

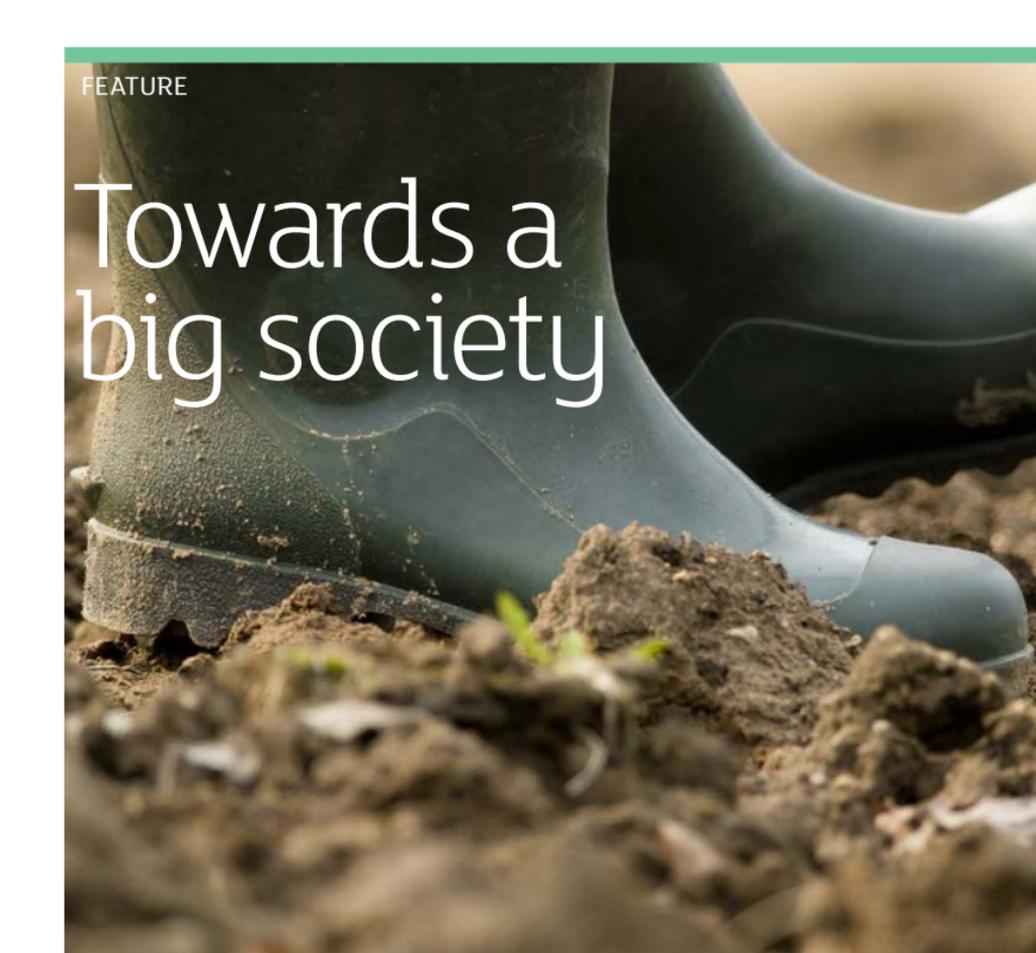
Wilson's  
Newsletter Spring 2013

Towards a big society  
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# Charity Newsletter





# Towards a big society

**U**nlike commercial organisations, charities make great use of and rely very heavily upon volunteers. Against the backdrop of the current Prime Minister's "Big Society" call for mass engagement in public life and the success of the volunteers for the 2012 Olympics, more and more people are putting themselves forward for some form of voluntary work.

It is commonly known that volunteers are not 'employees' but it is worthwhile reminding ourselves of the specific test that underpins such an important separation from main stream employment law.

