

Public Benefit and Fee-charging: Summary of consultation responses

About this summary

This document summarises the feedback received by the Charity Commission in response to its consultation on draft supplementary guidance on *Public Benefit and Fee-charging*.

The draft guidance has now been revised and published. This document explains how we have responded to the consultation comments, and signposts relevant sections in the published guidance.

Background information

The Charity Commission is established by law as the independent regulator and registrar of charities in England and Wales.

To be recognised in law as a charity, an organisation must have charitable purposes which are for the public benefit. This is known as the 'public benefit requirement'. Although all charities already have to meet this requirement, the Charities Act 2006 highlights it by explicitly including public benefit in the definition of a charitable purpose. It retains the current law on public benefit but creates a level playing field by requiring all charities to demonstrate, explicitly, that their purposes are for the public benefit; previously the law presumed this to be the case for charities which advance education or religion or relieve poverty.

The Act does not contain any new definition of public benefit or suggest how charities should meet that requirement. It does give the Charity Commission the new objective of promoting awareness and understanding of the operation of the public benefit requirement, and requires the Commission to issue, and consult on, guidance on public benefit to which charity trustees are required to have regard when running their charity.

In January 2008 the Commission published its general guidance on public benefit, *Charities and Public Benefit*, following a four-month public consultation on draft guidance, which generated nearly 1,000 responses. Following publication of that guidance, the Commission launched a series of consultations on draft supplementary guidance on the public benefit of those charities most directly affected by the changes in the Act – that is charities established for the prevention and relief of poverty, the advancement of education, the advancement of religion and also fee-charging charities, which were highlighted during debates on the Charities Bill.

The consultation process

On 12 March 2008 we published draft supplementary guidance on *Public Benefit and Fee-charging* for consultation. The consultation period was 16-weeks, ending on 11 July.

We sought to raise awareness of the consultation in a range of ways including: publication on our website; direct mailings by post and email; routine contact with charities and their representative organisations; a press release and media work; provision of speakers at a number of external events; a small external discussion group and one-to-one engagement meetings with interested charities and others.

We have engaged with numerous MPs and peers to raise their awareness of our approach to public benefit, including our consultations on draft supplementary public benefit guidance, through a series of events as well as written briefings, individual meetings and appearing before Parliament's Public Administration Select Committee.

Responses to the consultation on *Public Benefit and Fee-charging*

We received 189 responses in total.

All the responses we received have been recorded, analysed and taken into consideration. We are grateful to everyone who took the time to respond.

In view of the number of responses we received, and the detail and complexity of many of them, this document summarises the key themes and issues that emerged from our analysis of the responses, rather than summarising what each response contained.

Anyone who wishes to see a full list of responses, or copies of individual responses, should contact Charity Commission Direct on 0845 300 0218.

General comments about the draft supplementary guidance

- Overall, general comments on the draft guidance were positive, with responders making complimentary comments about its clarity, helpfulness and style.
- However, many responders also said that the guidance would benefit from being simplified and shortened.

Actions taken:

We have simplified and shortened the guidance, whilst retaining all the key elements.

For example, we have moved some of the more detailed examples or explanations, into annexes.

Signpost – See Annexes A-C

- Particular issues on the overall guidance raised by some responders were:
 - concern about the amount of guidance on public benefit responders perceived that charity trustees would have to have regard to;
 - questioning of whether our supplementary guidance properly forms part of the Commission's statutory guidance on public benefit to which charity trustees must have regard;
 - a call for even greater clarity about which aspects of the draft guidance represent a legal requirement and those aspects which are best practice advice.

Actions taken:

Although all of the guidance contained in *Public Benefit and Fee-charging* is of relevance for charities that charge fees for the services or facilities they provide, not all of the material in that guidance is statutory guidance on public benefit.

We have therefore clearly identified which sections of the guidance are supplementary public benefit guidance to which trustees of fee-charging charities must have regard.

In addition, we use the term 'must' when referring to a specific legal or regulatory requirement and we indicate throughout the guidance which sections contain a legal or regulatory requirement. Those sections are marked with the symbol **L**. We use the term 'should' when referring to items we regard as minimum good practice.

Signpost – Sections C, D and E are supplementary public benefit guidance.

- a few responders disliked our use of the term 'aims' when referring to an individual charity's purposes, although they recognised that this term is defined in our guidance as meaning a charity's individual purposes.

Actions taken:

We have continued to use the term 'aims' when referring to an individual charity's purposes, as we think it is important to be able to distinguish clearly in the guidance between an individual organisation's purposes and the descriptions of purposes in the Charities Act 2006. We have also clarified our definitions of the terms 'purposes' and 'charitable purposes'.

Signpost – See section B9 for definitions of the terms 'aims', 'purposes' and 'charitable purposes'.

Comments about our draft supplementary guidance on public benefit and fee-charging

- Significant challenges were made in a number of responses (such as the responses from the Charity Law Association and the Independent Schools Council) to the legal basis of our fee-charging guidance (and therefore the legal underpinning for principles 2b and 2c in our general public benefit guidance which our fee-charging guidance expands upon). Those responses question the correctness of our interpretation of the relevant case law and the effect of the Charities Act on the existing legal position. In particular they:
 - questioned the extent of the Commission's role with regard to interpreting the law on public benefit and issuing guidance;

Actions taken:

The Commission has a statutory duty to issue guidance to promote awareness and understanding of the operation of the public benefit requirement.

