

Starting a Small Charity

4d: Payments to Trustees

One of a series of Guidance Leaflets

The Scope of These Guidance Leaflets

This leaflet is one of a series which give a quick overview of the various things that you will need to take into account in setting up a new small charity.

They are NOT a full and comprehensive guide to Charity Law and all the associated regulations. They are just a simple overview of the main points for those who want to set up a small charity to serve their local community or to help those with a particular area of need. So if you are expecting your charity's annual income to be more than £150,000/yr, or to own property, or to employ more than the equivalent of 3 full-time staff then you should seek proper professional guidance elsewhere.

For more information, see the Introduction leaflet to this series.

The topics covered in this series are:

- 1 Outputs & Outcomes
- 2 Charitable Purposes/Objects
- 3 Governing Document
- 4:
 - a: Roles & Responsibilities of Trustees
 - b: Typical Roles & Responsibilities of the Chair
 - c: Typical Roles & Responsibilities of the Treasurer
 - d: Payments to Trustees** *{This Leaflet}*
- 5: A "Minute Book"
- 6: A Bank Account
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Payments To Trustees

1. Introduction

The general perception is that all charity Trustees are, and should be, unpaid volunteers.

In its guidance document, *Charity Law and Regulation*, the National Council for Voluntary Organisations (NCVO) states:

NCVO believes the voluntary principle goes right to the heart of what it means to be a charity and is what makes our organisations distinctive. The role of trustees is based on this principle, and should remain a voluntary one.

<https://www.ncvo.org.uk/about-us/media-centre/briefings/429-charity-law-and-regulation-briefing>

The Charity Commission's model governing documents for both Unincorporated Associations and Charitable Incorporated Organisations (Foundation & Association) start off with clauses which prohibit making payments to Trustees, namely:

Benefits and payments to charity trustees and connected persons

(1) *General provisions. No charity trustee or connected person may:*

- (a) *buy or receive any goods or services from the charity on terms preferential to those applicable to members of the public;*
- (b) *sell goods, services or any interest in land to the charity;*
- (c) *be employed by, or receive any remuneration from, the charity;*
- (d) *receive any other financial benefit from the charity;*

But they then go on to detail, in a considerably larger number of clauses, all the exceptions and loopholes in "the law" which will actually allow charities to circumvent those initial prohibitions and to make payments to their Trustees in a wide variety of circumstances, viz:

...unless the payment or benefit is permitted by sub-clause (2) of this clause or authorised by the court or the prior written consent of the Charity Commission ("the Commission") has been obtained

<https://www.gov.uk/government/publications/setting-up-a-charity-model-governing-documents>

On-line guidance on payments to Trustees is similarly ambivalent – first focusing on prohibiting payment before outlining the various exceptions and loopholes.

Payments to charity trustees: what the rules are

When you become a trustee, you volunteer your services and usually won't receive payment for your work.

Trustees could be paid for:

- building work such as plumbing or painting*
- providing specialist services, such as estate agency or computer consultancy*
- providing premises or facilities for occasional use, for example as a meeting room*
- administration or secretarial work*

<https://www.gov.uk/guidance/payments-to-charity-trustees-what-the-rules-are>

What is the difference between paying a trustee for the provision of a service and paying for trusteeship?

Paying a trustee for the provision of a service usually involves a charity making a one-off or occasional payment to a trustee who is to provide it with a specific service that is quite separate from his or her normal trustee duties. Many charities already have a specific power to do this in their governing documents.

In contrast, payment for trusteeship means that a trustee receives payment from a charity for carrying out his or her normal trustee duties. In some cases, payment will be made on a continuous basis whenever these duties are carried out; or it may take the form of a periodic or annual allowance; or it may be made on an occasional basis, intended to reflect only a certain aspect of the trustee role, or to enable a trustee to attend a specific meeting or event. Crucially, there is no general power in charity law for trustee boards to make such payments.

