



# Trustee Indemnity Insurance

## Information Sheet for Trustees

### Contents

1. What is trustee indemnity insurance?
2. How can charities make use of the general power to buy TII?
3. What conditions do trustees have to meet in order to use the general power?
4. Apart from these specific conditions, does the Commission have any “best practice” advice for charities wishing to purchase TII?
5. Meaning of words and expressions used in this information sheet

### 1. What is trustee indemnity insurance?

Trustee indemnity insurance (TII), covers trustees against personal liability when legal claims are made against them, either by their charity or by a third party. Provided trustees have authority, they are entitled to be insured against claims that may arise from their legitimate actions as trustees, and will be covered against liability as long as they have acted honestly and reasonably. In most cases this authority will be provided by the statutory general power brought in by the 2006 Act. The main difference between TII and other types of insurance taken out for the benefit of the charity is that TII directly protects an individual trustee, rather than the charity itself.

Provided the cost is reasonable, TII may be paid for out of charity funds. But, because TII paid for in this way is regarded as a personal benefit, it must have proper authorisation **before** the charity can purchase it. This can be in the form of a specific power in the charity’s governing document, an order of the Courts, a scheme or order from us, or an authority given by legislation or regulations.

This principle applies even where a trustee purchases TII out of his or her own pocket, and wishes to claim a refund from the charity as a legitimate expense – the money cannot be refunded **unless** there is a specific authority in place.

Ensuring there is proper authority is important. Without it, any policy is unlikely to be effective, with the result that insurance companies might not pay out on an otherwise valid claim. The charity would have wasted its money, and the trustees would technically be in “breach of trust”, and could be held liable to make good the loss to the charity.

### 2. How can charities make use of the general power to buy TII?

The 2006 Act inserted a provision into the 1993 Act that provides trustees with a proper legal authority to buy TII, so long as they are able to meet certain conditions (see section 3 below), and provided there is nothing in the charity’s governing document that specifically forbids it.

This means that trustees wishing to take out TII, but without a suitable power in their charity’s governing document to do so, no longer have to apply to us for an authority. They can rely on the general power in the 1993 Act to arrange insurance cover for:

- any personal liability for breach of trust or duty in their capacity as trustees or holding trustees;
- any negligence, default, breach of duty or breach of trust committed by them while acting as directors or officers of a charitable company, or of any company carrying out activities on behalf of the charity; (this includes “wrongful trading” where the business is carried out by a charitable company, or where the business is carried out by a company on behalf of the charity).

The only time charities will need to obtain our approval in future is if there is an “express prohibition” against TII. A prohibition of this type (see section 3 below) is likely to be very rare, and we will usually make a short scheme to overturn it – unless there is a good reason not to. (We will not normally overturn a prohibition where there is evidence the charity intends to take out a form of TII that is beyond the scope of the legislation).

### 3. What conditions do trustees have to meet in order to use the general power?

#### There must be no express prohibition

Trustees need to examine their charity's governing document to make sure the purchase of TII is not expressly forbidden.

An "express prohibition" will specifically refer to TII, and will **not** be a part of any wider provision against trustees benefiting personally. The general power now in the 1993 Act **overrides** that type of prohibition, which may often be described as a "*trustees [or directors] not to be personally interested*" clause.

The general power also overrides the need for our approval where use of a trustee benefit provision is stated to be conditional upon our "prior written consent".

If there does appear to be an express prohibition, the trustees should contact us, so that we can consider whether a short scheme should be made overturning it. This type of scheme does not require any advertising and can be made quickly. We will not normally need to give our authority in the scheme to the purchase of TII. When the prohibition is set aside, the charity can simply make use of the general power.

#### TII must be in the best interests of the charity

The trustees must be clear their decision to purchase TII is based on the genuine need, and that risks and potential liabilities have been identified that justify spending charity funds on insurance cover. They should ensure the cost is reasonable, and will not be a drain on the charity's finances, or in any way adversely affect its activities. They will need to be satisfied the insurance policy they take out is suitable for the charity, and that they are clear on the extent of insurance cover – after taking expert advice if necessary.

#### Trustees must observe a "duty of care"

The general power also requires that trustees are subject to the "duty of care" in the Trustee Act 2000 when making a decision to take out TII.

In broad terms, trustees must exercise all reasonable care and skill when making and carrying out a decision, allowing for any special knowledge or experience an individual trustee might have, particularly when acting in the course of a business or profession.

They must exercise the power responsibly in the interests of their charity, and take independent professional advice as appropriate when selecting the right insurance policy for their charity.

