

payment of charity trustees

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table of contents

	Page
1 Introduction	1
2 The general principles	1
3 Problem areas	2
4 Definitions	3
5 Payments and benefits permitted by Charities Act 2006	4
6 Trustee Indemnity Insurance	5
7 Expenses	6
8 Small benefits	7
9 What is accepted for new charities	8
10 What to do if change is needed	9
11 When unauthorised payments have already been made	10
12 Disclosure in the charity's accounts	11
13 If further help is needed	12

1 Introduction

Payments to, and benefits for, trustees, or 'the provision of trustee remuneration' to use a more formal phrase, can be an area of law that churches and charities can easily fall foul of, despite best intentions. Nevertheless, this is an area that the Charity Commission takes extremely seriously and needs to be treated similarly by trustee boards if they are to avoid difficulties.

The purpose of this Briefing Paper is to inform trustees, in straightforward language, of the law and practice relating to this subject in order that good practice and procedures are adopted.

Whilst this paper only covers charities England and Wales, the principles also apply in broad terms in Scotland and Northern Ireland and the Charity Commission guidance can be taken as indicating best practice. However, charity law is a devolved matter in these two regions and the separate Scottish or Northern Irish law should be consulted. Further help can be obtained from the Office of the Scottish Charity Regulator (www.oscr.org.uk) or the Charity Commission for Northern Ireland (www.dsdni.gov.uk/charities_commission.htm).

2 The general principles

The concept of charity trustees not being paid for acting as a trustee is a long held principle of the law, based on the idea that trustees must not put themselves in a position where their personal interests conflict with their duty to act in the best interests of the charity. This principle has held the test of time and contributes significantly to public confidence in charities. This can be especially so for smaller charities and those within tight knit communities, where being seen to act with integrity is as important as actually acting with integrity. As such, churches and Christian charities have a special responsibility here.

Generally, and with very limited exception, trustees are not entitled to receive any payment out of the charity's funds other than reasonable and necessary out-of-pocket expenses, such as the cost of travel to attend trustees' meetings. Additionally, they must not benefit, either directly or indirectly, from the charity by, for instance:

- taking a lease of the charity's property;
- borrowing money from the charity; or
- making contracts to do business with the charity.

This is a legal rule and the trustee who breaks it may have to make good any loss that results to the charity out of their own pocket. Even if there is no loss, a trustee who makes a profit from breaking the rule may have to pay the amount of any profit to the charity¹.

These principles are explored in more detail in the Charity Commission publication CC11 "Trustee expenses and payments"². This is essential reading for anyone who is or may be in the position of making payments to or for the benefit of Trustees. Given the pitfalls that we have seen charities get into in this area, we strongly suggest that charities make it mandatory reading for their trustee board members.

¹ Taken from Section F2 of Charity Commission publication CC3: The Essential Trustee: What you need to know.

² Refer to 'Charity requirements and guidance' link at www.charity-commission.gov.uk

Whilst legitimate expenses can be reimbursed, trustees cannot receive any benefit from their charity in return for **any service** they provide **unless** they have express legal authority to do so. That authority may be:

- express written authority in the charity's trust deed (or other governing document);
- under the limited provisions of Charities Act 2006 (see later commentary);
- written authorisation from the Charity Commission; or
- by Court Order.

In other words – unless the governing document explicitly says you can pay trustees and the circumstances in which you can, then you should carefully consider whether your charity has the legal power to do so. These principles apply to all charities whether registered with the Commission or not.

In the interests of proportionality, the Charity Commission will not usually require charities to seek authority for the payment of minor benefits to trustees. There are, however, conditions attached to this relaxation which are examined in further detail under the heading 'small benefits' below.

3 Problem areas

Over the years, Stewardship has seen many problems arise where unauthorised payments are made without the charity realising that there is an issue. This tends to happen more in churches than in other charities because there is a wider diversity of individuals involved and trustees can have a lower profile where there is a defined spiritual leadership team.

