



Trustee Payment -

CSD-1381A

New power for charities to pay for services provided by a trustee

What is this information sheet about?

It is about the new power which allows any charity to pay one or more of its trustees to provide services to the charity, where the trustee board reasonably believes it to be in the charity's best interests to do so. The services in question must be ones which the charity trustee provides in addition to carrying out normal trustee duties.

Relevant to:

Any charity, however it is constituted, that wishes to pay a trustee in these circumstances; provided there is no express prohibition against payment in its governing document, or in any other rules the charity must follow (see Q12). The new power also applies to anyone or any business connected with a trustee that a charity proposes to pay for providing a service. This includes spouses, partners, or relatives of a trustee, and it also applies to any trustees or nominees that have been appointed simply to hold the title to a charity's property.

Action for trustees:

Trustee boards wishing to use the new power will need to familiarise themselves with this guidance. They should follow it unless there is a very good reason not to, or if they can't meet the conditions of the new power. In those cases, or where in any doubt, trustees should contact us.

Q1. What services are covered by the new power?

A. Provided certain conditions are met, the new power allows trustees of all types of charity (or individuals or businesses connected with them) to receive payment for providing any professional or business services or supplies to the charity over and above normal trustee duties. This would include, for example:

- secretarial duties;
- the delivery of a lecture;
- a piece of research work;
- legal or accountancy work;
- providing timber for a building;
- use of a trustee's premises or facilities;
- use of a trustee's firm for a building job;
- entering into a maintenance contract with a trustee's firm;
- providing curtains or decorating materials for hall premises;
- expert services: eg estate agents, land agents, management and design consultants, computer specialists, builders, electricians, translators, and graphic designers.

Payment for services includes the supply of goods, and payments "in kind" – eg use of free or reduced rate accommodation by a trustee or person connected with a trustee.

Some charities already have a power in their governing documents or other rules which allow them to make payments in these circumstances. But where a charity has no such power, it will be able to use the new power without any need for the Commission's approval.

Q2. What if a charity already has a power to pay charges for professional services?

- A. The new power is extra to any power to pay a trustee that a charity might have in its governing document or in any other rules. If, for example, a power in a charity's governing document only allows payment of a trustee for professional services (eg legal or accountancy services), a charity can make use of the new power to pay for other types of service (see above).

Note: There is no legal power for any charity to pay a trustee to provide auditing services – a trustee cannot legally act as an auditor for his or her charity.

Q3. What situations won't the new power cover?

- A. The new power does not cover situations where:
- the charity wishes to pay a trustee for carrying out normal trustee duties – this is different from providing an extra service;
 - the charity wishes to employ a trustee or person connected with a trustee on a full or part time contract;
 - there is a clear express prohibition against trustee payment in a charity's governing document or in other rules that apply to it.

Note: An express prohibition is a strict rule against any trustee payment. It does not include the type of power in a governing document which says that trustees can only be paid with our approval. The new power overrides that type of rule, which we regard as a form of approval, rather than an express prohibition. (See also Q12).

Finally, the new power can't be used if the trustee board is not able to comply with any of the conditions mentioned immediately below. In that event, the trustees are advised to get in touch with us in advance of any payment, to see if we can give separate authority to the proposal.

Q4. What conditions do charities have to meet in order to use the new power?

- A. The new power can be used if the following conditions are met:
- there must be a written agreement between the charity and the trustee or connected person concerned; a note in the charity's records will not be enough – there must be a proper agreement (see Q5);
 - the trustees must be satisfied that payment is no more than is reasonable for the service provided, and that paying one of their number is in the best interests of the charity (see Q9);
 - in order to help the charity manage any conflict of interest, a trustee who receives payment may not take part in decisions of the trustees about the agreement, and should withdraw from meetings in which the terms of the agreement are discussed; though a trustee can be asked to give information about the service being provided;
 - trustees (including directors of charitable companies) are subject to the duty of care in the Trustee Act 2000 when deciding whether to pay (see Q10).

As we have seen in Q3, the new power can't be used if there is an express prohibition against payment; see also Q12 for what to do if there is such a prohibition.

As a further safeguard for the charity, it can't be used if the number of trustees who are being paid for any reason from the charity's funds will then be half or more than half of the trustee board. (See also Q11).

Q5. What form should the agreement take?

A. The form the agreement takes will depend to some extent on the nature of the service being provided, and the amount of detail needed to cover it. Legal advice should be sought if an arrangement is likely to continue for some time, or if it is particularly complex. But overall, an agreement should contain:

- an accurate description of the service to be provided;
- the name of the trustee or connected person (including a business) who will receive the payment;
- details of the amount, if it will be a “one-off” or fixed-term payment, or else the maximum amount for services to be provided over the duration of the agreement; if there is a “payment in kind”, details of the benefit and its approximate value must be provided;
- a statement that the trustee concerned (including one who is connected to a person or business providing a service) will withdraw from any discussion of the trustees about the terms of the agreement or the standard of goods or services provided; this does not, though, prevent a trustee or connected person from providing information to the trustee board;
- a statement that the trustee concerned must not vote on these matters, and may not be counted for the purpose of deciding whether a quorum is present at a meeting to discuss them.

