



## Consultation response:

Draft Guidance: Grant funding an organisation that isn't a charity

Response from the Association of Charitable Foundations,

Charity Finance Group and NCVO

April 2016

1. **Association of Charitable Foundations (ACF)** is the membership association for foundations and charitable grant-making trusts in the United Kingdom. ACF's priorities include enabling trusts and foundations to achieve good practice in grant-making and helping them to be effective in the many ways that they use their resources, including their investments for charitable purposes.
2. **Charity Finance Group (CFG)** was founded in 1987. It is the charity that works to improve the financial leadership of charities, promote best practice, inspire change and help organisations to make the most out of their money so they can deliver the biggest possible impact for beneficiaries. CFG has nearly 1,400 members and they manage over £21 billion in charitable income. Our work supports the strategic development of their organisations and good financial management is at the forefront of delivering a sustainable and efficient charity sector.
3. **National Council for Voluntary Organisations (NCVO)** is the largest representative body for charities and voluntary organisations in England, and has over 12,000 members ranging from large 'household name' charities to small community organisations. NCVO's strategic aims are to champion and strengthen civil society and volunteering, and to strengthen voluntary organisations.

### Introduction

4. We have been grateful for the opportunity to engage with and contribute to the work of the Charity Commission in preparing this draft guidance on grant funding organisations that are not charities.
5. In our experience charitable funders are increasingly finding themselves working in pioneering ways to deliver public benefit, and increasingly in collaboration with other and emerging sectors. Grant funding organisations that are not charities may not be the most frequent use of charitable grant, but it is an important tool in supporting innovation in civil society. For that reason we hope that the Commission will take the time required to pitch the guidance right so that trustees are enabled and informed and not unnecessarily inhibited.

6. Specifically we think it is crucial that the guidance spells out the key principles of good grant-making while asserting the sole responsibility of trustees to determine how best to further their charitable purposes in their particular context. It is important that the guidance does not fetter the discretion of trustees, for example in their ability to fund the overheads or build the capacity of organisations that may not be charities but whose work contributes to the delivery of the funder's charitable purposes.
7. This response is based on the feedback of charitable funders and other organisations – many of them ACF members - who have shared with us their expertise in and experience of grant-funding organisations that are not charities.

### **Over-arching reflections**

8. Practitioners who attended a consultation event were grateful for the assurances from the Charity Commission that this guidance was intended to be *enabling* for charitable funders and, rather than being prescriptive, clearly affirming the sole responsibility of trustees to determine how best to further their charitable purposes in their particular context. We are also pleased to see the draft guidance's emphasis on proportionality as a key principle in trustees' deciding how to go about assessing and responding to risk.
9. We think that the principled approach, reinforcing the principles of good grant-making, is the most helpful and appropriate way forward given the extremely wide range of circumstances in which the guidance may apply – from funding local sports clubs to international NGOs responding to humanitarian disasters.
10. The main risk in these circumstances, it seems to us, is that organisations that are not charities may not always fully appreciate the constraints that surround charitable funding. For this reason, before making a grant, trustees should assure themselves that the organisation is trustworthy, that it can be relied upon to further the charitable purposes, and that the funder has clearly communicated to grant-holder the charitable purpose of the funding and the restrictions on its use that therefore apply. It is very important that these principles and messages are firmly stated in the final document if it is to help trustees apply it to the very the very wide range of situations we anticipate that it will cover.
11. Overall our sense is that the draft guidance is a good starting point, and the following reflections are offered in that context.

*The guidance should highlight the benefits of grant-funding organisations that aren't charities rather than suggest that it is exceptional or odd*

12. The Charity Commission's oversight of individual charities' actions occurs when problems have been reported and that is the context for this guidance arising. There is a risk that the mere fact of guidance being produced could send a message that the Commission views grant-funding organisations that aren't charities is problematic in and of itself. We know that this isn't the Commission's intent. Indeed, our intelligence from charitable funders is that this is an area of important social innovation. We therefore feel that, while the overall tone of the guidance is permissive, it should begin with a more positive statement of how grant-funding non-charities can be an important means for funders to achieve their charitable purposes and that the principles that it is based on are applicable to good grant making generally.
13. For this, and a number of other reasons, we think that the guidance could be enhanced with some case studies demonstrating positive good practice and we would be happy to assist the Commission in constructing those case studies.