Typical examples are listed below:

- **Pastors or youth workers of churches** who are put on the board of trustees without the question of the legality of their salary being considered.
- **Trustees who fill a short term 'hole' in the church administration** and receive salary or a gift for serving the church in this way.
- **Royalties paid to a trustee employed by the church** – for example, a Pastor who receives a salary authorised by the church Trust Deed but then also collects personal royalties or other payments in respect of teaching materials prepared in their role as Pastor.
- **Employing close relatives in the same household:** spouses of trustees employed in administrative roles. This can be common in churches where leading members may be trustees and their spouse may be available to work for the church but needs to be paid for their time. This may be legal under the terms of the governing document but it does not automatically become so, just because their spouse who is a trustee is eligible to receive remuneration (e.g. if the trust deed authorises the employment of the pastor, senior elder or other spiritual leader who may be a trustee). In these circumstances, the spouse is treated as a trustee because of the relationship (as a 'connected person') but may not fall within the specific job roles authorised in the trust deed.
- **Support for mission activities of children of trustees:** churches have been known to provide support payments to children of members who are trustees not thinking of the relationship. With adult children, this is not normally regarded as a breach - the Charity Commission does not normally object as long as the parent does not

personally benefit from the church's payments. There is, however, a clear need to manage the conflict of interest.

- **Gifts given to the church to benefit leaders who are trustees** which are then paid onto the trustee leader(s) concerned. Whilst payment of salary may be authorised by the governing document and, using that authority, the trustees have agreed a salary level, additional voluntary payments over and above the agreed salary are not authorised unless the (remaining) trustees have concluded that (and resolved that) to make the extra payments would be in the best interests of the church.
- **Poorly documented expenses:** Churches have been known to make substantial payments for church leaders who are also trustees for travel, accommodation or other expenses, where it is not clear what the purpose is, who was travelling or what they covered. This is unwise and, even though they may be legitimate, can create an impression that individuals are gaining something underhand from the charity from which they are trustees.
- **'Honouring gifts':** it is common in churches to honour speakers and other church workers with gifts. We have seen occasions when substantial gifts have been made to leaders who have also been trustees of the charity. Whilst we understand the reason why this happens, unless the procedures detailed in section 2 have been applied, this gift would not meet the requirements of charity law.
- **Goods or services supplied by a business in which the trustee is a partner** or part owner where the goods or services are supplied at more than marginal cost to the trustee's business. For example; accountancy services provided by a firm of which a trustee is a partner (and where the marginal costs may be extremely low), or building work done for the charity by a building firm (albeit at a discount) where the business owner is a trustee.
- **Rent paid** for a property owned by a trustee, close relative or business partner.
- **Personal exploitation of business opportunities** which arises out of a trustee position, such as a property purchase the charity does not take up but the trustee does in their own capacity.

4 Definitions

Throughout this paper, we use terms which have specific technical meaning. This section describes these special words and phrases:

Breach of Trust

A breach of trust occurs where any duty imposed on a trustee (by law, the Charity Commission or the charity's Governing Document) is not complied with.

Charity Commission Scheme

A legal document made by the Commission or the Court which either sets out the rules for running the charity (in which case it is also its Governing Document) or amends the powers of the charity (in which case it forms part of the Governing Document).

Connected persons

It is not only the trustees themselves that are affected by the payment / benefit rules but persons who are 'connected' with them (see the definition of 'trustees' below). The term 'connected persons' is defined in Charities Act 1993. These are people close to the trustee, who may influence their decisions – such as family, relatives or business

partners of the trustee. For more information on this, see the 'problem areas' section below.

A full definition of 'connected persons' appears in Schedule 5 of the 1993 Act.

Conflict of interest

This is where a trustee's personal financial interests may (or appear to) influence or affect the decisions that they make for their charity.

Governing document

The legal document that establishes the charity. This will set out the charity's purposes and how it is to be managed and administered. It may be a trust deed, memorandum and articles of association (of a charitable company), constitution, will, conveyance, Scheme of the Charity Commission or some other formal legal document.

Payment

Payment can be by money or other material benefit. An honorarium, even if it is a modest or token sum not intended to reflect the real value of a trustee's service, is a form of trustee payment. From this it can be seen that even non-commercial sums can be considered inappropriate by the Charity Commission.

Trustees

Charity Trustees are defined as the people responsible for controlling the management and administration of the charity. They may be called trustees, directors, governors, managing trustees, committee members or other titles. It is the role that is being played – those who are ultimately responsible for 'controlling the management and administration' of the charity that defines a trustee.

