

# Are we still a charity?

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## CHARITABLE PURPOSES AND PUBLIC BENEFIT UNDER THE NEW LAW

You may be surprised to know that until recently you would have had to dust off the 1601 Statute of Elizabeth I as the starting point to finding the definition of a charity. Charitable purposes in that Act included facilitating 'the marriages of poor maids'.

Fortunately, there is now a clear modern definition of what a charity is. From 1 April 2008 the sections defining what it takes to be 'a charity' in the Charities Act 2006 are in force.

The purpose of this article is to:

- Allow you to understand the definition of a charity.
- Let you know what you have to do to ensure that you retain (or achieve) your charitable status.

This article is relevant to:

- Existing charities.
- Organisations considering becoming charities.
- Charities considering setting up charitable subsidiaries.

## DEFINITION OF CHARITY

A charity is an organisation that is:

- Established for exclusively charitable purposes, and
- For public benefit.

### Charitable purpose

The good news is that if your purposes were previously accepted as charitable they will remain charitable under the new provisions.

However, if you are setting up a new charity or a charitable subsidiary, or are altering your objects, then you will need to fit them into the new list of charitable purposes in the Charities Act 2006.

Charitable purposes are:

- The prevention or relief of poverty;
- The advancement of education;
- The advancement of religion;
- The advancement of health or the saving of lives;
- The advancement of citizenship or community development;
- The advancement of the arts, culture, heritage or science;
- The advancement of amateur sport;
- The advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- The advancement of environmental protection or improvement;

- The relief of those in need, by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- The advancement of animal welfare;
- The promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;
- Other purposes currently recognised as charitable and any new charitable purposes which are similar to another charitable purpose.

The charity may have a number or different purposes. Each purpose must be charitable.

## Public benefit

To satisfy this requirement there must be:

- A demonstrable benefit arising from the organisation pursuing its purposes; and
- The public (or sufficient section of the public) must benefit.

To put this bluntly, the charity needs to be valuable and to benefit more than just private individuals.

The Charity Commission has identified key principles in relation to public benefit, which may form a useful checklist for trustees:

### Principle 1: There must be an identifiable benefit or benefits

- It must be clear what the benefits are.
- The benefits must be related to the aims.
- Benefits must be balanced against any detriment or harm.

### Principle 2: Benefit must be to the public, or section of the public

- The beneficiaries must be appropriate to the aims.
- Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted:
  - by geographical or other restrictions; or
  - by ability to pay any fees charged.
- People in poverty must not be excluded from the opportunity to benefit.
- Any private benefits must be incidental.

The Charity Commission has published comprehensive guidance on public benefit and is in the process of issuing further guidance to particular sectors. See the Charity Commission website to consult this. <http://www.charitycommission.gov.uk/publicbenefit/>

The issue of unreasonable restriction on access to benefits is likely to be one of the most problematic for many charities. In the next section, assistance is given as to what you should do to make sure your charity complies with the law.

## WHAT DO YOU NEED TO DO?

Action is required by all charities. The key action points are:

- Trustees need to analyse the aims and activities of their organisation and assess the public benefit provided.
- You need to consider who benefits from the charity and whether the opportunity to benefit from your charity's activities is unreasonably restricted.
- You must ensure that your organisation operates effectively, and does actually produce benefits.
- You must report on your charity's public benefit in their Annual Report.
- Trustees must observe their public benefit duties.

The Charity Commission will be active in policing whether existing charities are charitable: it is to conduct a rolling review in relation to public benefit and public benefit must be reported on in the Annual Report.

If in the view of the Charity Commission the public benefit requirement is not being achieved, it will:

- Seek to work with the organisation to make sure the test is met.
- In extreme cases, replace trustees who do not co-operate.
- Remove the charity from the register, in the last resort.

In relation to new organisations, failure to demonstrate likely compliance with the public benefit requirement will mean that the Charity Commission will not register the organisation as a charity.

The new Charity Tribunal is now available to those charities wishing to contest decisions of the Charity Commission in relation to public benefit.

