that they are putting their assets and livelihood in jeopardy or that 'volunteering is no fun any more'.

The problem is that trustee indemnity insurance does not, on the whole, provide the protection that many people believe it to have.

In situations where personal liability arises and no insurance cover is available, the circumstances of such liability must be taken into account. As mentioned above, provided a charity trustee has acted reasonably and honestly in the best interests of the charity, he or she should be entitled to an indemnity out of the charity's assets. In the case of a breach of trust or duty where such assets are insufficient to cover the liability, the charity trustees may petition the Charity Commission for relief under the Charities Act 2006 or the court under s.61 of the Trustee Act 1925.

To help you decide whether of not to take out trustee indemnity insurance, do an audit of your organisation's activities and how your management committee operates and makes decisions. Follow good practice in terms of inducting new trustees: ensure that all charity trustees know the constitution and understand the duties and responsibilities of charity trustees.

In the case of a community association or village hall the simple hiring out of community facilities to local people and groups is unlikely to result in any personal liability that will not be covered by public liability or employers' insurance. If your charity does undertake activities that might not be covered by insurance you must consider whether it should be undertaking such activities.

In deciding whether to take out this insurance trustees should balance the benefits of the protection to the trustees, and the charity, against the cost of the premium. Individual trustees can of course pay their own premiums if they wish. There may, for example be a benefit to a charity where there are problems with recruiting new trustees and taking out the insurance is what is necessary to encourage people to join the committee. Trustee Liability Insurance is no protection against intentional wrongdoing or the making of improper profits and even when liabilities are negligence-based, many kinds of damage will be excluded. Providing trustees acted honestly and reasonably there should be few concerns about personal liability and village hall charities may feel that Trustee Liability Insurance is not worthwhile.

2.4 Taking out trustee indemnity insurance

After careful consideration and having conducted an audit of the organisation, trustees may decide that they want to take out trustee indemnity insurance. It used to be the case that, unless the constitution included the power to pay for trustee indemnity insurance, trustees would have to ask the Charity Commission for consent to include such power in their constitution. Such consent would only have been given if they could present a good case to the Charity Commission that such insurance cover was necessary. The Charities Act 2006 introduced the right of trustees to buy this insurance out of charity assets without an explicit power from the Charity Commission or from their governing document. This is providing that that trustees are satisfied that it is in the charity's best interests to buy this with the charity's money and that the governing document does not expressly prohibit the purchase.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3. Sources of further information and advice

ACRE and the Rural Community Action Network (RCAN) provides an information and advice service for village hall management committees through its network of village hall advisers. A link to the village hall advisers is available on the ACRE website www.acre.org.uk

ACRE produces a range of village hall publications and information sheets to support this service which are available from your local RCAN member.

ACRE publications that may be of interest to readers of this publication are listed below:

Village Hall Information Sheet 11:	Charities Act 1992, 1993 and 2006
Village Hall Information Sheet 17:	Trustees – roles and responsibilities
Village Hall Information Sheet 39:	Village halls and incorporation

The Charity Commission publishes a range of publications and guidance which are available on their website. The following may be of particular interest to village hall committees:

CC3 The Essential Trustee: What you need to know
CC3a Responsibilities of Charity Trustees: A summary
The Charities Act 2006 – What trustees need to know (produced jointly by the Charity Commission and the Office of the Third Sector.)
CC49 Charities and Insurance

The Charity Commission:
Harmsworth House, 13-15 Bouverie Street, London, EC4Y 8DP.
For all general enquires telephone: 0845 3000 218 www.charity-commission.gov.uk

Aon Limited:
Insurance House, 125/129 Vaughan Way, Leicester, LE1 4SB Tel: 0845 070 8985

Community Sector Law Monitoring Group, Community Matters, 12-20 Baron Street, London, N1 9LL.
Tel: 020 7837 7887 www.communitymatters.org.uk

ACRE and the Rural Community Action Network (RCAN) together deliver a local advisory service tailored to the needs of rural community buildings throughout England. This service aims to ensure that hall trustees have access to accurate information about regulatory requirements, training and one-to-one advice and support with business planning. All RCAN advisers are networked by ACRE, undertake an OCN accredited course and are provided with resources to support their work. The national Hallmark quality standards programme encourages hall trustees to adopt best practice through a peer visitor programme. However, demand from halls for support often exceeds supply and demonstrates the need for a proactive, local service that can support all halls to achieve their aspirations and potential.

About ACRE

Action with Communities in Rural England is the national umbrella body of the Rural Community Action Network (RCAN), which operates at national, regional and local level in support of rural communities across the country. We aim to promote a healthy, vibrant and sustainable rural community sector that is well connected to policy and decision-makers who play a part in delivering this aim. ACRE is nationally recognised for its expertise in ensuring rural community-led solutions are central to public policy debate.

Rural Community Action Network (RCAN)

The Rural Community Action Network (RCAN) covers the whole of rural England through the work of 37 local member organisations, eight regional bodies and ACRE. Network members are county-based, independent, local development agencies that, for decades, have been delivering support on the ground to enable rural communities to improve quality of life for all. They act as a strategic voice for rural communities, allowing grassroots issues to be championed and solutions worked out in partnership between statutory, voluntary and private sector providers. Their strength lies in their ability to work within communities in an inclusive and holistic way, helping local people to develop local solutions and identify unmet needs through a unique approach to community-led planning. Alongside this, network members provide a trusted local support network for rural community groups, including dedicated expertise in arenas such as transport, housing, the management of community-owned facilities, social enterprise and rural services.

ACRE is pleased to have worked in partnership with AON Limited on this information sheet.

This Village Hall Information Sheet is one in a series available from ACRE's Village Hall Information Service. A full list of ACRE Information Sheets and other publications can be found at www.acre.org.uk

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