There is no single statutory definition of "volunteer". The Police Act 1997 (Criminal Records) Regulations 2002 (which provides for criminal record checks) define a volunteer as:

**"a person engaged in an activity which involves spending time, unpaid (except for travel and other out of pocket expenses), doing something which aims to benefit some third party other than or in addition to a close relative."**

The Manifesto for Change and The Compact Code of Good Practice on Volunteering define volunteering as:

**"an activity that involves spending time, unpaid, doing something that aims to benefit the environment or individuals or groups other than (or in addition to) close relatives."**

The legal status of any individual is crucial as it determines the extent of any statutory employment rights they have against the organisation to which they provide their services. There are broadly three categories of protected individuals under employment law; employees (with the widest range of protection), workers (who have more limited employment rights) and thirdly, a wider class of individuals in employment who are protected from discrimination under the Equality Act 2010.

The overriding prerequisite for any of these protected individuals is that there is a legally binding contract between them and the organisation. Not surprisingly, it is therefore key to a genuine volunteer arrangement that this binding



“Charities must be careful to avoid making any form of payment that could be construed as wages”

contractual relationship is absent. Whilst, therefore, it is tempting to avoid any form of written agreement between the parties (on the simple and not unreasonable notion that the less written the less risk there is of creating a formal binding relationship), that is not the advisable way to proceed. A written volunteer agreement, provided the terms are reflected by the actual relationship, will not create a legally binding contract but represent a clear agreement as to the ‘volunteer’ status of the individual.

Volunteer agreements tend to be less legalistic, fairly short and typically include information on:

- The volunteer’s role
- Induction and training
- Supervision, support and flexibility
- Expenses
- Insurance
- Health and safety
- Confidentiality
- Leaving

The agreement should state, quite clearly, that the agreement is binding in honour only, is not intended to be a legally binding contract between the parties and

may be cancelled at any time at the discretion of either. It should also state that neither party intends any employment relationship to be created either now or at any time in the future.

One common area of dispute, which regularly comes before the Tribunals, is that of the issue of pay. As is clear from the definitions set out above, no pay can be made to the volunteer for the services they provide. For that purpose, ‘voluntary workers’ are specifically excluded from the National Minimum Wage. Genuine expenses can be reimbursed but charities must be careful to avoid making any form of payment that could be construed as wages (destroying the ‘volunteer’ status of the agreement and leading to employment rights in favour of the individual). Payment of actual expenses should be clearly identified as such, supported by receipts.

It is advisable to avoid applying your general Staff Handbook to volunteers. At most, it would be appropriate to have a separate volunteer policy document, with appropriate and short policies on areas such as health and safety, procedures for recruitment, supervision, problem solving and other relevant aspects concerning the volunteer relationship.

With the volunteer sector likely to grow in the coming years it is increasingly important for charities to ensure that the legal status of those individuals is clearly and unambiguously dealt with and that the day-to-day relationship does not stray away from the legal concept underpinning a ‘volunteer’.

# Can I cease to be a charity?

We are sometimes asked by a charity client if it can cease to be a charity. The reason for the question varies. Here are some examples:

## 1

### **The charity has given away all of its money in furtherance of its aims.**

Assuming that the charity was not permanently endowed, if it has spent all of its money and has no assets left, the charity will cease to exist if it is unincorporated. If it is a company, and is debt free, it can easily be wound up. All the trustees need to do then is to complete the Charity Commission's on-line form and the Charity Commission will then remove the charity from the Register of Charities. The trustees should retain the final accounts and a signed copy of the resolution of the members (if any) or of the trustees, resolving to wind up the charity in case these are required by the Charity Commission.

The position will not be straightforward, however, if the charity has spent its permanent endowment. Trustees would be in breach of their duties if they spent

permanent endowment funds. Permanent endowment is supposed to be invested and only the income can be expended on the charity's objects. A permanently endowed charity cannot be wound up and, in consequence, it cannot cease to be a charity. One solution may be to apply to the Charity Commission for a scheme the effect of which is to give the permanent endowment on trust to another charity which is willing to take on the legal obligation to invest it and apply the income for the objects. However, the charity does not cease to exist. Only the responsibility for administering it will change. Another solution may be to exercise the statutory power to render permanent endowment expendable and then spend it.

