

# Charities and Public Service Delivery

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## A. Foreword

[Foreword to be inserted following consultation]


## **B. Introduction**

### **B1. What is this guidance about?**

This booklet gives an introduction to the role that charities can have in delivering and improving services funded or provided by public authorities, as one possible way of carrying out their charitable purposes. It has been written primarily for charities embarking on public service delivery, although the principles should hold good for all charities, no matter how complex their operations.

The guidance looks at the issues from the Charity Commission's perspective. Our role as regulator is neither to encourage nor discourage public service delivery by charities; we advise charities about the legal requirements they must meet and good practice they should consider. We also highlight some of the risks that they should take account of. Where it is outside our role to provide detailed technical advice, for example how to calculate full cost recovery, we highlight guidance produced by other organisations.

### **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  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 the good practice guidance unless there is 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 revision in a new format, reflecting the Commission's new understanding of the law, changes within the charitable sector and changes in the relationship between charities and 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:

**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](http://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 VCS in Wales. For further information see the Voluntary Sector Scheme page on the National Assembly for Wales' website [www.wales.gov.uk](http://www.wales.gov.uk).

**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 Commissioners, or other formal document.

**Mission:** A term used by many charities to describe why they exist and what impact they want to have. This may include an explanation of the charity's objects or purpose (as stated in its **governing document**) in non-legal terms; and the particular outcomes or goals that the charity wants to achieve to fulfil its objects. Sometimes this is set out as a **mission statement**.

**Public authority:** This term describes any organisation that is part of government, including the Welsh Assembly, government departments, county and district councils, NHS bodies and Local Education Authorities. Such organisations are often referred to as "**commissioners**", i.e. bodies that commission services.

**Trustees** means **charity trustees**. Charity trustees are the people who serve on the governing body of a charity. They may be known as trustees, directors, board members, governors, or 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** stands for the Transfer of Undertakings (Protection of Employment) Regulations 1981 and 2006. These regulations (and amendments) implement the European Community Acquired Rights Directive 1977. TUPE is intended to protect the rights of employees when a transfer from one employer to another is made, 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 is difficult to define; it 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 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 mutuals.

## C. Charities and public service delivery at a glance

These pages summarise the issues that charities need to consider if they are considering public service delivery.

### Charities and public services

“Public services” means those services that public authorities normally provide or commission. Authorities often have a legal duty to provide these services, but not always, and the level of duty may vary. In practice there have always been similarities and overlap between public services and voluntary or charitable services.

### Understanding the risks



Public service delivery presents both opportunities and risks for charities. Key risk areas include financial risks, risks to the charity’s mission and independence, contractual risks, risks to service delivery or quality, and reputational risks.

We do not want charities to be risk averse but risk aware. We highlight these risks so that charities can understand, anticipate and manage them.

Trustees must fully understand, and consider the need for professional (legal and accountancy) advice on the terms of any contract or funding agreement before signing it.

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 legal framework



There is no legal prohibition on charities delivering services on behalf of public authorities, or using charity funds to deliver these services. This does not alter the trustees’ responsibility to comply with the general requirements and restrictions of charity law.

Charity law requires that:

- 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.

### Stick to your mission



The 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.

All decisions about what activities a charity engages in must be controlled by its trustees. These decisions must be consistent with the charity’s objects and powers, and should be directed by its mission and priorities rather than by funding opportunities.

### Guard your independence



Trustees must always exercise independent judgement and properly manage any conflicts of interest. 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 the body that appoints him or her.

Charities that deliver public services are not, and should not feel, prevented from engaging in political activity or campaigning; the same rules apply to all charities, regardless of their other activities, as explained in our leaflet *Campaigning and Political Activities by Charities* (CC9).

### **Know your worth**

“Worth” in this context refers to both the full cost of the services the charity provides, and the factors that inform the pricing of those services.

