



NHS Charities and Public Benefit (England and Wales)

Briefing paper, October 2016

Background

Given the financial pressures that the NHS is currently facing, the HFMA's Charitable Funds Special Interest Group agreed that it would be helpful to produce a briefing to remind all NHS charities in England and Wales of the importance of meeting the 'public benefit requirement' at all times and to signpost key sources of guidance.

The Group is grateful to the Association of NHS Charities for its help in producing this briefing and in particular for the wording in the section on staff events.

Legal requirements

The *Charities Act 2011* states that for an organisation to be charitable it must have only charitable purposes. It also requires that a charity's purpose must be for the 'public benefit' – if this is not the case, the organisation is not a charity.

Under the same Act, charity trustees must 'have regard' to the Charity Commission's public benefit guidance 'when exercising any powers or duties to which the guidance is relevant'. In practice this means that trustees must be able to demonstrate that they are aware of the Commission's guidance and that they have taken it into account.

The *Charities (Accounts and Reports) Regulations 2008* require all charity trustees to report each year in their trustees' annual report on how they have carried out their charity's purposes for the public benefit. The detailed reporting requirements are different for 'small' and 'large' charities – for details, see the Charity Commission's publication – *Public Benefit Reporting*: <https://www.gov.uk/government/publications/public-benefit-reporting-pb3>

This reporting requirement is reflected in the *Charities Statement of Recommended Practice* (SORP) which requires that charities must:

- explain the main activities undertaken to further the charity's purpose for the public benefit
- include in their report a statement confirming whether the trustees have had regard to the Charity Commission's guidance on public benefit.

What is the public benefit?

Public benefit means that the charity's purpose must be beneficial with any harm that results outweighed by the benefits achieved. The charity's purpose must also:

- benefit the public in general (or a sufficient section of it)¹
- not give rise to more than incidental personal benefit.

¹ Other than for charities whose purpose is to relieve or prevent poverty.

For more details see the Commission's publication – *Public Benefit: the public benefit requirement*: <https://www.gov.uk/government/publications/public-benefit-the-public-benefit-requirement-pb1>

What does this mean in practice?

All decisions made by trustees that have an impact on the way in which people benefit from the charity's purpose and/or on who benefits are covered by the statutory duty to have regard to the Commission's guidance. For trustees, this means making decisions:

- that ensure that your charity's purpose provides benefit
- that manage risks of detriment or harm to the charity's beneficiaries or to the public in general from carrying out your charity's purpose
- about who benefits in ways that are consistent with your charity's purpose
- that make sure any personal benefits are no more than incidental.

For more details and further advice, see the Commission's publication – *Public Benefit: running a charity*: <https://www.gov.uk/government/publications/public-benefit-running-a-charity-pb2>

What does this mean for NHS charities?

In addition to the guidance relating to public benefit that all charity trustees must have regard to, the Charity Commission has issued *NHS Charities Guidance*² which covers a number of key issues, as follows.

The boundary between charitable and exchequer spending

There can be problems in identifying when it is appropriate for charitable funds to be spent on services that are usually funded by the public sector. NHS charities are permitted to contribute to the delivery of these services provided that:

- a clear charitable purpose is served that falls within the trusts of the charity concerned
- the decision is made in the interests of the charity to further its charitable objects AND
- there is a clear open, and independent process (i.e. separate from the linked NHS body's decisions about the use of its exchequer funds) of decision making by the trustee(s) to support the decision to apply charitable funds in this way (including an assessment of how far the public sector body's duty of provision extends).

The Commission's guidance – *NHS charities and independence indicators and evidence*³ – is relevant here.

Subsidising or replacing public services

The Commission's guidance states that 'there is no underlying assumption that charities must not subsidise or replace public services, but clear criteria [should be] set for decision making by trustees if they wish to spend in areas normally/previously paid for from exchequer funds. For more details, see *Charities and Public Service Delivery: An*

² *NHS Charities Guidance*, Charity Commission, 2012:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360670/NHS_charities_guidance.pdf

³ *NHS charities and Independence indicators and evidence*, Charity Commission, 2009:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360349/NHS_charities_and_independence_indicators_and_evidence.pdf

Appropriate spending

The Charity Commission's guidance notes that patient focused spending (unless directed mainly towards private patients) will generally meet the public benefit test. It also identifies three tests that should be applied by trustees to confirm whether or not spending is 'appropriate':

- is it within the objects of the charity concerned and, if the funds are also restricted, within the terms of that restriction?
- is the immediate and direct effect of the spending too far removed from the intended charitable outcome to guarantee that outcome?
- does it represent a more effective way of applying available funds than other alternatives that may be in need of funding?