## 2

**The charity is wholly funded by subscriptions from its members. The members would prefer not to operate under the legal constraints imposed by the law on charities in the UK.**

The members might want the organisation to do things which cannot fall within the objects of a charity such as political activities. Where the members come from countries other than the UK, there may also be cultural reasons for objecting to regulation by the Charity Commission, OSCR and the courts. So the members want to continue to operate in the future through a non-charitable company.

In principle, a charity can cease to operate if it doesn't have any charitable funds left – see above. However, if it has a reserve of funds derived from subscriptions paid by the members, the residue cannot be transferred to the non-charitable body. The residual funds are and must remain applicable by the charity for the existing objects. Therefore, they might be spent by the trustees before winding up the charity. If this is not a practical solution, it may be necessary to apply to the Charity Commission for a scheme so that the residual funds can be administered by independent

trustees for the existing objects. This might enable the residual funds to be applied towards the operations of the new non-charitable body as long as the trustees of the residual funds ensure that they are applied by that body only for the objects.

However, it is important for the trustees and the members of the charity to understand that if they cease to have charitable status, the non-charitable organisation will no longer be eligible for the tax reliefs available to the charity and this may cause them to think again! Furthermore, any intellectual property and other property rights belonging to the charity cannot be given to the non-charitable body without compensation. For example, if the charity has its own premises (freehold or leasehold), the non-charitable body cannot occupy them without payment of rent to the trustees of the charity. Whilst the desire of the members can be satisfied, it is not a straightforward matter and there is no guarantee that the funds preserved by the scheme can be given to the non-charitable body in the future! Careful consideration should also be given to the impact of a change in status on employees.

# Cancer Care Foundation

The Charity Commission concluded its long running inquiry into Cancer Care Foundation and published a mammoth report on its findings in November 2012. The Commission had investigated the relationship between the charity and its subsidiaries (including a subsidiary called CTL which it acquired for value) as well as that of trustees and employees of those bodies. Being satisfied that there were serious concerns, the Commission appointed an Interim Manager which instigated litigation against a company called FIL which had provided fund-raising services to the subsidiaries.

The primary findings of the Charity Commission were as follows:

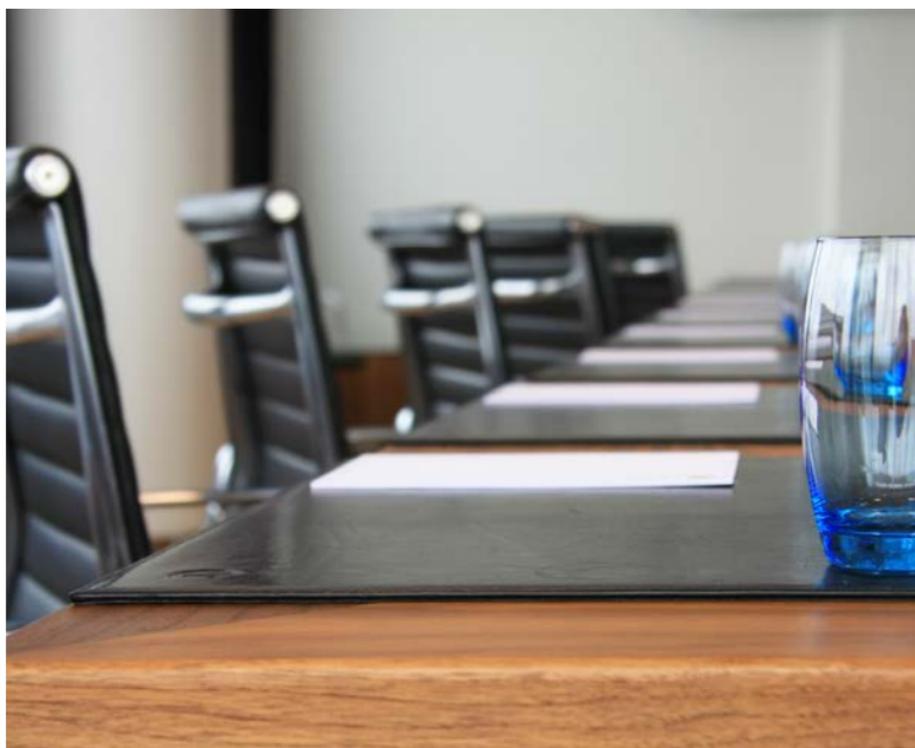
- the trustees did not act in the best interests of the charity in acquiring CTL and subsequently entering into fund-raising agreements with FIL
- CTL's relationship with FIL resulted in very high fund-raising costs being paid to FIL and the level of charitable distributions was very low
- one of the trustees of the charity was a director of CTL at the time it was acquired
- no advice was taken by the trustees about the value of CTL and whether it reflected the amount of the purchase price paid by the charity
- the charity's solicitor advised that the trustees may be in breach of trust in acquiring CTL owing to the speculative nature of the investment – the trustees did not, as advised by the solicitor, contact the Charity Commission for advice on the purchase of CTL
- there was no record in trustee meetings of any decisions being taken about the acquisition of CTL
- the managing director of CTL was

