



Legal Liabilities of Governing Group Members: What you need to know

As a member of a governing group your most important responsibility is to act in good faith and in the best interests of your organisation and those you support or your cause, making sure you remain focused on your organisation's purpose. One question always comes up when we work with governing groups - 'what are my personal legal liabilities?'

With changes in legislation, there have been suggestions that the expectations of governing group members (trustees, board members, committee members and directors) have increased to that of a company director. Is that true? Or has legislation just caught up with expectations that already existed? Steven Moe and his purpose focussed team from Parry Field Lawyers have kindly shared what you need to know about the legal liabilities of governing group members.

Want to avoid liability? Be informed and practise good governance.

The following is focused on helping governors to be aware of where liability might exist. While it is important to be aware of your potential liability, the bigger focus should be on practising good governance as this will almost certainly help you to avoid situations where liability might arise.

Greater scrutiny of governors

The expectations of governors are increasing in line with society's expectations for accountability and good governance.

It is useful to keep in mind why laws are enacted, which is typically to benefit

society and to act as a deterrent for inappropriate behaviour. Laws relevant to governors exist to promote good practice and to make sure governors are held accountable for poor behaviour. Furthermore, governors have always been subject to certain duties in the common law (the body of unwritten laws based on legal precedents established by the courts). Some of the recent changes to governance laws, the Trusts Act 2019, Charities Amendment Bill 2022, and Incorporated Societies Act 2022, are Parliament's way of 'codifying' the common law. When codified in legislation is it more accessible to people than if it were just in the common law.

In our view, governors should be 'alert to' and not 'alarmed about' their potential liability, provided they are practising good governance.

Personal liability and structure

Personal liability depends in part on the structure of your organisation.

	Unincorporated group	Incorporated society	Registered charitable trust (society-based)	Registered charitable trust (trust-based)	Company	Industrial and provident society	Māori land trust
Relevant legislation	None – See comments below	Incorporated Societies Act 1908 (to be replaced by Incorporated Societies Act 2022)	Charitable Trusts Act 1957 Trusts Act 2019	Charitable Trusts Act 1957 Trusts Act 2019	Companies Act 1993	Industrial and Provident Societies Act 1908	Te Ture Whenua Māori Act 1993
Minimum people required	Two individuals	15 individuals (10 under 2022 Act)	Five individuals or existing society	Two or more trustees	One or more shareholders, one director	Seven individual members	Trustees (appointed by Māori Land Court)
Liability of governing group members	Personal, individual, and joint liability for debts, torts, and statutory obligations and offences	Limited liability if decision-makers act legally, prudently within society's objects and not for personal gain	Trustees will be personally liable, but usually the trust deed will grant them the right to be indemnified out of trust property	Limited liability if trustees act legally and prudently within the trust's objects and not for personal gain	Limited liability if directors act legally and prudently within company's objects and not for personal gain Also specific legislation provisions for directors.	Limited liability if directors act legally and prudently within the society's objects and not for personal gain	Limited liability if directors/ trustees act legally and prudently within trust's objects and not for personal gain Also specific legislation provisions for trustees
Who is liable?	Individuals	Entity	Individuals if not registered with the Companies Office Entity if registered with the companies office		Entity	Individuals if not registered with companies office	Entity
Tax status / Charitable status	Income not taxed if group has charitable status with DIA Charities and IRD				Charitable status possible	Tax paid on profits	Charitable status possible

People in incorporated groups are generally better protected from liability than those in unincorporated groups. In incorporated groups the trust board, society or company has separate legal status. This means that it is not the people (members, trustees, or directors) who enter into any obligations for the group (e.g., signing a contract) but the incorporated group itself. The group, or entity, not the people become liable. In contrast, governors of unincorporated groups may be held personally liable for obligations the group takes on and for any judgments made against the group by the courts. You can apply to incorporate your group or organisation through the Companies Office.

Governors can typically be held liable:

- 1) for breaches of the duties set out in their governance documents,
- 2) for breaches of the duties listed in the relevant governance legislation, or
- 3) for breaches of other relevant laws such as those related to employment, privacy, health and safety, tax, and contract to name a few.

It is critical to know your organisation's governance document (your Constitution, Trust Deed or Rules) and any rules specific to your group and how you have agreed to operate.

