

Ex Gratia Payments by Charities



The Charity Commission

The Charity Commission is the independent regulator of charities in England and Wales. Its aim is to provide the best possible regulation of charities in England and Wales in order to increase charities' effectiveness and public confidence and trust. Most charities must register with the Commission, although some special types of charity do not have to register. There are over 160,000 registered charities in England and Wales. In Scotland the framework is different, and the Commission does not regulate Scottish charities.

The Commission provides a wide range of advice and guidance to charities and their trustees, and can often help with problems. Registered charities with an annual income over £10,000 must provide annual information to the Commission. The Commission has wide powers to intervene in the affairs of a charity where things have gone wrong.

Contents

| | |
|---------------------------------------------------------------|---|
| What is this guidance about? | 2 |
| Meaning of words and expressions used | 2 |
| What is an ex gratia payment? | 2 |
| Other payments needing authority or advice | 3 |
| On what authority can trustees make ex gratia payments? | 3 |
| Who may apply for authority to make an ex gratia payment? | 3 |
| Ex gratia payments made out of property left in a will | 3 |
| Ex gratia payments not connected with property left in a will | 4 |
| What does a 'moral obligation' mean? | 4 |
| Method of applying to us | 5 |
| Where more than one charity is involved | 5 |
| Reference to the Attorney General | 6 |
| What happens if an application is refused? | 6 |

What is this guidance about?

1. This guidance describes the procedures which charity trustees must follow when they wish to make an ex gratia payment out of the charity's funds.

Meaning of words and expressions used

2. In this guidance:

A **payment** includes:

- the waiver by trustees of rights to money or property to which the charity is legally entitled but may not yet have received; or
- a payment of money by trustees out of the charity's existing funds; or
- a transfer of some existing charity property, other than money, by the trustees.

Trustees means **charity trustees**. Charity trustees are the people who, under the charity's governing document, are responsible for the general control and management of the administration of the charity. In the charity's governing document they may be called trustees, managing trustees, committee members, governors, or directors, or they may be referred to by some other title. The term does not include holding or custodian trustees.

The Charities Act means the **Charities Act 2011**.

Governing document means any document setting out the charity's purposes and, usually, how it is to be administered. It may be a trust deed, constitution, memorandum and articles of association, will, conveyance, Royal Charter, Scheme of the Commission or other formal document.

A **testator** (or **testatrix**) is a person who has made a will.

Must or **need to** are used to refer to actions that the trustees, or their agents or employees, have to take by law.

Where we use terms such as the trustees **should** or we **suggest, recommend** or **advise** we are referring to actions which the trustees, their agents or employees could take, and which we consider to be good practice, but which are not legal requirements.

What is an ex gratia payment?

3. "Ex gratia payment" is not a term having a precise legal meaning, but is used in this guidance as a convenient way of describing a payment made by a charity in particular circumstances. These are where:
 - the trustees believe that they are under a moral obligation to make the payment; but
 - the trustees are not under any legal obligation to make the payment; and
 - the trustees have no power under the governing document of the charity to make the payment; and
 - the trustees cannot justify the payment as being in the interests of the charity.

If trustees are unsure whether or not a particular proposed payment is an ex gratia payment, they should seek professional advice.

Other payments needing authority or advice

4. There are other payments, as well as ex gratia payments, which we may need to authorise and these are described next.
5. The first is a payment which trustees have no legal obligation or power to make, but which they believe it to be in the charity's interests to make. We can authorise such a payment by making an Order under the Charities Act provided that the trustees have been able to satisfy themselves that making the payment is expedient in the interests of the charity; in other words that benefit will accrue to the charity from making the payment.
6. 'Expedient' means something more than 'convenient' and means that there must be a definite advantage to the charity.
7. The second is where trustees are in doubt whether or not they have authority under the charity's governing document or under the general law to make a particular payment, or to take a particular action, which they have in mind. Such a doubt may arise because, for example, the powers of the trustees as described in the charity's governing document are not clearly expressed. It will often be appropriate for the trustees to seek their own professional advice.

On what authority can trustees make ex gratia payments?

8. The law requires charity trustees to apply a charity's funds and property only in furtherance of the purposes of the charity, and in ways which are laid down or permitted by the charity's governing document. Trustees are not, in general, allowed to depart from this rule of law which, at first sight, might seem to rule out the making of ex gratia payments by charities.
9. However, in a court case decided in 1969 (**In re Snowden Dec'd [1970] 1 Ch 700; [1969] 3 WLR 273; [1969] 3 All ER 208**) the judge ruled that charity trustees could make ex gratia payments in cases where it could be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment. The Court decided that they may do so provided that they first obtain the authority of the court or of the Attorney General. The Charities Act extends this principle to allow us, as well as the court and the Attorney General, to give trustees the necessary authority to make the payment. In exercising their power to authorise ex gratia payments, we are subject to the supervision of the Attorney General, and to any directions given by him.

Who may apply for authority to make an ex gratia payment?

10. The application is required to be made by the trustees of the charity entitled to the funds out of which the proposed payment is to be made, though the trustees may of course instruct their solicitor, or other adviser, to apply on their behalf. We cannot accept an application from the person who would benefit from the ex gratia payment, or from the executors of a will who are not themselves the charity trustees.

