

# CHARITIES THAT ARE CONNECTED WITH NON-CHARITABLE ORGANISATIONS MAINTAINING YOUR CHARITY'S SEPARATION AND INDEPENDENCE

NCVO response to Charity Commission consultation – 15 May 2018

## About your organisation

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### Is your charity connected with a non-charitable organisation as explained in the draft guidance?

Yes / ~~No~~

NCVO Trading Ltd, a private limited company, is a wholly owned subsidiary of NCVO, and NCVO appoints its board's members. In its turn, NCVO Trading Ltd holds a third of the shares in Trustees Unlimited LLP; the other two shareholders are Bates Wells Braithwaite (BWB) and Russam GMS. Trustees Unlimited was established in 2009 to help not-for-profit organisations recruit high-quality trustees in a rigorous and cost-effective way.

## About the section called 'Who this guidance is for'

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### How well does this section explain whether you need to read this guidance?

~~Very well~~ / Satisfactorily / ~~Poorly~~ / Don't know

The definition of 'connected organisation' in this guidance is potentially very broad, and the more detailed list seems inconsistent with the initial summary of the definition of 'connected'. At the beginning, the guidance says that 'By "connected" we mean the connection between the charity and the non-charitable organisation is deliberate'. The list of indicators of a connected relationship, however, makes no reference to 'deliberate' and instead has a list of criteria, including the statement that 'If any of these applies to your charity, this guidance is relevant to managing your relationship with the non-charitable organisation'.

Most of the criteria on this list are clearly logical, but the criteria of 'shared projects/initiatives' and 'shared mission or common goals' are both very broad indeed, especially if the test is to meet only one criterion. We would suggest these would work better if narrowed. For 'shared projects/initiatives', it would be better to make it clear that this applies to routinely sharing projects or initiative as part of an ongoing relationship. For 'shared mission or common goals', it would be better to make it clear that this applies to

working towards goals or having a shared mission which the two organisations have agreed, rather than goals or missions which simply coincide.

We would also suggest that, certainly for the last two criteria, it would be more helpful to say that whether a charity is deemed to be connected to a non-charitable organisation depends on weighing these factors up in the context of the other criteria. We understand that the Commission is aiming this guidance at charities with a serious, long-term relationship with a non-charitable organisation; the current guidance seems to us to stretch a good deal more broadly than that.

More specific examples of organisations which the Commission would and would not deem 'connected' would also be helpful.

## About the section called 'Get it right from the start'

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### How well does this section provide an overall framework for trustees to manage their charity's relationship with a connected non-charitable organisation?

~~Very well~~ / Satisfactorily / ~~Poorly~~ / ~~Don't know~~

It is clearly useful to have an overall framework for trustees within guidance such as this, and the linked list of areas to consider is particularly helpful in that regard. NCVO has a number of comments about the text, itemised below.

#### Furthering non-charitable interests

NCVO fully agrees that it is important for charities to ensure their resources and activities are only deployed to further charitable objectives. This continues to apply when charities have a relationship with a non-charitable organisation. However, there are circumstances where the charity itself is only working to further charitable purposes, but where another purpose may also be benefited by a given activity (even though that activity is squarely charitable). The phrasing 'must not further the wider or related purposes of the non-charitable organisation', currently in this section of the guidance, could unduly hamper charities in these circumstances. Indeed, later on (in the 'Common issues for trustees' section at page 18), the guidance instead refers to the risk that 'the primary purpose of the charity's grant to it would be to advance the political purposes of the connected organisation'. We think consistent language, probably referring to the fact that the charity itself must only further charitable purposes and can only work with non-charitable organisations to that end, would be preferable.

#### Shared or similar names

The rationale behind this section is clear. NCVO agrees with the principle that charities need to be clear with the public and their supporters when they have a relationship with a non-charitable organisation. We therefore understand the need to provide appropriate clarification of which areas of activity are and are not charitable. However, it is important that the Commission recognises that there are many different ways to achieve this aim,

depending on the relationship between the particular charity and connected non-charitable organisation. More clarity on what is likely to be required – a clear statement on a website specifying which areas of activity are and are not carried out by a charity, for instance – would be helpful.