The last two points are there to help the charity manage any conflict of interest, and to show the terms of the agreement have not been influenced by the person receiving payment.

Trustees may wish to include a statement to the effect that the payment is in the best interests of the charity, and is reasonable in relation to the service provided. This is not essential, but shows these issues have been properly considered. (See Q8 and Q9.)

Q6. Who should sign the agreement?

A. The agreement must be signed by someone authorised by the trustees to do so. This could be one (or more) of the trustees who don't stand to benefit, or someone else with a good knowledge of the matter. The agreement should also be signed by the trustee or connected person who is to be paid.

Q7. Do charities need to keep a record of the agreement?

A. Yes – because it is part of the charity's accounting records. It must be kept for at least 3 years if the charity is a company (6 years is recommended for best practice), and for 6 years in the case of a non-company charity.

Q8. What is meant by “reasonable payment” for the service provided?

A. Usually, no more than what would be the “going rate” for the job or goods involved. We recommend testing the market and comparing prices for work carried out in similar circumstances. Quotes should be obtained unless the cost is very low. Generally, the higher the cost, the more the charity needs to show it is getting value for money. The fact that a charity is paying less than the going rate may be a deciding factor, but the quality of goods or a service could also be important, as could speed of delivery. We would not expect charities to conduct a full tendering exercise if a transaction is relatively small, and if a good quality service can be provided quickly and at low cost.

We recommend charities keep a record of any quotes, tenders, or other information that may have enabled the trustees to make a decision to pay a trustee or connected person.

Q9. How do charities decide whether paying a trustee for a service is in the “best interests” of the charity?

A. There should be a clear advantage to the charity in using a trustee to provide the service or goods, rather than someone else. This might involve a simple financial advantage, but there can be other factors that might influence a decision to pay a trustee. Sometimes a good working knowledge of the

charity's operations can be a distinct advantage, and require less training input. This sort of factor needs to be weighed against any likely disadvantages – one being that the trustee would be barred from contributing to decisions about the scope of the service and its terms and conditions.

The service must be needed by the charity, and the trustee concerned must be skilled and qualified enough to deliver it. As we have seen, there may be a cost advantage in using a trustee, but this does not always mean work should be done “on the cheap”. Trustees must be satisfied the charity will be receiving value for money, and that there will be no adverse affect on its reputation. The charity must be able to bear the cost without hindering its operation.

Q10. What is meant by the “duty of care” (in the Trustee Act 2000) that trustees must follow when making a decision to pay one of their number?

A. This means the duty to exercise reasonable care and skill in making a decision. Generally a higher standard is expected of paid or professional trustees as they will usually have special knowledge or experience. But when deciding whether to pay one of their number, we would expect all trustees and company directors to:

- act in the best interests of their charity;
- take professional or other appropriate advice when in doubt;
- be clear that payment can be justified;
- ensure conflicts of interest are properly and openly managed;
- ensure agreements are complied with, and kept on the charity's records as required by law; and
- disclose any payments in the charity's accounts.

Q11. How many trustees can be paid?

A. The rule is that the new power can be used if, at the time in question, the total number of trustees receiving payment from the charity's funds will be less than half of the trustee board. When assessing this, the charity needs to include:

- any trustees connected to persons or businesses receiving payment;
- any trustees who are receiving payment for being trustees; and
- trustees who are paid employees of the charity.

If there are only two trustees, the new power can't be used, since paid trustees would not then be in a minority. If there is no other authority for the payment, either our approval will be needed, or, if the governing document allows it, the trustees can appoint an additional unpaid trustee, which would allow the new power to be used.

Q12. What if there is a prohibition on trustee payments?

A. Trustees can't use the new power unless the prohibition in the governing document is removed. A company may do this by amending its Memorandum and Articles of Association. An advantage for companies is that the 2006 Act has removed the need for our approval to this type of alteration – so long as any new power does not go beyond the scope of the statutory power to pay for the provision of a service. Directors of charitable companies will need to consult the charity's legal advisers about the precise nature of any alteration, but generally, wording which allows payment of a director for the provision of a service to the extent permitted by ss.73A and 73B of the 1993 Act will be acceptable, without any need for our approval. Alternatively, if a prohibition is simply against payment for the provision of a service, it can be removed without our consent. The charity can then make use of the statutory power, so long as the payment is strictly within the terms and conditions of that power.

If the charity is not a company, there is no corresponding “self-help” option, and the trustees will need to contact us to see if the prohibition can be lifted. If we agree, this normally requires only a very short Scheme. We will normally be prepared to make one, unless there is a fundamental reason why this would not be in the interests of the charity.

