

Guidance Note: PCC members and private benefit.

This note has been produced by the Archbishops' Council to provide guidance to PCCs who are considering providing remuneration to one of their members or a "connected person". Because this inevitably creates a conflict of interest between the personal interests of the PCC member and their legal duty to act in the best interests of the PCC, there are legal requirements which must be followed.

A. Firstly, an overview of the legal position.

PCC members, or persons connected to them, may receive payment for services provided to the PCC if certain conditions are met. (See section B below.)

PCC members, or persons connected to them ('connected persons'), cannot become employed by the PCC, unless specific authority has been granted by the Charity Commission in advance. (See section C below.)

For this purpose connected persons are:

- 1) a trustee's child, stepchild, parent, grandchild, grandparent, brother or sister;
- 2) the spouse or civil partner of the trustee or any of those listed in 1 above;
- 3) a person carrying out business in partnership with the trustee or any of those listed in 1 and 2 above;
- 4) any institution which is controlled either by the trustee or any of the persons listed above, whether individually or together ('control' for this purpose meaning the ability to secure that the affairs of the institution are conducted in accordance with their wishes);
- 5) a body corporate in which any of the persons mentioned above has a substantial interest, whether individually or together ('substantial interest' for this purpose involving a) owning shares that have a nominal value of more than one-fifth of the share capital or b) the ability to control the exercise of more than one-fifth of the voting power at any general meeting.

B. Remuneration for services provided.

The Charities Act 2006 created a new power which allows any charity (including a PCC) to pay one or more of its trustees (or connected persons) to provide services to the charity, where the charity reasonably believes it to be in the charity's best interests to do so. The services in question must be ones which the charity trustee provides in addition to carrying out normal trustee duties.

More detailed guidance is available on the Charity Commission website. You should search for Guidance Note "CSD-1381A" (www.charitycommission.gov.uk)

Examples of such services might include:

- legal or accountancy work;
- providing materials for the repair of a building;
- use of a PCC member's premises or facilities;
- use of a PCC member's firm for a building job;
- entering into a maintenance contract with a trustee's firm;
- expert services: eg as estate agents, land agents, management and design consultants, computer specialists, builders, electricians, translators, and graphic designers.

This power can be used if the following conditions are met:

- There must be a written agreement between the charity and the trustee or connected person concerned: a note in the charity's records will not be enough - there must be a proper agreement (see below).
- The agreement must set out the amount or exact amount to be paid.
- The payment must be no more than is reasonable for the service provided.
- Before entering into the agreement the trustees must satisfy themselves that paying one of their number is in the best interests of the charity.
- In order to help the charity manage any conflict of interest, a trustee who receives payment may not take part in decisions of the trustees about the agreement, and should withdraw from meetings in which the terms of the agreement, or the acceptability of the services under it, are discussed (though a trustee can be asked to give information about the service being provided).
- Trustees are subject to the duty of care in the Trustee Act 2000 when deciding whether to pay. This "duty of care" requires them to:
 - act in the best interests of their charity;
 - take professional or other appropriate advice when in doubt;
 - be clear that payment can be justified;
 - ensure conflicts of interest are properly and openly managed;
 - ensure agreements are complied with, and kept on the charity's records as required by law; and
 - disclose any payments in the charity's accounts.
- As a further safeguard for the charity, the procedure can't be used if the number of trustees who are being paid for any reason from the charity's funds will be half or more than half of the trustee board.

The Agreement

The form the agreement takes will depend to some extent on the nature of the service being provided and the amount of detail needed to cover it. Legal advice should be sought if an arrangement is likely to continue for some time, or if it is particularly complex. But overall, an agreement should contain:

- an accurate description of the service to be provided;
- the name of the trustee or connected person (including a business) who will receive the payment;
- details of the amount, if it will be a "one-off" or fixed-term payment, or else the maximum amount
- for services to be provided over the duration of the agreement; if there is a "payment in kind", details of the benefit and its approximate value must be provided;
- a statement that the trustee concerned (including one who is connected to a person or business providing a service) will withdraw from any discussion of the trustees about the terms of the agreement or the standard of goods or services provided
- a statement that the trustee concerned must not vote on these matters, and may not be counted for the purpose of deciding whether a quorum is present at a meeting to discuss them.

The last two points are there to help the charity manage any conflict of interest, and to show the terms of the agreement have not been influenced by the person receiving payment.

The PCC may wish to include, either in the agreement itself, or in the minutes of the meeting approving the agreement, a statement to the effect that the PCC is satisfied that the payment is in the best interests of the charity, and is reasonable in relation to the service provided. This is not essential, but shows these issues have been properly considered.

C. Gaining the Charity Commission's consent to employment

A trustee, or a person connected to them, cannot lawfully become an employee without gaining the authority of the Charity Commission. Conversely, however, an employee may subsequently become a trustee (member of the PCC) and there is no practical issue providing any increases in remuneration received whilst the employee is a trustee are fair and reasonable. This section describes the process to gaining the Charity Commission's consent to employment of a trustee.

Where the total remuneration (including all benefits) to the employee will be under £50,000 per year, as is likely to be the case in virtually every application from a PCC, there is a streamlined application process. You should search on the Charity Commission's website for the application form, CSD-1381C.

The form cannot be used where the PCC member concerned canvassed for the post, or was involved in devising the job specification or advertising for the post - again including involvement in settling the terms and conditions of the employment. In this situation the PCC will need to make out a case justifying the granting of consent.

You should note that, whether the form is used or a case is made out separately, the Charity Commission cannot authorise any payments retrospectively, but can only authorise new or continuing payments.

The principal factors that the Charity Commission will consider in giving its authority include whether:

- The charity has a need for the work to be carried out.
- The person has the appropriate knowledge and skills for the job.
- Payment for the job is reasonable in relation to the work being carried out. (How does it compare with payment for similar duties elsewhere? Is the charity obtaining value for money?)
- The risks inherent in the inevitable conflict of interest have been considered and managed.
- (Usually) the job has been subject to an open and transparent selection process.

D. The distinction between a contract of employment and a contract for the provision of services

In view of the different processes required to deal with them, it may be important for a PCC to know whether a contract with one of its members, or a connected person, is a contract of employment of one for the provision of services.

A contract of employment is a legal agreement between an employer and an employee. It comes into force when an employee agrees to work for an employer in return for pay. An employer is legally required to put most of the main details of an employee's work in a written statement of main terms and conditions - for example working hours, pay and leave. In contrast, a contract for service is an agreement between a self-employed contractor and another party to carry out a particular job or provide a particular service. In this case there is no employment relationship. The distinguishing marks of an employment relationship are normally that:

- the person concerned must have agreed, in return for payment, to carry out work personally (rather than by hiring someone else to do it); and
- the employer must exercise at least some control over the worker.

In many cases it will be clear whether or not someone is an employee. (Bell ringers or choir members, for example, are most unlikely to be employees: they will nearly always be volunteers, who do not work under a contract of any kind. As for organists, they can serve under a variety of arrangements - as volunteer, self-employed contractor or employee - so the important thing is that all parties should be clear as to the nature of the agreement, which should be recorded in writing. The RSCM website offers some guidance on this and points to where specimen forms of contract can be obtained.) However, the distinction between the two forms of contract is not always clear; and if in doubt the PCC may need to seek advice (e.g. from the diocesan registrar.)