



TRUSTEES &
GOVERNANCE

Charities and Public Service Delivery

An introduction
and overview



The Charity Commission

The Charity Commission is the independent regulator of charities in England and Wales. Its aim is to provide the best possible regulation of charities in England and Wales in order to increase charities' effectiveness and public confidence and trust. Most charities must register with the Commission, although some special types of charity do not have to register. There are some 190,000 registered charities in England and Wales. In Scotland the framework is different, and the Commission does not regulate Scottish charities.

The Commission provides a wide range of advice and guidance to charities and their trustees, and can often help with problems. Registered charities with an annual income or expenditure over £10,000 must provide annual information and accounts to the Commission. The Commission has wide powers to intervene in the affairs of a charity where things have gone wrong.

More information about the Commission together with a range of guidance for charities can be found on our website www.charitycommission.gov.uk, or by contacting Charity Commission Direct:

Telephone: **0845 300 0218**
Minicom: **0845 300 0219**
By post: **Charity Commission Direct**
PO Box 1227
Liverpool
L69 3UG

Contents

A	Foreword	2
B.	Introduction	3
C.	Charities and public service delivery at a glance	6
D.	Charities and public services	10
E.	The charity law framework	12
F.	Understanding the risks	17
G.	Stick to your mission	25
H.	Guard your independence	27
I.	Know your worth	31
J.	Guidance for charities that give grants	41
K.	Other issues to consider	43
L.	Further information and advice	46

A. Foreword

Dear Reader,

Charities work in a wide range of ways to help their beneficiaries and obtain funding from many sources. One of these may be by delivering services through a funding agreement with a local authority, NHS Primary Care Trust or even a government department. You may well be seeking the advice provided here because your charity already delivers public services this way, or is thinking about doing so.

When we first published the initial version of this guidance, 'contract culture' was still a very recent development for charities. But the last few years have seen increasing numbers of charities undertaking this work and the debate has certainly moved on. Not least because Government is actively encouraging charities and voluntary organisations to play a major role in public service delivery and reform.

As the independent regulator of charities, it is not for the Commission either to encourage or discourage the delivery of public services by charities. For some, there may be significant funding opportunities and the chance to deliver better services to those they help. But there are also risks: risks to independence, risks to achieving full funding and the danger of mission drift. Some charities are already delivering public services successfully, but it's certainly not the only way that charities can fulfil their mission.

These are important issues for trustees to consider when deciding if public service delivery is right for their charity. Our role is to highlight legal and other issues and also to highlight examples of good practice that trustees need to be aware of when making these decisions. That is what this guidance is about.

Dame Suzi Leather

Chair

Andrew Hind

Chief Executive



B. Introduction

B1. What is this guidance about?

This introduction to public service delivery is primarily aimed at smaller charities and those charities considering delivering public services for the first time. We hope it will also be useful to those charities that are already delivering public services. It gives an overview of the legal and good practice issues that charities need to consider. Some of the key questions the guidance looks at are:

- What are public services?
- Can charities deliver public services?
- Can charities use their own funds to pay for or contribute to services that public authorities normally provide or fund?
- What are the legal requirements that charities must comply with?
- What recommended good practice should charities consider?
- What risks should charities be aware of?
- What sources of help and advice are available?

This guidance focuses on the regulatory issues that charities need to consider. We have also signposted guidance produced by other organisations that provides further advice in this area.

B2. 'Must' and 'should': what we mean

In this booklet, where we use 'must', we mean it is a specific legal or regulatory requirement affecting trustees or a charity. Trustees must comply with these requirements. To help you easily identify those sections which contain a legal or regulatory requirement we have used the **L** symbol next to the short answer in that section.

We use 'should' for items we regard as minimum good practice, but for which there is no specific legal requirement. Trustees should follow good practice guidance unless there's a good reason not to.

We also offer less formal advice and recommendations that trustees may find helpful in the management of their charity.

B3. Previous guidance

This booklet replaces *Charities and Contracts* (CC37). It is a complete rewrite in a new format. The emphasis of the guidance has moved beyond just contracts to wider issues of funding and delivery, reflecting changes both within the charitable sector and in its relationship with the public sector.

B4. How to use this guidance

The structure of this guidance follows the main headings used in the next section, 'Charities and public service delivery at a glance'. Under each heading, we ask a selection of questions that trustees or charity managers may have about public service delivery. Generally we give a concise summary answer ('the short answer'), and then give more background ('in more detail').

B5. Other sources of help and advice

Details of some resources providing useful and practical guidance are mentioned in the text of this guidance and listed in section L, together with contact details for all the organisations mentioned, and a brief description of what they do.

B6. Some technical terms used

Although we have tried to write this booklet in everyday language, we have had to use technical terms in places. This list explains some of them:

Beneficiary: A legal term for a person who is eligible to benefit from a charity's work. The beneficiary group of a charity will be defined in the charity's governing document. Beneficiaries may sometimes be called clients or service users.

The Compact, established in 1998, is a framework for partnership drawn up by government and the voluntary and community sector (it is not a legally binding agreement). There are also local compacts between the sector, local authorities and other local public bodies. The Compact has codes of good practice for Black & Minority Ethnic Groups, Community Groups, Consultation & Policy Appraisal, Funding & Procurement, and Volunteering. For further information see the Compact website www.thecompact.org.uk.

The Voluntary Sector Scheme: The National Assembly for Wales' Voluntary Sector Scheme fulfils the same role in Wales as the Compact does in England. The Scheme sets out the broad principles and shared values which govern the relationship between the National Assembly and the voluntary and community sector in Wales. For further information see the Voluntary Sector Scheme page on the Welsh Assembly Government's website <http://new.wales.gov.uk/topics/housingandcommunity/voluntarysector/publications/volsectorscheme?lang=en>.

Governing document: A legal document setting out the charity's purposes and, usually, how it is to be administered. It may be a trust deed, constitution, memorandum and articles of association, will, conveyance, Royal Charter, Scheme of the Commission, or other formal document.

Mission or mission statement: A term used by many charities to describe why they exist and what impact they want to have. A mission statement can:

- provide an explanation of the charity's objects or purpose in everyday language;
- help to communicate the charity's ethos and values; and
- provide a focus for strategic planning by defining the particular outcomes or goals that the charity wants to achieve.

A charity's mission (or mission statement) must be consistent with, and not wider than, its objects.

Objects or purposes: The legal purpose(s) for which a charity exists, or the thing(s) it was set up to achieve, as set out in its **governing document**. The objects may be worded quite broadly and expressed in legal language. They direct (and consequently restrict) how the charity's assets must be used.

Public authority: Any organisation that is part of national or local government, including the Welsh Assembly, government departments, county and district councils and NHS bodies. Such organisations are often referred to as 'commissioners', ie bodies that commission services.

Commissioning and Procurement are processes by which public authorities usually obtain services, starting with identifying the need for a service, through setting the service

specification to acquiring or purchasing the service.

Trustees means **charity trustees**. These are the people who serve on a charity's governing body. They may be called trustees, directors, board members, governors, committee members or some other title. They are responsible for the general control and management of the administration of the charity. (Other types of trustee are not mentioned in this guidance.)

TUPE: The Transfer of Undertakings (Protection of Employment)

Regulations 2006 protect the rights of employees who are transferred from one employer to another, requiring the new employer to maintain certain terms and conditions such as pay, leave and pension entitlements.

Voluntary and Community Sector:

Charities are a significant part of a wider sector in society known as the Voluntary Sector or Voluntary and Community Sector (VCS). Not all voluntary and community organisations (VCOs) are charities. The VCS includes all organisations that are neither part of government (public or state sector) nor the private (for profit) sector. Many documents on public service delivery refer to the VCS, not just to charities.

This sector is sometimes also known as the **Third Sector**. The commonly used definition of the Third Sector also includes social enterprises (some of which are charities), co-operatives and mutual societies.

C. Charities and public service delivery at a glance

These pages provide a quick summary of the issues that charities need to consider if they are considering public service delivery.

Charities and public services

By 'public services' we mean services that public authorities normally provide or commission. Not all public services are provided under a legal duty; some are provided under discretionary powers (in other words, they are optional). Even when there is a legal duty, the law does not always specify exactly what level of service must be provided.

It is up to charities to decide on the most effective way to meet their beneficiaries' needs. To those charities that choose to engage in public service delivery, we advise:

- stick to your mission;
- guard your independence; and
- know your worth.

The charity law framework



There is no general legal prohibition on charities delivering public services under a funding agreement with a public authority or using their own funds to do so. This does not alter the trustees' responsibility to comply with charity law and the requirements of the charity's governing document.

The following legal rules apply to all charities but are particularly relevant to charities delivering public services:

- charities must only undertake activities that are within their objects and powers;
- charities must be independent of government and other funders;
- trustees must act only in the interests of the charity and its beneficiaries; and
- trustees must make decisions in line with their duty of care and duty to act prudently.

