

Research by Higher Education Institutions



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 trust and confidence. Most charities must register with the Commission, although some special types of charity do not have to register. There are some 190,000 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 of 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.

More information about the Commission together with a range of guidance for charities can be found on our website www.charitycommission.gov.uk, or by contacting Charity Commission Direct:

Telephone: **0845 300 0218**

Typetalk: **0845 300 0219**

By post: **Charity Commission Direct**
PO Box 1227
Liverpool
L69 3UG

Contents

A. Introduction	2
B. Summary	5
C. HEIs and charitable activity	7
D. Research and public benefit	12
E. Research as a non-charitable fundraising activity	15
G. Further information and advice	16

A

Introduction

A1. What is this guidance about?

Universities and other Higher Education Institutions (HEIs) have always been recognised as charities under the law of England and Wales. Whilst charitable status confers certain benefits (such as entitlement to tax reliefs – see http://www.hmrc.gov.uk/charities/guidance-notes/annex1/annex_i.htm), charities are limited in what they can do. Their activities are constrained by the requirement to further the charitable aims of their governing document for the public benefit.

HEIs and similar charitable bodies have a long history of working at the forefront of advancing learning and education. Research has always been an essential way of furthering these purposes. This guidance explains when undertaking research will be in furtherance of a main charitable aim. Research in furtherance of a main charitable aim is distinct from ‘non-charitable’ research (including research undertaken to raise funds or other resources for application for the aims of the HEI or research body).

This guidance has been written particularly for charity trustees of HEIs, staff at HEIs involved in arranging or managing research, commercial organisations that fund research at HEIs, and government departments involved in funding or regulating the activities of HEIs. It explains in particular:

- how the requirements of charitable status and public benefit affect HEI research;
- when research will, and will not, be charitable;
- what are private benefits, and when they are acceptable in furtherance of a main charitable aim;
- how HEIs can benefit from non-charitable research; and
- where to find further guidance.

In particular, this guidance should be read alongside *Charities and Public Benefit* (the Charity Commission’s general guidance on public benefit) and our supplementary guidance on *Public Benefit and the Advancement of Education* and *Public Benefit and Fee Charging*. (You can download this guidance at <http://www.charitycommission.gov.uk/publicbenefit/default.asp>.)

Research carried out by HEIs may, depending on the circumstances, constitute a trading activity. Where the existence of research trading is established, it is regarded by HMRC as part of a single trade for tax purposes comprising all the HEI’s trading activities. Where trading is undertaken as part of actually carrying out the main charitable aims specified in the governing document, then charities may trade on a substantial and continuing basis. Such trading is described as ‘primary purpose trading’ for tax purposes.

Charities are also, subject to qualifications, allowed to trade in order to boost resources for application for their aims. This latter (fundraising) trading is not exempt from tax. It can be undertaken in certain conditions directly by a charity, but is much more likely to be undertaken by a separate trading arm which will gift-aid its profits to the charity. Charities themselves cannot undertake substantial ongoing non-charitable trading. For further guidance on trading see our guidance *Trustees, Trading and Tax* (CC35).

Not all research is charitable (in the sense of being undertaken in the course of actually carrying out the main charitable aim); in particular not all research is carried out for the public benefit. Even where research is carried out for the public benefit, some private benefits (e.g. benefits to private or commercial companies) may result. In order for the research to remain charitable, any non-charitable benefits must be incidental. This is explained in part D of this guidance.

Government has recognised the potential of HEIs to benefit United Kingdom industry and commerce and the wider economy through research, particularly research conducted in collaboration with commercial companies. There are financial incentives for HEIs to enter into the kinds of collaborative activities that government is encouraging. HEIs must act solely in furtherance of their own charitable objects (see part C1 of this guidance). They must operate in ways that are consistent with these charitable objects and powers. There is no reason why the requirements of charity law and government policy should be mutually exclusive. But decisions must be taken by those responsible for the administration of charities solely by reference to the requirements of their governing document.

A2. Scope of this guidance

This guidance applies to universities and other HEIs in England and Wales. There are different charity law frameworks in Scotland and Northern Ireland (although the tax position in Scotland and Northern Ireland is the same as in England and Wales). The charity regulators in those countries may produce their own guidance on this subject in due course.

This guidance considers issues in relation to HEIs, the use of their assets and the furtherance of their charitable aims. It is important to bear this in mind when considering the relationship between a charity and a commercial entity whose objectives in undertaking research will of course be to obtain non-charitable private benefits. What the Commission, as charity regulator, will look at is not the overall purpose of a research agreement (which may well have a commercial side to it) but the purpose and scope of the university's participation in that research agreement.

