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| Trustee Indemnity Insurance |
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| OG100 |
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# Policy Statement/Overview

## Summary of the guidance

# Casework Guidance

### OG100 Overview 14 March 2012

This guidance explains the effect of the general statutory power to purchase trustee indemnity insurance using charity funds, and what action may be needed on our part where there is an express prohibition against such insurance.

## 1. Introduction

### 1.1 What is trustee indemnity insurance?

Trustee indemnity insurance (TII) covers trustees against having to personally pay legal claims made against them (by their charity or by a third party) for a breach of trust, or a breach of duty or negligence, committed by them in their capacity as trustees. Provided that 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 power in the 2011 Act.

Provided the cost is reasonable, the insurance premiums can be paid for out of charity funds. But, because TII paid for in this way is regarded as a form of personal benefit to the trustee(s) concerned, 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, a Scheme or Order from us, an order of the Courts, or now most commonly, an authority conferred 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 can’t 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 may 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 repay the cost to the charity.

The main difference between TII and other types of insurance taken out for the benefit of a charity is that TII directly protects an individual trustee rather than the charity itself. But in practice, TII is often provided under a single policy in combination with other types of cover. This could include:

* Professional liability insurance: covering errors or omissions resulting in a civil liability for the charity, where the charity provides counselling, advice, or an information service;
* Fidelity or 'theft by employee' insurance: covering fraud or loss through criminal acts by officers or employees;
* Trustee Reimbursement insurance: covering residual liability for a claim which ought to have been met out of the charity's assets, but for which trustees may be held liable because those assets are insufficient to meet the claim.

These and other examples of insurance, which may or may not indemnify against personal liability, are discussed in more detail in our booklet [CC49 Charities and Insurance](https://www.gov.uk/government/publications/charities-and-insurance-cc49). The important point is that, if the insurance policy as a whole provides any indemnity to trustees for their personal liability, it will amount to a benefit which needs authority.

### 1.2 What powers do trustees have to buy TII?

The 2011 Act provides trustees with a legal authority, so long as the trustees are able to meet the conditions of its use (see next section); and provided also that there is nothing in the charity’s governing document that specifically forbids it.

It is likely to be extremely rare for a governing document specifically to prevent the purchase of TII, so in practice this means it is very unlikely we will need to make Orders or Schemes authorising the purchase of TII. In other words, most, if not all charities, will be able to rely on the power in the 2011 Act to purchase TII.

If there is what is termed an 'express prohibition' against TII, a short Scheme will be needed to overturn it - if we agree this is in the interests of the charity (see section 2).

The governing document may give an express power to purchase TII. If this is narrower than the statutory power, the trustees can rely on the statutory power; if it is wider than the statutory power, the trustees can rely on the power in the governing document. They should, however, be able to demonstrate why they consider it is in the best interests of the charity to provide this wider insurance for their benefit.

The main TII powers and restrictions are summarised immediately below.

### 1.3 Summary of the law

Section 189 of the 2011 Act allows trustees to pay for TII out of the funds of their charity, provided they are satisfied the arrangement is in the best interests of the charity. ('Best interests' means giving a clear advantage to the charity.)

Trustees can therefore 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.

(Note: The latter will cover any liability for 'wrongful trading' where the business is carried out by a charitable company, or by a company on behalf of a charity.)

This general statutory power is subject to the following exclusions:

* liability in respect of fines imposed in criminal proceedings, or penalties arising from regulatory action; (for example, penalties imposed by the Financial Services Authority 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.

It is made clear the term 'conviction' means one that is final, taking into account the termination of any appeal process.

The Secretary of State has the power to amend the exclusions by order.

Trustees are also subject to the 'duty of care' in section 1(1) of the Trustee Act 2000 when making a decision to buy TII.

Note: The statutory power cannot be used where the charity’s trusts contain an express prohibition against TII (section 189(6)(a) refers).

See section 2 for action where there is an express prohibition, and for the effect of the law where there is a general or qualified prohibition.

### 1.4 What is meant by 'duty of care' in this context?

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 professional advice as appropriate when selecting the right insurance policy for the charity.

We recommend that, before considering the purchase, trustees check whether they have in place policies and procedures that help reduce any potential risk. See [CC26 Charities and Risk Management](https://www.gov.uk/government/publications/charities-and-risk-management-cc26) on our website.

In this context, the duty of care in the 2000 Act does apply to directors of charitable companies, who are not normally subject to that provision.

## 2. What if there is an express prohibition?

### 2.1 What is meant by 'express prohibition'

By 'express prohibition' in this context we mean a provision in a governing document that specifically refers to TII, and explicitly forbids its purchase out of charity funds.