The full cost of a service includes both the direct costs of providing the service and the indirect costs (also called overhead, administrative or “core” costs) associated with it. Charities should understand the full cost of a service in order to make sound judgements about deciding on a price for a service. There is no reason why a charity should not set a price so as to achieve a surplus.

Trustees have a duty to use charity assets as effectively as possible. Full cost recovery should apply in any circumstances where a public authority is purchasing a service from a charity, regardless of the type of funding agreement used, unless it is in the charity’s interests to forego full cost recovery.

If a charity is either considering taking up, or renewing, a funding agreement, and identifies that 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
- decline the funding 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.

### **Guidance for grant-making charities**

If grant making charities are asked to fund public services, we recommend that they:

- 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.
- Ensure that decisions are based on the law and the interests of the charity’s beneficiaries.
- Use such considerations to inform grant-making policies.

On the basis that charities should generally expect public authorities to fully fund the cost of services that they are purchasing, it should be exceptional for grant making charities to be called upon to subsidise public service provision.

### **Other issues to consider**

There are steps charities can take to reduce some of the risks associated with public service delivery, including using the form of a limited company, insurance, or delivering the service via a separate trading company. There are some complex legal issues which are explained in more detail in other guidance (as set out in section L, below).

Some charities may wish to consider working in partnership with other charities. The risks and opportunities involved need to be fully considered. These are explained in more detail in our booklet *Collaborative working and mergers* (CC34).

### **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 do we mean by public services?

#### The short answer

“Public services” means those services that public authorities normally provide or commission, often under a legal duty. (Some examples are given below.) There are many areas of overlap between charitable (or voluntary) and public services, and it may not be obvious to the public who is providing or funding a service. The level of legal duty on authorities may vary depending on the nature of the service.

#### In more detail

“Public services” include a wide range of services provided by, or on behalf of, public authorities. These services include:

- Social housing
- Medical care and treatment
- Elder care and sheltered accommodation
- Education
- Recreational and leisure services
- Recycling, refuse collection and disposal
- Museums, art galleries and libraries
- Advice and advocacy

Charities have always undertaken activities that people tend to think of as “public services”, and charity often pre-dated and pre-empted statutory provision. For example, state education didn’t exist until the mid 19<sup>th</sup> 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 of services, 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 provide authoritative advice on the duty of public authorities to provide particular services, but section I of this guidance sets out some of the steps that a charity could take to obtain clarification of a public authority’s duty.

## E. Understanding the risks

Public service delivery presents many opportunities for charities, but there are also risks. Trustees should make informed decisions about whether to engage in this kind of activity.

### E1. 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 self-financing.

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.

### E2. What risks should charities be aware of?

#### The short answer

Charities' experience of public service delivery has highlighted the following key risk areas for individual charities and for the sector as a whole:

- financial;
- objects and mission;
- independence;
- contractual/litigation;
- sense of obligation;
- delivery or service quality;
- reputation.

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.

#### In more detail

**Financial Risks:** There are a number of financial risks that charities should be aware of.

- **Under-funding:** this can occur if charities do not accurately identify the full costs of a service or negotiate for them in funding agreements; in many cases funding offered by public authorities does not cover the full costs of services. This may reduce the long-term sustainability of service delivery by charities and cause them to use up reserves and other funds.
- **Inappropriate duration of funding:** the duration of funding should be appropriate to the service being delivered. Many funding agreements are of short duration. This can hinder long-term planning and involve expending significant time and resources on obtaining further funding. Multi-year funding agreements are permitted under government procurement rules (see below).
- **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 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 underspend. Clawback is neither a requirement, nor considered to be good practice, under government procurement rules.
- **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.

**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 or object drift.) This can be serious; in law acting outside the objects is called breach of trust, and could result in personal liability to trustees (although it is very unusual for a trustee to be held liable for an honest mistake).

**Loss of independence:** Charities may feel unable to express criticism about the actions or policies of public authorities that fund them, for fear of potential loss of funding. Public authorities may seek to exercise control over charities' decision-making processes.