*It would be helpful to have more description of the spectrum of organisations that aren't charities, including distinguishing public and community benefit organisations*

14. There are a number of different kinds of organisations that aren't charities to which charitable funders may make grants. Some may conceivably carry greater potential risks than others, and in some cases it is not entirely clear that there are any great risks attached to the fact of their not being charities.
15. For example, Community Interest Companies (CICs) and Community Benefit Societies (BenComs) are both legally obliged to provide community benefit and in both cases assets are locked to those purposes. With that in mind, feedback from practitioners is that in relation to both CICs and BenComs, charitable funders feel they can have greater assurance that grant funding will achieve a public benefit. In saying that, we acknowledge that community benefit and public benefit are analogous and not exactly similar. For that reason it would be helpful if the Commission could briefly outline the nature of the difference so that funders can be aware of the risks for purposes of due diligence.
16. Another case is that of a charitable funder making grants to a public sector organisation, for example a school. Again we would argue that in such a case the charitable funder can be well assured that the grant will achieve a public benefit, but perhaps it would be helpful to highlight existing guidance on charities working with public sector organisations.
17. A statement on the difference between public benefit and other definitions of social good may also provide an opportunity to clarify the important distinction that emerged in discussion with practitioners, i.e. the difference between 'charitable activities' and 'charitable purposes'. That discussion helpfully highlighted that charitable purposes can often be achieved by activity that isn't in itself 'charitable' but which can nonetheless deliver a clear public benefit. Two examples might be the provision of housing or funding for the arts, neither of which can be a charitable purpose in its own right, but each of which can be a highly appropriate means to a charitable end. Highlighting this may provide reassurance for funders reading the guidance.
18. Another area where there needs to be more clarity is between the terms 'unrestricted' and 'restricted' in the document. Although we appreciate that the Commission is seeking to be helpful in using the language of practitioners, the terminology is confusing for the purposes of this guidance. In terms of what the Commission is seeking to achieve with this guidance, all charities make 'restricted' grants i.e. grants which are restricted to the charitable purposes of the grant maker. For most practitioners however the difference between 'restricted' and 'unrestricted' grants is the level of flexibility which grant makers give to recipients. While in practice grants sit on a spectrum between restricted and unrestricted, for the purposes of this guidance the distinction is not useful. No grant maker would give a grant that was 'unrestricted' in the sense of giving a grant which was not in line with the charitable purposes of the grant maker.

**'Core costs' and examples where the guidance as currently drafted creates practical difficulties**

19. The area where we believe most thinking remains to be done is where the guidance seeks to establish boundaries around how grants may be used to cover the running costs of organisations that are not charities.
20. Currently the draft says that, beyond covering 'the costs that are directly connected to carrying out the activities the organisation has agreed to fund', 'a charity cannot fund the 'core' costs (or overheads) of a non-charity.'

21. Unfortunately, the term 'core costs' as used in the draft is open to a variety of interpretations. Not only that, but the draft uses it synonymously with 'overheads' and many funders distinguish the two – using overheads to refer to costs over and above salaries, often added as a percentage on top of salary costs to cover accommodation, IT, management etc.
22. More significantly, discussion with practitioners leads us to believe that the wording in this section is confusing for grant-makers and could inhibit important good practice in a way that must be contrary to the Commission's overall policy intent.

#### *Funding public benefit work outside the UK*

23. For example, one case is that of funding international NGOs - many of which, were they to exist in the UK, would qualify as registered charities. In these circumstances, as for many UK charities, it can be important and appropriate for funders to build the core capacity of civil society organisations so that they are resilient, able to respond flexibly to changing needs and have the ability bid for other funding streams to support their activity. Without funding for 'core' essentials such as accommodation, ICT, salaries for leadership and the costs of growth and adaptation, such organisations would in many cases cease to exist to the great detriment of their beneficiaries and the frustration of the charitable objectives of the UK based funder. The guidance as currently drafted would prohibit important funding arrangements such as these
24. In addition, we are aware of concerns from 'operational' charities that work internationally that the guidance is not drafted with their situation in mind, i.e. where grant making is an ancillary to the charity's main way of working. For example, charities working internationally with partners for humanitarian purposes may be required to grant fund organisations that are not charities in order to deliver aid effectively.
25. While such charities will have processes in place to ensure that funds are used in line with charitable purposes, and the same principles apply to all sorts of funders, the level of due diligence and reporting must be proportionate according to the level of risk in each situation and developed in line with the circumstances in which the grant is given. We would welcome clarity within the guidance that this is also the Commission's understanding as our consultation with charities that work internationally and experts is that without this clarification the guidance could have a significant negative impact on their ability to pursue their charitable purposes.

