

## **Social Enterprise UK response to the “Draft Guidance: Grant funding an organisation that isn’t a charity”**

### **About Social Enterprise UK**

Social Enterprise UK was established in 2002 as the national body for social enterprise in the UK. We are a membership organisation. We conduct research; develop policy; campaign; build networks; support individual social enterprises; share knowledge and understanding; support private business to become more socially enterprising; and raise awareness of social enterprise and what it can achieve. Social enterprises are businesses driven by social or environmental objectives whose surpluses are reinvested for that purpose in the business or in the community. They operate across a wide range of industries and sectors from health and social care, to renewable energy, recycling and fair trade and at all scales, from small businesses to large international companies. They take a range of organisational forms from co-operatives and mutuals, to employee owned structures and charitable models. Our members come from across the social enterprise movement, from local grassroots organisations to multi-million pound businesses that operate across the UK.

### **Introduction**

SEUK welcomes the Commission’s development of guidance to trustees on this issue. 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been grateful for the opportunity to engage with and contribute to the work of the Charity Commission in preparing this draft guidance on grant funding organisations that are not charities. Overall our sense is that the draft guidance is a good starting point, and the following reflections are offered in that context. We welcome the opportunity to comment on the draft guidance, and appreciate the efforts that Commission officials have made to engage with stakeholders since it was published.

The main thrust of the draft guidance is to ensure that grants to non-charities are in line with the charitable purposes of the grant-making charity. We agree wholeheartedly with this approach, and recommend that this point of departure is used throughout as a basis for all other elements of the guidance.

While the overall tone of the guidance is permissive and proportionate, one section stands out. One section of the



draft guidance departs from this and is, in our opinion, highly problematic. The section of the guidance with which we take particular concern is:

*"A charity can only fund charitable activity that is intended to further its purposes. It follows that:*

- *a charity can't give an unrestricted grant to a non-charity*
- *a charity can only allow a grant to cover costs that are directly connected to carrying out the activities it has agreed to fund*
- *beyond that, a charity can't fund the 'core' costs (or overheads) of a non-charity"*

We are concerned that the effect of the guidance will be to discourage trustees from providing funding to certain types of organisations or projects. We believe that Trustees could become unnecessarily conservative in their willingness to allocate support for certain organisations, which would hinder the potential for them to deliver public benefit.

The Charity Commission guidance reminds Trustees of the need to protect the best interest of their charities by ensuring that grants are used appropriately by the recipient organisation. Whilst we are mindful that this guidance has been drafted to guard against specific instances of misappropriation and misallocation of funds, we are concerned that there are unintended consequences.

We think that the Commission needs to look again at this wording. 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. We note that this is not a formal consultation, but given the strong concerns that we have about this section of the draft guidance in particular, we trust that there will be further opportunities to engage with the Commission before the guidance is finalised. We would be pleased to engage further with the Commission on further iterations of the guidance, helping to settle on workable alternatives to the existing text and providing further evidence and examples where necessary.

We set out our various concerns below.

## **1. Clarity**

We are concerned that the language in the part of the new draft guidance which pertains to funding organisations that aren't charities lacks clarity and will lead to confusion.

First, the reference to “beyond that” which could be read to mean that ‘a charity can only allow a grant to cover costs that are directly connected to carrying out the activities it has agreed to fund, which may include core costs if they were in the agreed activities but not beyond that which has been agreed’. Alternatively, it could be read to mean that ‘a charity can only allow a grant to cover costs that are directly connected to carrying out the activities it has agreed to fund, but which cannot include core costs and overheads’.

Another area where there needs to be more clarity is between the terms ‘unrestricted’ and ‘restricted’ in the document. For most practitioners, the difference between ‘restricted’ and ‘unrestricted’ grants is an issue primarily for the grant recipient – are the terms and conditions of a grant narrower than the scope of the recipient? If not, the grant can be seen as unrestricted. The idea of restricted and unrestricted grants is not one that necessarily makes sense from the perspective of a grant-maker.