So, not everyone with a title of 'Director' is necessarily a 'trustee'; for example, in a charitable company it is likely to be those who are directors as recorded by Companies House that will be the charity trustees. Those merely with a job title such as 'Director of ...' who are not also a company director in the formal sense will probably not be regarded as one of the charity's trustees.

For the purposes of considering trustee payments and benefits, the charity has to consider payments made to persons connected with the trustee as if they are payments or benefits to the trustee themselves. Charities should also consider ex-trustees as, in some situations, the Commission will treat them in the same way as current trustees. In those circumstances, it is not sufficient for the trustee simply to resign before the payment is made.

Trustee remuneration

The term 'remuneration' can be taken in this context as a shorthand term to mean any form of payment or benefit that the trustee receives.

5 Payments and benefits permitted by Charities Act 2006

Charities Act 2006 relaxed **some** of the previous restrictions on trustee remuneration. These rules do not override any provision in a charity trust deed, an Order of the Commission or any statutory provision. Where the Governing Document does permit payment of trustees (for example, for professional services), the statutory rules extend rather than restrict their application.

However, trustees should take care not to misinterpret the restricted nature of these relaxations. It is still the case that a trustee or a connected person cannot be

remunerated without a specific power (which is unusual in any event) if the proposed remuneration or benefit relates to their capacity as:

- a trustee, or
- an employee.

Subject to this, remuneration is permissible if:

- stated safeguards are complied with (for which see below);
- there is no provision in the Governing Document of the charity that prohibits that person receiving remuneration;
- remuneration is provided for services to the charity (other than as a trustee).

The safeguards that must be adhered to are:

- the amount or maximum amount of the remuneration is both reasonable in the circumstances and set out in a written agreement between the charity and recipient. The trustees must have regard to any guidance issued by the Charity Commission concerning the making of such agreements;
- the trustees must be satisfied that the arrangement is in the best interests of the charity;
- the trustee(s) to be remunerated should take no part in any decision to remunerate or other matter connected with the relevant agreement (above);
- remunerated trustees must remain a minority in number of the total trustees.

The Charity Commission will have power, by Order to:

- require repayment in whole or in part of any remuneration that a trustee has received if he has taken part in the decision to remunerate himself (or a person connected with him);
- to prevent remuneration in whole or in part from being paid;
- relieve a trustee (as well as an auditor or independent examiner) of a personal liability for breach of trust where the Commission are satisfied that the trustee, auditor or examiner has acted honestly, reasonably and where the trustee, etc. ought fairly to be excused for the breach of trust.

6 Trustee Indemnity Insurance

Trustee Indemnity Insurance (TII) indemnifies trustees from personal liability for claims made against them for breach of trust, negligence or default as long as the mistake was honestly made and not the result of wilful misconduct. In practice, trustees are not held liable in this way for honest mistakes, but anxiety about the possibility may give rise to reluctance on some people's part to become trustees.

Generally, a charity's own funds cannot not be used to pay for TII as this would contravene the trustee remuneration rules, by bringing an impermissible personal benefit to the trustees.

Charities Act 2006 deals with this by providing statutory authority for trustees to purchase TII out of the charity's own resources **without** the prior permission of the Charity Commission, so long as they are satisfied that it is in the best interests of the charity to do so and there is no provision in the charity's governing document which specifically forbids the purchase.

If there is a specific prohibition in the charity's governing document then trustees can still approach the Charity Commission with a request for an amendment so as to permit the purchase.

7 Expenses

A legitimate expense payment to a trustee is permissible without any special authority. The key point here is that in order to show that the expense is legitimate, it should generally be supported by bills or receipts from third parties, except where it is impractical to expect this, for example, because very small amounts are claimed.

'Expenses' fall under two categories:

- Expenses incurred which the trustee has had to meet personally in order to carry out their trustee duties;
- Reimbursement for costs that the trustee has incurred as agent for the charity – e.g. buying something needed by the charity which has been bought on the credit card of one of the trustees.

Payments falling in the second category (reimbursement of charity purchases) should not be counted as the trustee's expenses – these are purchases made on behalf of the charity and should be accounted for as part of the charity's own expenditure.

