The Charity Commission’s new public benefit guidance – what do charities need to know?

In September 2013, the Charity Commission published new guidance on public benefit.

Who needs to know about this?

All charity trustees have a statutory obligation, under the Charities Act 2011, to have regard to the Charity Commission’s public benefit guidance “when exercising any powers or duties to which the guidance is relevant”. So all trustees should be briefed on this news.

Is the guidance new?

Yes and no. The Charity Commission first published public benefit guidance in January 2008. Some changes were made to the guidance in 2011, after a successful challenge to the guidance by the Independent Schools Council in the Charity Tribunal. The Charity Commission has now completely rewritten its guidance, following a consultation in 2012.

What exactly do trustees need to look at?

The Charity Commission has published a suite of documents about public benefit, which are available at http://www.charitycommission.gov.uk/detailed-guidance/charitable-purposes-and-public-benefit/charities-and-public-benefit/. Only three of these documents are so-called “statutory guidance”, i.e. guidance which trustees have an obligation to have regard to. These are:

- Public benefit: the public benefit requirement (PB1)
- Public benefit: running a charity (PB2) and
- Public benefit: reporting (PB3)

These can all be downloaded as stand alone pdf documents.

All the other new documents are helpful and may be of interest, but there is no statutory obligation to review them.

This is good news. The draft guidance issued by the Charity Commission was long, in a difficult to read format, and unclear about when it was “statutory guidance” or not: BWB and others were very critical of the format and we are pleased that the Commission has responded positively to our concerns.

What do these three documents say?

There is no substitute for reading the guidance itself, but we highlight the main issues to be aware of.

Public benefit: the public benefit requirement (PB1)

This guide explains that a charity’s purposes must be for the public benefit. It is directed mainly at people setting up new charities, and charities considering changing their purposes, but other guidance cross refers to this document, so in our view all trustees should read it.
As a general point, the guidance makes it clear that the Charity Commission will make decisions about public benefit, in individual cases, on the law as it applies to the facts of the particular case. The law on public benefit is complex and the guidance itself can, of necessity, only be a high level summary.

It is helpful, however, that the Charity Commission confirms that in most cases it will be clear that an organisation’s purpose is for the public benefit.

**Public benefit: running a charity (PB2)**

This guide will be of most interest to trustees of existing charities. It explains that when running their charity, the charity trustees must carry out the charity’s purposes for the public benefit.

**When is this guide relevant?**

Trustees must have regard to the public benefit guidance when exercising any powers or duties to which it is relevant. In a welcome addition to the guidance, the Commission clarifies that this does not mean every decision that charity trustees make. What are relevant are decisions made by the trustees which impact on the way in which people benefit from the charity’s purpose, and who can benefit from it.

**What does “have regard” mean?**

The Charity Commission says that this means that charity trustees should be able to show that they are aware of the guidance and have taken it into account when making a decision to which the guidance is relevant. If they have decided to depart from the guidance, they must show that they have good reasons for doing so.

This is not new – the Commission’s earlier guidance said the same thing – but it is helpful as it reminds us that the Commission’s guidance is not the law – it is the Commission’s interpretation of the law – so there may in some cases be scope to depart from the guidance. Trustees would, however, be well advised to seek professional advice if they wish to depart from the guidance in a significant way.

**What exactly is public benefit?**

The guide explains that there are two “aspects” to public benefit – the benefit aspect and the public aspect. There was a similar two-fold analysis in the earlier guidance, but there are some differences in how it is defined. This is what the guidance says:

“The ‘benefit aspect’ of public benefit is about whether the purpose is beneficial. To satisfy the ‘benefit aspect’ of public benefit:
- A purpose must be beneficial
- Any detriment or harm that results from the purpose must not outweigh the benefit.”

Charity trustees need to understand how their charity’s purpose is beneficial, and carry out the purpose so as to benefit the public in that way. Unfortunately there is very little guidance on detriment or harm: the Charity Commission says that the trustees must identify and minimise risks of harm, and make sure that any harm that might arise is a minor consequence of carrying out the purpose.

“The ‘public aspect’ of public benefit is about who the purpose benefits. To satisfy the ‘public aspect’ of public benefit the purpose must:
- Benefit the public in general, or a sufficient section of the public
- Not give rise to more than incidental personal benefit."

This part of the guidance is very different from the earlier guidance, as it was this part of the earlier guidance that was challenged in the Charity Tribunal.

Many charities will benefit the public at large. Some, even though they have a wide class of potential beneficiaries, may choose to focus on certain beneficiaries. The Commission acknowledges that trustees may do this, provided:

- They have proper reasons for doing so
- They do not exclude the poor from benefit
- The smaller group of people is a sufficient section of the public for the charity's purpose
- They make decisions in accordance with the Charity Commission's recent separate guidance on trustee decision-making, which sets out how charity trustees should approach decision-making.

There are some difficulties with this. What does proper mean? What does "a sufficient section of the public" mean (although there is more guidance on this in PB1)? These questions illustrate a problem with the new guidance. A major change is that rather than being prescriptive about how trustees can and should provide public benefit, the guidance is now very clear that trustees have freedom to decide how they carry out their charity's purposes. It says:

“When making decisions about how to carry out their charity's purposes for the public benefit, many trustees are concerned about what is 'the right' decision. In many situations there is no one 'right' decision to be made.