**Contractual/litigation risks:** This is a particularly serious risk area. Entering into a contract to deliver public services entails risk. There may be penalties for non-delivery or other breaches of the contract. It may also require the charity to undertake 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. Terms of the contract may be complex or unreasonable.

Dealing with members of the public also involves risks of liability, for example personal injury.

**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 beneficiaries.

**Risks to delivery or service quality:** A key reason why public authorities engage charities in delivering public services is the expectation of obtaining value for money and quality. The framework and process of transferring services can, however, reduce the capacity of charities to meet the expectations of service commissioners and beneficiaries. Poor contractual specifications, bureaucratic performance targets and inappropriate funding arrangements can all adversely affect service quality and value.

**Reputational risks:** Public opinion about whether charities should deliver public services is divided, but there is a risk that entering into contractual relationships with public authorities, and in particular using donated income to subsidise public service delivery, could weaken public confidence in individual charities, or in the sector generally. Unwillingness to exercise independence or voice criticism of funders could also harm a charity's reputation.

Poor service quality could also damage 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.

### **E3. Is public service delivery too risky, and should charities avoid it?**

#### **The short answer**

Any charity that is considering public service delivery should weigh up the risks and the opportunities. We do not want charities to be risk averse; it is important to recognise and manage risks, and ensure they are appropriately shared between the charity and the public authority.

#### **In more detail**

Risk is a part of everyday life. Charities cannot avoid risk altogether, and sometimes real innovation and change are only achieved through taking risks. 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. Charities should be neither risk averse nor reckless, but risk aware. It is about taking properly informed decisions which are in the interests of the charity.

This booklet highlights particular risks that charities may face when engaging in public service delivery and, where possible, suggests how charities can anticipate and manage them. The Commission has also produced a guide to Charities and Risk Management, available on our website.

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.

### **E4. What help and guidance is available on the financial and other risks?**

There are numerous publications on the financial aspects of public service delivery, some of which are listed in section L of this booklet. For information about procurement rules, see *Improving Financial Relations with the Third Sector: Guidance to funders and purchasers* (HM Treasury, 2006) or *The CJC Guide to Buying from the Third Sector* (CIPFA, 2006). Further advice and guidance is also available from the Finance Hub (part of ChangeUp) and Acevo. For information about balance of risk see *Surer funding: improving third sector public service delivery* (Acevo and New Philanthropy Capital, 2004), *How voluntary and community organisations can help transform public services* (NCVO, 2006) or *Beyond Transfer to Transformation* (Unwin and Molyneux, 2005).

### **E5. Should we take advice before signing a contract or funding agreement?**

#### **The short answer**

Yes.

#### **In more detail**

Contracts are legal documents. Terms of contracts and other funding agreements may be enforceable against the charity or contain penalties for non-performance. The terms should include, for example, the service to be delivered, payment terms, arrangements for monitoring and evaluation, and termination provisions. 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. In some cases terms of the contract may be unreasonable, for example, the charity may have no rights of termination in any circumstances or the indemnity may be unjustifiably wide.

Many public authorities use standard contracts containing terms and conditions more suitable for a private company than a charity or voluntary organisation. An authority may try to insist that a contract is non-negotiable, but a charity always has the choice to ask to negotiate or to refuse to sign.

Trustees must not sign any contract 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 to consider the need for professional (legal and accountancy) advice on a contract before agreeing to sign it, taking into account such factors as the size and value of the contract, the resources of the charity, and the risks that the contract presents.

Some charities, usually larger ones, employ in-house professional advisors; others may need to obtain advice externally. Any trustees who are professionally qualified must consider their duty of care (see section F2 of this booklet) when deciding whether it is appropriate for them to advise their charity on any particular matter.

**Sources of general advice:** The Public Service Delivery Network, established by NCVO and Futurebuilders, is for those working in the VCS with responsibility for negotiating and managing public service contracts. The aims of the Network are to develop capacity within the sector by providing a forum for peer support, developing and sharing resources, networking and professional development opportunities.