Understanding the risks



Public service delivery presents both opportunities and risks for charities. Key risk areas include financial risks, the risk of compromising the charity's independence, the danger of mission drift, service delivery and contractual risks, and reputational risks.

Any charity that is considering public service delivery should weigh up the risks and the opportunities. It is important to recognise and manage risks, and ensure they are appropriately shared between the charity and the public authority.

Trustees must not agree to any contract or funding agreement unless they are satisfied that its terms are in the charity's interests. They should therefore consider the need for professional (legal and accountancy) advice on the terms of such documents.

Stick to your mission

L

A charity's mission and all of its activities must be within its objects and powers. Equally it should be clear how any activity contributes to achieving the objects and mission.

Trustees have, and must accept, ultimate responsibility for directing the affairs of their charity. They should ensure that they are appropriately involved in decisions about what activities the charity undertakes. Where decision making is delegated, trustees should set clear parameters about how, and by whom, such decisions can be made, and how the trustees will keep themselves informed about the charity's activities.

The following questions should be considered by all trustees when considering whether their charity should carry out any activity or service, but are particularly relevant to charities considering the delivery of public services:

- Is this activity consistent with the charity's objects and powers?

- How does it fit in with the charity's mission and any specific aims or objectives within our current work plan?
- How will it meet the needs of the charity's beneficiaries?
- How will it be funded? (This is discussed in more detail in the rest of this guidance.)
- Has the charity fully assessed the risks and taken steps to mitigate them?

As good practice, trustees should periodically review the charity's objects and mission, to ensure that they are still appropriate.

Guard your independence

L

In carrying out his or her responsibilities, a trustee must act solely in the interests of the charity. A trustee is not a delegate or representative of any appointing or funding body. It is essential that all trustees understand their legal duties, and conflicts of interest are managed.

Charities that deliver public services should not feel inhibited from engaging in political activity or campaigning; the same rules apply to all charities, regardless of their other activities. For more information read *Political Activity and Campaigning by Charities* (CC9).

Know your worth

By 'knowing your worth' we mean:

- understanding the full cost of the charity's services;
- recognising the charity's scope to deliver and any limitations;
- identifying any unique or distinctive qualities of the charity's services; and
- using these and other relevant factors to set a price for those services.

Full cost recovery should apply in any case where a public authority is purchasing a service from a charity, unless it is in the charity's interests to forego full cost recovery. Charities are allowed to achieve a surplus on funding agreements.

If a charity is either considering taking up, or renewing, a funding agreement for public service delivery where the funding on offer will not cover the full cost of the service, it can:

- negotiate for more funding;
- offer a lower level of service commensurate with the funding on offer;
- decide to use other funds to make up the shortfall; or
- reject the funding agreement and not deliver the service.

The charity's decision must be based on the interests of the charity and the needs of its beneficiaries. There are particular questions that the trustees should consider before deciding to use charitable funds to make up the

shortfall, which are detailed in this guidance.

There may be steps that a charity could take to make a public authority comply with the Compact or a statutory duty. These are detailed in section I of this guidance.

Guidance for charities that give grants

Grant-making charities should only be asked, and should only agree, to subsidise public services or other public provision when there is clear justification for doing so.

In considering applications for funding in connection with public service delivery, we recommend that grant-making charities:

- consider the full range of funding options;
- ensure that decisions are based on the law and the interests of the charity's beneficiaries;
- use their experience of what public authorities have funded in the past;
- ask questions and challenge assumptions about what public authorities are prepared to fund or have a duty to fund; and
- use such considerations to inform grant-making policies.

Other issues to consider

There are steps that charities can take to manage some of the risks associated with public service delivery, including adopting the form of a limited company ('incorporation'), using insurance, or delivering the service via a trading company.

Where partnership is appropriate it can enable charities to compete for larger contracts or benefit from efficiency gains by reducing duplication of administrative functions. This may be of particular benefit to smaller charities. Charities need to consider the benefits and risks before entering into partnership or collaborative working arrangements. These are explained in more detail in our guidance *Collaborative Working and Mergers: An introduction* (CC34).

In general, charities receive no special treatment in respect of VAT on their business activities. VAT registration is required if their taxable turnover exceeds the statutory limit. A charity can discuss any aspect of VAT which affects it with the HM Revenue & Customs National Advice Centre.

Further information and advice

This is summarised in section L of this guidance.

D. Charities and public services

This section explains what we mean by public services in this guidance, and the relationship between public services and charitable (or voluntary) service provision.

D1. What are public services?

The short answer

By ‘public services’ we mean services that public authorities normally provide or commission. (Some examples are given below.)

In more detail

‘Public services’ include a wide range of services provided or commissioned by public authorities. These services include:

- advice and advocacy;
- care of the elderly and provision of sheltered accommodation;
- education;
- medical care and treatment;
- museums, art galleries and libraries;
- recreational and leisure services;
- recycling, refuse collection and disposal;
- social housing; and
- urban or rural regeneration.

For centuries, charities have undertaken activities that people now tend to think of as ‘public services’, and charity often pre-dated, and prompted, statutory provision. For example, state education didn’t exist until the mid 19th century, and the National Health Service was founded in 1948. Before then, schools and hospitals were provided by charities. Public perception of what government should provide changes over time, as do relative levels of provision by the charitable and public sectors. Public authorities have taken over responsibility for some services in response to changing public expectations, government policy and statutory duties. More recently, whilst retaining responsibility for the provision (or funding) of services, public authorities have contracted out delivery of some services to private or voluntary sector organisations.

Public authorities do not always have legal duties to provide all of their services; some services are provided under discretionary powers (in other words, they are optional). Even when there is a legal duty to provide a service, the law does not always specify the level of service that must be provided.

The Commission cannot give authoritative advice on the duty of public authorities to provide or fund particular services, but section I of this guidance sets out some of the steps that a charity may take to obtain clarification of a public authority's duty.

D2. Are there differences of approach between England and Wales?

In recent years there has been a number of government initiatives in England and Wales aimed at developing the relationship between government and the VCS and the role of the VCS in public service delivery and reform.

To find out more about government policy in England see the Office of the Third Sector's Third Sector Action Plan and HM Treasury's discussion document *Exploring the role of the third sector in public service delivery and reform*. For more information on the Welsh Assembly Government's policy, priorities and programme for the reform of public services in Wales see *Making the Connections*. More details

of these and other documents are given in section L.

There are differences of emphasis between England and Wales, but charities in both countries face similar issues around public service delivery.

D3. Can charities contribute to the improvement of services without delivering them?

Charities can play a key role in bringing about improvements to services that their beneficiaries receive (regardless of whether they actually deliver those services), by using their experience of beneficiaries' views and needs, including any barriers to accessing services, to inform and influence the design and delivery of public services.

Where charities provide advice about the design and delivery of services, they should consider whether they are, in fact, providing free 'consultancy' or giving away intellectual property. This information can be valuable and charities should consider whether they are being fairly rewarded or funded for it.

E. The charity law framework

This section highlights the legal requirements that charities must comply with when engaging in public service delivery.

E1. What does the law say about charities delivering public services?



The short answer

Very little. There is no general legal prohibition on charities delivering public services under a funding agreement with a public authority or using their own funds to do so, even if the authority has a legal duty to provide the service. This does not alter the trustees' responsibility to comply with the requirements and restrictions of charity law as summarised in this section, or the requirements of the charity's governing document.

In more detail

The key legal principles are as follows:

- Charitable purposes are broad, and may overlap with the duties of a public authority.
- There is not a legal bar on using charitable funds to deliver public services or facilities, but case law establishes a principle that charitable funds should be used reasonably and prudently.
- Many legal duties of public authorities are not precisely defined in law.

This does not alter the trustees' responsibility to comply with charity law and the charity's governing document.

New charities: A charity can be set up to deliver, either exclusively or as part of a wider range of activities, a particular public service or services. The organisation must be set up for exclusively charitable purposes for the public benefit (the legal test for charitable status), and not simply as a means of carrying out a public authority's duties or policy.

Existing charities: The relief of taxation is a charitable purpose provided it is for the public benefit. Very few charities have this express charitable object, but they and charities with general charitable purposes can directly subsidise public funds, provided they can show that this is for the benefit of the public.

Without either this specific object or general charitable purposes, a charity cannot apply its funds directly for the relief of taxation. However a charity would not need these particular objects provided the trustees are satisfied that any relief of taxation is only an incidental consequence of achieving the charity's stated charitable purpose.

E2. What requirements of charity law must trustees comply with in undertaking public service delivery?



The short answer

The following legal rules apply to all charities but are particularly relevant to charities delivering public services:

- Charities must only undertake activities that are within their objects and powers.
- Charities must be independent of government and other funders.
- Trustees must act only in the interests of the charity and its beneficiaries.
- Trustees must make decisions in line with their duty of care and duty to act prudently.