This guidance was written by the Charity Commission in consultation with the Higher Education Tax Forum, whose members include the Higher Education Funding Council for England (HEFCE), HM Revenue and Customs, and Higher Education umbrella bodies (for further information, see section F). HEFCE has confirmed that, in its role as principal regulator (see below), it would take the same approach to the issues discussed in this guidance.

A3. Previous Charity Commission guidance

This guidance repeats and replaces previous informal guidance, issued by the Commission and widely circulated since 2004, outlining the legal principles relating to research or exploiting the results of research undertaken by research institutions (letter from Kenneth Dibble, [then] Director of Legal Services, dated 25 May 2004).

A4. 'Must' and 'should': what we mean

In this guidance where we use '**must**' we mean it is a specific legal or regulatory requirement affecting trustees or a charity. Trustees must comply with these requirements. To help you easily identify those sections that contain a legal or regulatory requirement, we have used the **L** symbol next to that section.

We use '**should**' for items we regard as minimum good practice but for which there is no specific legal requirement. Trustees should follow the good practice guidance unless there is a good reason not to.

A5. Some technical terms used

The following terms are used throughout this booklet and should be interpreted as having the specific meanings given below:

The Charities Act: the Charities Act 1993 as amended by the Charities Act 2006.

Aims: in this guidance we use this term to mean the purposes of an individual organisation. It is important to be able to distinguish clearly between an individual organisation's purposes and charitable purposes in general. We have therefore used the term 'aims' as shorthand for the purposes of an individual charity or organisation applying for registration as a charity.

Governing document: a legal document setting out how a charity is to be administered. It may be a trust deed, constitution, memorandum and articles of association, will, conveyance, Royal Charter, Scheme of the Charity Commission, or other formal document. In the case of a HEI, this document could be (for example) a Charter, Act(s) of Parliament or an Instrument and Articles of Government.

Higher Education Institution (HEI) means a university or college of higher education. For further explanation of these terms see the glossary on HEFCE's website at: <http://www.hefce.ac.uk/aboutus/glossary/glossary.htm#h>

Intellectual Property Rights (IPR) are legal rights over new discoveries or inventions, for example, patents, trademarks copyright, design right.

Objects: an organisation's aims (or purposes) are usually expressed in the 'objects clause' of its governing document. However, not all

charities have a governing document with an objects clause, and sometimes the objects clause does not adequately or fully express the organisation's aims (in which case they need to be ascertained from other existing admissible evidence). There is therefore a distinction between an organisation's aims and the words that appear in its objects clause.

Private benefit(s): in this guidance we have used the term 'private benefits' to mean any benefits that a person or organisation receives other than as a beneficiary of a charity. It does not, therefore, include the sorts of personal benefits people might receive as a beneficiary, such as receiving an education, or medical treatment, or a charitable grant for example.

Purpose(s) and charitable purpose(s): in this guidance we use the term 'purposes' when referring to the descriptions of purposes listed in the Charities Act. These describe broad areas of potentially charitable activity but there is no automatic presumption that an organisation with a stated aim or object that falls within one of the descriptions of purposes is charitable. To be a 'charitable purpose' it must be for the public benefit. This has to be demonstrated in each case.

Trustees means charity trustees - the people who serve on the governing body of a charity. They may be known as trustees, directors, board members, governors or committee members. Charity trustees are responsible for the general control and management of the administration of a charity.

B1. In summary, what does the law require?

L

Charities must exist for exclusively charitable aims for the public benefit as defined by charity law in England and Wales. The aims of individual charities are found in their governing documents.

HEIs must only carry out activities that are in furtherance of the charitable objects indicated in their governing documents and consistent with their constitutional and legal powers. Such activities, as noted above, include research. In this connection, HEI research can be something which advances education, or which advances knowledge across a range of academic subjects. The leading court decisions on charitable research¹ establish that research will normally qualify as charitable only if:

- the subject matter of the proposed research is a useful subject of study;
- it is intended that knowledge acquired as a result will be disseminated to others; and
- the research is conducted for the benefit of the public or a section of the public (as explained in *Charities and Public Benefit*).

Any private (non-charitable) benefit must be legitimately incidental to the achievement of a HEI's charitable aims for the public benefit. (This is explained in section D of this guidance.)

There cannot be an automatic presumption either of public benefit or that private benefit is incidental.

Any non-charitable research (or non-charitable exploitation of research, for example spin-outs) must be carried out in accordance with the rules and guidelines on non-charitable trading (as

explained in sections C6 and E of this guidance). Whether research carried out by arrangement with a commercial partner is charitable will depend on the particular arrangements in place (as explained in section C.)

B2. Are these new requirements under the Charities Act 2006?

Not really. The main change under the 2006 Act was that it removed a presumption that the advancement of education was for the public benefit. All charities must now demonstrate that they exist and operate for the public benefit. Charity trustees must also consider statutory guidance on public benefit published by the Commission when exercising any powers or duties to which it is relevant.