In relation to the first category (personal expense incurred by the trustee), the Charity Commission have provided guidance on the sorts of expenses that they consider acceptable or unacceptable.

Acceptable:

- Reasonable cost of travelling to and from trustee meetings or other trustee business and events. This includes petrol mileage allowances provided that they are within the limits permitted by HMRC as not being taxable.
- Reasonable cost of meals taken whilst on charity business.
- Reasonable cost of childcare (or other dependents) whilst attending trustee meetings.
- Reasonable overnight accommodation and subsistence whilst attending trustee meetings, specialist training, sector events, etc.
- Cost of postage and telephone calls on charity business (this can include the trustee's telephone rental and broadband subscription so long as these costs are split to reflect the percentage of time relating to usage on behalf of the charity).
- Communication support / special aids or equipment for Trustees with disability.

Unacceptable:

- Travel, accommodation and subsistence for partners who are not themselves on charity business.
- Payment of private telephone or other private expenses incurred on business unrelated to the charity.
- Payment of private medical insurance.
- Petrol mileage allowances at above the HMRC approved rates.
- Any other expense that is excessive or is not legitimate.

Payments not ranking as 'expenses':

The following are not 'expenses' therefore require explicit authorisation:

- Payments to cover loss of earnings whilst on charity business.
- 'Financial loss' allowances
- Honoraria
- Payment for specialist skills (unless within the Charities Act 2006 statutory relaxation)
- Expenses which include a 'profit element'

Examples are payment for use of a trustee's property for storage and use of charity equipment or for used working on charity matters, or where an expense is re-charged to the charity at an amount above the cost actually incurred by the trustee, or payment for buying an item for the charity which is in addition to the cost of the item itself (such as including a 'buying fee').

Expense policy?

Where trustee expenses are likely to be significant or if they are likely to be paid on a regular basis, it is a good idea to have a formal, written policy. This will cover what is and is not eligible, the evidence needed to support claims and a means of claims being authorised independently of the person claiming, or paying the claim.

The Charity Commission recommend:

- the formal expense policy should exist applying to all trustees, all staff including the most senior personnel, and all volunteers;
- the policy should be clearly communicated within the charity and included within induction training;
- expense claims should be authorised by someone other than the claimant and checked for accuracy before payment;
- expense claims should contain a self-declaration that the claim is accurate and incurred in connection with the business of the charity;
- to minimise the charity's cash payments, reimbursement should be made by cheque or BACS transfer;
- any mileage rate paid for motor travel should be at HMRC rates that do not result in a tax or national insurance liability for the charity or the claimant.

8 Small benefits

Gifts to retiring trustees

The Charity Commission permit trustees to provide a modest token of appreciation to a trustee who is retiring, and they may think it in the interests of good morale to do so, where:

- the value of the gift is nominal; and
- the trustees have agreed that the payment is in the interests of the charity.

As a "rule of thumb", the Commission work on the basis of a gift or token costing no more than £25. In most cases all that will be appropriate is a token of esteem, such as a bunch of flowers or bottle of wine. But this is only a general guideline - smaller or larger values may be appropriate.

The trustees must be able to show (if asked) what grounds they had for deciding that the award of the gift was in the interests of the charity. Typical grounds include publicly recognising the contribution of those who have given their time freely, thereby encouraging greater commitment - both from existing and future potential trustees.

This policy can also extend to a trustee leaving to take up another post. It is a matter for the trustees to exercise their judgement as to whether a person's length of service and quality of contribution to the charity should be acknowledged with a leaving gift.

Further guidance on this is available from the Charity Commission's Operational Guidance OG92 C10: www.charity-commission.gov.uk/About_us/OGs/g092c010.aspx

Small trustee payments

In the interests of proportionality, the Commission do not normally expect charities to seek authority where the total value of trustee payments is less than £1,000 (excluding legitimate expenses) in a financial year, even if there are express prohibitions on payment in the governing document.

Payments of this nature can include recognition of long service of a trustee to the charity, or a token payment or small gift to a retiring trustee.

In all cases, trustees still need to be satisfied that payments below £1,000 are in the best interests of the charity and should consider whether making them could adversely affect the charity's reputation.

9 What is accepted for new charities

The Charity Commission have become more relaxed about governing documents specifically authorising employment and professional services by a member of the trustee body and now readily accept that there are benefits in churches for the pastor or lead elder to be a trustee as well as employee.