Ex gratia payments made out of property left in a will

11. The court case mentioned earlier (usually referred to simply as "**Re Snowden**") concerned gifts left to specific charities in a will, and it is in these circumstances that the question of an ex gratia payment most commonly (though not always) arises.

12. Sometimes a charity receives a larger gift than the testator really intended because of a legal technicality or an oversight on the testator's part. As a result some other person or persons will be deprived of money or property which the testator intended that person to receive.
13. Although the charity is legally entitled to keep the whole of the gift it has received, the charity trustees may conclude that they are morally obliged to make an ex gratia payment to the person out of the charity's entitlement so that he or she receives what the testator intended him or her to receive. If the trustees do wish to do this, they must obtain our authority before making the payment.
14. On the other hand, it will rarely be appropriate for trustees to make an ex gratia payment where a testator fully intended to leave his property to a charity, but where relatives feel he was not morally justified in leaving it to a charity rather than to them. The testator has a right to dispose of his property as he chooses, and the fact that the relatives are disappointed not to receive the money is not in itself a reason for trustees to feel any moral obligation towards the relatives.
15. Where the testator had made a solemn, though not a legally binding, promise to someone else an ex gratia payment by the charity may be justified if that promise was not fulfilled by the will.

Ex gratia payments not connected with property left in a will

16. Cases not connected with wills do not often arise. There is no typical case, but an example might be where a person has made a gift to a charity reasonably but mistakenly believing that his or her personal circumstances allowed for the making of a gift of that size at that time. If it later became clear that the donor had, as a consequence of his or her generosity to the charity, reduced himself to poverty, the charity trustees might feel morally obliged to make an ex gratia payment by returning all or part of the donor's gift. The same rules will apply in such a case.

What does a 'moral obligation' mean?

17. Before they contact us for authority to make an ex gratia payment to someone, trustees need to consider whether or not they have a moral obligation towards that person.
18. In **Re Snowden** mentioned above, the judge said that the power to authorise an ex gratia payment was
"... not to be exercised lightly or on slender grounds but only in cases where it can be fairly said that if the charity were an individual it would be morally wrong of him to refuse to make the payment".
19. We will apply that test in considering whether or not to authorise a payment. Trustees need to be able to convince us that there are reasonable grounds for them to believe they would be acting immorally by refusing to make the payment. Trustees should bear in mind that any money or property of the charity used to make an ex gratia payment will no longer be available for the charity's purposes. The charity's beneficiaries will thus be disadvantaged by the trustees' decision to make the ex gratia payment.
20. All applications for authority to make an ex gratia payment are to be made to us rather than to the Court or the Attorney General.

Method of applying to us

- 21.** We need firm evidence that the making of an ex gratia payment is justified. In the case of an ex gratia payment proposed to be made out of property left to a charity under a will, the trustees need to set out the facts of the case as clearly as possible and provide:
 - a copy of the will and of its probate;
 - evidence to show that the will does not dispose of the testator's estate in the manner in which he or she really intended;
 - evidence to show why the testator was prevented from giving effect to his or her real intention. It will not be enough to indicate that the testator expressed a wish to benefit someone if he or she had the opportunity to give effect to that wish but did nothing about it.
- 22.** It is important that the evidence be clear and impartial. A statement by someone who claims he or she is morally entitled to a proportion of the estate would not normally be enough on its own, because it is not impartial. Statements under oath are not normally necessary, but if the strongest evidence available can only be given by someone who has an interest in the outcome of the application, a statutory declaration may be appropriate.
- 23.** Other evidence might include:
 - statements or statutory declarations by independent persons as to the testator's true intentions;
 - statements in writing by the testator himself or herself, expressing his or her true intentions;
 - the actions of the person to whom the ex gratia payment is proposed to be made. Someone who has been promised a legacy by the testator might make commitments or take actions on the strength of this promise.
- 24.** We will ask the trustees for further information or evidence if we believe it to be necessary to enable us to come to a decision. If we decide to authorise the payment, we will give our authority by Order. The Order needs to be preserved as evidence that the ex gratia payment was made with our authority. The charity's auditor or independent examiner may also need to see it.

Where more than one charity is involved

- 25.** If a charity applies for authority on behalf of itself and another charity, or a number of other charities, the application needs to be accompanied by a written statement from the trustees of each charity. Each statement needs to confirm that the trustees are satisfied that they are under a moral obligation and explain the grounds for that belief.
- 26.** A separate statement from each charity is required even if each statement refers to the application submitted by the principal charity and adopts the reasons set out in that charity's own statement or letter.

Reference to the Attorney General

- 27.** We will refer an application for authority to make an ex gratia payment to the Attorney General if:
- directions given to us by the Attorney General preclude us from authorising the payment ourselves; or
 - we consider that it is desirable that the particular application should be dealt with by the Attorney General rather than by us. This may be the case if the application raises a particular point of principle or practice upon which we need the Attorney General's guidance.

What happens if an application is refused?

- 28.** If we refuse to make an Order, the charity asking for it may make a fresh application directly to the Attorney General who may permit the payment or refuse to do so.
- 29.** An application to the Court for approval cannot be made without an Order of the Commission because such an application would constitute 'charity proceedings' within the meaning of the Charities Act. If we refuse to make an Order an application may be made to the Court for such an Order.

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