



Parliamentary Briefing

Update on public benefit guidance

The Charity Commission has withdrawn parts of its guidance for charity trustees relating to public benefit and fee-charging charities following a ruling by the Upper Tribunal. This briefing explains this area of the Commission's work and provides information for charity trustees in your constituency who may be affected by the changes.

Background

The Charities Act 2006 endorsed a long-standing legal requirement that charities must have purposes that are for the 'public benefit'. The Act did not include any definition of what that public benefit requirement means but, apart from removing any presumption of public benefit which existed in law in favour of certain classes of charity, broadly retained the existing case law.

The legislation gave the Charity Commission a new objective 'to promote awareness and understanding of the operation of the public benefit requirement'. It also required the Commission to issue guidance on public benefit, and requires charity trustees to have regard to the Commission's guidance when carrying out any powers or duties to which the guidance is relevant. Charity trustees also have an ongoing duty to operate their charity for the public benefit and to report annually on how they have done this.

In January 2008, following public consultation, the Charity Commission published its general public benefit guidance and, in December 2008, published supplementary guidance for certain types of charity, including guidance for charities that charge high fees. The issue of high fee-charging charities, such as charitable independent schools, was debated during the passage of the Charities Act through Parliament. The Commission's supplementary guidance was intended to clarify the complex area of charity law regarding public benefit and fee-charging.

In 2009-10, the Commission carried out a series of public benefit assessments of individual charities, which included five charitable independent schools, to illustrate how the public benefit principles identified in its guidance apply in practice. Two of the schools failed to demonstrate that they made more than minimal or tokenistic provision for the poor to benefit (identified in the Commission's fee-charging guidance as a requirement of charity law) and so were required by the Commission to prepare plans to address this. Both schools subsequently did this to the Commission's satisfaction.

The Upper Tribunal ruling

Prompted by these assessments, in May 2011 a judicial review was brought against the Commission's guidance by the Independent Schools Council (ISC), challenging the legal basis of that guidance. This matter was referred to the Upper Tribunal to be considered alongside a reference brought by the

Attorney General, who had sought to clarify this aspect of charity law. The Upper Tribunal gave its judgment in October and December 2011.

The Upper Tribunal ruled that in order to operate for the public benefit, trustees of high fee-charging educational charities (including schools) have a duty to make provision for 'the poor' (i.e. people who cannot reasonably afford the fees) to benefit 'that is more than minimal or tokenistic' and which relates to the charity's educational purposes. The Tribunal also ruled that it is for the trustees of a fee-charging charity to decide how best to meet that obligation in the circumstances of their charity (not for the Commission, the Tribunal or the courts), provided they did so in a way that any reasonable trustee would have done.

The Tribunal's interpretation of the Commission's guidance was that the Commission was suggesting an objective test of 'reasonableness' in relation to the adequacy of provision that a fee-charging charity makes for the poor. The Tribunal indicated that the guidance confuses the public benefit requirement for being a charity and the trustees' duty to operate their charity for the public benefit once established as a charity. In these respects the Tribunal decided that parts of the Commission's guidance on public benefit were 'obscure' or 'wrong'. The Tribunal subsequently made an order which allowed the Commission to withdraw those aspects of its guidance that require rewriting to ensure they are consistent with the Upper Tribunal's decision.

What trustees need to know

Following the ruling, the Commission has withdrawn the relevant parts of its guidance and clearly indicated on its website which sections have been removed. Full details of changes are available at: http://www.charitycommission.gov.uk/RSS/News/pr_public_benefit_fee_charging.aspx

Pending the production of revised guidance, the Commission has also prepared questions and answers and interim advice for charity trustees, which are available on its website. These can be found at: http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/interim_advice.aspx

The Commission has publicised this by sending a notification to all registered charities for which it holds email addresses, as well as notifying interested parties and charity media. The Commission is currently in the process of redrafting the guidance and aims to publish it in draft form in spring 2012. There will then be a public consultation for three months before publication of the final guidance in summer 2012. Charity trustees, in the meantime, must continue to have regard to the remainder of the Commission's public benefit guidance, the vast majority of which is unaffected.

The Upper Tribunal's ruling confirms that trustees must run their charity to ensure that the poor can benefit in a way that is more than minimal or tokenistic. It is for trustees of individual charities to decide for themselves how to meet this requirement. The Upper Tribunal has said that there is no clear line which identifies what it is that trustees must do, and acknowledged that it was simply not possible to 'give the parties the clarity for which they were hoping'.

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