If the trustees are in any doubt about the effect of a particular prohibition, we can offer advice.

Q13. What happens if a trustee is in breach of the agreement?

- A. Technically, we can require that any payments made by the charity must be refunded by the person in breach. Whether we would do so would depend on the circumstances of the case. But it would not necessarily mean, for example, that the charity cannot take the benefit of any services provided by that person even though the person in breach of the agreement may still be liable to return the payment.

Q14. Can the agreement be amended?

- A. Yes, if it is in the best interests of the charity to vary the terms of the arrangement. This must be agreed by majority decision of the trustees who do not stand to gain, and the trustee who is providing the service must not be present or form part of the quorum for the discussion. The decision should be recorded in the minutes of the meeting. As with the original agreement, the trustee concerned can be asked to provide information to the trustees ahead of their discussion.

Q15. Does use of the new power need to be mentioned in the charity’s accounts?

- A. Yes. Under the SORP 2005 accounting framework, charities that prepare accounts on an accruals basis must give details of payments and other benefits to charity trustees and connected persons – including family members and businesses. They are also required to say under what legal authority the payment is made, together with the reason for it.

Although there is, strictly speaking, no need for this if a charity prepares accounts on a receipts and payments basis, we recommend as best practice, and in the interests of transparency, that similar details are provided. This can help protect trustees from accusations that they are benefiting in a hidden way.

(See *Charity Reporting and Accounting: The Essentials* (CC15) – available on the Publications page of our website).

Q16. What if a charity wants to pay for goods or services from a trustee or connected person, but can’t comply with the conditions?

- A. This could occur, for example, if the result would be that half or more than half of the trustees would then be receiving payment from charity funds. Or it might be that a trustee had some involvement with the trustees’ discussion and/or decision to pay. In those circumstances, the charity would need to approach us for approval, and make a case for the payment still being in its interests.

See Q12 for what to do if there is a prohibition preventing payment.

Further information about applications for trustee remuneration outside the scope of the new power will be included in our publication *Trustee Payment and Expenses*. If trustees are unsure whether they have a power to make a payment, we advise that they contact us.

Technical information:

- Section 36 of the Charities Act 2006 inserts new sections 73A and 73B after section 73 of the Charities Act 1993. These provide a general legal authority for charities wishing to pay a trustee or connected person for the provision of a service or goods.
- Section 37 of the 2006 Act inserts s73C, which says that a trustee receiving payment or who is connected to someone receiving payment under the terms of an agreement under s73A cannot act as a trustee in relation to any matter concerning the agreement. The Commission is given power to order total or partial repayment if we consider a trustee who is disqualified from acting in that way has in fact done so.

- Subsection (3) of s73C provides a validation for acts carried out on behalf of the charity by a person who is nonetheless in breach of an agreement under s73A.
- An amendment to s64 of the 1993 Act (inserted by s31 of the 2006 Act) brings directors of charitable companies within the scope of the new power, so that our approval is not required for constitutional alterations allowing director remuneration within the scope of that power.

Technical terms:

- **Breach of trust:** A breach of a duty or responsibility that a trustee has to the charity with regard to furthering its purposes and administering it in accordance with the charity's governing document or any other rules it must operate by.
- **Connected person:** The full definition is contained in Schedule 5 of the Charities Act 1993, but it broadly means immediate family, relatives, or business partners of a trustee. It also covers businesses in which a trustee has an interest through ownership or influence. The term includes a trustee's spouse or civil partner, children, grandchildren and grandparents, as well as businesses where a trustee or family member holds at least one-fifth of the shareholding or voting rights.
- **Governing document:** A legal document setting out the charity's purposes and, usually, how it is to be run. Most commonly, it will be one of the following: trust deed, constitution, memorandum and articles of association, will, conveyance, Royal Charter, Scheme of the Commission.
- **Prohibition**(against payment): A direct instruction against paying trustees. This would usually be couched in negative terms, for example: '*The trustees shall not pay ...*' or '*No trustee shall be paid ...*' But a form of wording that says, '*All trustees must act gratuitously*' would also be a prohibition.
- **Quorum:** The minimum number of people entitled to attend and vote who must be present at a meeting to make valid decisions at that meeting. A quorum can be a fixed number or a percentage of those entitled to attend and vote. The number of people required to form a quorum is usually stated in the governing document.
- **Scheme:** A legal document, usually made by us or (less often) the High Court, which either sets out all the rules for running a charity (so being its **governing document**), or which alters the existing powers of a charity (making it a part of its governing document).
- **SORP 2005** means the publication *Accounting and Reporting by Charities: Statement of Recommended Practice* (available on our website).

If you have a query about this guidance or need further advice about using the power, or some of the other publications or forms referred to in this guidance, please telephone our Contact Centre on **0845 3000 218** (minicom **0845 3000 219**) or write to or e-mail us at the following addresses:

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