Grants to pay for equipment

The Commission's advice (in addition to the principles set out in *Charities and Public Service Delivery*) is that trustees 'should seek suitable assurances concerning the ongoing use of the facilities/equipment to be funded before they provide the funds'. The guidance also states that 'if the trustees made an informed decision in good faith to make a grant they cannot be criticised for having made the grant'.

Staff events

The Commission recognises that NHS charities can use for staff benefit their unrestricted general purpose funds (which include 'staff funds' given by grateful patients or their families). However, this is only on condition that the staff benefit 'translates demonstrably to relief of sickness of NHS patients'.

In relation to social events for staff the usual justification is that such functions improve staff morale, which can be expected to lead to better care of patients. However, the Commission recommends that, before deciding whether to use NHS charity funds for these purposes, the trustees consider:

- whether it is in fact justifiable to infer patient benefit from what is being funded
AND
- whether other spending could achieve a more direct patient benefit.

This means that when considering an event, trustees need to analyse its usefulness – in terms of patient benefit – and assess it against other options and priorities for funding. This includes considering whether the type of function and level of expenditure are appropriate.

It is also important for trustees to understand and assess whether there are any tax consequences – for the charity or the staff – of such events.

Ultimately this is a matter for the trustees' discretion – after they have considered all relevant factors.

Once the decision is made, the trustees should record it. The minutes or other formal records should show that they actively considered the matter; their written record needs to be sufficient to allow someone to understand the issues, the decision and the reasons for it. This will be helpful for them to refer to in the event that their decision is questioned – whether by the Commission, the media, or others.

For more detail, see the Commission's publication – *It's your decision: charity trustees and decision-making*: <https://www.gov.uk/government/publications/its-your-decision-charity-trustees-and-decision-making>

Decision making

An anonymised example of how one charitable fund approaches its decision making is shown below but please note that this is included for illustrative purposes only and should be read in conjunction with the guidance referred to in this briefing. Trustees are responsible for ensuring that whatever arrangements they adopt are consistent with their powers and appropriate for the proper conduct of their business.

Decision making process – example approach

When applications are received by this charity to fund items of expenditure, the following questions are asked:

1. Is the expenditure of a type that would normally be funded from charitable funds?

For an item to be classed as charitable, it must meet one of the charitable purposes set out in the *Charities Act 2011*. In relation to an NHS charity the purpose that is relevant is the 'advancement of health or the saving of lives, education, religion, the arts, culture, heritage or science, environmental protection or improvement'.

If the expenditure meets the above criteria, then it must be confirmed that the individual fund from which the expenditure is to be made allows such expenditure. For example, certain funds will relate to specialties or areas, and therefore the funds can only be spent for the benefit of those specialties or areas. In addition, many funds do not have the funding of research within their purposes, so research expenditure from such a fund could not be supported.

2. Public benefit requirement

The Charity Commission has introduced a public benefit requirement on all charities. In the case of an NHS charity, the fact that it supports the NHS is deemed to meet this requirement as the service is available to all.

3. Is the expenditure for an item that should normally be funded from exchequer?

The following questions may help here:

- if the funding were not granted, would the service in question continue, or cease?
- if the service would cease, then the money granted from the charity must be paying for that service (i.e. subsidising exchequer) and therefore the request should be refused
- if the service would continue, then the money granted from the charity could be argued to be enhancing the service, which is an allowed charitable purpose.

4. Is the NHS Trust's board content with the purchase?

Although the capital cost of an item will be funded by the charity, the running costs will be an exchequer liability, and so some confirmation should be sought that any additional costs can be funded from exchequer sources. It would be most unusual for charitable funding to be granted to pay for such expenditure. The NHS Trust should also be asked to

demonstrate that the purchase is part of the overall capital strategy, and not just the 'whim' of a department.