However, trustees must make decisions that are within the range of decisions that trustees could properly make in those particular circumstances.

Provided that the trustees make a decision within that range, then they will have made a 'right' decision.

It is not for the courts or the Charity Commission to tell trustees which decision to make where there is a range of decisions open to them.”

Some will welcome confirmation of this level of freedom. It is certainly in line with the Charity Tribunal's decision in the Independent Schools Council case. But there are concerns that this may actually make life more difficult for charities. Shortly after the judgment in the Tribunal case BWB's Stephen Lloyd wrote in Civil Society:

“How can [trustees] be seen to be properly discharging their duties as trustees? Under the [old] public benefit guidance system they could follow the Charity Commission guidance, prescriptive though some felt it was. Now they have to work it out on their own.”

On a more general note, the guidance (both statutory and non statutory) is far less detailed than both the previous guidance, and the new draft guidance which was the subject of the public benefit consultation. While this means that there is less guidance for trustees to take on board, it also means that trustees struggling to grasp what their obligations are have less of an idea of how the Commission might view their situation.

However, this may be an inevitability. The law on public benefit has evolved over time, in a piecemeal manner, and it is very difficult to articulate principles which will apply in every
situation. Every case will be looked at on a case by case basis. While that may not provide much comfort to trustees, it does reflect the legal position.

Having said that, PB2 contains specific sections for charities which restrict benefits to a narrower range of beneficiaries via a membership scheme, or restrict physical access to their facilities. There is also a separate Annex on charging for services. This explains:

- If a charity charges for its services, the trustees must consider whether the charges are more than the poor can afford. There is no definition of what is meant by “poor”, but the Commission says that this will usually mean “charges that someone of modest means will not find readily affordable”, and gives some examples.
- If the poor cannot afford the charges, the trustees must ensure that the poor can benefit. The guidance says: “The level of provision that trustees make for the poor must be more than minimal or token. It is for a charity’s trustees to decide, taking into account all the circumstances of their charity, what provision (in addition to what would be more than minimal or token provision) to make to enable the poor to benefit.”

This, while it is hardly plain English, sets out some of the principles in the Independent Schools Council case. Our view is that another passage from that judgment may be more helpful to trustees. Here the Tribunal said that the correct approach for assessing whether the public benefit requirement is satisfied, is “to look at what a trustee, acting in the interests of the community as a whole, would do in all the circumstance of the particular school under consideration and to ask what provision should be made once the threshold of benefit going beyond the de minimis or token level had been met”. It is not enough, said the Tribunal, simply to point to some benefit for the poor without looking at the charity’s activities as a whole. We think that trustees who look at their charity’s activities in the round, in order to work out what benefit to the public at large they can realistically provide, in their own particular circumstances, should be able to demonstrate to the Charity Commission that they have been acting “properly”.

Turning to the requirement that a purpose must not give rise to more than incidental personal benefit, here the Commission says that personal benefit (ie a benefit that someone receives from a charity) is incidental where (having regard to its nature and amount) it is a necessary result or by-product of carrying out the purpose.

Public benefit: reporting (PB3)

This document explains what duties charity trustees have in relation to reporting on public benefit. Trustees must, in their annual report, include details of the activities undertaken by the charity to further the charity’s purposes for the public benefit (more detail is required for charities over the audit threshold) and a statement as to whether they have had regard to the Commission’s public benefit guidance.

This guide highlights in very clear terms how public benefit reporting, when done well, can be an effective tool for trustees as it provides a public platform for them to outline what their charity does for the public benefit. This is in line with recommendations by Lord Hodgson in his 2012 review of charity law, which were recently endorsed by Government.

Persistent failure to comply with this requirement could be a regulatory issue.

Conclusion

We do not agree with all of the Charity Commission’s new guidance. For example, one of the new documents, called What Makes a Charity, is quite restrictive in what it says about
charity campaigning, and we are worried that this may adversely affect new organisations
with a campaigning focus which wish to register as charities.

However, we think that the new guidance is a significant improvement on the draft guidance
which was the subject of the consultation. The serious concerns which BWB raised about
the format of the guidance, and confusion between a charity’s purposes and its activities,
have largely been addressed. We think that the Commission has, on the whole, done a
good job of distilling a very complex area of the law into high level guidance for trustees to
understand.

For most charities, complying with the public benefit rules will not cause any problems. The
requirement to have regard to the Charity Commission’s public benefit guidance, and to
report on public benefit, will simply make sure that they focus on the public benefit that their
charity provides.

Where there are questions over a charity’s public benefit, such as concerns that a charity
may be doing harm, or restricting its benefits to a narrow class of beneficiaries, trustees may
face trickier issues. The clarification that it is up to the trustees themselves to decide how to
provide public benefit may be an accurate reflection of the law, but means that the new
guidance runs the risk that a small minority of trustees have been left with little help in feeling
their way through a legal quagmire.

Please feel free to contact Alice Faure Walker on a.faurewalker@bwbllp.com, or your usual
BWB contact, if you would like further advice about the impact of the new guidance on your
charity.

Bates Wells Braithwaite
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