The Charity Law Association has produced guidance for its members on charities and contracting.

There are a number of initiatives to increase the effectiveness of the VCS in competing for contracts and delivering services. These include Futurebuilders England (an investment fund), the Communities Investment Fund (its equivalent in Wales, run by WCVA) and the ChangeUp programme managed by Capacitybuilders. ChangeUp works through six hubs of expertise run by voluntary sector partnerships, covering finance, governance, ICT, performance, volunteering and workforce. For further details see section L2 of this booklet.

## **E6. Can charities contribute to the improvement of services without delivering them?**

Charities can play a key role in bringing about improvements to the services that their beneficiaries receive, regardless of whether they actually deliver those services, by using their experience of beneficiaries' views, the services they need and the barriers to accessing those services. Through lobbying and advocacy, charities can inform and influence the design and delivery of public services. Charities for people with disabilities have been particularly successful at bringing about such changes.

## **E7. What are the Commission's key messages to charities on public service delivery?**

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;

- know your worth (i.e. the full cost of a service, and the basis for the price that the charity charges).

These principles will help charities to avoid or manage the key risks, and are explained in more detail in the rest of this guidance.

## F. The Legal Framework

This section highlights the legal requirements that charities should be aware of before engaging in public service delivery.

### F1. What does the law say about charities delivering public services?



#### The short answer

There is no 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 general requirements and restrictions of charity law as summarised in this section.

#### In more detail

**New charities:** A charity can be set up to deliver a particular public service or services, provided it is for a purpose that is exclusively charitable in law and for the public benefit (not simply a means of carrying out a public authority's duties or policy).

**Subsidising or relieving public funds:** The relief of taxation is charitable in law provided it is for the benefit of the public. The very few charities that have this express charitable object can apply their funds directly in subsidising public funds, provided they can show that this is for the benefit of the public.

Without such an object, a charity cannot apply its funds directly for this purpose. However a charity would not need this specific object provided the trustees are satisfied that any relief of taxation is only an incidental consequence of achieving the charity's stated charitable purpose (e.g. relief of sickness).

### F2. 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 set out 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 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, detailed in section M2 of this guidance.

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, Safeguarding Independence).

**Interests of the charity:** Trustees have an overriding duty to act in the interests of the charity and its beneficiaries. This means that they must never allow their personal interests, or the interests of another organisation or body, to sway their judgement.

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, it may be advantageous in the short term to provide a service that does not cover its own costs. In the longer term, however, this may use up the charity's reserves, affecting its 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;
- 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 E5 of this guidance).

For more information about this duty, see *The Essential Trustee* (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 the powers contained in the Trustee Act 2000, or when they exercise similar powers derived from another source. However, legal precedent and good practice mean that the duty of

care should be considered as applying to all aspects of trustees' work in making decisions about their charity, including for trustees of charitable companies.

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).

## **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?**



The objects of a charity are the legal purposes set out in its governing document. A charity's objects may be worded quite broadly and expressed in legal language.

In order to explain in non-legal terms exactly what the charity wants to achieve or who it is there to help (its mission), some charities use a mission statement. This can be helpful in setting direction or priorities and communicating the ethos of the charity. The mission statement should flow from, and must be consistent with, the objects. Whenever they are considering the mission, the trustees should always refer back to the objects.

The mission and all the activities of a charity must be within its objects and powers. 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 a charity's affairs and ensuring that it is solvent, well-run, and meeting the needs for which it has been 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.

Deciding what activities to undertake is one of the most important decisions that a charity makes. It follows that the trustees should always decide what activities the charity undertakes, or where this is not practicable, they should set clear parameters about how, and by whom, such decisions can be made. They should always be kept informed about, and regularly review, the charity's activities.