In more detail

The charity's objects and powers:

Charities must always operate within the objects in their governing documents. The objects may refer to a specific locality or beneficiary group (for example based on gender, age, disability or need). The particular kinds of services or activities that the charity can undertake may be specified.

Charities must also operate within their legal powers. Usually, a charity's powers will be found in its governing document, but powers can also be contained in legislation or case law.

Trustees should understand, and be able to explain, why the charity is

undertaking any activity and how it furthers the charity's objects.

Legal independence: In order to be a charity, an organisation must exist solely for charitable purposes, not for the purpose of carrying out the policies or instructions of a public authority. As evidence of this, the Commission would look for a number of characteristics, which are explained in *The Independence of Charities from the State* (RR7).

This would not prevent a public authority from nominating or appointing trustees, or even being a trustee in its corporate capacity. Where this happens, however, conflicts of

interest must be properly managed (see section H, Guard your independence).

Interests of the charity: Trustees have an overriding duty to act in the interests of the charity and its beneficiaries. This means:

- they must never allow their personal interests, or the interests of another organisation or body, to sway their judgement; and
- they must never place restrictions on themselves, or allow restrictions to be placed on them, that would limit their ability to make decisions on the interests of the charity.

In practice, few charities can assist every potential beneficiary, and trustees have to make difficult choices about priorities. Trustees should consider the needs of both present and future beneficiaries, and allow this to inform decisions about funding and sustainability. For example, trustees may feel there are short-term advantages to be gained, such as the ability to reach new beneficiaries, by providing a service that does not cover its own costs. In the longer term, however, the advantages may be outweighed by the effect on the level of the charity's reserves, its overall financial stability and its ability to carry out other work.

Duty of prudence: To comply with their duty of prudence, trustees must:

- ensure the charity is and will remain solvent;
- use charitable funds and assets reasonably, and only in furtherance of the charity's objects;
- avoid undertaking activities that might place the charity's endowment, funds, assets or reputation at undue risk; and
- take special care when investing the charity's funds or borrowing funds for it to use.

This may mean, for example, taking independent professional advice on matters where the trustees don't have sufficient expertise (which could include contract drafting and negotiation – see section F4 of this guidance).

For more information about this duty, see *The Essential Trustee: What you need to know* (CC3).

Duty of care: Trustees must give enough time, thought and energy to their duties, and make reasonable use of their skills and experience. The specific 'duty of care' in the Trustee Act 2000 is to exercise such care and skill as is reasonable in the circumstances having particular regard to:

- any special knowledge or experience that the trustee has or professes to have; and

- where a trustee acts in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

Strictly speaking, this only applies to trustees of unincorporated charities who are exercising powers in the Trustee Act 2000, or when they exercise similar powers derived from another source. However, case law and the Companies Act 2006 impose similar duties on directors of charitable companies. Good practice means that the duty of care should be considered as applying to all trustees and to all aspects of their work in making decisions about their charity.

The trustees' duty of care is explained in more detail in *The Essential Trustee* (CC3) and our operational guidance on *Statutory Duty of Care* (OG86 B6).

F. Understanding the risks

Public service delivery presents many opportunities for charities, but there are also potential risks. Trustees should make informed decisions about whether to engage in this kind of activity and the terms on which they do so.

F1. What opportunities might public service delivery offer to charities?

Public service delivery represents one way for charities to further their mission, expand their activities and provide new services to meet the needs of their beneficiaries. In principle (as explained below), it should be properly funded and hence a potential source of income.

At the same time, it can be a means of improving the public services that beneficiaries receive, and an opportunity to influence public authorities' policy towards beneficiaries.

F2. What risks should charities be aware of?

The short answer

Risk is a part of everyday life. Charities cannot avoid risk altogether, and sometimes real innovation and change are only achieved through taking risks.

Charities' experience of public service delivery to date has highlighted the following potential risk areas:

- financial, including use of reserves and sustainability;
- governance, including constitutional and independence;
- service, including contractual risks, and quality of service; and
- reputational, including public perception and relationship with public authorities.

Many of these risks do not arise solely from public service delivery, and charities may be familiar with them through other aspects of their work.

It is important for charities to be aware of any risks involved. We advise charities to use this information in considering and negotiating the terms of any funding agreement.

In more detail

Financial risks:

- **Under-funding:** For example, this might occur if charities do not accurately identify the full costs of a service or negotiate for them in funding agreements. Using reserves or other funds to make up the cost of providing a service may affect a charity's long-term sustainability.
- **Inappropriate duration of funding:** Short-term funding of a service can hinder a charity's long-term planning. It can also divert staff time and resources to obtaining further funding. HM Treasury's *Guidance to Funders* (see section L) states that the length of funding should be determined by what the funding is intended to achieve.

- **Block or spot-funding:** Some funding agreements are based on payment per client (spot-funding); others are for a 'block' of services (block-funding). Different arrangements may suit different circumstances. Spot-funding can be unpredictable if the charity has no control over how many (or few) client referrals it receives, making it difficult to plan staffing and resource levels. It may also entail the negotiation of a larger number of contracts. It may, however, be more flexible where services need to be tailored (and priced) to the specific needs of individuals.
- **Late funding (payment in arrears):** Funding in arrears forces the charity to meet costs (including capital costs) up-front, causing potential cashflow problems. Government procurement rules permit payment in advance in certain circumstances.
- **Funding linked to quality of service:** Under some funding agreements, payment may be withheld if the quality of the service fails to meet specified standards. If the specification is open to interpretation, this could lead to a dispute between the charity and the funder.
- **Clawback:** Some funding agreements require repayment of any surplus. However, HM Treasury's *Guidance to Funders* (see section L) makes it clear that clawback arrangements should only be applied when it is necessary to safeguard a funder's

interest in a publicly funded asset (eg a building), that they should not apply in the procurement of goods or services, and that conditions attached to funding should be flexible and pragmatic.

- **Statutory obligations:** If staff transfer from the public sector to a charity, their terms and conditions may be preserved under TUPE regulations. The charity could become liable for additional salary, pension or redundancy costs. Existing staff may object if transferred staff have better terms and conditions.

Governance risks:

- **Objects and mission-related risk:** In order to obtain funding, there is a risk of charities undertaking activities or delivering services that are outside their objects or powers. (This is commonly known as mission drift and is discussed at more detail in section E.)
- **Loss of independence:** See section H.

Service-related risks:

- **Contractual/litigation risks:** As with any contract, entering into a contract to deliver public services entails assessment of the risks, as well as the opportunities. There may be penalties for non-delivery or other breaches of the contract. It may also require the charity to take on other contractual risks such as leasing premises or equipment and employing staff. It may be difficult to terminate a contract if arrangements do not work out as expected. Contract terms may be complex or unreasonable.

The terms of some tender processes can tie applicants into contractual agreements. In such cases a charity could be deemed by tendering to have accepted contractual terms unless it expressly reserved its position beforehand. Conversely, by seeking to reserve its position the charity might risk having its tender rejected.

Dealing with members of the public also involves risks of liability, for example personal injury.
- **Inappropriate levels of monitoring:** Whilst it is to be expected that a funder will require a certain level of monitoring to ensure that agreed outcomes are delivered, inappropriate levels of monitoring may create an unjustifiable administrative burden and unnecessary additional costs. Inappropriate monitoring could also undermine the confidentiality of trustees' decision making (for example, observers attending all trustees' meetings).
- **Public authority duty:** Public authorities have a number of responsibilities under human rights, freedom of information and equality legislation. Charities that deliver services under contract on behalf of a public authority may be required under contractual terms to comply with these duties, creating additional administrative requirements and costs. The charity should consider its obligations carefully. This area of law is currently under review.
- **Sense of obligation:** Many charities understandably feel a sense of loyalty or responsibility towards their beneficiaries. They should not, however, feel obliged as a consequence to accept funding agreements on terms that are not in the interests of service users or other (present and future) beneficiaries.
- **Risks to delivery or service quality:** The framework and process of transferring services to charities can reduce their capacity to meet the expectations of service commissioners and beneficiaries. Poor contractual specifications, inappropriate monitoring arrangements and inadequate funding can all adversely affect service quality and value.

Reputational risks:

- Entering into contractual relationships with a public authority, and in particular using donated income to fund the delivery of a service, could weaken the confidence donors have in an individual charity, unless the charity clearly explains its approach.
- Unwillingness to exercise independence or to challenge funders might also affect a charity's reputation.
- Poor service quality could also harm a charity's reputation. Service users' frustrations may be directed towards the charity that delivers the service rather than the commissioning authority, particularly if the authority seeks to avoid responsibility for contracted out services; but there are reputational risks for both. Responsibility for resolving complaints about the service should be clearly set out within the funding agreement. As a matter of good practice, charities should have clear policies and procedures for handling complaints.
- There could also be a reputational risk in not delivering a service if that was contrary to the expectations of the charity's beneficiaries and other stakeholders.