### **Political activity**

NCVO has some concerns about the wording of this section, which is not consistent with the language in the Charity Commission's guidance at CC9. The latter is much more supportive of campaigning as a legitimate charitable activity. The phrase 'It may be legitimate for the charity itself to undertake political activity', in particular, has much less enabling connotations than CC9, which includes the following language:

Campaigning, advocacy and political activity are all legitimate and valuable activities for charities to undertake. Many charities have strong links to their beneficiaries, and more generally to their local communities, commanding high levels of public trust and confidence, and representing a myriad of diverse causes. Because of this, they are uniquely placed to campaign and advocate on behalf of their beneficiaries.

It is important to maintain consistency in language between different pieces of Charity Commission guidance in order to avoid confusion and uncertainty for charities. In addition, we would be concerned by any change in language which made charities any more cautious about legitimate campaigning activity – especially as the Commission itself noted its experience that charities were often overcautious in this regard. Any language about political activity by charities should fully reflect the language used in CC9.

### **Conflicts of interests or loyalty**

Clearly ensuring that conflicts of interest are handled appropriately is an important part of managing the relationship with a non-charity, and guidance on this issue is therefore important.

However, the guidance approaches the issue as 'avoiding' conflicts of interest instead of 'managing' these situations. It should be recognised that conflicts of interest may arise as a natural consequence of the relationship and through no fault of the charity trustees. The key point is that they are appropriately addressed.

The notion of 'conflicts of loyalty' is also unhelpfully worded in some areas. In particular, the risk that a relationship 'has introduced a general sense of loyalty towards the non-charitable organisation that affects how well you comply with your legal duties' risks implying that a record of a successful relationship is in itself a risk. The issue is instead whether trustees continue to evaluate the continuing relationship with only the charity's best interests in mind.

The nature of the consideration given to the relationship may also vary, depending on the nature of the organisation. This is particularly true for wholly-owned subsidiaries, which may simply be trading arms whose sole purpose is to generate revenue for the charity. In this

case, clearly the same willingness to assess the relationship with only the charity’s best interests in mind is key, but the concept of a conflict of loyalty has little relevance – despite the potentially close control of the subsidiary (such as appointing the subsidiary’s board members).

### **Wholly-owned subsidiaries**

NCVO believes the emphasis in this guidance errs too much on the side of emphasising a wholly-owned subsidiary as a higher risk factor, when in reality a number of charities have wholly-owned subsidiaries precisely in order to manage risk better – ring-fencing commercial activity the revenue from which can support the charity’s primary purposes, for example, and minimising tax liabilities in line with HMRC guidance. We would prefer to see an emphasis on assessing the balance of risks from different arrangements open to charities, rather than a sole focus on the risk from having a subsidiary.

## **About the section called ‘Common issues for trustees’**

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### **How well does this section identify all the main issues that can arise?**

~~Very well~~ / Satisfactorily / ~~Poorly~~ / ~~Don’t know~~

### **How well does this section help trustees consider and address these issues?**

~~Very well~~ / Satisfactorily / ~~Poorly~~ / ~~Don’t know~~

NCVO would raise a concern about the stipulation in the section on grant-funding that a charity cannot fund the connected organisation’s general running or administrative costs. Of course the charity should ensure any such decision is solely made in the charity’s best interests, but why could it never deem it in its interests to fund such costs for a wholly-owned subsidiary whose only purpose is to support the charity?

More generally, NCVO believes the text on grant-funding should be fully consistent with the existing guidance for funding an organisation which is not a charity. The Commission could simply signpost to existing guidance, and include relevant excerpts if desired, such as the below:

A charity can grant fund the support costs of activities, services or outcomes delivered by another organisation that is not a charity, provided these are intended only to further the charity’s own purposes. The charity must not fund any costs which are outside its purposes.

An organisation that isn’t a charity is not restricted by charitable purposes or public benefit. For a charity, which is subject to these restrictions it means that it can only fund activities, services or outcomes of a non-charity that are intended to further the charity’s purposes for the public benefit.