It is clear that, under section 189(6)(b), the statutory power overrides a general prohibition against trustees receiving any personal benefit, and also any 'qualified prohibition', where the use of a power is expressed to be conditional upon our prior written consent.

This covers, for example, our model 'trustees [or directors] not to be personally interested' clause. We do not need to make a Scheme in such cases - the charity can rely on the statutory power.

### 2.2 Action where there is an express prohibition

It is likely to be very rare to find an express prohibition against TII. If a charity does approach us where there is an express prohibition in its governing document, we will need to consider carefully the circumstances in which it was introduced, and whether it should reasonably be overturned.

We accept that TII is widely regarded as a useful adjunct of trusteeship, and that there may be circumstances where potential trustees may be deterred from volunteering if it is not available. However, there may be circumstances where it is not in the interests of the charity to overturn a prohibition.

For example, the charity founder might have also included a trustee remuneration provision, with the stated intention that TII should be paid for out of that remuneration, and not from any separate provision. Or the founder may strenuously object to charity funds being spent on what he/she considers to be unnecessary insurance. The test from our point of view will be whether the charity is finding it difficult to recruit trustees because it cannot offer TII cover.

Our scheme will effectively limit the extent of TII to be purchased to that allowed by the statutory provision. If we have evidence the charity wishes to purchase wider cover, we will need to consider carefully the grounds on which we could authorise this as being expedient in the interests of the charity, and/or the risks of making a standard scheme, rather than one which specifically sets out the statutory restrictions.

**Important note** : Legal advice should be sought if there is doubt as to whether any wider provision should be authorised.

But generally, unless there is a compelling reason for not doing so, we will delete or set aside the prohibition. For non-company charities, we will normally make a short altering scheme in accordance with our normal drafting practice.

In the case of a charitable company, we will assist the directors to remove the prohibition by approving an amendment to the memorandum of association under s198(2) of the 2011 Act (see [OG 47](http://ogs.charitycommission.gov.uk/g047a001.aspx)).

### 2.3 Action if we need to give authority

Where a prohibition has been overturned by a scheme, we will not normally need to authorise the purchase of TII, since the statutory power will be fully available to the trustees.

However, if it is possible to justify authorising a general power, then in the case of a charitable company, the directors (as trustees of the charity) will need both:

an appropriately worded power to provide the insurance (which may include the power 'to do all such other lawful things as are incidental or conductive to the attainment of its objects'); and

where (as will usually be the case), there is a provision in the charity's memorandum precluding any trustee from receiving a personal benefit from the charity, an addition to the range of exceptions to this clause.

See [C5](http://ogs.charitycommission.gov.uk/g100a001.aspx#tab3#heading_toc_4e_21) for model provisions.

Provided the charitable company is willing to accept the limitations and conditions reflecting the legal extent of cover that may be provided, consent may be granted in the usual way – see [OG 47](http://ogs.charitycommission.gov.uk/g047a001.aspx).

In the case of non-company charities, we will make a Scheme using the model in C3.

## 3. Registration: Approving governing documents

Given the existence of the statutory power, there is technically no need for a governing document to include a formal power to purchase TII, although of course there is no bar to this. Charities intending to operate in Scotland may wish to include a formal power, in the absence of any current general power in Scottish law to purchase TII - see next section.

If there is a TII provision, we are are only concerned that the scope of the power is within that allowed by law, and is expressed to be subject to the conditions and exclusions set down in s189.

There is no objection to a provision that may further restrict the use of the power, or to one that is couched in terms that allow the trustees to purchase cover “to the fullest extent permitted by law”.

But any TII provision that appears to extend the scope of personal cover beyond that allowed by s189 should be queried, and, if appropriate, referred for legal advice.

The same principles apply when approving new standard governing documents for national charities that include a TII provision. (We are not concerned with whether a previous 'standard' contained any form of prohibition against TII.)

## 4. English and Welsh charities operating in Scotland

Scottish charity law currently contains no general statutory power allowing trustees to purchase TII, which the Office of the Scottish Charity Regulator (OSCR) regards as a form of trustee remuneration.

Scottish charity trustees are entitled to receive remuneration if their charity had an express power of remuneration on or before 15 November 2004.

And a charity without an express power may make use of the statutory remuneration power set out in the Charities and Trustee Investment (Scotland) Act 2005.

But, since one of the criteria for using this power (as set out in s67 of that Act) is that only a minority of trustees can benefit, the power to purchase TII is ruled out - because TII will normally cover the whole trustee body.