For every aspect of a charity's work, the trustees should identify and assess the risks and decide how best to reduce, avoid or manage them. Part of negotiating a funding agreement with a public authority should be to examine the balance and sharing of risks between the charity and the authority. It is in no one's interests for the charity to carry an unfair burden of risk if this undermines the effectiveness and quality of the service and value for money.

Another way of managing or reducing some of the financial, contractual and delivery risks is to get involved in the commissioning (service design and specification) process at an early stage. Charities can positively influence the way services are shaped, using their understanding of beneficiaries' needs.

F3. What help and guidance is available on managing risks?

There are numerous publications on public service delivery, more of which are listed in section L of this guidance. Charities may in particular find the following guidance helpful:

- *Improving Financial Relations with the Third Sector: Guidance to funders and purchasers* (HM Treasury, 2006)
- *The CJC Guide to Buying from the Third Sector* (Chartered Institute of Public Finance and Accounting (CIPFA) 2006)

(These documents are aimed at readers in the public sector, although charities may wish to draw them to the attention of commissioners when discussing funding agreements.)

- *Surer funding: improving third sector public service delivery* (Association of Chief Executives of Voluntary Organisations (acevo) and New Philanthropy Capital, 2004)
- *How voluntary and community organisations can help transform public services* (The National Council for Voluntary Organisations (NCVO) 2006)
- *Beyond Transfer to Transformation* (Unwin and Molyneux, 2005)

The Commission has also produced a guide to *Charities and Risk Management*, which is available on our website.

F4. Should charities consider taking advice before signing a contract or funding agreement?



The short answer

Yes. In particular, trustees should take account of the size of the contract and any particular potential risks it may carry, when they are deciding what advice they need.

In more detail

Contracts are legal documents. Terms of contracts and other funding agreements may be enforceable against the charity, and may also contain penalties for non-performance. There are different legal considerations depending on the nature of the funding agreement (see I3, Different types of funding agreement). The terms should include, for example, the service to be delivered, payment terms, arrangements for monitoring and evaluation, service redress, provisions for any surplus or deficit, review and termination. There will often be obligations on the charity to indemnify the authority against third party claims, or possibly to take on certain premises or staff. The terms of the contract may not be in the charity's interests.

A public authority may try to insist that a contract is non-negotiable, but legally a charity should always have the choice to ask to negotiate or to refuse to sign. Charities should be careful, however, about entering into tendering processes where contractual terms may be imposed on the charity unless any amendments it wishes to negotiate are set out in its tender.

Trustees must ensure that no legal document is signed unless they are satisfied that its terms are in the charity's interests; to do otherwise would be a breach of duty. It is therefore essential for trustees to consider the need for professional (legal and accountancy) advice; particularly where the charity is considering entering into an agreement which is of high value compared to the charity's size or which carries potential risks. This advice could come from external or in-house specialists.

Any trustees who are professionally qualified must consider their duty of care (see section E2 of this booklet) when deciding whether it is appropriate for them to advise their charity on any particular matter.

Some sources of general advice:

Charities may find the following helpful. For more detail see section L.

Publications:

- *Before Signing on the Dotted Line, all you need to know about procuring public sector contracts* (NCVO, 2006)
- *Introductory Pack on Funding and Finance: Guide to Procurement and Contracting* (NCVO and Institute of Public Finance, 2007)

Useful contacts:

- The Public Service Delivery Network (contact NCVO)
- Futurebuilders England
- ChangeUp (managed by Capacitybuilders)
- Wales Council for Voluntary Action (WCVA) Public Sector Delivery and Improvement Network (to contact WCVA see section L)

G. Stick to your mission

It is essential that charities are clear about why they exist and who they are there to help, so that they do not lose direction. Lack of clarity about direction and purpose can be the first step towards mission drift. This section focuses on the relationship between a charity's objects or legal purposes and its mission, what it aims to achieve, and how this should direct its activities (which may include public service delivery).

G1. How should a charity's objects govern its mission and activities?



A charity's mission and all its activities must be within the scope of its objects and powers. Whenever the trustees are revisiting their mission, they should always refer back to the objects.

Equally it should be clear how any activity contributes to achieving the objects and mission. This is essential where charities are entering into contracts to deliver services, where the terms or scope of a funding agreement may not exactly match the charity's objects.

G2. Who should make decisions about what activities the charity undertakes?



The trustees have, and must accept, ultimate responsibility for directing the affairs of their charity, ensuring that it

is solvent and well-run, and delivering the charitable outcomes for the benefit of the public for which it was set up. Trustees can generally delegate certain powers to agents or employees, and in practice managers may play a key role in day-to-day decision-making (particularly in larger charities). It is the trustees, however, who hold and must always retain ultimate responsibility for running the charity. They also have ultimate responsibility for ensuring that the charity complies with the terms of any contract.

Deciding what activities to undertake is one of the most important decisions that a charity makes. It follows that the trustees should ensure that they are appropriately involved in decisions about what activities the charity undertakes. Where decision making is delegated to staff or anyone else, trustees should set clear parameters about how, and by whom, such decisions can be made, and how the trustees will keep themselves informed about the charity's activities.

G3. What should a charity think about before undertaking an activity or service?

L

Decisions about activities or services must be directed by the charity's objects, and should follow its mission and planned priorities rather than funding opportunities. Funding considerations may well be a factor, but they should not drive or determine the mission.

The trustees should consider the following questions when considering any activity or service:

- Is this activity consistent with the charity's objects and powers?
- How does it fit in with the charity's mission and any specific aims or objectives within our current work plan?
- How will it meet the needs of the charity's beneficiaries?
- How will it be funded?
- Has the charity fully assessed the risks and taken steps to mitigate them?

Trustees should remember that public authorities procuring public services may lack awareness of the objects of the charity or the trustees' legal responsibilities. Charities can encourage finance and other staff of public authorities to take advantage of any training or information services available to them, for example CIPFA-

qualified finance staff in the public sector can access the expertise of the CIPFA Charities Panel.

G4. Can a charity's mission or objects be updated, and could we change the objects in order to deliver a particular service?

L

It is likely that a charity's mission will evolve and change over time in response to changing needs in society. The trustees should periodically review the charity's objects and mission, to ensure that they are still appropriate.

Updating a mission statement is a policy decision that the trustees may take (but the mission should continue to reflect the objects). Changing the charity's objects is a legal process. The provisions in the governing document, the law and the Commission's powers must be followed as appropriate. This is explained in other guidance from the Commission including *Amending Charities' Governing Documents: Orders and Schemes* (CC36).

If the Commission's approval, consent or legal authority is required, we would not normally authorise a change if the **only** reason for making it was to secure a particular funding agreement. A charity's objects and mission should direct its funding strategy, not the other way around.

H. Guard your independence

Independence goes beyond the legal status of an organisation: safeguarding independence should be an ongoing activity. Trustees must always exercise independent judgement and properly manage any conflicts of interest. This is particularly important for charities that deliver public services, where public authorities may seek to influence or direct the charity's decision making. There is also a risk that the general public may perceive the charity to be compromising its independence if it receives funding from a public authority. There are steps charities can take to ensure that independence is not compromised.

H1. How can charities stay independent and manage conflicts of interest?

L

The short answer

In carrying out his or her responsibilities, a trustee must act solely in the interests of the charity. A trustee is not a delegate or representative of any appointing or funding body. It is essential that all trustees understand their legal duties. Where necessary to safeguard the interests of their beneficiaries, charities should exercise their independence and explain its importance to service commissioners and funders.

In more detail

Good governance: Charity trustees and managers should follow good practice in governance. New trustees should receive suitable induction and training. Conflicts of interest should be identified, recognised and managed, and decision-making processes should be accountable and transparent. Charities should consider the code of governance for the voluntary and community sector (for details see section L of this guidance).

The Compact: The Compact recognises the independence of charities and other voluntary organisations from government, and their right to exercise that independence irrespective of funding. In Wales the Voluntary Sector Scheme also recognises the independent nature of the sector. All public authorities should acknowledge and adhere to these principles.

Managing conflicts of interest: A conflict of interest is any situation in which a trustee's personal interests, or interests that they owe to another body, may (or may appear to) influence or affect the trustee's decision making. Trustees should refer to the Commission's guidance on how to manage conflicts of interest, available from our website under 'Guidance for Charities'.

Where a public authority is trustee of a charity in its corporate capacity this can create particular conflicts. Any funding agreement between the authority and the charity would constitute self-dealing and the funding agreement may be open to challenge unless it has been authorised by the court or the Commission. We would need to be satisfied that the charity had put in place mechanisms to manage the

conflict of interest, and that the proposed arrangement was in the charity's interests.