As a matter of course, we now offer our charity formation clients clauses authorising employment of a trustee.

Further, Stewardship, working together with the Charity Commission, the African Caribbean Evangelical Alliance, Evangelical Alliance and Anthony Collins Solicitors, has agreed some standard forms of governing documents suitable for independent churches. These documents are suited to churches with a leadership team form of church government (rather than congregational/church meeting) and include clear trustee remuneration powers. Copies are available from the Evangelical Alliance website www.eauk.org/resources/publications/trust-deed.cfm.

The Charity Commission's model deeds (which can be viewed at www.charity-commission.gov.uk/Start_up_a_charity/Guidance_on_registering/mgds.aspx) show a number of possible general alternatives.

In accepting a trustee remuneration clause, the Charity Commission will insist on specific limitations on the scope of that power. Typically, this will be along the following lines:

- (i) "that at no time shall a majority of the Trustees receive remuneration or other benefits for services rendered to the Trust;
- (ii) that any Trustee whom it is proposed to remunerate or confer other benefits upon shall not be present during the formal deliberations and decision making by the other Trustees relating to any such proposed remuneration or benefits;

- (iii) that the Trustees are satisfied that the level of the proposed remuneration or the nature and value of any such other benefits is reasonable and proper having regard to the nature and value of the work carried out or services undertaken by such Trustee and to the income of the Trust;
- (iv) that the decision to remunerate or confer other benefits upon such Trustee and the level of that remuneration and nature and value of any such other benefits shall be taken and decided upon by not less than two thirds of all the remaining Trustees”.

In ‘non church’ charities, a case needs to be put to the Charity Commission as to why it is considered important that an employee is also a trustee, but where a reasonable case is put forward then clauses along the lines of those above are being accepted.

All of those conditions are essential, and evidence in the trustees meeting minutes that they have been complied with is also vital. Therefore:

- we would recommend that there should be a clear majority of trustees who don’t receive any payment or benefit (not just salary) and not simply an equal number;
- the trustee minutes should clearly record the discussion on the employment arrangements, at a meeting with the necessary quorum and majority of two thirds present, but preferably with **all** other trustees present, to make a point of recording that the person in question was not present at the point of the meeting when the discussions took place and that they had no influence upon the decisions made;
- there should also be a record of the ‘reasonableness’ of the salary package; if possible by comparison with other similar positions;
- it is recommended that there is an employment contract for the person so that not only the salary but also the other ‘terms and conditions’ are clear and not open to dispute;
- these same procedures should be adopted at each subsequent review of salary etc., or terms and conditions.

It must be remembered that none of the above allow the payment to a trustee for acting as a trustee – it is only for undertaking non-trustee services to the charity.

10 What to do if change is needed

Whilst it is easier for a remuneration clause to be agreed when forming a new charity than to amend the powers of an existing charity, it is essential that changes made by the latter types of charity are carried out properly. It is also a good opportunity to review other aspects of the governing document to see if there are additional changes that would be desirable to the modern, smooth running of the charity’s management and administration. There have been many changes in charity law and governance over recent years. If your governing document is over ten years old, there may well be benefits in a wider review. It is recommended this is carried out by a professional with charity law experience.

If the charity simply wishes to apply for authorisation to pay a trustee *as an employee* without any wider change to the governing document then it should complete the Declaration and Application form CSD-1381C available from the Charity Commission website (www.charity-commission.gov.uk). Applicants may find reading the Information Sheet CSD-1381A and Guidance Notes CSD-1381B helpful prior to completing the Application Form.