also a co-owner of FIL, the company which had entered into supposedly arms' length arrangements with CTL to conduct professional fund-raising on its behalf. This agreement was the subject of litigation. The terms of the agreement were very favourable to FIL

- during the period 2000 to 2002 CTL paid FIL £4,232,780 in administration costs and FIL paid CTL £1,425,329 for the same purpose. The charity also spent £26,207,023 on fund-raising costs. Only 1% of its income was spent on charitable distributions in 2002 and the rest was expended on fund-raising costs. Prior to the appointment of the Interim Manager, CTL never transferred any of its profits to the Charity.
- CTL became insolvent following the termination of the agreement with FIL because FIL became entitled to all fund-raising rights

Unauthorised benefits were paid out of charitable funds to three former trustees, one of whom had become the paid chief executive of the charity.

- The governing document of the charity prohibits the appointment of a trustee to a paid office. One trustee called Bryan Taylor, had resigned his trusteeship to take up the position as chief executive of the charity. It is a breach of charity law to resign as a trustee in order to be appointed as a paid officer of the charity without the consent of the Charity Commission
- Mr Taylor received £48,400 per annum from a subsidiary of the charity but it wasn't clear what he did in return for the money. He also appeared to have exclusive use of a Jaguar Sovereign XJ, 4.0 litre car.



- Two other trustees of the charity had also resigned to take up paid positions.
- The interim manager was not able to recover unlawful payments made to Mr Taylor as he had moved abroad.
- It had not been possible to establish whether funds had been raised from donors on the understanding that they would be used for the benefit of specific charities
- The charity's fund-raising literature may have led donors to believe that funds would be given to specified children's hospices with which trustees of the charity had links. However, the Commission was unable to establish whether the literature had been used

### Commentary

A primary duty of trustees is to preserve the assets of their charity. This requires trustees to act

impartially, take independent advice and ensure that they do not pay more than is necessary for services and goods supplied to their charity. It is clear from this report that the former trustees of Cancer Care Foundation were in breach of their legal duties in a number of material respects. In consequence the charity lost significant sums of money.

Conflicts of interest were rife and there didn't appear to be anyone capable of taking a disinterested stance on behalf of the charity until the interim manager was appointed.

All of this should serve to remind trustees of the benefits of keeping their governance and procedures under review to ensure that there are adequate checks and balances in place in order to prevent conflicts of interest from arising and that proper advice is obtained before they find themselves committed to contractual arrangements which are not beneficial.