Contractual terms and conditions: In some cases, public authorities seek to include conditions in funding agreements that might cause the trustees to act in breach of trust or restrict their ability to act solely in the interests of the charity. These could include rights to nominate clients or beneficiaries, to appoint trustees or to send representatives to trustee meetings. They may also include equality and diversity requirements that affect trustee appointments, or the ways in which beneficiaries are selected.

Whilst it is understandable that an authority will want some control over the delivery of its services, the charity must not accept any terms or conditions that are contrary to the terms of the governing document (for example, the mechanisms for trustee appointment). The trustees must not surrender their discretion, and must not restrict their discretion unless they are satisfied that it is in the charity's interests to do so.

Saying no: Charities should not feel obliged or compelled by their funders to deliver public services, or a particular service. It is for a charity's trustees to decide what activities the charity should undertake, and that decision must be based on the interests of the charity and the needs of all its beneficiaries. Such a decision may, of course, be more difficult if the charity is considering renewing an existing contract where beneficiaries are already in place.

Independence is explained in more detail in our publication *The Independence of Charities from the State* (RR7).

H2. If a charity delivers public services, can it still campaign?

The short answer

Yes, subject only to the rules and restrictions that apply to all charities.

In more detail

Charities that deliver public services should not feel inhibited from engaging in political activity or campaigning; the same rules apply to all charities, regardless of whether their activities are related to public service delivery or not. These rules are explained in our guidance *Political Activity and Campaigning by Charities* (CC9).

A charity should not be dissuaded from campaigning or seeking to influence public policy on matters where the trustees believe that it is in the beneficiaries' interests to do so. It may also be important in terms of public perception and confidence for the charity to demonstrate that it can exercise its independence by voicing its opinion.

I. Know your worth

Charities should be fully informed about the financial aspects of public service delivery.

11. What does the Commission mean by 'know your worth'?

The short answer

By 'knowing your worth' we mean:

- understanding the full cost of the charity's services;
- recognising the charity's scope to deliver and any limitations;
- identifying any unique or distinctive qualities of the charity's services; and
- using these and other relevant factors to set a price for those services.

In more detail

The cost of a service: The full cost of a service includes both its direct costs and also the indirect costs (sometimes called overhead, administrative or 'core' costs) associated with it. Core costs include the share of management costs (such as senior staff time and board meetings), research and development costs (including training) and other support costs (including premises and utility costs) that can be fairly allocated to the service.

Charities should know the full cost of any service they deliver or plan to deliver.

By knowing and understanding their full costs, trustees can make more informed decisions about whether to undertake particular services or accept offers of funding.

Recognising the charity's limitations: It is important to know the limits of the charity's capacity. The charity should not take on services, projects or activities that it will be unable to deliver or complete.

Unique or distinctive qualities: Charities may have unique or distinctive qualities giving them the potential to provide enhanced services. Such qualities might include specialist knowledge or experience, the charity's ethos (for example, being user-led), or innovative approaches to service delivery. (These qualities are often described as 'added value'.) Where a charity identifies such qualities, this should inform the charity's thinking:

- in evaluating whether delivery of a particular service would be an effective way of the charity furthering its objects (and mission);
- in calculating the full cost of delivering a service (including costs of providing a higher quality or level of service), and setting a price that reflects the charity's 'unique selling points'; and
- in deciding whether it would be in the interests of the charity and its beneficiaries to undertake delivery of a service at less than the full cost (see below).

Pricing a service: Besides the full cost and any distinctive qualities, other factors that we advise trustees to consider in pricing a service include any particular risk factors (for example, new services and shorter contracts might need to be priced to compensate for potentially greater levels of risk), their relationship with the commissioning authority, the strength of the charity's name or brand, and the competitiveness of the market.

It is perfectly reasonable for a charity to earn a surplus. As highlighted in *The Reform of Public Services: the Role of the Voluntary Sector* (NCVO, 2005), when it is in the charity's interests to do so, the price of a service can be set to make:

- a full recovery of the cost of providing it;
- a surplus to reinvest in the charity's ongoing work; or
- a calculated loss (subsidising the service).

12. How can charities understand their full costs?

There are a number of resources on full cost recovery that are available to charities, including costing models, training and advice, further details of which are in section L:

- Acevo's *Full Cost Recovery* toolkit can help charities to allocate core costs in a way that is compatible with the rules that apply to public sector finance.
- Annex A of the Treasury's *Guidance to Funders* contains examples of costs that are likely to be incurred in providing services.
- A number of organisations, including acevo and National Association for Voluntary and Community Action (NAVCA), provide training on full cost recovery.

Trustees should understand the nature of the service to be provided and the way that costs work in order to ensure that the contract is well managed. For example, some costs may vary directly with the level of service use; others may be fixed or semi-fixed and less affected by changes in service use. A full understanding of costs, including the operational drivers lying behind them, is essential to inform business planning, tendering and budgeting processes.

13. When should charities expect and negotiate for full cost recovery?

The short answer

Charities should expect and negotiate for full cost recovery in any case where a public authority is purchasing a service from them, unless the charity decides it is in its beneficiaries' interests to forego full cost recovery.

In more detail

Different types of funding agreements:

The terminology used to describe funding agreements can be very confusing and imprecise. There are important differences between the different types of funding agreement. These differences are legally complex, but for the purposes of this guidance:

- A grant is a gift or donation. The donor has no right to receive anything in return, but may attach terms and conditions specifying how the grant is to be spent, which could make it a restricted fund within the charity's accounts. Spending the grant on anything else would be a breach of trust. Any surplus funds will be subject to the same restrictions unless the terms of the grant stipulate otherwise.
- A contract is a legally enforceable agreement between two (or more) parties where one party agrees to provide services in return for payment. A payment under a contract is a fee not a grant, and is subject to VAT (see section K3). Any

surplus under a contract is not a restricted fund, but might be subject to contractual terms and conditions.

- Service level agreement (SLA) is not a legal term. An SLA is usually a document setting out the understandings of the public authority and the charity about the service to be provided. It would only be a contract if it fulfilled all the legal criteria for a valid contract, including that both parties intended it to be legally binding.

Purpose of the funding: It is important for charities to understand the purpose of the funding. In many cases a public authority will want to obtain (purchase) a particular public service. In such cases, the funding agreement is likely to specify terms and conditions.

A public authority may also provide funding by way of donations to support charitable activities that it recognises the value of, perhaps because they support the authority's wider community objectives.

Application of full cost recovery: Under the terms of the Compact and its Funding and Procurement Code (and the Code of Practice for Funding the Voluntary Sector, in Wales), full cost recovery should apply in any case where a public authority is purchasing a service from a charity, unless the charity decides to forego full cost recovery.

Where a public authority is not purchasing a service but simply supporting charitable activity then the level of support given is something that can be negotiated between the charity and the authority but is ultimately at the discretion of the authority.

14. What if the funding offered will not cover the full cost of a service that a public authority is purchasing?



The short answer

If a charity is either considering taking up, or renewing, a funding agreement for public service delivery where the funding on offer will not cover the full cost of the service, it can:

- negotiate for more funding;
- offer a lower level of service commensurate with the funding on offer;
- decide to use other funds to make up the shortfall; or
- reject the funding agreement and not deliver the service.

The trustees' decision must be based on the interests of the charity and the needs of its beneficiaries.

In more detail

Trustees must not agree to use any of the charity's funds unless they are satisfied that it is in the interests of the charity and its beneficiaries, and fully in line with its objects. Any decision to subsidise or supplement a service must be made by the charity and should not be imposed on it as a condition of funding.

Before deciding to use any of the charity's own funds either to subsidise or enhance a service, trustees should consider the following questions:

- What level of legal duty does any public authority have to provide the service in question? Is there an absolute legal duty (with no discretion over the level of service to be provided); a legal duty but with discretion over service levels, or is the service purely discretionary?
- Would delivering this service be a proper and effective use of the charity's resources?
- Would it be an effective way of helping the charity's beneficiaries?

- What value would the charity add, or what enhancement would it provide to the service by using its own funds in this way?

In some situations, charities may be able to obtain additional funding or resources that would not normally be available to a public authority. Where such resources are available, charities should aim to use these to achieve genuine enhancements in services for beneficiaries. Public authorities should not assume that charities are automatically able to obtain additional funding or that 'added value' means a higher specification of service at no additional cost.

In those circumstances where a public authority has an absolute legal duty to provide a service and no discretion over the level of service, there would have to be very clear justification in the interests of the charity for subsidising the service.

15. Can charities make public authorities comply with the Compact (or the Voluntary Sector Scheme in Wales)?

All government departments are expected to comply with the Compact or the Voluntary Sector Scheme (as applicable) and associated codes of good practice. Most local authorities now have local compacts in place, mirroring the terms of the national Compact and VSS. The principles in these agreements should underpin any relationship between a charity and a public authority, and we therefore recommend that charities familiarise themselves with, and make use of, these documents.