Is paying for trusteeship contrary to the voluntary principle?

Unpaid trusteeship has always been a distinctive feature of charitable activity, and greatly enhances public confidence and trust in charities. There is a general expectation that charity

assets should be used directly for the purposes of the charity. As a consequence, any departure from this position is only likely to occur in exceptional circumstances and needs to be fully justified by trustee boards as being clearly in the interests of their charity.

<https://www.gov.uk/government/publications/trustee-expenses-and-payments-cc11>

The confusion is not alleviated by the Charities Act.

Sections 185-188 of the Charities Act which deal with remuneration (payments) to Trustees (and are specifically referred to by the Charity Commission model governing documents) contain NO clauses which directly prohibit the making of payments to Trustees.

Instead those sections simply detail the conditions/restrictions under which Trustees CAN be paid for their “services rendered”.

<http://www.legislation.gov.uk/ukpga/2011/25/section/185>

Not surprisingly, therefore, many people looking to set up small charities and become Trustees find themselves confused by what payments they are, and are not allowed to make to Trustees.

This is particularly so in situations where they want to set up a charity to make a contribution to the public good by meeting what they perceive to be an unfilled need, but also need to generate some personal income at the same time. This is because in such situations they find it difficult to understand the differences between their roles & responsibilities as Trustees and their roles and responsibilities as providers of services to their charity. And, therefore, they have difficulty in understanding why being a Trustee should have any impact on whether or not they should be paid for providing services to their charity.

2. The Role & Responsibilities of a Trustee.

As a Trustee of your charity you are equally (with all the other Trustees) personally responsible for the proper management of The Charity in accordance with its charitable objects and charity law. You must:

- ✓ Ensure your charity is carrying out its purposes for the public benefit;
- ✓ Comply with your charity’s governing document and the law;
- ✓ **Act in your charity’s best interests;**
- ✓ Ensure your charity is accountable;
- ✓ **Manage your charity’s resources responsibly;**
- ✓ Act with reasonable care and skill.



3. When Trustees are Suppliers to their Charity.

A fundamental tenet of the commercial world is that the suppliers of goods/services to the public do so to generate an income for themselves and a profit for their shareholders (if any).

There are no legal restrictions on how much the suppliers of goods/services can earn, or how much profit they can generate for their shareholders – *ie*: how much they can charge their customers for their goods/services in relation to how much they cost supplier to produce/provide. Indeed, those who can generate high incomes for themselves and high profits for their shareholders are generally regarded in high esteem by the business world and the public at large.

Any Trustee of a charity who is also a provider of goods/services to their charity inevitably has an unavoidable conflict of interest.

On the one hand, as a supplier of goods/services, it is entirely legitimate and proper that they should seek to maximise their income/profit both by encouraging customers (including their charity) to buy their goods/services (*ie*: promotional advertising) and by charging as much as their customers are prepared to pay.

On the other hand, as a Trustee of their charity, it is their obligation to:

- ✓ Act in their charity’s best interests, and
- ✓ Manage their charity’s resources responsibly. *ie*: ensure that their charity’s funds are wisely and prudently spent to provide the maximum value-for-money to the charity’s beneficiaries.

Whilst such conflicts of interest are not invariably incompatible (*ie*: making it impossible for a Trustee ever to be a supplier to their charity) they are always present and, therefore, a risk to the charity

For example:

If there were other suppliers of the same (or very similar) goods/services, would the charity's choice of supplier be biased in favour of the supplier which was also a Trustee? This might not be a significant problem if there were uncontroversial differences in the fitness-for-purpose or value-for-money of the goods/services of the various suppliers. But if the differences between the various goods/services were more subjective – *eg*: if it was accepted that the quality of the goods/services of one supplier was lower than that of the Trustee-Supplier, but the cost was also lower, how would value-for-money and fitness-for purpose be compared based only on the best interests of the charity rather than the best interest of the Trustee-Supplier.

