Can creating a risk register actually create risks for you?

Managing the risks facing any charity is a key part of the duties of the trustees and senior management team.

A key tool in helping charities manage risks is the creation of a risk register which outlines the steps to be taken to mitigate each risk. Sadly there are circumstances in which the register might exacerbate potential liability for the charity, particularly when it can be shown that all the steps identified as mitigating the risk had not been completed.

The key risks are:

- **liability under contracts** – most charities that provide a service under contracts have a force majeure clause. These clauses provide that the charity will be relieved from liability for breach of contract if the non-performance is beyond its reasonable control. If a risk register identified a risk and steps to mitigate it weren't carried out, the charity might lose the benefit of the force majeure protection;

- **claims by third parties** – if there is a claim against a charity for any sort of loss, for example personal injury, the risk register would be disclosable in the subsequent proceedings. If steps had been highlighted and the recommendations not followed through, the inference could be that the charity was liable; and

- **undermining insurance cover** – insurance cover against, for example loss of income due to an event interrupting the charity's ability to trade, is a valuable protection. However insurers can deny cover where the loss or liability was known or expected and preventative action was not taken. Identifying a risk could lead to a loss which, if it wasn't then mitigated, could undermine the charity's ability to claim from its insurance company.

Reducing the risk of risk registers

If risk registers create the risks outlined above, then what can be done to reduce the possibility that these risks will materialise?

Those preparing risk reports and registers need to ensure that certain rules are followed, including:

- avoid listing events or circumstances over which the charity has no control;

- confine statements on the register to the facts and avoid statements of opinion;

- avoid sensational or exaggerated language and ensure that all statements relating to risk management are careful and measured; and

- avoid mention of mitigation strategies which are either difficult or too expensive to carry out, and ensure that recommended mitigation measures are reasonably easy to implement and are actually implemented.

Privilege

If the risk described could form the basis of a claim it may be worth involving your solicitor, whether in-house or external, in reviewing the reports and register so that you are able to claim legal privilege (i.e. so that the communication between yourself and the solicitor cannot be disclosed without your permission) in any subsequent proceedings.

Theoretically one could avoid potential problems with risk registers by simply dispensing with them. However it is not likely that the relatively small risk of these issues arising will mean that it is worthwhile dispensing with this valuable tool.

James Sinclair Taylor
Partner
+44 (0)20 8394 6480
James.Taylor@russell-cooke.co.uk

Sukanya Ransford
Senior associate
+44 (0)20 8934 6496
Sukanya.Ransford@russell-cooke.co.uk

www.russell-cooke.co.uk