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

Decisions about activities or services should be directed by the charity's objects, mission and priorities rather than by 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 our objects and powers?
- How does it fit in with our mission and any specific aims or objectives within our current work plan?
- How will it meet the needs of our beneficiaries?
- How will it be funded? (This is discussed in more detail in the rest of this guidance.)

Trustees should remember that public authorities procuring public services may lack awareness of the objects of the charity or the trustees' legal responsibilities.

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



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?



#### 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 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, arise simultaneously or appear to clash with those of the charity. 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 contract between the authority and the charity would constitute self-dealing and the contract 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 restrict the trustees' ability to act solely in the interests of the charity. These could include rights to nominate clients or beneficiaries, appoint trustees or send representatives to trustee meetings; or equality and diversity requirements affecting trustee appointments or the selection of beneficiaries.

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). It must not accept any nominated beneficiary who does not qualify under the charity's objects. Furthermore 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 its beneficiaries.

Independence is explained in more detail in our publication *The Independence of Charities from the State* (RR7), and in Section M2 (below), Characteristics of an independent charity negotiating for government funding.

## **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 their other activities. These rules are explained in our booklet *Political Activity and Campaigning by Charities* (CC9).

Some charities say that they feel unable to express any criticism of public authorities that fund them, because of concerns that the authority may withdraw funding. A charity's ability to act as a "critical friend" to a funder will depend on the strength of the relationship between the two organisations, and will obviously require the exercise of tact and diplomacy by the charity.

A charity should not be dissuaded from campaigning 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.

### I1. What does the Commission mean by “worth”

#### The short answer

By “worth” we mean two things: the full cost of the services the charity provides, and the factors that inform the pricing of 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:

- Trustees have a duty to use charity resources as effectively as possible;
- Trustees have a duty always to act in the interests of the charity and its beneficiaries;

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

**The price of a service:** Cost is only one factor in setting a price for a service. Other factors that trustees might consider include any particular service qualities that they may be able to demonstrate (such as specialist knowledge, being a user-led organisation or innovative approaches to service delivery), their relationship with the commissioning authority, and the competitiveness of the market.

Obviously, as highlighted in *The Reform of Public Services: the Role of the Voluntary Sector* (NCVO, 2005), the price of a service can be set to obtain full cost recovery, a surplus to reinvest in the charity’s ongoing work or a calculated loss (subsidising the service) when it is in the charity’s interests to do so. It is important to recognise that it is perfectly reasonable for a charity to earn a surplus. Such a surplus may, however, be a restricted rather than a general fund, depending on the terms of the funding agreement.

### I2. 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. Acevo’s full cost recovery model 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 publication *Improving financial relationships with the third sector: Guidance to funders and purchasers* (2006) contains examples of costs that are likely to be incurred in providing services. A number of organisations, including Acevo and NAVCA, provide training on full cost recovery.

Trustees should understand the nature of the service to be provided and the behaviour of costs 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, will help with business planning, tendering and budgeting processes.

### **I3. When should full cost recovery apply?**

#### **The short answer**

Funding agreements with a public authority may be described by different names. It is important for charities to understand the nature of the funding on offer, what obligations this would place on the charity and whether the charity should expect and seek full cost recovery.

#### **In more detail**

**Descriptions of funding agreements:** The terminology around funding agreements can be very confusing and imprecise. Some terms that may be used interchangeably (grant, contract, service level agreement) describe completely different things (the transfer of funding or the terms and conditions which apply to that funding).

**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.

It is essential for trustees to be clear about whether funding is unrestricted, restricted to particular activities or purposes, or subject to terms or conditions that could be legally enforceable against the charity. Unless the funding agreement specifies otherwise, restrictions may apply to any surplus funds.

**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 (as explained in this guidance).

Where a public authority is not purchasing a service but simply supporting a 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.

### **I5. 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**

Although, as explained above, there is no specific legal prohibition on charities using their own funds to deliver public services, 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. 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.

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.