However, pending a legislative resolution of this issue, guidance issued by OSCR states that it will not turn down a new organisation for charitable status just because of the presence of a TII power in its governing document. This includes applications from 'cross-border' charities which may based in England and Wales, but also required to register with OSCR because they operate in Scotland.

## Model Scheme 14 March 2012

THE CHARITY COMMISSION FOR ENGLAND AND WALES

Under the power given in the Charities Act 2011

Orders that from today, the

[date]

the following

Scheme

will affect the trusts of the charity known as [name]

**1. Definitions**

In this Scheme:

'the charity' means the charity identified at the beginning of this Scheme.

'the existing governing document' means.

**2. Administration**

The charity is to be administered by the existing governing document as altered or affected by this Scheme.

**3. Alteration of governing document**

(a) Notwithstanding any provision to the contrary in the existing governing document, the trustees of the charity may provide indemnity insurance for themselves out of the funds of the charity as and when required, provided that the policy will contain a provision which has the effect that the insurance shall not indemnify the trustees against:

(i) fines or regulatory penalties;

(ii) the costs of unsuccessfully defending criminal prosecutions for offences arising out of the fraud or dishonesty or wilful or reckless misconduct of a trustee; and

(iii) liabilities to the charity which result from conduct which the trustee knew, or must reasonably be assumed to have known, was not in the interests of the charity, or where the trustee did not care whether such conduct was in the interests of the charity or not.

(b) The trustees shall exercise the duty of care set out in clause 4 (below) whenever they exercise this power.

**4. The duty of care**

The duty of care requires the trustees to exercise such care and skill as is reasonable in the circumstances, having regard in particular:

(1) to any special knowledge or experience that they have or hold themselves out as having; and

(2) if a person acts as a trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

**GENERAL PROVISION**

**5. Questions relating to the Scheme**

The Commission may decide any question put to it concerning:

(1) the interpretation of this Scheme; or

(2) the propriety or validity of anything done or intended to be done under it.

## INFORMATION SHEET FOR TRUSTEES – 14 March 2012

This OG reproduces the information sheet sent to trustees who wish to apply for authority to purchase trustee indemnity insurance. It is also available as a Word template - CSD 1279.

## 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 that the 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 given in the 2011 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 may 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 2011 Act 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 2011 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 2011 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 a 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.);
* iability 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](https://www.gov.uk/government/publications/charities-and-risk-management-cc26) (CC26) 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](https://www.gov.uk/government/publications/charities-and-insurance-cc49) (CC49).

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

**The 2011 Act** means the Charities Act 2011.

**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](https://www.gov.uk/government/publications/the-essential-trustee-what-you-need-to-know-cc3) (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.

## Charitable company: Model form of power and addition to range of director exceptions to provide trustee indemnity insurance

1. Model power

(1) To provide indemnity insurance to cover the liability of the directors:

(a) which by virtue of any rule of law would otherwise attach to them in respect of any negligence, default, breach of trust, or breach of duty of which they may be guilty in relation to the company;

(b) to make contributions to the assets of the company in accordance with the provisions of section 214 of the Insolvency Act 1986.

 (2) Any such insurance in the case of (1)(a) shall not extend to:

(a) any liability resulting from conduct which the directors knew, or must reasonably be assumed to have known, was not in the best interests of the company, or where the directors did not care whether such conduct was in the best interests of the company or not;

(b) any liability to pay the costs of unsuccessfully defending criminal prosecutions for offences arising out of the fraud or dishonesty or wilful or reckless misconduct of the directors;

(c) any liability to pay a fine or regulatory penalty.

(3) Any insurance in the case of (1)(b) shall not extend to any liability to make such a contribution where the basis of the director's liability is his knowledge prior to the insolvent liquidation of that company (or reckless failure to acquire that knowledge) that there was no reasonable prospect that the company would avoid going into insolvent liquidation.

2. Addition to range of director exceptions

[Provided that nothing in this document shall prevent any payment in good faith by the company:]

*Insert after other exceptions* -

( )

of any premium in respect of any indemnity insurance to cover the liability of the directors which, by virtue of any rule of law would otherwise attach to them in respect of any negligence, default, breach of trust or breach of duty of which they may be guilty in relation to the company: Provided that any such insurance shall not extend to any claim arising from liability resulting from conduct which the directors knew, or must reasonably be assumed to have known, was not in the best interests of the company, or where the directors did not care whether such conduct was in the best interests of the company or not, and provided also that any such insurance shall not extend to any claim arising from liability for the costs of unsuccessfully defending criminal prosecutions for offences arising out of the fraud or dishonesty or wilful or reckless misconduct of the directors.