Or if the Trustee-Supplier was the only source of the required goods/services, how would the charity allay the inevitable challenges/suspensions that the Trustee-Supplier was exploiting his/her monopoly position for his/her own benefit?

In the everyday commercial supplier-customer environment, the decision on whether or not to buy, and from which supplier, rests purely with the customer who has to make their own value-for-money decision in the context of caveat emptor (“let the buyer beware”).

In the charity environment, the Trustee-Supplier conflict is further complicated by the fact that those paying for the goods/services (*ie*: the charity's donors) are not the ultimate recipients (*ie*: the charity's beneficiaries). Thus, in the charity environment, the equivalent ‘caveat donator’ (let the donor beware) is entirely dependent on the charity's Trustees gaining the donors' trust in their integrity of to make such decisions responsibly on their behalf.

4. Regulating Trustee-Supplier Situations

It is clear that there will be times when it is unequivocally in the best interest of a charity (*ie*: the best interests of the charity's donors, beneficiaries and the public) for it to obtain goods/services from a supplier who also happens to be one of its Trustees.

It is for that reason that the Charities Act, and the model constitutions for both Unincorporated Associations and Charitable Incorporated Organisations, include provisions to enable Trustees to be paid for supplying goods/services to their own charities.

But it is also clear that the Trustee-Supplier situation creates a number of significant risks, both for the charity concerned and for the charity sector as a whole.

It is for that reason that the rather confusing (for new charities and charity Trustees) system of checks and balances has been introduced by the Charities Act (and implemented by the Charity Commission) in order to regulate, and thereby minimise the inevitable risks of, Trustee-Supplier situations.

4.1a Overt Fraud & Exploitation

Although the creation of opportunities specifically to defraud or exploit a charity's funds is the risk mostly likely to come to mind when thinking about setting up Trustee-Supplier situations, is probably the least likely risk to occur.

However, it is well-established that opportunity is an important factor in crime.

Police Research Series. Opportunity Makes the Thief: Practical theory for crime prevention

<http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/prapdfs/fprs98.pdf>

Thus, the bigger risk is that a Trustee-Supplier situation, initially legitimately set up by a charity in its best interests as meeting all the required criteria of necessary, reasonable & incidental, subsequently becomes an irresistible opportunity for fraud or exploitation.

This is particularly so if the charity uses the excuse “*Oh, we completely trust our Trustee ‘X’ as our supplier*” as a justification for not applying the same rigorous controls for monitoring X's supply of goods/services as they would for an external supplier. Then, should Trustee X's business encounter some “hard times”, the lack of rigorous controls can all-too-easily create an irresistible temptation to the supplier (*ie*: Trustee X) to exploit that opportunity to increase the supplier's income/profits by

“upping the prices”, or “adding in extra services” without proper validation that they continue to meet the “necessary, reasonable and incidental” criteria for proper use of charity funds.

4.1b Procurement Drift

Even if external commercial pressures do not create opportunity-driven temptations to overt fraud or exploitation, a careless attitude by the other Trustees can lead to procurement drift.

For example:

Trustees taking the “easy option” of just adding in other goods/services to the Trustee-Supplier’s contract without properly evaluating their fitness-for-purpose or value-for-money, or what alternative good/services were available which would better serve the interests of their charity.

This can easily turn a supply contract which was originally in the best interests of the charity into one which creates income/profits (*ie*: Private Benefits) for the Trustee-Supplier which no longer satisfy the necessary, reasonable & incidental criteria required by charity law.

4.1c Credibility & Reputational Risk

Being highly dependent on the goodwill of funders and donors, charities are particularly susceptible to the damage to their credibility and reputation which can so easily be done by even a suspicion that they are not as honest and transparent as they should be.

Suspensions or accusations that charity Trustees are “feathering their own nests” at the expense of their funders/donors/beneficiaries by awarding themselves lucrative contracts for the supply of goods/services can be particularly damaging, given various recent criticisms of “inappropriate” charity salaries and scandals over inappropriate expenses claims in the public sector.