Finally, the expression ‘the grant activities’ is also problematic as charities and other organisations delivering public benefit often rely on a mix of funding and activities cannot be always identified as exclusively ‘grant activities’.

## **2. ‘Core costs’ vs ‘overheads’**

It is essential that trusts and foundations have the explicit scope to fund the relevant overheads of organisations delivering public benefit. In the current draft, references to core costs/overheads could inadvertently prevent charities from making grants to organisations, such as early stage social enterprises, to deliver public benefit.

Around a decade ago, in the Treasury’s Guidance to Funders and Purchasers<sup>1</sup>, Neal Green of the Charity Commission helped shape the guidance that funders “...must recognise that it is legitimate for third sector organisations to recover the appropriate level of overhead costs associated with the provision of a particular service” and pointed out that “the debate has historically and typically been based on a false principle that overhead costs are somehow unrelated to an organisation’s ‘real work’”.

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<http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/guidncefunders1505061v1.pdf>

While it is helpful to restate that “a charity can only fund charitable activity that is intended to further its purposes”, a charity can provide funding to a non-charity which includes research and development, core costs and overhead costs associated with that activity.

Trustees may choose to fund core costs and overheads of an organisation – assuming that the organisation in question delivers a public benefit in line with their charitable purpose. The new draft guidance seems to remove that discretion entirely and could be read to not allow funding of either. In addition, the draft guidance conflates core costs with overheads unhelpfully whilst not defining either adequately. The term ‘core costs’ as used in the draft is open to a variety of interpretations.

### **3. Tone**

The guidance serves to suggest that grant-funding organisations that aren't charities is exceptional or odd. Grant-funding non-charities can be an important means for funders to achieve their charitable purposes. Grant funding organisations that are not charities may not be the most frequent use of charitable grant, but is a significant part of the way charitable funds are deployed. The current draft suggests otherwise.

### **4. Delivering charitable purpose through non-charities**

Charitable funders may choose to fund other organisations in order to deliver their charitable purpose. Charitable purposes may include, for example, the relief of poverty or the advancement of education and training. These purposes, and others, may be advanced through the activities of a spectrum of organisations that aren't charities, including, for instance:

- local sports clubs.
- international NGOs - many of which, were they to exist in the UK, would qualify as registered charities. 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.
- social enterprises – particularly in start-up mode and not yet delivering services, so that the purpose of grant-funding can't be 'directly linked to delivering activities". Rather the aim of funding is capacity building the organisation itself because doing so furthers the charitable aims of the funder.
- public bodies, such as schools or hospitals.
- Unincorporated associations.
- A co-operative community benefit society.
- A community interest company.
- An arts company.

Community Interest Companies (CICs) and Community Benefit Societies (BenComs), for example, are both legally obliged to provide community benefit and in both cases assets are locked to those purposes.

## **5. Legal Discretion of Trustees**

In this section, the guidance departs from the principled-based approach into a prescriptive mode and in doing so it removes discretion from trustees who alone can assess the suitability of a grant and the conditions that should be attached. Legally, only trustees can decide how best to use their charities resources to achieve their purposes. Trustees must ensure that the grant is not used to fund activity that does not deliver a public benefit.

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. We therefore question the legal basis of this guidance and the claim that it does not represent any new regulatory requirement. The guidance should be adjusted to affirm the sole responsibility of trustees to determine how best to further their charitable purposes in their particular context.

We ask the Commission to explain the legal basis for this content, and how it can be aligned with the established principle that trustees are best placed to ensure that all grant-making is in line with each respective charity's purposes. We would like a clearer exposition of the golden thread that links the new draft guidance with existing guidance as we believe it represents a significant policy shift. In its current form, the guidance may leave the Charity Commission open to legal challenge. It would be better to resolve this now rather than leave the Charity Commission open to challenge in the courts.