These agreements are not legally binding, but many of their principles are enshrined in government policy or public law. The Compact has been successfully used in public law cases, and helped in the settlement of legal disputes. Charities may be able to get help and advice about breaches of the Compact from the Compact Advocacy Programme (details from NCVO) or from WCVA on breaches of the VSS. More serious breaches of the Compact may be referred to the Commission for the Compact, an independent body established by government in 2006 to champion the Compact and promote good relations between the Voluntary Community Sector (VCS) and government.

16. How could a charity go about identifying or enforcing a public authority's legal duty?

The short answer

It can be very difficult in practice to identify exactly what legal duty a public authority has to provide or fund a particular service, but a charity can ask for clarification of an authority's responsibility. There are certain steps charities could consider taking to enforce such a duty.

In more detail

Because public authorities may provide services under an absolute legal duty, a legal duty that gives them discretion over the level of service, or a discretionary (optional) power, a precise statutory duty can be difficult to identify.

It would be reasonable to ask an authority for written clarification of what duty it has to provide a service, or what funding is available for that service. If necessary, a request could be made formally under the Freedom of Information Act 2000 for copies of any information the authority has on their duty. A charity could also seek independent advice on the authority's legal duties, although this would involve legal costs.

Where a charity identifies that a service affecting its users is not being provided to the required level out of public funds, it may consider whether anything can reasonably be done to persuade the public authority to provide funds to fill the gap. The charity could, either alone or with other organisations, try to negotiate with the public authority for additional funding.

It is acceptable for charities, provided they act in accordance with their objects, to apply legal, political or administrative pressure to secure for their beneficiaries an improved level of public funding for the service in question. We recommend reading our guidance *Political Activities and Campaigning by Charities* (CC9) if a charity is considering exerting political pressure to improve public funding.

There are also a number of legal remedies that charities and their beneficiaries could consider, including judicial review of a public authority's decision, or bringing a case under the Human Rights Act 1998. A charity may also wish to help a beneficiary to bring a case where the beneficiary does not have the financial resources to do so otherwise and the charity is satisfied that this would be an effective way to further its charitable purposes. Legal action should not be undertaken lightly or without first taking professional advice.

Unless trustees obtain prior authorisation from the Commission to use charity funds to meet the costs of legal action, there is a risk that they may become personally liable for these costs. Trustees should therefore consult the Commission before commencing legal action. Charities should also bear in mind that there are deadlines for bringing legal action.

17. What if a charity's governing document prohibits subsidising statutory funds?



The short answer

Charities must not take any action that is expressly forbidden by their governing document. If the trustees believe that a particular power or restriction is preventing the charity from carrying out its purposes, they should consider amending the governing document. As mentioned in section G4, the Commission can advise charities about and, if necessary, authorise amendments.

In more detail

Express prohibition: Some governing documents expressly forbid the charity to relieve or subsidise statutory funds. (This may be expressed in positive terms such as 'shall not'.) Such a prohibition must not be ignored; trustees must understand exactly what is prohibited.

What is permitted? In any case where the charity was providing a service on terms of full cost recovery, there would be no difficulty. If the charity was not receiving full cost recovery, the trustees would have to be clear about what level of legal duty the funding authority had, and whether the level of funding fulfilled that duty. If the authority had an absolute duty, the trustees would need to consider whether the governing document permitted the charity to subsidise statutory funds.

Amending governing documents: Most modern governing documents contain a power of amendment setting out the amendment process. Amendments to key clauses, such as the objects and other clauses affecting how charity assets are used, may require the Commission's prior written consent or approval, or may be prevented altogether.

The Commission can provide advice on amending governing documents, and has power to make some changes that charities cannot, but would have to consider any request from a charity according to the particular circumstances and the charity's interests. This is explained in other Commission guidance including *Amending Charities' Governing Documents: Orders and Schemes* (CC36).

J. Guidance for charities that give grants

Some of the underlying principles of this guidance can be applied to charities that give grants, but there are other issues for these charities to consider. They do not generally provide services themselves or obtain funding from government. They might, however, receive requests for funding, either directly linked to the provision of public services or facilities, or from another charity or organisation that is involved in public service delivery.

J1. What issues should grant-making charities consider?

The short answer

In considering applications for grant funding, we recommend that charities:

- consider the full range of reasonable grant making options;
- ensure that decisions are based on the law and the interests of the charity;
- use their experience of what public authorities have funded in the past;
- ask questions and challenge assumptions about what public authorities are prepared to fund or have a duty to fund; and
- use such considerations to inform the development of their grant-making policies.

In more detail

Application of legal principles: The same key legal principles apply to grant-making charities. There is no legal bar on charities using their own funds to subsidise or supplement public

services, but they must only do so when it is within their objects and powers, and in the interests of the charity and its beneficiaries to do so.

Charities should generally expect public authorities to fully fund the cost of services that they purchase, and in particular to fully meet the cost of statutory obligations. Therefore, grant-making charities should only be asked, and should only agree, to subsidise public services or other public provision when there is clear justification for doing so.

Past experience: The charity could consider whether the service in question is a new service. If not, who provided it in the past, and what level of service did public authorities fund?

Duties of public authorities: It may be possible to find out whether a public authority has a duty to provide this service, what minimum level of service is the authority required to fund, and what level of statutory funding is available. As explained at section 1, the most practical way to do this may be to ask the authority. Such a request could be made in writing, and could be made under the Freedom of Information Act if necessary.

Setting policy parameters: It is for the trustees to decide the priorities and parameters within which their charity will make grants. As with many other aspects of defining grant-making policy this may involve prioritising some potential beneficiaries over others. It may also involve considering short term and longer-term priorities and funding needs.

Some grant-making charities are concerned that there is a risk of public authorities becoming reliant upon additional charitable funding in the long term, or that the ability of grant-making charities to fund additional or innovative provision may be diminished. These are factors that trustees may choose to take account of in setting grant-making policies.

K. Other issues to consider

Much of the debate about public service delivery focuses on funding, but there are other issues to consider, particularly in relation to managing risk and maximising effectiveness.

K1. What other steps can charities take to manage risk?

The short answer:

There are certain steps that charities can take to manage some of the risks associated with public service delivery, including using the form of a limited company, insurance, or delivering the service via a trading company.

In more detail:

'Incorporating' the charity: If the charity is unincorporated (a trust or an association), then any contractual liabilities would fall on the trustees personally rather than on the charity. The trustees of any unincorporated charity that is considering public service delivery should first consider establishing an incorporated structure.

An incorporated structure will usually be that of a charitable limited company. The advantages of the company structure are firstly that it is a legal entity in its own right (the company, rather than the individual trustees, enters into contracts and employs staff); and secondly that, in normal circumstances, the liability of members is limited. It should be noted, however, that incorporation would not protect the charity itself from the

financial risks associated with public service delivery. Conversely, there are additional administrative and regulatory burdens. These issues are discussed in more detail in *Choosing and Preparing a Governing Document* (CC22) and in *Charity Incorporation: How to 'incorporate' an unincorporated charity and apply for registration* (STS-1302), both of which are available from our website.

A new form of incorporated charity, the Charitable Incorporated Organisation (CIO), has been created by the Charities Act 2006. This is intended to provide a more straightforward form of incorporation for charities. The relevant provisions of the Act are expected to come into force in 2008.

Where a charity which is incorporating has a defined benefit pension scheme, it is important to take professional advice and confirm with the Pensions Regulator, prior to incorporation, the implications of incorporation on the pension fund. There is additional guidance on our website: *Defined Benefit Pension Schemes – Questions and Answers*.

Setting up a separate company: An alternative to ‘incorporating’ an unincorporated charity is to set up a separate company specifically to deliver a service or services under contract. This is also an option for charitable companies. Using a separate company would enable the trustees to ‘ring-fence’ the liabilities under the contract by keeping them apart from the charity’s other activities and funds. There are costs involved in establishing and running a company, and trustees will need to weigh up whether it is in the charity’s interests to transfer an activity to a separate company or keep the activity, and the risk, within the charity.

The separate company could itself be a charity, or it could be a non-charitable trading company. A charity can be set up for and undertake trading which achieves its charitable purposes. It will be required to register as a charity in the usual way. A non-charitable trading company is commonly used to enable a charity to raise funds or trade outside the scope of its objects, for example by providing public services, whether charitable or not, under contract. However, as the company is not a

charity itself it will in principle be liable to tax and VAT. Income and corporation tax can be avoided by using Gift Aid to transfer profits to the charity.

The advantages and disadvantages of setting up non-charitable trading companies, and the legal restrictions that charities must observe are complex. These are explained in more detail in our guidance *Charities and Trading* (CC35).

Insurance: The different kinds of insurance available to charities are explained in detail in our booklet *Charities and Insurance* (CC49).