### **16. 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 cases may be referred to the Commission for the Compact, an independent body being established by government to champion the Compact and promote good relations between the VCS and government.

## **17. 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, such a request could be made formally under the Freedom of Information Act 2000. A charity could also seek independent advice on the authority's legal duties, although this might be expensive.

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 charities, 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. 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. To ensure that the charity's funds can properly be used to meet the costs of legal action, the trustees must obtain prior authorisation from the Commission, so trustees should consult the Commission before commencing legal action. Charities should bear in mind that there are deadlines for bringing legal action. (The deadline for a judicial review is 3 months from the date of the decision, and for a Human Rights Act claim, 12 months from the date of the alleged breach.)

## **18. What if our governing document prohibits subsidising statutory funds?**



### **The short answer**

Charities cannot take any action that is expressly forbidden by their governing document. If a particular power or restriction prevents the charity from carrying out its purposes, the governing document should be amended. As mentioned in section G4, the Commission can provide advice on amending governing documents, and if required, authorisation to make an amendment.

### **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.

**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.

**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 are unable to make. This is explained in other Commission guidance including *Amending Charities’ Governing Documents: Orders and Schemes* (CC36).

## J. Guidance for Grant-making charities

The guidance in this leaflet applies equally to grant-making charities as to any other charity, but there are different 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 from another charity or organisation that is involved in public service delivery.

### J1. What other issues should grant-making charities consider?

#### The short answer

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

- 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.
- Ensure that decisions are based on the law and the interests of the charity's beneficiaries.
- Use such considerations to inform grant-making policies.

#### In more detail

**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 I, 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.

**Legal and other considerations:** As explained in this guidance, there is no legal bar on charities using their own funds to subsidise or supplement public services, but they should only do so when it is within their objects and powers, and in the interests of the charity and its beneficiaries to do so.

On the basis that charities should generally expect public authorities to fully fund the cost of services that they are purchasing, it should be the exception for grant making charities to be called upon to subsidise public service provision.

**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 we 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 not already a limited company, the trustees should consider establishing a charitable limited company to take over the charity's operations. 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.

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.

The Commission has produced guidance on this subject *Charity Incorporation: How to 'incorporate' an unincorporated charity and apply for registration* (STS-1302), which is available from our website.

**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 on its income. This 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, 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. These requirements are often met by the charity taking out public liability insurance. The taking out of such insurance is desirable and prudent and can protect both the charity and the public body.

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

There are both benefits and risks associated with partnership or collaborative working between charities. Some of these were discussed at the Commission's conference on Charities and Public Service Delivery, a summary of which is available on our website. The Commission aims to encourage partnership working only where it is in the interests of the charities concerned; charities should not feel pressured into inappropriate partnerships. Where partnership is appropriate it can enable charities to compete for larger contracts or reduce duplication of administrative functions.

The Commission has published detailed guidance on Collaborative working and mergers (CC34), which sets out the issues to be considered in more detail.

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

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

- View and print them from our website;
- Order during office hours (0830-1800 weekdays) by phoning us on 0845 333 0123;
- Order outside office hours by phoning our voicemail order line on 01823 345427; or
- Write to the Distribution Officer at PO Box 392, Newton Aycliffe, DL5 6YG

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

### **L1. Charity Commission publications**

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 (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)

### **Charity Commission website publications**

- A guide to conflicts of interest for charity trustees (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)

### **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](mailto: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

E mail: [info@acevo.org.uk](mailto:info@acevo.org.uk)

Website: [www.acevo.org.uk](http://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

1<sup>st</sup> Floor, Millbank Tower

Millbank

London

SW1P 4HQ

Tel: 020 7828 1212

Website: [www.audit-commission.gov.uk](http://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](mailto:jane.fewkes@capacitybuilders.org.uk)

Websites: [www.changeup.org.uk](http://www.changeup.org.uk)

[www.capacitybuilders.org.uk](http://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