### Is the public's opportunity to benefit unreasonably restricted?

The benefits of a charity are rarely directed to every person in the country in equal measure. Charities are often linked to a particular cause or a particular section of the community, and the beneficiaries are likely to be those associated with that cause or are members of that community. What is important is that those who can access benefit are not unnecessarily restricted as that would not be in the spirit of 'charity'.

The following is an amended version of the Charity Commission checklist, the purpose of which is to ensure that any restriction is reasonable:

- Who do your organisations aims intend to benefit?
- If the benefit is to a section of the public, how are the beneficiaries defined or what restrictions are there on who can have the opportunity to benefit?
  - **For geographical restrictions:** What is the geographical area that defines who can benefit? What is the purpose the restriction? How large is the area?
  - **For restrictions based on charitable need:** What is the charitable need shared by the beneficiaries that is being relieved or addressed?
  - **For restrictions based on personal characteristics:** What defining characteristics are used to decide who benefits? Why are such personal characteristics used? How do those characteristics relate to the charitable aims?

- **For restrictions based on access to facilities:** Are there restrictions on what is available for access, or on who can have access, or limited opening times? What is the purpose of the limitation? Is the restriction justifiable?
- **For restrictions based on eligibility for membership:** Does someone have to be a member to benefit? If so, is it open to anyone interested to join? If not, who can join and how? Is the membership restriction (and attached criteria) reasonable?
- **For restrictions based on trustees' discretion:** What criteria will the trustees use to decide who can benefit? What is the justification for that restriction?
- **For restrictions based on ability to pay any fees charged:** What does your organisation charge for its services or facilities? How are charges set? Is everyone charged the full rate? What opportunities do people who cannot afford to pay those fees have to benefit from your organisation's aims? How do people in poverty have the opportunity to benefit?

Some charities will need to make tough decisions in relation to how:

- Their service provision can be broadened to achieve greater public benefit.
- Any restrictions on access to services be softened.
- The Charity can come across as focused on public benefit.

### Is the charity actually producing a benefit?

It must be clear what benefits arise from carrying out the charity's aims. The Government and Charity Commission seem to want to see charities delivering, rather than being havens for people with good intentions.

With regard to demonstrating effectiveness the following principles apply:

- The benefits should be capable of being recognised, identified, defined or described.
- It is not necessary that the benefits be capable of being quantified and measured.
- The Charity Commission is looking for practical explanations of what the charity does and what outputs result.
- It is not possible merely to claim that you have adopted a particular charitable purpose from the above list and therefore the benefit results automatically.

Some trustees may conclude that their organisation no longer delivers sufficient benefit to those it is intended to help, despite those connected with charity doing their utmost. Options that trustees could consider in those circumstances include:

- Merger with another charity, where joint delivery could improve service.
- Transfer of assets to a successful charity with similar purposes.
- Dissolution and removal from Register, with remaining assets applied to another charity/charities with similar aims.

### Include public benefit in the Annual Report

For larger charities (income of £500,000 plus or income of £100,000 plus and assets of £2.8 million plus), the annual report requires an explanation of how public benefit is achieved. No prescription is given in relation to the number of words or pages that are required, but you will need to explain the charity's achievements, measured by reference to the charity's aims and to the objectives set by the trustees.

For smaller charities, trustees are required to include a brief summary in their annual report of the main activities undertaken in order to carry out the charity's aims for the public benefit. In practical terms you will need to add a specific paragraph into your annual report dealing with this.

## Follow the trustees' public benefit duties

Charity trustees must:

- Ensure that they carry out their charity's aims for the public benefit
- Have regard to the Charity Commission guidance on public benefit (when they exercise any powers or duties where that may be relevant)
- Report on their charity's public benefit in their Trustees' Annual Report.

Charity trustees are not legally required to follow the Charity Commission guidance on public benefit but they must have regard to it when it is relevant for their charity. That means they should be able to show that:

- They are aware of the guidance.
- In making a decision where the guidance is relevant, they have taken it into account, and
- If they have decided to depart from the guidance, they have good reasons for doing so.

## CONCLUSION

The new legal provisions provide a clear definition of what a charity is. They also place burdens on charities to show that they are delivering in an outward looking way.

With many funders also applying public benefit principles, this is a good opportunity for you to take some simple steps to ensure that your charity maximises its potential whilst operating within the law.

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