#### *Funding social enterprises and start ups*

26. Another example is the case of a charity funding socially entrepreneurial activity, where there is 'profit with a purpose' - especially when it is in startup mode. Civil society is changing and new ways of achieving social good are emerging and developing as never before. Often philanthropic or charitable funding is essential in supporting the innovators and creators of social enterprises that will deliver public benefit in new ways. While the world of 'venture philanthropy' can sometimes involve social investment, which is outside the scope of this guidance, grants are an essential part of the ongoing funding mix as well as being pre-cursors to repayable finance (helping entrepreneurs and organisations become investment ready) or as accompaniments to early stage social finance. It is important to get across that, while in startup mode, organisations typically are not yet delivering services, so that the purpose of grant-funding can't be 'directly linked to delivering grant activities'. Rather its aim is capacity building the organisation itself because doing so furthers the charitable aims of the funder.

27. In such cases practitioners report that they carry out a great deal of due diligence to assure themselves that the nascent organisation's goals are going to deliver a social benefit that justifies the support of a charitable grant. That due diligence will include looking at the memorandum and articles, the existence of an asset lock, remuneration levels and whether there is a power to amend any of the above. Where charity trustees can satisfy themselves that their charitable goals align with the organisation and that the private benefit test is passed, it is highly desirable that charities should be able to make grants that build the capacity of social enterprises, subject of course to appropriate conditions being placed in any grant agreement to enshrine the charitable purpose of the grant. Grant conditions are an enabling mechanism for a funder in these circumstances.
28. The difficulty seems to be where the funding arrangement doesn't express a relationship of *agency* - where the charitable funder is relying on the organisation to carry out specific activities (such as advocacy or campaigning work for charitable purposes), but instead where the purpose of the grant is intended to build or maintain the capacity of an organisation to ensure that it is able to deliver a social good – for example providing employment and training for ex-offenders - which clearly counts as a public benefit.
29. For this reason we think that the Commission needs to look again at this wording to ensure that the guidance does not inadvertently prevent charitable funders from playing their important supportive part in the emerging mixed economy of civil society.
30. We also note that the matter of 'core costs' is the one place where the guidance departs from the principled-base approach into a prescriptive mode. In doing so it removes discretion from trustees who alone can assess the suitability of a grant and the conditions that should be attached. In crafting a better solution we would suggest the Commission consider what principle is at stake and whether there is a better way of communicating that to trustees who in law are the decision makers.
31. As a way forward we would suggest thinking more deeply about what underlying principle is at stake in this specific case and alerting trustees to a specific risk. Legally, only trustees can decide how best to use their charities resources to achieve their purposes.
32. We wonder if it might be possible to approach the issue in an enabling way, as the guidance intends. We that in mind we would propose inserting something along the following lines instead of the current prohibition:
33. Trustees, as well as funding specific activities that deliver a public benefit will at times wish to consider funding the additional running costs that are directly associated with delivering them. As in every other case the trustees must ensure that the grant is not used to fund activity that does not deliver a public benefit.
34. Trustees, in furtherance of their charity's purposes, may also choose to build the capacity of organisations that aren't charities. In such cases trustees as well as assuring themselves of the trustworthiness of the organisation they are funding, should make clear in grant conditions that the money is restricted to the purposes of delivering charitable purposes. They should also have appropriate monitoring in place to ensure this happens.

## **Case studies**

35. As we have mentioned, we believe that it would be helpful to have some case studies demonstrating good practice in areas where grant funding organisations that are not charities help deliver a charity's goals. We would suggest some or all of the following candidates:

- A community interest company
- An arts company
- A foreign organisation that in the UK would in all likelihood pass the test for charity registration
- Capacity building a startup phase social enterprise
- A local authority school
- A prison
- A hospital

36. We would be happy to work with the Commission in finding such case studies of good practice that would exemplify the sort of due diligence and grant conditions that were appropriate.

## **Conclusion**

37. We have been grateful for the opportunity to provide feedback to the Commission at each stage of this important piece of guidance. While we understand that the guidance is itself not intended to make new regulations, we would observe that it is stating and simplifying existing rules for the first time in this context. In our experience charitable funders are increasingly finding themselves working in pioneering ways to deliver public benefit, and increasingly in collaboration with other and emerging sectors. Grant funding organisations that are not charities may not be the most frequent use of charitable grant, but it is an important tool in supporting innovation in civil society. For that reason we hope that the Commission will take the time required to pitch the guidance right so that trustees are enabled and informed and not unnecessarily inhibited.