It has always been the case, however, that educational charities had to be able to demonstrate that their research was charitable, and the principles of what makes research charitable were established by the courts many years ago. If HEIs and research bodies were operating in accordance with the law and in furtherance of their aims for the public benefit before the 2006 Act, then (if still operating in the same way) they will fulfill current legal requirements.

Another significant factor is that, prior to the implementation of the 2006 Act, no authority was directly responsible for regulating Universities' and Higher Education Corporations' compliance with charity law. Under the 2006 Act, HEFCE will become the principal regulator for most HEIs in England. HEIs in Wales, and the autonomous colleges and halls of the Universities of Oxford, Cambridge and Durham will be regulated by, and required to register with, the Commission.

¹ Re Hopkins' Will Trusts [1965] Ch 669 and Re Besterman's Will Trusts (see [1982] Ch 327, 352-3)

B3. What are HEIs expected to do in order to meet these requirements?

The trustees of an HEI retain overall responsibility for ensuring that research conducted by their charity meets the requirements. They must fulfill their duties in the same way as any other charity trustees, exercising reasonable diligence and care, and acting in good faith, having properly informed themselves and taken account of all relevant factors before making any decision. (See sections D3-D4 of this guidance.)

Where authority for taking decisions about research is delegated, there should be a proper framework of policies and procedures for decision making in place, to ensure that contracts for research will only be authorised if the legal requirements for charitable research are met and the terms are reasonable and in the charity's interests, in relation to the circumstances that can be known to the charity at the time. (See sections D4-D5 of this guidance.)



HEIs and charitable activity

C1. What are the charitable aims of a HEI?



HEIs tend to have broad aims (for example, the promotion of arts sciences and learning). The advancement of education and learning generally are well established purposes that are capable of being charitable. The aims of HEIs may fall within more than one of the new descriptions of charitable purposes set out in the Charities Act 2006. HEIs do not all have identical objects, and each HEI should review its activities against its own objects. HEIs' individual governing documents will either expressly set out their objects or, together with other admissible evidence, provide the details of what the aims are. For example, if a university's charter does not have an objects clause which clearly sets out its aims, then evidence of usage over many years may identify an aim to promote education and learning for the public benefit.

HEIs may typically see their mission as to contribute to society through the pursuit of education, learning, and research at the highest levels of excellence. They strive for quality and depth of provision across all subjects and a close inter-relationship between teaching, scholarship, and research combined with strong support for individual researchers as well as research groups. They seek to relate to wider society by various means, including the contribution which the HEI can make to society through the pursuit, dissemination, and application of knowledge. So they will seek to develop opportunities for innovative collaboration with businesses, charitable foundations, and public sector bodies.

It is essential that a charity's mission continues to follow its objects. Where this fails to happen, it is often described as mission drift, and can result in charities engaging in activities that are outside their charitable aims, which is a breach of trust. Sometimes this can be rectified by updating the objects of the charity (where this is possible and appropriate in the circumstances). Otherwise the activity must stop or, if appropriate, be undertaken by a non-charitable trading subsidiary of the charity.

C2. When is research a valid charitable activity?



Research is not, in itself, a charitable aim or activity. To be charitable, research carried out or funded by a charity must both fall within its aims and powers and be carried out for the public benefit. It follows that the research must fulfil each of the criteria set out below:

- *Research must be in a subject, or be directed towards establishing an outcome, which is of value and calculated to promote in a meaningful and direct way the particular charitable aims indicated in the body's objects (typically to advance or enhance knowledge and understanding in an area which education may cover for the public benefit).*

Research into a subject may be of public benefit whether or not it is directed at testing a particular hypothesis and (if it is so directed) regardless of whether any particular hypothesis which the research sets out to test is proved valid or invalid. In any case knowledge and understanding should be advanced or enhanced.

- *Research must be undertaken with the intention that the useful knowledge acquired from the research will be disseminated (and so advance the particular charitable aims) to the public and others able to utilise or benefit from it.*

Any research which results in useful knowledge must be disseminated. This includes making the knowledge available or otherwise accessible. In some circumstances, particularly where the charitable aims go beyond the advancement of education, knowledge acquired as a result of research can be 'disseminated' through the practical application of the research results where this is done for the public benefit. This applies equally to research results whose value is immediately apparent and may be of practical application, and to research results which simply add to the store of useful knowledge and which may be developed further by subsequent research.

- *Research must be justified and undertaken for the public benefit and not solely or mainly for self-interest or for private or commercial consumption.*

Public benefit may arise from research in a variety of ways. In many cases, the dissemination of the useful knowledge gained will constitute adequate public benefit.