E mail: [info@cfdg.org.uk](mailto:info@cfdg.org.uk)

Website: [www.cfdg.org.uk](http://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](mailto:CTSFU@hm-treasury.x.gsi.gov.uk)  
Website: [www.hm-treasury.gov.uk/ctsfu](http://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  
Russell Cooke  
2 Putney Hill  
Putney  
London  
SW15 6AB

Tel: 020 8394 6486  
Email: <mailto:shivas@russell-cooke.co.uk>  
or: [admin@charitylawassociation.org.uk](mailto: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  
3 Robert Street  
London  
WC2N 6RL  
Tel: 020 7543 5846  
Email: [corporate@cipfa.org](mailto:corporate@cipfa.org)  
Website: [www.cipfa.org.uk](http://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  
E mail: [communitymatters@communitymatters.org.uk](mailto:communitymatters@communitymatters.org.uk)  
Website: [www.communitymatters.org.uk](http://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  
E mail: [info@dsc.org.uk](mailto:info@dsc.org.uk)  
Website: [www.dsc.org.uk](http://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 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](mailto:info@futurebuilders-england.org.uk)  
Website: [www.futurebuilders-england.org.uk](http://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](mailto:governance.hub@ncvo-vol.org.uk)  
Website: [www.governancehub.org.uk](http://www.governancehub.org.uk)

### **Local Government Association**

The LGA exists to promote better local government. We aim 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](mailto:info@lga.gov.uk)  
Website: [www.lga.gov.uk](http://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](http://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. Our purpose is to promote local voluntary and community action nationally.

NAVCA  
177 Arundel Street  
Sheffield S1 2NU  
Tel: 0114 278 6636  
E mail: [nacvs@nacvs.org.uk](mailto:nacvs@nacvs.org.uk)  
Website: [www.nacvs.org.uk](http://www.nacvs.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](mailto:enquiries@nao.gsi.gov.uk)  
Website: [www.nao.gov.uk](http://www.nao.gov.uk)

### **The National Council for Voluntary Organisations (NCVO)**

Produces a wide range of information and support services for those working in the voluntary sector, including a publication on inducting and supporting Trustees.

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  
E mail: [ncvo@ncvo-vol.org.uk](mailto:ncvo@ncvo-vol.org.uk)  
Website: [www.ncvo-vol.org.uk](http://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  
1<sup>st</sup> Floor  
Peel Building  
2 Marsham Street  
London  
SW1P 4DF  
Tel: 020 7035 4413  
Email: [thirdsector@cabinet-office.x.gsi.gov.uk](mailto:thirdsector@cabinet-office.x.gsi.gov.uk)  
Website: [www.cabinetoffice.gov.uk/thirdsector](http://www.cabinetoffice.gov.uk/thirdsector)

### **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  
e-mail: [admin@publiclawproject.org.uk](mailto:admin@publiclawproject.org.uk)  
Website: [www.publiclawproject.org.uk](http://www.publiclawproject.org.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  
E mail: [help@wcva.org.uk](mailto:help@wcva.org.uk)  
Website: [www.wcva.org.uk](http://www.wcva.org.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

**Improving financial relationships with the Third Sector: Guidance to Funders and Purchasers**

HM Treasury, May 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](http://www.thecompact.org.uk)

**Funding and Procurement: Compact Code of Good Practice**

Compact Working Group, March 2005; see [www.thecompact.org.uk](http://www.thecompact.org.uk)

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

HM Treasury, 2002

**Working with the Third Sector**

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

**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

**The Voluntary Sector Scheme**

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

## M. Appendix

### M1. What has changed and why? A summary of the Wigan and Trafford decision

Provision of “public” services by charities has a long history, often pre-dating and pre-empting state provision (for example, hospitals and hospices, schools and residential care).

Over time there have been changes in the relative levels of provision by the charitable and public sector. More recently, government has encouraged charities and wider voluntary sector to take a greater role in public service delivery.

