

Committee Members Governance Role Summary

Below is a summary extracted from the document “Guide to the Legal Duties of not-for-profit Committee members and office holders in Victoria” issued by Justice Connect’s Not-for-profit Law service (formerly PilchConnect). A full version of the document is available on the website.

These legal duties are not onerous – in many ways they are just simple ethical principles which can be viewed as ‘common sense’ or ‘good practice’.

Why do Committee members have particular legal duties?

As a Committee member you have been elected (or invited onto the Committee) by the organisation’s members and are trusted to make decisions on behalf of the organisation.

The four main legal duties that Committee members have to comply with are:

- ▶ the duty to act in good faith in the best interests of the organisation and for a proper purpose
- ▶ the duty to act with reasonable care and skill (including the duty to prevent insolvent trading)
- ▶ the duty not to improperly use information or position
- ▶ the duty to disclose and manage conflicts of interest.

A brief on each of the above legal duties is as follows:

Duty 1: Duty to act in good faith and for a proper purpose

a) Duty to act in good faith in the best interests of the organisation

This means that you must act honestly, fairly and loyally when making decisions for your organisation. To do this, you should have regard to the purpose of the organisation and its membership as a whole, as well as its finances and operations. You should not be making decisions based on your own personal interests, preferences or alliances - or those of other people or organisations you are involved in.

b) Duty to act for a proper purpose

As a Committee member you must make decisions which help the organisation to achieve its purpose or objective - that is, ‘what the organisation is set up to do’. Make sure that you are familiar with your organisation constitution or charter.

Duty 2: Duty to act with reasonable care, diligence and skill

This duty requires you to:

- ▶ take your role as a Committee member seriously
- ▶ make use of any skills and experience you have for the benefit of the organisation
- ▶ give sufficient time, thought and energy to any tasks you have undertaken and to decisions you are required to make, and
- ▶ monitor the affairs, activities, strategic direction and financial position of the organisation.

In relation to the financial affairs of your organisation, this duty requires you to:

- ▶ understand your organisation's current financial position at all times, and
- ▶ prevent your organisation from continuing to incur debts if you know or suspect that your organisation cannot meet its current debts when they fall due (commonly known as the 'duty to avoid insolvent trading').

Some points to note:

If your Committee does not have the required skills on a particular matter, this duty means you need to seek help from someone who does.

You must understand the issues the Committee is making decisions on - you cannot just rely on the opinions of others on the Committee and become a 'rubber stamp'. All Committee members have a duty to make inquiries and satisfy themselves that the organisation is being well run, and is operating in a safe and efficient manner.

Reasonable decisions – not perfect decisions

The duty of reasonable care does not mean that all the decisions your Committee makes have to be perfect. The law recognises that often Committees have to make difficult operational decisions, and that no one has the ability to accurately predict the future.

Taking care of the organisation's financial position (and avoiding insolvent trading)

Every Committee member needs to understand the organisation's current financial position so as to make informed decisions about whether the organisation can responsibly enter into new transactions, contracts or other debts. It is unacceptable to think 'Oh I don't have to think about the dollars, that is the Treasurer's job!' It is not just the Treasurer that has this duty - all Committee members have a duty to properly inform themselves about the organisation's financial position.

Duty 3: Duty not to misuse information or position

The legal duty in short:

As a current or former Committee member, you must not make improper use of:

- ▶ your position as a Committee member, or
- ▶ information you obtain through your position as a Committee member to either:
 - ▶ gain an advantage for yourself or any other person or organisation, or
 - ▶ cause detriment to the NFP organisation you are on the Committee of.

Duty 4: Duty to disclose and manage conflicts of interest

A conflict of interest is not the same as a disagreement between Committee members.

A conflict of interest situation arises when a person, who has a duty to act in the best interests of another, is presented with the opportunity or potential to 'use' that position in some way for their own personal benefit (or for the benefit of relatives or another organisation).

Consequences of breach of duties - defences, penalties & protections

Legal action against NFP Committee members is extremely rare. If you follow the Governance guideline, set out in the Guide, it is unlikely you will act in breach of a legal duty. Good governance processes are the safest, cheapest and most effective protection against any legal action. They are also the best way to protect the reputation of your organisation.

Having said that, there are legal consequences if you are found not to have complied with your legal duties (ie. to have 'breached' the duties). The main penalties for breach are financial (eg. a fine or paying compensation to the organisation, or both). There are a limited range of defences available to Committee members who are accused of a breach of duty. Also, there are a number of protective actions that Committee members can take to guard against penalties in the unlikely event of legal action.

Possible defences against an allegation of a breach of duty

If you are facing an accusation (or possible legal action), that you have breached a legal duty there are a number of defences you may be able to use to defend yourself. These include:

Your conduct met the standard imposed by the duty 'Business judgement' rule (i.e. have used reasonable care, diligence and skill.

Delegation

In general, even if a Committee delegates an action to an employee, or a sub-Committee, the Committee members are still legally responsible for that action.

Committee members cannot delegate their duty of reasonable care and diligence.

Reliance on advice

If you have relied on the advice of a professional to make a decision – this might form part of a defence to a claim that you have breached a duty. It is generally agreed that it is reasonable for Committee members to rely on advice (eg. from an external person like a lawyer).

Special information for registered charities (Governance Standard 5 applicable to charitable organisation)

Governance Standard 5 sets out the duties that apply to the responsible persons within a charitable organisation as follows:

- ▶ the duty to act with reasonable care and diligence
- ▶ the duty to act honestly in the best interests of the charity and for its charitable purposes
- ▶ the duty not to misuse their position as a responsible person
- ▶ the duty not to misuse information they gain in their role as a responsible person
- ▶ the duty to disclose conflicts of interest
- ▶ the duty to make sure the financial affairs of the charity are managed responsibly, and
- ▶ the duty not to allow the charity to operate whilst it is insolvent.

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<... End of extract from the above mentioned document ...>

Below is extracted from another document found in the Australian Charities and Not-for-profits Commission (ACNC) portal relating to Governance Standards for a registered Charitable organisation

These standards set out a minimum standard of governance, to help promote public trust and confidence in charities.

The governance standards apply from 1 July 2013.

What are the standards?

Standard 1: Purposes and not-for-profit nature of a registered entity

Charities must be not-for-profit and work towards their charitable purpose. They must be able to demonstrate this and provide information about their purpose to the public.

Standard 2: Accountability to members

Charities that have members must take reasonable steps to be accountable to their members and provide their members adequate opportunity to raise concerns about how the charity is governed.

Standard 3: Compliance with Australian laws

Charities must not commit a serious offence (such as fraud) under any Australian law or breach a law that may result in a penalty of 60 penalty units (currently \$10 200) or more.

Standard 4: Suitability of responsible persons

Charities must check that their responsible persons (such as board or committee members or trustees – called ‘responsible entities’ under the ACNC Act) are not disqualified from managing a corporation under the Corporations Act 2001 (Cth) (Corporations Act) or disqualified from being a responsible person of a registered charity by the ACNC Commissioner. Charities must take reasonable steps to remove any responsible person who does not meet these requirements.

Standard 5: Duties of responsible persons

Charities must take reasonable steps to make sure that responsible persons understand and carry out the duties set out in this standard.