We recognise that, in most cases, HEIs will only want to undertake research that is in a useful subject of study and where it is intended that the findings will be disseminated; otherwise the research would be of limited value or merit and would be incapable of furthering the HEI's aims and mission.

C3. Can research involving a commercial partner or funder ever be charitable?

The fact that research is carried out in collaboration or by arrangement with a commercial organisation does not, in itself, determine whether or not the research is charitable. What will be significant is the impact of that relationship on the three key principles highlighted in section B1 (and C2) of this guidance.

Charitable research may be undertaken in collaboration or by arrangement with non-charitable sponsors or partners. These arrangements may take the form of sponsored collaborations, contract research, or joint ventures.

The main potential areas of difficulty with research involving a commercial partner are dissemination and public benefit. For example, the commercial entity may wish to restrict dissemination, or may wish to own IPR, in order to gain a commercial advantage. This will be a particular issue with contract research where the HEI is being paid to carry out a specific piece of research by a commercial company, which the commercial company will want to benefit from. In many cases it may not, therefore, be possible for such research to be charitable.

Charities can contribute resources to a collaborative project whose scope is wider than the charity's own objects, provided that the charity's resources are only used within the project on research which falls within the charity's aims, and safeguards are put in place to ensure that the charity's contribution is used appropriately.

C4. What else should charities consider if undertaking research for, or in partnership with, Government or political parties?

Trustees of educational research charities that work closely with Government or political parties should pay particular attention to the inherent risks associated with the nature of the work they undertake. Charities cannot be involved in directly promoting government policy for political advantage, or the policies of a particular political party, or be involved in party politics in any way. They must ensure the political neutrality of the work they do. This means that a charity cannot champion or otherwise support the Government or one political party and/or discredit another. It may express support for particular policies which will contribute to the delivery of its own charitable purposes as long as the charity's independence is maintained, and perceptions of its independence are not adversely affected.

C5. What would constitute sufficient dissemination of research findings?

Useful knowledge gained from research must be made available to the public. A broad view is to be taken in determining what research results are useful and what amounts to adequate dissemination. The HEI's approach to dissemination should be justifiable in the circumstances.

Useful results may be described as those that increase knowledge and understanding or produce other outcomes for the public benefit whether or not these are of immediate practical application.

The obligation to disseminate and make publicly available the useful results of research may be met by trustees in a variety of ways. One obvious way is through teaching. In many cases it will be through formal publication of papers in academic journals or the issuing of other published material covering the research and its results, such as books, booklets, magazine articles, papers or sundry notes. Such material may be produced in electronic form. Where the results of research may be of limited interest, this obligation can be discharged through ensuring that public access is given to the material. It is acceptable to restrict access to HEIs and other educational research establishments for persons who have sufficient reason to study the material concerned. However, in such cases, material should be catalogued and its existence made publicly known.

Where the results are of financial value, there is no objection in principle to the HEI charging for access, for example by selling publications. Charities may charge for the services or facilities they provide. They may also charge fees that more than cover the cost of those services or facilities, provided that the charges are reasonable and necessary in order to carry out the charity's aims, for example in maintaining or developing its activities. However, where, in practice, the charging restricts the benefits to only those who can afford to pay the fees charged, this may result in the benefits not being available to a sufficient section of the public. In the case of access to research findings, a level of charging that had the effect of restricting dissemination could call into question whether the activity was in furtherance of the charity's aims or for the public benefit.

In any case where charging cannot be justified in furtherance of the charity's aims, and there is a degree of permanence to this activity or it generates a significant profit, this may constitute a non-charitable trade. In those cases, the activity would best be handled through a non-charitable trading subsidiary (as explained in section E).

Finally, where the results of research work produce IPR which are protected through registration, the HEI may take the view in certain circumstances that the act of registration in itself amounts to both adequate and appropriate dissemination. Also, the application or exploitation of those rights (for example, where this led to new medical treatments) could, depending on the charity's objects, constitute adequate public benefit in itself.

Dissemination in the case of commercial sponsorship, contract research and joint ventures:

Charitable research may be undertaken in collaboration or by arrangement with non-charitable sponsors or partners. These arrangements may take the form of sponsored collaborations, contract research, or joint ventures. For such work to be regarded as a charitable activity, the conditions above must be complied with, including the provision of public benefit in the form of dissemination through publication or the use of the results in furtherance of the aims of the charity.

Sponsored Collaborations: Sponsored collaborations are research programmes agreed between an HEI and a commercial (for example, pharmaceutical) company. An agreement will set out the research programme and define any sharing of work and responsibilities. It will also deal with the allocation of funding and resources; the ownership, protection and exploitation of IPR which arise; and the publication or application of the useful results.