In fact, when it comes to trusts, the Trusts Act 2019 lists knowing the terms of the trust as the first of its **mandatory** duties.

P. Governance documents can become out-dated. For example, the Trusts Act 2019 has implications for governors of Charitable Trusts and the Incorporated Societies Act is being updated and has implications for officers. Read up about these changes and get a legal review of your documents to make sure they properly take account of any law changes.

It is important to have a good understanding of the relevant governance law for your group, as set out in the table. The more you refer to a law, the easier it is to understand and feel comfortable about.

Print out a copy of the legislation and take some time to get familiar with it. Identify the key provisions and highlight them. This is one way of protecting and empowering yourself. Remember, laws are for everyone, not just lawyers. There are excellent resources and links available on Charities Services website (charities.govt.nz) that consider many of the big legal questions and explain them in plain language.

You may also potentially be liable for a breach of other laws that apply to your specific organisation.

Keep in mind that at the heart of liability is the desire to deter poor behaviour by holding people accountable for it if it happens.

If you employ people, you must follow all relevant employment and health and safety laws. If you hold information about individuals, you must follow privacy laws. The greater the risk of potential harm, the greater the potential liability. Always ask, "What are the risks associated with this action or inaction?"

Lottery Game Rules

Many groups run raffles to fundraise. There are laws that govern how this should be done on the Department of Internal Affairs website (dia.govt.nz), search Lottery Game Rules.

Health and Safety at Work Act

This law has very wide application, including to groups that use volunteers. The Act exists, among other reasons, to protect the health, safety and welfare of people including volunteers, customers, and visitors.





The Act will apply to you if your group has any paid employees (including contractors), or if your group uses 'volunteer workers'. 'Volunteer workers' are people doing activities for an organisation on an ongoing and regular basis as part of core business, not simply for fundraising. If your group is purely a volunteer run organisation and does not have employees, it is not subject to the Act, but may still have ethical, legal, and social responsibilities.

The application of the Act will depend on your group's specific operations, it is not feasible to go into all duties here. As a governor, you need to be familiar with sections 36 to 46 of the Health and Safety at Work Act. No one can contract out of obligations under the Health and Safety at Work Act, with good reason. A good rule of thumb is to exercise the same care and attention for your group's health, safety, and welfare practices as you would want applied to your loved ones.

Unincorporated groups

As noted above, unincorporated group officers typically face greater liability. An officer can be liable for any group obligations e.g., if the group incurs debt the officers will be liable, particularly if they were aware of the debt and agreed to it.

The group's rules can be written to allow for a person who becomes liable (either the person who committed the wrong or the committee) to be indemnified (paid back) out of any property the group members hold individually.

Incorporated societies

Officers of an incorporated society need to adhere to the obligations in their constitution. They also need to adhere to the duties listed in sections 54 to 61 of the Incorporated Societies Act 2022.

A society may choose to indemnify an officer for costs and liabilities they incur through committing wrongful acts in good faith. The society may also choose to take out "Directors and Officers" insurance for officers or entire committees.

Officers may also face financial penalties if other provisions of the Act are breached, for example, each officer can be fined up to \$1,000 for failing

to provide documents the Registrar of Incorporated Societies has asked to inspect. It is a good idea to look through the Act and understand what is involved.

It is also important to be aware a third party may sue an officer personally under the civil law for breaches of trust or fiduciary duty if an officer acts outside the society's rules and objects, or for "conversion" of property.

Charitable trusts

Charities Services website says: "If you are an incorporated society or a charitable trust, in general there is limited personal liability, provided decision makers act honestly, prudently, within the group's charitable purposes and not for personal gain."

Trusts Act 2019

The Trusts Act 2019 includes mandatory and default duties. Mandatory duties must be performed by trustees and may not be modified or excluded by the terms of the trust. They are the duties to

- know the terms of the trust;
- act in accordance with terms of trust;
- act honestly and in good faith;
- act for the benefit of beneficiaries or to further the permitted purpose of trust;
- exercise powers for proper purpose.

Default duties must also be performed by trustees unless modified or excluded in the rules.

