



Charities and litigation

A checklist for trustees

If the trustees have explored all the options open to them to resolve the issue and they decide to take or defend legal action, they must be satisfied that doing so is in the best interests of the charity. The trustees should be able to demonstrate that any decisions whether or not to take or defend legal action are in the charity's best interests.

It is important that trustees can justify the decisions they make on behalf of their charity. The charity's beneficiaries, its supporters and the commission will expect to be satisfied that any decisions the trustees have taken are the best way forward for the charity. Fully considering and recording decisions on the following issues and questions will help the trustees do this.

The key actions for trustees are to:

- explore all reasonable options open to the charity to resolve the issue, such as dispute resolution or agreeing a legal compromise - this may include taking professional advice to ensure that all other options have been exhausted
- take and consider specialist legal advice (and possibly the advice of other suitably qualified expert advisers, for example an accountant or a chartered surveyor) on the following matters:
 - the relative strengths of the charity's case and of any defence or counterclaim which may be brought against the charity by the other party involved
 - the likely costs
 - the risks surrounding recovering the charity's costs
 - the risk of having to pay the costs of the other party
 - the value or potential value of any claim
- consider whether the legal action in question constitutes charity proceedings and whether the trustees will need to apply to the commission for consent
- consider the impact on the charity and its beneficiaries of spending funds on legal proceedings which will therefore not be available for other work carried out by the charity
- assess whether the charity has sufficient funds to meet the potential costs involved - both parties involved in legal action are likely to incur costs regardless of whether they win or lose, although the costs are likely to be higher for the losing party
- explore any insurance options to protect themselves and help manage the cost risks
- consider the impact on the charity's donors or funders if money is spent on legal action - also consider the impact on the charity if it decides not to defend its position or pursue a legitimate claim

- consider what the impact will be on the charity of devoting management resources, energy and time to the legal action
- plan for the impact on the charity's reputation of any publicity the legal action or inaction may attract
- identify if any of the trustees have a conflict of interest (or loyalty) in making the decision; in some circumstances it may be sufficient for the conflicted trustees not to be part of the decision making process on a particular issue - in others, information about the legal action will not be shared with the conflicted trustee
- review regularly the following issues:
 - is taking or continuing with the legal action in the charity's best interests and will the other party be able to comply with the terms of any judgment obtained?
 - will the other party be able to pay the amounts awarded both in terms of any judgment and legal costs and expenses if they lose the case - the court usually requires the loser to pay the winner's costs - however, this does not mean that they will have the money to pay or that the amount of costs awarded by the court will be the full amount of costs that the charity has to pay