Contracts often include clauses requiring the charity to indemnify the public authority against third party claims arising out of the provision of the service (for example, if a service user is injured as a result of the negligence of one of the charity’s employees). This indemnity is required in order to protect the public authority from claims against it, for example in cases where the charity as provider of the service has been negligent. The trustees also have a duty to safeguard the charity’s property. It follows that the trustees should consider the need for the charity to take out public liability insurance, to protect both the charity and the public body.

Some contracts contain very broad indemnity clauses, and this may be a matter on which the trustees need specific advice (see section F4).

K2. Should charities consider working together with other charities to deliver services?

There are both benefits and risks associated with partnership or collaborative working between charities. Partnership working can enable charities to compete for larger contracts or benefit from efficiency gains by reducing duplication of administrative functions. This may be of particular benefit to smaller charities. Charities need to be clear about their particular role in any partnership, particularly in terms of shared contractual responsibilities.

The Commission has published detailed guidance, *Collaborative Working and Mergers: An Introduction* (CC34), which sets out the issues to be considered in more detail.

K3. What are the VAT implications of public service delivery?

In general, charities receive no special treatment in respect of VAT on their business activities. VAT registration is required if their taxable turnover exceeds the statutory limit (£61,000 in January 2007, but subject to regular revision). VAT notices 700/1 (*"Should I be registered for VAT?"*), 701/1 (*"Charities"*) and 701/5 (*"Clubs and Associations"*) give further information and may be obtained by phoning the HM Revenue & Customs helpline on 08453 02 02 03. A charity can discuss any aspect of VAT which affects it with the HM Revenue & Customs National Advice Centre on 0845 010 9000 or by post at HMRC Charities, St Johns House, Merton Road, Bootle, Merseyside L69 9BB.

K4. What are the implications of competition law for charities delivering public services?

Charities need to be aware that competition law may impact upon public service delivery in certain circumstances. Guidance on competition law is available on the Office of Fair Trading website www.offt.gov.uk/Business/Legal/Competition/default.htm

L. Further information and advice

The Commission produces a wide range of publications and website guidance giving information and advice to charity trustees and the general public on a number of issues relating to charity law and regulation. The full list of publications is on our website.

We have also listed a selection of other organisations and publications which can be used as sources of information.

L1. Charity Commission publications

The list of our publications below is a selection based on some of the issues identified in this guidance.

The Essential Trustee: What you need to know (CC3)
Campaigning and Political Activities by Charities (CC9)
Registering as a Charity (CC21)
Choosing and Preparing a Governing Document (CC22)
Charities and Local Authorities (CC29)
Collaborative Working and Mergers: An introduction (CC34)
Charities and Trading (CC35)
Amending Charities' Governing Documents: Orders and Schemes (CC36)
Charities and Insurance (CC49)
The Hallmarks of an Effective Charity (CC60)
The Independence of Charities from the State (RR7)
Stand and Deliver: The future for charities providing public services (RS15)

Charity Commission website publications

A guide to conflicts of interest for charity trustees (see *Guidance for Charities*)
Policy Statement on Charities and Public Service Delivery (see *Guidance for Charities*)
Charities and Risk Management (see *Meeting Our Requirements*)
Trafford Community Leisure Trust and Wigan Leisure and Culture Trust (see *Decisions of the Commission*)
Turning your charity into a limited company (see *Apply for it*)
Charities and Public Service Delivery - Summary report of the conference held on 21 March 2006 (see *Strategies, Plans and Reports*)
Defined Benefit Pension Schemes – Questions and Answers (see *Guidance for Charities*)

To obtain copies of these or any other of our publications you can either:

- View and print them from our website;
- order during opening hours - Monday to Friday 08:00-20:00 and 09:00-13:00 Saturdays by telephoning us on 0845 300 0218;
- write to Charity Commission Direct, PO Box 1227, Liverpool, L69 3UG

L2. External organisations

Association of Charitable Foundations

ACF is the membership organisation which supports the work of charitable foundations and grant-making trusts in the UK.

ACF
Central House
14 Upper Woburn Place
London
WC1H 0AE
Tel: 020 7255 4499
Email: acf@acf.org.uk

Association of Chief Executives of Voluntary Organisations (acevo)

The membership body for chief executives of voluntary organisations acevo works to connect, develop and represent the sector's leaders.

Association of Chief Executives of Voluntary Organisations
1 New Oxford Street
London WC1A 1NY
Tel: 0845 345 8481
Fax: 0845 345 8482
Email: info@acevo.org.uk
Website: www.acevo.org.uk

Audit Commission

An independent public body responsible for ensuring that public money is spent economically, efficiently, and effectively in local government, housing, health, criminal justice and fire and rescue services.

The Audit Commission
1st Floor, Millbank Tower
Millbank
London
SW1P 4HQ
Tel: 020 7828 1212
Website:
www.audit-commission.gov.uk

Capacitybuilders and ChangeUp

The ChangeUp framework, developed in partnership with the sector, focuses on improving capacity building and infrastructure within the sector. ChangeUp is managed by Capacitybuilders, an agency led by a board of sector experts. ChangeUp works through six hubs of expertise run by voluntary sector partnerships, covering finance, governance, ICT, performance, volunteering and workforce (each of which has its own website).

Capacitybuilders
77 Paradise Circus
Birmingham B1 2DT
Tel: 0121 237 5100/5111
Email: jane.fewkes@capacitybuilders.org.uk
Websites: www.changeup.org.uk
www.capacitybuilders.org.uk

Charity Finance Directors' Group (CFDG)

A membership organisation which specialises in helping charities to manage their accounting, taxation, audit and other finance related functions.

Charity Finance Directors' Group
3rd Floor
Downstream Building
1 London Bridge
London SE1 9BG
Tel: 0845 345 3192
Email: info@cfdg.org.uk
Website: www.cfdg.org.uk

Charity and Third Sector Finance Unit, HM Treasury

The Charity and Third Sector Finance Unit is responsible for strategic policy development across HM Treasury on third sector issues.

Charity and Third Sector Finance Unit
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ
Tel: 020 7270 4558
Email: CTSFU@hm-treasury.x.gsi.gov.uk
Website: www.hm-treasury.gov.uk/ctsfu

Charity Law Association

The Charity Law Association aims to enable those who advise on or use charity law to meet together, exchange ideas and intelligence and use their experience and expertise for the benefit of the charity sector.

Shivaji Shiva
Honorary Secretary
Charity Law Association
Russell Cooke
2 Putney Hill
Putney
London
SW15 6AB
Tel: 020 8394 6486
Email: shivas@russell-cooke.co.uk
or: admin@charitylawassociation.org.uk

Chartered Institute of Public Finance and Accountancy (CIPFA)

CIPFA is one of the leading professional accountancy bodies in the UK and the only one which specialises in the public sector. CIPFA takes an active interest in charity finance matters through its Charities Panel of finance practitioners in, and regulators of, the voluntary and community sector. Contact CIPFA for details of a new Certificate in Charity Finance.

CIPFA
3 Robert Street
London
WC2N 6RL
Tel: 020 7543 5600
Email: corporate@cipfa.org
Website: www.cipfa.org.uk

Communities Investment Fund

The Communities Investment Fund has been launched by WCVA in partnership with Development Trusts Association Wales and Wales Co-operative Centre, to make long term investments through a flexible loan funding package.

For details contact **WCVA**

Community Matters

Community Matters is the nationwide federation for community associations and similar organisations. It supports and develops the capacity of community organisations and represents them at a national level.

Community Matters
12-20 Baron Street
London N1 9LL
Tel: 020 7837 7887
Email: communitymatters@communitymatters.org.uk
Website:
www.communitymatters.org.uk

Compact Advocacy Programme

The Compact Advocacy Programme campaigns and advocates for the voluntary and community sector. Its role is to ensure that government sticks to the Compact. It also offers advice and support and takes on cases where there is a clear breach of the Compact.

Contact **NCVO** for further information.

Directory of Social Change (DSC)

The Directory of Social Change is an independent source of information and support to the voluntary sector. It provides practical training courses, conferences and seminars and publishes reference guides, handbooks and journals.

Directory of Social Change
24 Stephenson Way
London NW1 2DP
Tel: 08450 77 77 07
Email: info@dsc.org.uk
Website: www.dsc.org.uk

Futurebuilders England

Futurebuilders England is the government backed investment fund to help the voluntary and community sector deliver better public services. The fund provides a combination of grants and loans for third sector organisations that deliver public services.

Futurebuilders England
Level 14
Cale Cross House
156 Pilgrim Street
Newcastle-upon-Tyne
NE1 6SU
Tel: 0191 269 2850
Email:
info@futurebuilders-england.org.uk
Website:
www.futurebuilders-england.org.uk

Governance Hub

The Governance Hub, part of ChangeUp, is a partnership of organisations working to improve governance throughout the voluntary and community sector in England.