It is important to note that trust terms must not provide a trustee with any indemnity against the trust property. Any liability for any breach of trust arising from a trustee's dishonesty, wilful misconduct, or gross negligence cannot be indemnified.

How to understand potential legal liability before becoming a governor

If you have been invited to be a governing group member, or are about to apply, it can be an exciting time. While it can be tempting to jump right in, we recommend pausing to genuinely consider your ability to fulfil the group's obligations and time commitments and find out about the potential liabilities.

Here are some suggestions:

- Find out if the group is incorporated as incorporation lessens personal liability.
- Ask for a copy of the governance documents and rules. Check what you are obliged to do.
- If the documents haven't been reviewed in five years, ask what the process is for review to make sure they are aligned with any changes to laws.
- Ask what policies and procedures are in place for the activities of your group. For example, if the group employs people, ask for their employment policies and procedures. Of particular importance is how governors monitor health and safety.
- Ask if there is insurance or indemnity for governors, and what is covered or excluded. Ask if there has ever been a claim made against the policy.
- Ask to see copies of minutes of meetings. Consider how well these correspond with the group's rules. Watch out for minutes that are too light on detail and where decisions don't follow the rules as this may mean there is potential for rule breaches.
- Do a Google search of the group and key governors. Follow your instinct.

Tip:

If the group is small and busy, you may feel awkward asking these questions. In our experience it is much better to ask the questions before you join than to join a group that is not well set up and become embroiled in liability issues down the track. If a group is put out by your questions, that may be a sign that it is not well set up to manage liability.

Top 5 Tips to avoid liability

1

Be 'alert to' not 'alarmed about' liability. Laws exist for a reason, to protect society and deter wrongdoing.

2

Empower yourself. Do your due diligence before becoming a governing group member.

3

Consider liability insurance.

4

Follow the obligations in your governing documents and all other relevant laws.

5

Good governance is a journey not a destination. Keep learning. The more you know the less likely you are to become liable for wrongdoing.

How to limit legal liability once you are a governor

- If your group is unincorporated, consider whether you should incorporate to limit liability.
- Follow the obligations set out in your group governance document and rules.
- Consider directors liability insurance.
- Keep documents and rules up to date with laws. Consider a legal review of your documents, for example, whenever there is a key legal change, or every five years.
- Subscribe to useful newsletters to stay up to date with relevant news.

Final message

Being a governor is typically a rewarding experience. Laws are placing greater emphasis on good governance to deter and protect against poor behaviour.

The best way to avoid liability is to know and follow your group rules and the relevant laws, to act in good faith and in the interests of the group, and to seek appropriate advice for critical decisions.

Try not to feel intimidated if you are just starting out. These days there is an absolute wealth of useful information available to help governors.

Good governance is an ongoing commitment and even the most seasoned governors should continue to upskill.

If you have concerns about your role as a governor, or your potential liability, we recommend you consult your lawyer.

Resources

- Parry Field Lawyers (parryfield.com) provide a lot of free guides, articles, and templates. Go to the Resources page to find:
 - "Charities in NZ: A Legal Handbook"
 - Incorporated Societies Act 2022: Information Hub – free webinars, articles, guides, videos, FAQ's and the "Guide to the Incorporated Societies Act 2022"
- Charities Services (charities.govt.nz) – Click on the tab 'I'm a registered charity' and check out Running a Charity and Officer Information
- Community Networks Aotearoa (communitynetworksaotearoa.org.nz)
 - Tick for Governance online course
- Institute of Directors (iod.org.nz/nfp)
 - webcasts and other resources

ParryField
Lawyers



Annemarie Mora

Annemarie is a Law Clerk in the Parry Field Lawyers Impact team. She is in her final year of a Bachelor of Laws, has a Bachelor of Arts, a Graduate Diploma in Public Relations, and is a Chartered Member of the Institute of Directors. She is a Trustee of two for purpose Charitable Trusts.

Steven Moe

Steven is a seed planter, connector, and podcaster, working with people to help empower positive change. He does this as a partner at Parry Field Lawyers assisting NFP, Charity and purpose driven clients across NZ get their legal structures right and through creating and sharing resources to support that work. He also hosts seeds podcast and has monthly zoom calls for the impact sector which you can join by contacting him.

E: stevenmoe@parryfield.com
P: 021 761 292