To be justified as a charitable activity, the charity will need to agree on the public dissemination of the results within the appropriate academic timeframe, normally within six months of the research being completed or the outcomes of value occurring; the longer any delay in publication beyond the normal academic timetable, the greater the burden of proof on the charity to show that the delay is reasonable. It is understood that, in the case of collaborations sponsored by commercial partners, there may be continuing contact throughout the life of the project between the academic researcher and the sponsor and also

routine delays to publication (within the appropriate academic time-frame) which involve giving a non-charitable commercial research partner further pre-publication access to research findings. Pre-publication access to research findings is a non-charitable private benefit (unless given to another charity). Such private benefit enjoyed by a sponsor would have to be justified alongside the other benefits being given to the sponsor by the charity under the contract. This must be on the ground that it is legitimately incidental to action properly taken by the charity trustees in the interests of the charity for the public benefit, i.e. necessary, reasonable and in the interests of the HEI in the circumstances as set out in sections D2-D4 of this guidance.

Public dissemination may be achieved either through publication of the results (which may take the form of filing of patents) or through the development and application of the research results for the public benefit. This may take the form of arrangements for the use of the material for further research work by the charity or others, or the exploitation of the research product by licensing or other arrangements which may lead to the application of the results for the public benefit and a financial return for the charity. Of course, public benefit issues will arise in the unusual case where dissemination of the useful knowledge acquired from the research involves an exclusive licence held by a commercial or non-charitable partner (which precludes publication or further use by the charity). The HEI will need to be in a position to show that any non-charitable benefits flowing from its agreeing to or participating in such arrangements are legitimately incidental (see D2) to the achievement of its charitable aims for the public benefit.

Contract Research: Contract research is where a commercial company or non-charitable body asks a charity to test or evaluate a piece of work, or proposals, or propositions in relation to an item of research. This work is therefore

essentially carried out by the charity for the benefit of the contracting body under an agreed programme. The charity will use its research facilities and other resources in carrying out the work under a written agreement.

To be justified as a charitable activity, the charity will need to secure the public dissemination of the results of research within a reasonable time frame (as explained above) after the research is completed or after the outcomes of value occur. Where this is not possible, charities should not be directly involved in contract research as a charitable activity unless they demonstrably have a particular research interest in the work to be undertaken. This must be either an interest in the specific work carried out because of related work the charity actually undertakes or funds, or in the acquisition of more general knowledge or other benefit to the current fundamental research interests of the charity. This may arise where the charity is interested in a complementary area including relevant research processes. In such cases research may still be justified as a charitable activity. Adequate financial benefit to the charity must of course be realised under the arrangements.

C6. What about research activity that is not charitable?

If not justified as a charitable activity, contract research and/or related exploitation may be carried out to raise funds:

Spin-outs: Spin-outs normally involve setting up a new (non-charitable) company to develop and perhaps exploit discoveries (normally protected by IPR) which are thought to have significant potential value in public benefit and financial terms. The company may be wholly owned by the charity or it may be jointly owned by the charity, the principal researcher(s) and a (usually) commercial body. The purpose of setting up these companies is to develop fundamental discoveries for wider exploitation.

The use of charitable resources in supporting spin-outs can only be justified if there is a reasonable prospect of the venture leading to wider public benefit or if the use of the charity's resources can be viewed as a prudent investment. Sometimes there may be a combination of these factors. Where the company is not wholly owned by the charity, trustees must ensure that, unless the charity's involvement is authorised and justified as an investment, it is justified as furthering its charitable work, and that any private benefit to the participants is incidental to furthering the charity's aims. The trustees must also ensure that the charity's interests are properly secured.

Non-Charitable Research: Research cannot be regarded as a charitable activity if its results are not disseminated either through publication or further application, or if their dissemination is so limited that there is no public benefit. The use of a charity's resources in these circumstances can only be justified on the grounds that it is an activity to raise funds. This is explained in part E of this guidance.

C7. Must HEIs retain ownership or control of IPR?

Charitable research may or may not produce results which can be exploited, either financially or in furtherance of the charity's aims. In the same way as for other property belonging to a charity, trustees have a duty to take reasonable steps to protect the charity's interest in any IPR and either ensure their use to further the charity's aims or maximise the return that the charity receives from them.

If, in the course of research carried out on its own account or commissioned and for its benefit, a charity produces inventions that are capable of protection as IPR, it is under a duty to secure the protection of such IPR, either through the registration of a patent or in such other ways as might be appropriate in the circumstances. The charity may consider in a particular case that another form of dissemination is a more appropriate way of achieving public benefit.

Where a charity is carrying out charitable research on behalf of a non-charitable body by collaborative sponsorship, contract research or under a spin-out, then it should normally share in any return on the exploitation of the research IPR. We recognise that shared ownership may be problematic in some cases. At the very least, in all cases, charities should ensure that they can exercise an appropriate degree of legal control over the use of IPR and receive a proper share in any benefits arising from such use, even if the practicalities of the ownership and exploitation of IPR in the case are such that IPR must be held by someone else.