And has been seen recently, even if only a few charities are involved in such malpractice, the damage done to the charity sector can, in the public eye, be much more widespread.

It’s the well-known adage “*Justice must not only be done – it must be SEEN to be done*”.

4.1d Complying with the Provisions of the Charity’s Governing Document

Thus, the apparent “inconsistencies” in the model Governing Documents for charities, confusing though they might be to first-time charities and charity Trustees, serve two important functions.

- ✓ They reinforce the fundamental notion that charities’ purposes are “external” – *ie*: focused on meeting the needs of others for the public benefit, rather than on the “internal” needs of the charity, its Trustees and staff. The concept is that, as unpaid volunteers, who therefore have no “commercial interest” in their charity, Trustees are free to focus exclusively on those “external purposes” in a way that those whose interests include their own commercial/financial interests are not;
- ✓ By providing a rigorously defined and transparent governance framework through which payments to Trustees CAN be made, but MUST be set up and managed to mitigate the risks of (a) deliberate fraud & exploitation; (b) procurement drift into contracts for the supply of goods/services which no longer meet the strict charity law requirement to be necessary, reasonable and incidental; (c) the credibility and reputation of the charity sector as a whole being drawn into disrepute as a consequence of scandals (real or otherwise) over Trustees (and staff) profiteering at the expense of charities’ donors & beneficiaries.

4.1e Getting it Right

In order that you can make sure that you are getting it right – AND CAN BE SEEN TO BE GETTING IT RIGHT – it is important that you have read, and have carefully, followed the guidance in the two Charity Commission guidance papers referred to in the Introduction, namely:

Payments to Charity Trustees: What the Rules Are

<https://www.gov.uk/guidance/payments-to-charity-trustees-what-the-rules-are>

CC11: Trustee Expenses and Payments

<https://www.gov.uk/government/publications/trustee-expenses-and-payments-cc11/trustee-expenses-and-payments#paying-trustees-for-services>

So once the Trustees – **WITHOUT THE INVOLVEMENT**¹ of any Trustee who might be a potential supplier – have:

- ✓ satisfied themselves that the payment meets the criteria of necessary, reasonable & incidental, and can therefore be justified as being in the charity’s best interests;
- ✓ make sure their charity’s governing document doesn’t prevent them from paying trustees for services that they are intending to contract;
- ✓ identified and recorded conflicts of interest and the steps taken to prevent them from affecting the decision;
- ✓ used reasonable care and skill when making their decision (and have taken legal advice where appropriate);
- ✓ decided what they will do if the services or goods aren’t satisfactory;
- ✓ and have kept records of discussions at meetings;

they can then proceed to:

- ✓ produce a written agreement between the charity and the trustee (or connected person) being paid;
- ✓ specify the exact or maximum amount to be paid;
- ✓ put in place procedures to ensure that do not allow payments or other benefits to half or more than half of your board as the number of trustees receiving any payment or benefit must be in the minority.

BEFORE finalising any contract the Trustees should again refer to their charity’s governing document to satisfy themselves that it allows them to enter into the Trustee-Supplier contract that they are considering.

AND make sure that they have carefully and comprehensively documented all the discussions leading to the decision to award the contract, together with full details of the contract itself.

NOTE: This leaflet is just an informal review of some of the issues which Trustees should bear in mind when considering paying one (or more) of their number to provide the charity with goods or services.

IT IS NOT A PROFESSIONAL OPINION ON THE ISSUES.

If in any doubt as to the legality of what they are proposing to do the Trustees **MUST** seek the guidance/opinion of a professional lawyer, preferably one who is experienced in charity law and its application to making payments to Trustees.