For many years the Commission’s position was as stated in *Charities & Contracts* (the previous version of CC37):

- Charities must not relieve or substitute statutory funds or services.
- Charities may only supplement or enhance statutory provision.

The Commission considered that this applied to all services that Government had a legal duty to provide. The only exception was for charities with the specific charitable purpose of relieving statutory funds. Our understanding was based on 18<sup>th</sup> and 19<sup>th</sup> century Poor Law cases, in which the courts criticised the use of charitable funds where the net effect was not additional benefit to the needy, but reduction of local rates, benefiting taxpayers.

On this basis and because of concerns regarding the independence from the public authorities, the Commission initially decided not to register Wigan Leisure and Culture Trust and Trafford Community Leisure Trust as charities. The two organisations, both established to provide leisure services for their respective local authorities, appealed against our initial decision. This prompted the Commission to review the legal position.

The Commission considered the following evidence and Issues:

- Charitable purposes are broad, and may overlap with the duties of a public authority. The definition of charitable purposes in the preamble to the Charitable Uses Act of 1601 includes the repair of highways and bridges, education, healthcare, and the relief of taxation.
- There is not a legal bar on the use of charitable funds to deliver public services, but a principle that charitable funds should be used prudently and effectively; trustees have overriding duties to apply funds only in furtherance of the charity’s objects and to act solely in the interests of the charity’s beneficiaries.
- Many legal duties of public authorities are not precisely defined in law; only in a minority of cases is there an absolute duty with no level of discretion over the level of service provided. In other cases, authorities have some discretion, when assessing needs, over the level of provision. Some services are provided under a purely discretionary power, not a duty.
- Relief of local or general taxation is a good charitable purpose provided it is for the benefit of the public (*AG v Bushby* (1857)). Without this specific purpose, a charity could not apply its funds directly in this way. However a charity would not need this specific purpose provided the trustees were satisfied that any relief of taxation was only an incidental consequence of achieving the charity’s stated charitable purpose.
- It is a legal requirement for charities to be independent, but that would not prevent a public authority from setting up a charity. The characteristics of independent organisations set out in our booklet *The Independence of Charities from the State* (RR7) was confirmed as being relevant in determining whether an organisation is as

a matter of practice independent from a public authority or whether it has been created for non charitable purposes such as to carry out the policies of a public authority.

The Commissioners' Decision concluded that both organisations:

- were independent;
- were established for exclusively charitable purposes directed towards the benefit of the public;

and were therefore charitable.

The law does not prevent charities from using their own funds to provide services on behalf of public authorities, even if a public authority has a legal duty to provide a service. The Commissioners' Decision provided guidance on the issues that charity trustees should consider before deciding to use charity funds in this way (as set out in this booklet).

**M2. Characteristics of an independent charity negotiating for funding** (taken from The Independence of Charities from the State – RR7)

In deciding whether or not a body has been created for an unstated, non-charitable purpose, a useful starting point is to compare the way that the body operates (or is intended to operate) with the way that a charity would be expected to operate. In the case of an independent charity negotiating with a governmental authority for funding:

- the trustees would have a choice about whether or not they accepted funding on the terms proposed by the public authority;
- they would take their own legal and financial advice;
- they would draw up their own policies and business plan;
- they would conduct arm's-length negotiations with the governmental authority;
- a trustee who was subject to a conflict of interest would not participate in discussions;
- the funding arrangements would preserve the trustees' fundamental discretions as to the selection of beneficiaries and the provision of services;
- the trustees would not commit themselves simply to giving effect to the policies and wishes of the public authority;
- the trustees would not agree to conditions that undermined the confidentiality of their discussions (such as the presence at their meetings of an observer from the public authority); and
- the trustees would be free to make their own decisions on matters outside the scope of the funding arrangement.

The fewer of these characteristics that a body displayed, the more likely it would be that it had been created in order to promote the local authority's interests and thus for a non-charitable purpose.