Where IPR is owned by a charity but not currently required to be applied for its aims, IPR of financial value should normally be exploited for the benefit of the charity. This may be done by selling or licensing IPR or under other arrangements. Whether such exploitation constitutes a trading activity will depend on the circumstances; for example, an activity that is regular, organised and actively managed in a commercial manner is likely to constitute a trade.

Where the exploitation amounts to trading, this should be undertaken through an agreement with a commercial company or through a non-charitable trading subsidiary of the charity. The IPR can normally only be made available to the company (either by way of transfer or licence) for a proper market consideration. This would not apply where the trustees are satisfied that the use of the IPR by the non-charitable company is an application in furtherance of the aims of the charity for the public benefit and such use is enforceable under an agreement between the two parties.

In circumstances where the IPR could be used to further the aims of the charity, the charity is not required to charge full value (or exceptionally any value) provided that the use of the IPR to further charitable purposes falls within the aims and powers of the charity and any private benefit is incidental.

D

Research and public benefit

D1. What are public and private benefits?

L

Public benefit is the legal requirement that every organisation set up for one or more charitable aims must be able to demonstrate that its aims are for the public benefit if it is to be recognised and (if applicable) registered as a charity in England and Wales. This is known as the 'public benefit requirement'.

Public benefit is assessed in the light of contemporary social and economic conditions and generally accepted informed views. The benefit must be identifiable and related to the charity's aims (and balanced against any detriment or harm). It must essentially be a *public* benefit, with beneficiaries appropriate to the aims and not unreasonably restricted or excluding those in poverty from the opportunity to benefit. And any private benefits (as explained at A5) must be incidental.

It is possible for research to be undertaken in conjunction with a commercial sponsor or as part of a joint venture between the HEI and some commercial entity.

In such a case, if the research is to be undertaken in furtherance of educational (or other charitable) aims for the public benefit, then:

- there must be appropriate arrangements in place making provision for:
 - dissemination of the useful results of research within a reasonable time (as explained at C5); and
 - the protection of any IPR the charity has established;
- it must be clear that any private benefits accruing to individuals or non-charitable or commercial entities are incidental to the delivery of the public charitable benefit, on the basis of information available to the charity at the time.

The fact that every charity's main aims must be exclusively charitable does not mean that the sole effect of the activities of the body must be

to promote charitable aims. It *does* mean that any benefits to individuals of a non-charitable character, which result from its activities, must be of a subsidiary or incidental nature. There is a distinction between a private benefit which is a substantial part of the aim (i.e. an end in itself, which is not legitimate for a charity), and one which is given or promoted only with a view to carrying out a main charitable aim (which may be given by a charity). This involves a question of degree, which will need to be considered in the circumstances of each case.

D2. When is private benefit legitimately incidental?

L

For a private benefit to be incidental, the trustees must be satisfied, and must be able to demonstrate, that it was **necessary** (either in furthering the charity's objects or as a consequence of doing so), **reasonable** (in relative amount) and **in the interests of the charity**, in the circumstances.

It is not possible to provide definitive guidance on what is incidental to furthering a charity's objects, because it will depend on the circumstances. For example, it does not automatically mean 'small' or 'insignificant' in absolute terms, because in a multi-million pound contract, actual amounts or financial values might seem quite large. It may well be legitimate for some individuals or businesses to make a significant return, should that be dictated by market conditions and the relevant circumstances of the case, in order to achieve the intended public benefit result.

Private benefits will be incidental if it can be shown that they directly contribute towards achieving the charity's aims and/or are a necessary result or by-product of carrying out those aims.

In general, a private benefit is a necessary result, or by-product, of carrying out a charity's aims if:

- it follows from some action that is taken, and is only taken, with the intention of, furthering the charity's aims; and

- the amount of private benefit is reasonable in the circumstances (based on what the charity could have reasonably known at the time).

If a private benefit does not meet these conditions, then it will be a non-charitable aim in its own right, and not incidental. It would be a breach of trust if the trustees decided to carry out activities that resulted in these benefits.

D3. How should trustees approach decisions about undertaking or funding research and related private benefit issues?

L

In deciding whether or not to undertake research, charity trustees must discharge their duty to their charity with a reasonable degree of diligence. They must ensure that any decision that they take regarding the undertaking of research is legally sound and, if later challenged, can be justified.

They must be clear that promoting the particular research in question falls within the aims of the charity (which includes ensuring that the research is for the public benefit) and within their powers as charity trustees. That is a matter of making the connection between carrying out the charity's aims within the trustees' powers in the governing document on the one hand and the objectives and anticipated outcomes of the research (as at the time of their decision) on the other.