Therefore, when making a decision to grant fund an organisation that is not a charity, you must ensure that:

- the grant is only for activities, services or outcomes that will further your charity’s purposes for the public benefit
- any funding of support costs is limited to the specified activities, services or outcomes
- the terms of the grant require the recipient to comply with these restrictions
- the grant does not give rise to more than incidental personal benefit
- you and your co-trustees can justify your decision as being in your charity’s best interests.

Where the guidance refers to a need to show how funding/support ‘is in the charity’s best interests (and not those of the non-charitable organisation)’, ‘rather than’ would be clearer than ‘and not’, to avoid any suggestion that coinciding best interests on both sides must always be avoided.

It may be helpful to refer readers to the ICO’s guidance on data sharing between organisations when referencing the broader issue at page 29.

## About the section called ‘If things go wrong’

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### How useful is this section?

~~Very useful~~ / Satisfactory / ~~Not useful~~ / ~~Don’t know~~

### How useful are the examples of how things could go wrong?

~~Very useful~~ / Satisfactory / ~~Not useful~~ / ~~Don’t know~~

NCVO would like to see more clarity on how the Commission would approach cases where there have been serious breaches of trustees’ legal duties, but where it is clear that they have made honest mistakes or can demonstrate they have acted in good faith. We would like to see general recognition that the Commission will take an approach which is proportionate to the severity of the case, but that even in serious cases, trustees’ good faith will be an important part of the overall assessment.

## About the section called ‘Applying to register a charity’

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### Does this section explain the information which we need in a helpful way?

Yes / ~~No~~

If the Commission is aware of other forms of documentation it might need, it would be preferable to list them rather than resorting to the phrase ‘examples of documentation we need to see’.

## About the additional resources

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### How helpful is the at a glance document?

~~Very helpful~~ / Helpful / ~~Not very helpful~~ / ~~Don't know~~

### How helpful is the checklist for putting the guidance into practice?

~~Very helpful~~ / Helpful / ~~Not very helpful~~ / ~~Don't know~~

Given the length of the guidance, it is definitely helpful to have a brief summary of issues to consider. Clearly it will be important to cascade changes made to the guidance into this summary.

## Examples within the guidance

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### How helpful are the examples in explaining the advice?

~~Very helpful~~ / Helpful / ~~Not very helpful~~ / ~~Don't know~~

Generally, yes, but some more borderline cases would be helpful to highlight where the Commission thinks the line might be in contentious cases.

## Overall, is the level of detail right?

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Much of this guidance is either a précis or a consolidation of guidance which exists elsewhere. While NCVO recognises the intent to bring guidance together in one place, we would suggest the Commission considers whether at least some of the sections in this document could simply signpost to existing guidance, which people will in any event have to read, perhaps with excerpts from that guidance where appropriate.

## Is the language sufficiently clear and easy to understand?

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Yes, with the caveats identified elsewhere in this response.

## **Is the purpose of each section and resource document clear enough to enable you to easily navigate and access the information you need?**

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Please see our answer to question 16.

## **Are there any gaps in the guidance?**

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The guidance refers to charities which have wholly-owned subsidiaries, but makes too little distinction between this position and charities which are themselves subsidiaries. Consideration of the position of corporate foundations would also be welcome.

## **Are there any unintended consequences of the advice in the guidance?**

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NCVO would observe that this is a long piece of guidance overall. While much of it brings together existing guidance, there is potential to cause confusion in two ways. First, the extremely broad definition of ‘connected’ relationships between charities and non-charitable organisations in this guidance could increase confusion about when the existing guidance should be followed. Second, in areas where the Commission has produced a précis of existing guidance, there is a risk of confusion about what the existing guidance actually says and perceived conflict between the different texts.

## **Additional comments**

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Although NCVO is a sector-wide body, we would note that this guidance could conflate a number of very different relationships and scenarios – trading subsidiaries, corporate foundations, charities set up by NGOs and others besides. There are therefore a number of specific issues relevant to different subgroups, which our response does not specifically address. We would expect the final guidance to reflect these specific issues and address them appropriately.