You should note the following before considering an application for authorisation:

- The authority given by the Commission cannot cover any past payments.
- A CSD-1381C application cannot be made:
 - for any employment if remuneration will exceed £50,000 p.a.;
 - if the Charities Act 2006 relaxations can be used instead;
 - for acting as a trustee (rather than for providing *other* services);
 - if the employment would result in a majority of trustees benefitting.
- The trustees will be asked to sign a Declaration confirming that:
 - the proposed payments are justified in the interests of the charity, and will have no adverse effect on the charity's ability to carry out its stated objects;
 - it is in the interests of the charity to employ the trustee named rather than someone unconnected with the charity;
 - the person named has played no part in the proposal or decision to employ him / her;
 - the employment was agreed by the trustees in good faith, and was not created to benefit the person(s) named;
 - in reaching the decision, the trustees have balanced the advantage of employing the person(s) named against the disadvantages of doing so;
 - the proposed contract, taken together with other payments already made to [other] trustees, will not result in a majority of trustees benefitting;
 - the appointment was/will be made on fair and open competition principles (or if not, there are good reasons in the interests of the charity for not doing so, which have been documented);
 - the amount to be paid is reasonable in relation to the proposed employment, and the charity can afford it;
 - that the conflict of interest will be properly managed (for example, by the trustee / connected persons withdrawing from any discussion or decision making affecting their employment terms);
 - the duty to declare the payments in the charity's annual accounts will be complied with.
- Where the latest accounts have not been filed with the Charity Commission, these will need to accompany the Application.
- The form must not be signed by the trustee who may receive payment.

Where a church remains an 'excepted charity' (i.e. one that, despite the provisions of Charities Act 2006, is still not required to register with the Charity Commission) none of the principles are changed and it is recommended that the issue is discussed with the church's denominational body (Baptist Union, FIEC, Diocesan Board, etc.) after which an approach to the Charity Commission is likely to be the next step.

11 When unauthorised payments have already been made

There is no published guidance from the Charity Commission on how they will deal with these situations. However, their past position has been that where benefit has

already been paid to a trustee, cases will need to be handled in accordance with their policy on unauthorised remuneration. In broad terms, we understand their position to be as follows:

The Commission will establish whether or not the payments represented good value to the charity and whether or not the trustees were acting in good faith. Where they conclude that both of these factors are satisfactory, they will seek to regularise the position if the payments are to continue. Where they conclude that there is a problem here, they may invoke their formal inquiry powers to protect the charity.

This means they would consider seeking restitution of the amounts paid from the trustee in question, or if not from them, from the other Trustees.

It should be noted that the Commission does not have the power to grant retrospective authority to the remuneration of Trustees and cannot eliminate the legal liability to repay the money. However, where they are satisfied that it is likely that the Courts would excuse the person from repaying all or part of the money received, they can decide, as an administrative matter, not to pursue the question of repayment. For practical purposes, a decision not to take any action would usually be the end of the matter.

The question of seeking restitution is not an empty bluff: it has in practice been applied and this is another very good reason why trustees should not make payments where there is doubt over the legal basis.

12 Disclosure in the charity's accounts

The accounts referred to here are the formal annual accounts that, for registered charities, are lodged with the Charity Commission and made available to the public.

The Statement of Recommended Practice "Accounting and Reporting by Charities" (The SORP)³ which applies equally to 'excepted charities' as it does to registered charities, requires disclosure in the notes to the accounts of all trustee remuneration and benefits regardless of size and whether there is an issue of legality.

The disclosures required cover:

- the names of the transacting parties;
- a description of the relationship (e.g. wife of a trustee);
- a description of the transaction (e.g. payment of salary and the role, or payment of rent and the property concerned);
- the amounts involved;
- outstanding amounts owed by the person at the year end, and amounts written off, if any;
- the legal authority for making the payment (e.g. trust deed, specific Charity Commission authority, or 'de minimis' authority, etc.)

If no Trustees or connected persons have received any remuneration or benefits, this should also be stated.

The SORP requirements represent best practice for smaller charities, but full compliance is a legal requirement for all charity accounts prepared on the 'accruals'

³ Paragraphs 221 to 233 of SORP deal with trustees' expenses and benefits. SORP can be accessed from <http://www.charity-commission.gov.uk/Library/guidance/sorp05textcolour.pdf>

basis in the United Kingdom (i.e. including Scotland and Northern Ireland). In England and Wales, this includes all company charities and all non company charities with a gross income over £250,000.

These disclosures are also mandatory when specific authority has been given by the Charity Commission for payment.

13 If further help is needed

Stewardship offer a modestly priced Consultancy Helpline providing e-mail and telephone support on a range of legal, tax, accounting, property and HR issues relevant to Christian charities:

For further details, please visit:

www.stewardship.org.uk/smartweb/support-services/consultancy:-employers