Furthermore, their decision must be a proper exercise of their discretion as charity trustees. It follows that trustees should seek to ensure that the research effectively furthers the charity's aims (and its conduct is well-managed and cost-effective, and proposals and results are properly evaluated to ensure quality).

The trustees must act in good faith. They must adequately inform themselves (from information that could reasonably be known at the time) in order to make the decision, and take into account all relevant factors. They must disregard any irrelevant factors (see D4, below).

Their decision must be within the range of reasonable decisions that a reasonable trustee body could have made.

The trustees must also take steps to manage any conflicts of interest that arise. A conflict of interest is any situation where a trustee's personal interests, or interests that they owe to another body, may (or may appear to) influence or affect the trustee's decision making. Trustees should refer to the Commission's *Guide to conflicts of interest for charity trustees*, available from our website.

Within those parameters, the decision is a matter for the charity trustees and there are only limited grounds upon which it could be challenged by anyone else. The decision will be judged by reference to the circumstances that could reasonably have been known at the time the decision was made.

Trustees may exercise their powers to delegate decisions about individual contracts or research proposals. They remain responsible for ensuring that proper decisions are made.

D4. How should trustees go about evaluating whether factors are relevant or irrelevant to their decision making?

The trustees (or those individuals to whom they have properly delegated the decision) have a duty as part of prudent decision making to adequately inform themselves before making the decision, and not to take into account irrelevant factors.

Whether a factor is relevant or not will be a matter of judgement in the circumstances. The considerations may be many and complex. The charity's objects and powers will virtually always be the overriding considerations. Other relevant considerations may include establishing good relations with government and other (commercial) funders and research partners.

D5. How would the Commission assess whether private benefit is legitimately incidental?

The Commission would not normally wish to go back after the event and look into the circumstances of a particular contract. We would generally only do so if there was good reason to believe that the trustees might have failed in some way to discharge their duties to the charity.

We recognise that it can be very difficult to identify before the event exactly what level of benefit a HEI's research partner might receive as a result of a charitable research contract. Charities cannot know, for example, commercial information that is available to the commercial entity (for example, business plans or market research). If a commercial entity received a benefit (for example, through the exploitation of IPR) that was of greater value than was reasonably anticipated at the time the contract was agreed, we would not consider that in itself to be evidence that the benefit was not incidental.

We would seek confirmation, with evidence as necessary, that:

- the trustees had put in place a robust process for the authorisation of contracts under which either they personally (or properly selected delegates appointed under powers available to the trustees) examined the details of the particular contracts, taking further proper professional advice as needed;
- the process was designed to ensure that contracts were only authorised if:

- the research was in an area which furthered the aims of the charity;
- the research was for the public benefit (with any private benefit being incidental);
- the terms agreed by the charity were reasonable in relation to the circumstances that could be known by the charity at the time; and
- the charity's interests were protected.
- there were adequate records of the decision making process, in particular recording any exceptions to the HEI's normal pricing policy or terms and conditions;
- there was appropriate supervision and training of the charity's staff involved in authorising contracts.

Unless it could be shown that:

- the charity trustees acted outside the charity's objects and powers, or
- in taking a decision apparently within those objects and powers, in fact they took into account factors which were irrelevant, improper or irrational, or
- the trustees failed to properly manage a conflict of interest, or
- their decision is one which no reasonable body of charity trustees properly directing itself could have taken;

then it is difficult to see what reason there might be for the Commission to intervene.

E1. How can charities carry out non-charitable trading for profit?

L

Trustees may promote research which is not directly undertaken as part of the actual execution of the objects, but which furthers its aims in a more indirect way (such as conducting private research for a fee as a means of generating additional income for the charity). The considerations they need to bear in mind are outlined in *Charities and Fundraising* (CC20) and *Trustees, Trading and Tax* (CC35). There must be a prudent decision to undertake the fundraising activity (i.e. a fully informed decision based on the sole consideration of the charity's best interests). Significant or substantial research for fundraising purposes should normally be channelled through a separate non-charitable trading company. The proceeds of such activity will not be, or fully be, eligible for tax exemptions (see <http://www.hmrc.gov.uk/charities/guidance-notes/annex4/sectiona.htm>), but the trading subsidiary may

be able to make use of Gift Aid to reduce or eliminate its Corporation Tax liability, for the benefit of its parent charity.

A charity cannot establish or financially support a non-charitable company as a vehicle for carrying out non-charitable research unless:

- the charity has power to incorporate such a company and sufficient powers of investment to invest in it, and
- such investment or support is considered to be prudent in the interests of the charity.

Otherwise this would be an application of charitable resources for a non-charitable aim.

Any research resource of the charity could only be made available to such a company at a proper market value and under a formal arms-length arrangement. However, the charity should not agree to make research resources available even on this basis if doing so would undermine or unduly prejudice a continuing charitable work of the charity.