The Governance Hub
NCVO
Regent's Wharf
8 All Saints Street
London N1 9RL
Tel: (020) 7520 2514
Email: governance.hub@ncvo-vol.org.uk
Website: www.governancehub.org.uk

The Institute of Chartered Secretaries and Administrators (ICSA)

The professional body for chartered secretaries. ICSA promotes best practice and provides guidance on good governance. ICSA offers a professional qualification covering business, company law, corporate governance, management, finance/accounting, administration and company secretarial practice.

ICSA
16 Park Crescent
London W1B 1AH
Tel: 020 7580 4741
Fax: 020 7323 1132
Email: info@icsa.co.uk
Website: www.icsa.org.uk

Local Government Association

The LGA exists to promote better local government. It aims to put local councils at the heart of the drive to improve public services and to work with government to ensure that the policy, legislative and financial context in which they operate, supports that objective.

Local Government Association
Local Government House
Smith Square
London
SW1P 3HZ
Tel: 020 7664 3131
Email: info@lga.gov.uk
Website: www.lga.gov.uk

Local Government Ombudsman

Local Government Ombudsmen investigate complaints of injustice arising from maladministration by local authorities and certain other bodies.

There are three Local Government Ombudsmen in England. Each of them deals with complaints from different parts of the country.

Adviceline: 0845 602 1983
Website (with contact details):
www.lgo.org.uk

National Association for Voluntary and Community Action (NAVCA, formerly NACVS)

NAVCA is the national voice of local voluntary and community sector infrastructure in England. Their purpose is to promote local voluntary and community action nationally. They do this through 360 local infrastructure organisations which provide a wide range of support, development and representation services to the local VCS. A directory of local infrastructure organisations can be found at www.navca.org.uk/liodir/

NAVCA
The Tower
2 Furnival Square
Sheffield S1 4QL
Tel: 0114 278 6636
Email: navca@navca.org.uk
Website: www.navca.org.uk

National Audit Office

Audits the accounts of all central government departments and agencies, as well as a wide range of other public bodies, and reports to Parliament on the economy, efficiency and effectiveness with which they have used public money.

National Audit Office
157-197 Buckingham Palace Road
Victoria
London SW1W 9SP
Tel: 020 7798 7400
Email: enquiries@nao.gsi.gov.uk
Website: www.nao.gov.uk

The National Council for Voluntary Organisations (NCVO)

NCVO is a lobbying organisation and represents the views of its members, and the wider voluntary sector to government, the European Union and other bodies. They are also at the leading edge of research into, and analysis of, the voluntary sector. NCVO produces a wide range of information and support services for those working in the voluntary sector. Contact NCVO for details of its **Public Service Delivery Network**.

The National Council for Voluntary Organisations
Regent's Wharf
8 All Saints Street
London N1 9RL
Tel: 020 7713 6161
Fax: 020 7713 6300
Helpdesk: 08002 798 798
Email: ncvo@ncvo-vol.org.uk
Website: www.ncvo-vol.org.uk

Office of the Third Sector, Cabinet Office

This Office has been set up to drive forward the government's role in supporting a thriving sector, and brings together the work of the Active Communities Directorate (ACD) and the Social Enterprise Unit (SENU).

Active Communities Directorate
1st Floor
Peel Building
2 Marsham Street
London
SW1P 4DF
Tel: 020 7035 4413
Email:
thirdsector@cabinet-office.x.gsi.gov.uk
Website:
[http://www.cabinetoffice.gov.uk/
third_sector/](http://www.cabinetoffice.gov.uk/third_sector/)

Public Law Project

The Public Law Project is an independent, national legal charity which aims to improve access to public law remedies for those whose access is restricted by poverty, discrimination or other similar barriers.

Public Law Project
150 Caledonian Road
London N1 9RD
Tel: 020 7697 2190
Email: admin@publiclawproject.org.uk
Website: www.publiclawproject.org.uk

Public Service Ombudsman for Wales

You can complain to the Public Services Ombudsman for Wales about local government, National Health Service organisations including GPs, and the National Assembly for Wales. The Ombudsman considers complaints about matters such as housing, planning, education, social services and health services.

Public Services Ombudsman For Wales
1 Ffordd yr Hen Gae,
Pencoed CF35 5LJ
Tel: (01656) 641 150
Email: ask@ombudsman-wales.org.uk
Website:
www.ombudsman-wales.org.uk

Wales Audit Office

The Wales Audit Office covers all sectors of government, except those reserved to the UK government. The Auditor General for Wales, as head of the Wales Audit Office either directly audits bodies, such as the National Assembly for Wales and the NHS or, as in the case of local government, appoints auditors to do so.

WAO Head Office
Deri House
2-4 Park Grove
Cardiff CF10 3PA
Tel: 029 2026 0260
Textphone: 029 2026 2646
Website: www.wao.gov.uk

Wales Council for Voluntary Action (WCVA)

WCVA represents the interests of, and campaigns for, voluntary organisations, volunteers and communities in Wales. WCVA provides a comprehensive range of information, consultancy, funding, management and training services. Charities can use the WCVA website to find their nearest County Voluntary Council (CVC).

Wales Council for Voluntary Action
Baltic House
Mount Stuart Square
Cardiff Bay
Cardiff CF10 5FH
Tel: 029 2043 1700
Helpline: 0870 607 1666
Email: help@wcva.org.uk
Website: www.wcva.org.uk

Welsh Local Government Association

The Welsh Local Government Association represents the interests of local authorities in Wales. The three fire and rescue authorities, four police authorities and three national park authorities are associate members.

Welsh Local Government Association
Local Government House
Drake Walk
Cardiff CF10 4LG
Tel: 029 2046 8600
Website: www.wlga.gov.uk

L3. Other Publications

Good Governance: a code for the voluntary and community sector
Governance Hub, 2005

Full Cost Recovery: a guide and toolkit on cost allocation
acevo & New Philanthropy Capital, 2004

Mind the gap - A funder's guide to Full Cost Recovery
acevo, 2006. Available from
www.acevo.org.uk/uploads/pdfs/FCRfundersmanual.pdf

Before Signing on the Dotted Line: all you need to know about procuring public sector contracts
NCVO, 2006. Available from www.ncvo-vol.org.uk/sfp/publications

Introductory Pack on Funding and Finance: Guide to Procurement and Contracting
NCVO, 2007, NCVO and Institute of Public Finance. Available from
www.ncvo-vol.org.uk/sfp/introductory-pack

**Improving financial relationships with the Third Sector:
Guidance to Funders and Purchasers**
HM Treasury, 2006

The CJC Guide to Buying from the Third Sector
CIPFA, 2006

The Compact on Relations between Government and the Voluntary Sector
Compact Working Group, 1998; see www.thecompact.org.uk

Funding and Procurement: Compact Code of Good Practice
Compact Working Group, 2005; see www.thecompact.org.uk

**The Role of the Voluntary and Community Sector in Service Delivery:
A Cross Cutting Review**
HM Treasury, 2002

**Exploring the role of the third sector in public service delivery and reform:
a discussion document**
HM Treasury, 2005

Working with the Third Sector
NAO and Home Office, 2005 (Report by the Comptroller and Auditor General, HC 75 Session 2005-2006)

Partnership in Public Services: an action plan for third sector involvement
Cabinet Office/Office of the Third Sector, 2006

Making the Connections: delivering better services for Wales

Welsh Assembly Government, 2004; see

<http://new.wales.gov.uk/about/strategy/makingtheconnections/?lang=en>

The Reform of Public Services: the Role of the Voluntary Sector

NCVO, 2005

How voluntary and community organisations can help transform public services

NCVO, 2006

Beyond Transfer to Transformation

Julia Unwin and Peter Molyneux, 2005; in *The voluntary sector delivering public services* (Joseph Rowntree Foundation)

Surer funding: improving third sector public service delivery

acevo and New Philanthropy Capital, 2004

Partnership in Public Service – An action plan for third sector involvement

Office of the Third Sector, 2006

The Voluntary Sector Scheme

<http://new.wales.gov.uk/topics/housingandcommunity/voluntarysector/publications/volsectorscheme;jsessionid=5A76DC3BE627BC2FF85457E5A90D6219.www1?lang=en>

This publication can also be accessed at the Charity Commission's website: www.charitycommission.gov.uk

© Crown copyright 2007. This publication may be reproduced free of charge in any format or medium provided that it is reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown copyright and the title of the publication specified.

This publication is printed on paper obtained only from sustainable resources and is totally chlorine free.

Supplied by Linney Group.

xxxxxx 02/2007

**You can obtain large-print versions
of this publication from the Charity
Commission on 0845 300 0218**

Charity Commission

Telephone: **0845 300 0218**

Minicom: **0845 300 0219**

By post: **Charity Commission Direct**

PO Box 1227

Liverpool

L69 3UG

Website: **www.charitycommission.gov.uk**