## Social Value Act 2013

**T**he Public Services (Social) Act 2013 came into effect on 31 January 2013. It has been described as “an ambitious piece of legislation passed with cross-party support that aims to transform the way billions of pounds is spent in local government, Whitehall and the NHS”.

The Act obliges public authorities to take into account wider social and environmental value when they choose suppliers. If a charity can show that it can not only deliver a service efficiently, but add value by, for example, giving work opportunities to unemployed people, it may win the contract even though another supplier puts in a lower bid.

The Act applies to public service contracts with a value above the EU threshold. This threshold is £113,057 for central government and £173,934 for other public bodies.

## CIOs – what you need to know

**T**he Charity Commission has begun to accept applications to register Charitable Incorporated Organisations (CIOs). Owing to anticipated high levels of demand for this new legal structure a step plan has been produced. With effect from 1 March 2013, the Charity Commission will accept applications to register new charities. In addition unincorporated charities can incorporate as CIOs and transfer their assets to them as follows:

With effect from	Annual income
1 March 2013	> £250,000
1 May 2013	£100,000–£250,000
1 July 2013	£25,000–£100,000
1 October 2013	£5,000–£25,000
1 January 2014	<£5,000
1 January 2014 (new charities)	<£5,000

During 2014 a charitable company limited by guarantee will be able to convert to CIO status. It is not clear at this stage when and how this will be implemented as it requires Parliamentary approval of separate regulations.

In addition to a raft of regulations, the Charity Commission has produced Guidance on setting up and registering a CIO. The Commission has also prepared two useful and reasonably comprehensive precedents for the constitution of a CIO: one for a CIO without a membership and the other for a CIO with a membership. These documents can be adapted for particular organisations although there are limits on the provisions which can be adapted by reason of the precise requirements laid out in the Charities Act 2011 and the regulations made by the Charity Commission which introduced the precedents.

# What will Charities Online mean for the charities sector?



**Toby Bushill**, a director in the Deloitte Charities and Not for Profit team

**T**here is not much time for charity trustees and their fund-raising teams to gear up for Charities Online. The new system for gift aid claims goes live on 22 April 2013. It replaces the old manual form R68(i) which charities and Community Amateur Sports Clubs have used for many years to reclaim tax from HMRC.

In a welcome response to concerns over the tight timetable, HMRC have recently announced that charities may still submit postal claims in the old R68(i) format for a transitional period until the end of September 2013. But charities will still need to review their systems and gift aid procedures to prepare for these changes, otherwise they could face cash flow delays and risks of non-compliance with the tax legislation.

The good news is that HMRC expect this should mean that charities get their money sooner – the standard turnaround time for repayment claims is set to reduce from 30 to 15 days.

Whilst charities currently use a variety of R68 formats, the new system will be standardised and prescriptive. Going forward, charities will submit gift aid claims in three ways:

- 1 Using an online form. This will allow claims to be made for up to 1,000 donors at a time;
- 2 Sending a paper form by post.

A new paper form (ChR1), limited to no more than 90 donors per claim; or

- 3 Using the charity's own software. Charities with large volumes of donor records will have the option of submitting claims for directly from their own systems, using a compatible software package (developed in-house or bought from a third party provider).

A key change is that in most cases charities will need to supply the donor's address and postcode. It will still be possible to aggregate small donations (£20 or less) and sponsored events, provided individual gifts of £500 or more are pulled out separately. Under the current system, charities only have to supply the donor's name and the date and amount of the donation.

Whilst this information should already be held in the underlying gift aid paperwork, extracting the extra details accurately from files and databases is likely to present practical challenges for many charities' fund-raising teams. In some cases, donor information held on paper files may not even have been transferred onto spreadsheets. We await practical guidance from HMRC on whether charities will be expected to verify addresses – for example, where enduring gift aid declarations do not have up to date information.

Whilst the six month transitional period offers some welcome breathing space, charities which rely on gift aid to supplement their incoming resources will need to focus on adapting their systems in the coming months to cope with these changes.

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