F

Further information and advice

The Charity Commission

The Commission produces a wide range of publications and online guidance giving information and advice to charities and the general public on a number of issues relating to charity law and regulation. The full list of publications is on our website.

Charity Commission Direct
PO Box 1227
Liverpool
L69 3UG
Tel: 0845 300 0218
Minicom: 0845 300 0219
Website: www.charitycommission.gov.uk

The Higher Education Taxation Forum

The Higher Education Taxation Forum provides a mechanism to bring together HM Revenue and Customs, other government departments and other public bodies with an interest in higher education and representatives of universities and colleges to address and seek solutions to key taxation issues that impact on higher education.

The Forum will seek to identify the issues and ensure these are addressed through its membership.

Current member organisations of the Forum:

- Higher Education Funding Council for England
- Association of Heads of University Administration
- Association of Research Managers and Administrators
- U N I C O
- Association of University Research and Industry Links
- British Universities Finance Directors Group
- Charity Commission

- Confederation of British Industry
- Department for Business, Enterprise and Regulatory Reform
- Department for Innovation, Universities and Skills
- HM Revenue and Customs (direct tax)
- HM Revenue and Customs (indirect tax)
- HM Revenue and Customs (Public Bodies Group)
- HM Revenue and Customs (CT and VAT)
- HM Treasury
- UK Intellectual Property Office
- Research Councils UK
- Universities UK
- Office of the Scottish Charity Regulator (observer)

For further information about the Forum, please contact:

Ian Lewis
HEFCE
Northavon House
Coldharbour Lane
Bristol BS16 1QD
tel 0117 931 7336
email: i.lewis@hefce.ac.uk

British Universities Finance Directors Group (BUFDG)

BUFDG is the representative body for finance directors in UK higher education. We:

- provide a strategic financial perspective on higher education activities
- collect, analyse and disseminate information
- provide training and development for finance directors and their staff

- maintain forums for discussion, consultation and exchange

British Universities Finance Directors' Group (BUFDG)

Loughborough Innovation Centre
Epinal Way
Loughborough
Leics LE11 3EH

Tel: 01509-228852

Fax: 01509-228851

Email: <http://www.bufdg.ac.uk/contact/matt>

The Higher Education Funding Council for England (HEFCE)

HEFCE distributes public money for teaching and research to universities and colleges. In doing so, it aims to promote high quality education and research, within a financially healthy sector. The Council also plays a key role in ensuring accountability and promoting good practice. Under the provisions of the Charities Act 2006, HEFCE will become the principal regulator for most HEIs in England.

HEFCE

Northavon House
Coldharbour Lane
Bristol BS16 1QD

tel 0117 931 7317

fax 0117 931 7203

email <http://www.hefce.ac.uk/aboutus/helpdesk.htm>

Website www.hefce.ac.uk

HMRC Charities Helpline

Call the Charities Helpline:

- to order forms or leaflets
- to apply for recognition as a charity for tax and Gift Aid purposes

- for advice on VAT reliefs for charities
- for advice on VAT reliefs for disabled people
- registering as a Community Amateur Sports Club (CASC)
- for help completing a Company or trust tax return
- for advice about Gift Aid, Payroll Giving and making a repayment claim
- for any other charity or CASC tax enquiries

(Opening hours 8.00 am to 5.00 pm, Monday to Friday. Closed weekends and bank holidays)

HM Revenue & Customs Charities
St Johns House
Merton Road
Liverpool
L75 1BB

tel 0845 302 0203

Email: charities@hmrc.gov.uk

Lambert Tool Kit for Collaborative Research

This is a toolkit for universities and companies that wish to undertake collaborative research projects with each other. The toolkit consists of a set of five Model Research Collaboration (one to one) Agreements numbered 1-5 and four Consortium (multi-party) Agreements lettered A-D and documents that should help you to use and understand those agreements. The toolkit was prepared by the Lambert Working Group on Intellectual Property.

For details see <http://www.innovation.gov.uk/lambertagreements/index.asp?lvl1=0&lvl2=0&lvl3=0&lvl4=0>

This publication can also be accessed at the Charity Commission's website: www.charitycommission.gov.uk

© Crown copyright 2009. This publication may be reproduced free of charge in any format or medium provided that it is reproduced accurately and not used in a misleading context. The material must be acknowledged as Crown copyright and the title of the publication specified.

**You can obtain large-print versions
of this publication from the Charity
Commission on 0845 300 0218**

Charity Commission

Telephone: **0845 300 0218**

Typetalk: **0845 300 0219**

By post: **Charity Commission Direct**

PO Box 1227

Liverpool

L69 3UG

Website: **www.charitycommission.gov.uk**