In summary:

If the charity has used one of the model governing documents provided by the Charity Commission <https://www.gov.uk/government/publications/setting-up-a-charity-model-governing-documents>:

- For “one-off” contracts – *ie*: where the Trustee-Supplier is going to make one single supply of goods or services in return for a single payment – it is probably allowable under the Charities Act and the charity’s governing document, and would not require the explicit approval of the Charity Commission.
- For a “multiple minor” contract – *ie*: where the Trustee-Supplier is going to make several supplies of goods or services in return for payments over a period of time, but where the supply constitutes only a small part of the Trustee-Supplier’s overall business or income – it is likely to be allowable under the Charities Act and the charity’s governing document and would not require the explicit approval of the Charity Commission, provided that only a minority (*ie*: less than half) of the charity’s Trustees had similar contracts.

HOWEVER – BE WARNED !!!

¹ A degree of pragmatism is clearly required here.
For example: it will undoubtedly be necessary to clarify with the potential Trustee-Supplier the nature (quality, quantity, specifications, cost, etc) of the goods/services to be provided.
What is necessary here is to ensure that any information shared with, and questions asked of, the potential Trustee-Supplier are the same as those shared with, or asked of, all the other potential suppliers to ensure that the potential Trustee-Supplier is not given any preferential treatment over any other potential supplier.
In addition, the potential Trustee-Supplier must not in any way be involved in the Trustees’ discussion of the pros & cons of the various supply options that they are considering.

How the Charities Act (and, therefore, the Charity Commission) view “multiple minor” contracts can be quite different to how they are viewed by HM Revenue & Customs for “employment” and, therefore PAYE & NI Contributions, purposes.

As a “real life” example: A church (a registered charity) had a panel of musicians from which it engaged individuals on an ad hoc basis to play the piano or organ at its services (ie: 1½hrs on Sunday mornings). Even though the musicians were engaged only “as and when required” and paid modest amounts, HMRC determined that because they were engaged on a number of occasions throughout the year they should be treated as employees and the Church was required to register them as employees and deduct PAYE & NI contributions “at source” (ie: from the amount paid to the musicians);

- For a “major” contract – ie: where the Trustee-Supplier would be providing goods or services in return for payments on a regular basis and the supply constituted a significant part of the Trustee-Supplier’s income – experienced legal advice should be sought and it is likely that the prior explicit approval of the Charity Commission would be required (or, at the very least, the Charity Commission should be informed of what was being proposed so that they could raise an objection if they felt it was appropriate).

5. Paying Trustees to be Trustees

There is nothing in the Charities Act which says that Trustees cannot be paid for being Trustees, provided that the charity’s governing document allows it (which most do not).

However, it is possible for a charity to apply to the Charity Commission for permission to pay its Trustees and, indeed, some larger charities have obtained such Charity Commission dispensation.

For example: Nuffield Health, one of the UK’s largest charities (charity no: 205533, annual turnover £711M). According to its Annual Report & Financial Statement 2014², its Board of Trustees (7 Trustees) are, together, paid in excess of £230,000/yr (more than the annual turnover of ca80% of the smallest UK charities³).

It is known that there are other charities which also have dispensation to pay at least some, if not all, of their Trustees for being Trustees. But, in response to a recent Freedom of Information request, the Charity Commission said it was unable to provide the actual number because the way it recorded information about Trustees’ remuneration was not able to give a “fair or reliable” answer.

For the reasons outlined in 4.1d above, paying Trustees for their services as Trustees – thereby giving them a “commercial/financial” interest in their charity – is strongly discouraged.

So, whilst it is “theoretically” possible to make a case for paying Trustees, the case will generally be based primarily on the size and complexity of the charity’s operations and, therefore, be way outside the capabilities of all but the charities with the largest incomes.

Paying Trustees to be Trustees is, therefore, way outside the scope of this leaflet.

² http://apps.charitycommission.gov.uk/Accounts/Ends33/0000205533_AC_20141231_E_C.pdf

³ <https://www.gov.uk/government/publications/charity-register-statistics/recent-charity-register-statistics-charity-commission>