#### Trustees must ensure the insurance policy contains certain exclusions

Where TII is taken out, the insurance policy **must** include a clause to ensure that it will **not** cover:

- liability in respect of fines imposed in criminal proceedings, or penalties arising from regulatory action; (for example, penalties imposed by the Financial Services Agency or Companies House.);
- liability arising from defending criminal proceedings in which the trustee is convicted of fraud, dishonesty, or wilful or reckless misconduct; and
- liability arising out of conduct which the trustee knew, or should have known, was not in the interests of the charity.

These are specifically excluded by law from the type of indemnity that TII will cover.

### 4. Apart from these specific conditions, does the Commission have any "best practice" advice for charities wishing to purchase TII?

Yes. We strongly recommend that, before considering the purchase of TII, trustee bodies should check whether they have in place policies and procedures that help reduce risk to themselves and the charity (see 'Charities and Risk Management' on our website). In particular, we advise that trustees:

- familiarise themselves with their charity's governing document and their own powers and duties – including what powers they have to delegate authority to an agent or employees;
- seek professional or other expert advice (including from us) where they are unsure about their duties and liabilities;
- find out what areas of law might have an impact on the activities of the charity; for example, employment, health and safety, human rights, data protection;

- before entering into a contract, satisfy themselves the charity has the resources to meet its part of the contract, and understand the consequences of not meeting an obligation in the contract;
- tighten up procedures within their charity where they have identified a potential risk;
- consider and, if necessary take professional advice, about the different types of insurance that might be suitable for their charity; and
- make sure they understand what liabilities the policy they take out will actually cover.

In this respect, trustees should note that TII will **not** normally cover them against the risk of personal liability arising from **contracts** they have entered into on behalf of their charities. Nor will they cover:

- redundancy payments made to employees of the charity;
- liabilities under a lease (eg, for the repair or maintenance of a building);
- occupiers' liability for injury to the public whilst on the charity's property (public liability insurance);
- liability for fraud or dishonesty by employees (fidelity guarantee insurance); or
- liability for faulty, inaccurate or wrongful advice given either for a fee, or under contract (professional indemnity insurance).

Further explanation of the different types of insurance that may be suitable for charities is contained in our booklet Charities and Insurance (**CC49**).

## 5. Meaning of words and expressions used in this information sheet

**The 1993 Act** means the Charities Act 1993.

**The 2006 Act** means the Charities Act 2006.

**Breach of trust** means a breach of any duty imposed on a trustee. For charity trustees, these duties may be imposed by the provisions of a charity's governing document, laws and regulations, or Orders of the Court or the Charity Commission. A duty is something which trustees have to do. It is distinguished from a **power**, which trustees may or may not choose to use. (See our booklet The Essential Trustee (**CC3**) – for more details about trustees' duties and responsibilities).

**Charitable company** means a company:

- which is formed and registered under the Companies Act 2006; this will also include a company already registered under the Companies Act 1985, or one which was already in existence at that time;

and which

- is established for **exclusively** charitable purposes.

**Companies Act** means the Companies Act 2006.

**Court** means the High Court or any other court in England and Wales having jurisdiction over charities, or any judge or officer exercising that jurisdiction.

**Governing document** means a legal document setting out the charity's purposes and, usually, how it is to be administered. It may be a trust deed, constitution, memorandum and articles of association, will, conveyance, Royal Charter, Scheme of the Commission, or other formal document.

**Holding trustee** means individuals who are appointed to hold the legal title of charity property. They can only act on the lawful instructions of the charity Trustees and in accordance with any provisions contained in the governing document. The governing document may confer other duties or responsibilities on holding trustees and so it is important that it is consulted in every case.

**Must** is used where there is a specific legal or regulatory requirement affecting trustees or a charity. Trustees (or their agents or employees) must comply with these requirements.

**Recommend and advise** are used when we are suggesting actions that we consider to be good practice, but that do not currently represent a legal requirement.

**Should** is used for items we regard as minimum good practice, but for which there is no specific legal requirement. Trustees should follow good practice guidance unless there's a good reason not to.

**Third party** is used to mean anyone who is outside the charity: that is to say, someone other than the charity's trustees, volunteers, members of staff, or the charity itself.

**Trustee** means a charity trustee. Charity trustees are the people who are responsible for the general control and management of the administration of the charity. In the charity's governing document they may be called trustees, managing trustees, committee members, governors or directors, or they may be referred to by some other title.