We are satisfied that our public benefit guidance reflects the legal meaning of public benefit.

Signpost - Alongside our published public benefit guidance, we have also published *Public Benefit: Statement of the basis for the Charity Commission's role and actions* which is a statement on our role with regard to interpreting the law on public benefit and issuing guidance.

- questioned whether the Commission should produce guidance on fee-charging, since that is not linked to any particular charitable purpose;

Actions taken:

Many different sorts of charities can, and do, charge for their services and facilities. Fee-charging is not a charitable aim, and so the aims of fee-charging charities will be the charitable aims that it carries out, in full or in part, by providing services or facilities that it charges for.

In relation to public benefit, the issue for a fee-charging charity is the effect that charging fees has on who has the opportunity to benefit from its services or facilities and, where relevant, whether or not there is sufficient opportunity to benefit for people who cannot afford to pay the full fees charged.

Throughout the debates on the Charities Bill, prior to its enactment as the Charities Act 2006, and during our consultations on public benefit guidance, the charitable status of charities that charge fees for their services or facilities, particularly high fees that many people could not afford, has been an issue of significant public, media and political interest. The trustees of many fee-charities therefore have been understandably concerned about what meeting the public benefit requirement means for them. Our general guidance on public benefit, *Charities and Public Benefit*, set out the general principles of public benefit that we have identified from existing charity law. Those principles include principle 2b: the opportunity to benefit must not be unreasonably restricted by ability to pay any fees charged, and principle 2c: people in poverty must not be excluded from the opportunity to benefit. Our guidance *Public Benefit and Fee-charging* explains how those principles relate specifically to charities that charge fees for their services or facilities.

Although it would be impractical to produce tailored guidance for each type of fee-charging charity, we have included in our guidance some illustrative examples of ways in which charities with different charitable aims might provide opportunities to benefit for people who cannot afford the full fees charged.

Signpost – the illustrative examples are contained in Annex C.

- argued that fee-charging either has no bearing on public benefit (and that taking fee-charging into account amounts to a public benefit test based on activities not purposes), or that it has a bearing only where fees are set with the aim of generating profit rather than pursuing a charitable purpose; or enhancing a service beyond meeting a charitable need resulting in higher fees which makes the service less accessible; or where fees are set on a deliberately exclusionary basis rather than the level required to deliver the services to the appropriate standard;

Actions taken:

Fee-charging is likely to be a public benefit issue where the service or facility that is charged for forms a significant part of the charity's aims, or the way it carries out those aims, and/or the fees that are charged for that service or facility are high. This is because it has a bearing on who has the opportunity to benefit from that service or facility and, in particular, the extent to which the charity can show that its aims meet public benefit principles 2b and 2c.

The test in the Charities Act 2006 is whether an organisation has aims that are for the public benefit which is clearly a 'purposes test'. Public benefit has to be demonstrated from the way the aims will, or may, operate which necessarily involves considering its activities as well as other legally relevant aspects of the surrounding factual background.

If the public benefit requirement were an ‘activities test’, the question would be does the activity meet the public benefit requirement? As a ‘purposes test’, the question is does, or may, the charity’s aim(s) operate for the public benefit? When assessing this, the benefits from the activities, and the surrounding factual background where legally relevant, are looked at in the round.

Signpost – see section C1, and sections E3 and E4 which set out the factors we will consider when assessing the public benefit of fee-charging charities.

- argued that there is no legal basis for saying that restricting benefits only to people who can afford to pay the fees charged amounts to an unreasonable restriction (especially where the fees reflect the costs of providing the service);

Actions taken:

The relevant principles, derived from existing case law, are that the opportunity to benefit must not be unreasonably restricted by ability to pay any fees charged and that people in poverty should not be excluded from the opportunity to benefit.

We are satisfied that our public benefit guidance reflects the legal meaning of public benefit.

Signpost – See our *Analysis of the law underpinning Public Benefit and Fee-charging* for a summary of the Commission’s view of the relevant charity law.

- took issue with a suggestion that benefits might be weighted – where direct access benefits should be looked for first and count for more than more indirect benefits, although there was no consensus view on this; and
- argued that our guidance is directed towards ‘social engineering’, or fulfilling a political agenda, rather than promoting awareness and understanding of charity law.

Actions taken:

Our guidance explains that fee-charging charities must ensure there are sufficient opportunities to benefit for people who cannot afford the fees, and that there are many different ways of doing this. This includes offering free or subsidised access and providing other significant opportunities to benefit. It also explains that, in assessing whether a charity provides sufficient opportunity to benefit to people who cannot afford the fees, we will consider the totality of the opportunities to benefit that the charity provides.

Our guidance sets out how we will do this.

Our guidance explains how the principles of public benefit set out in *Charities and Public Benefit*, which are derived from existing charity law, relate specifically to charities that charges fees for their services or facilities.

Signpost – see sections C3 – C8, and sections E3 – E6. See also our *Analysis of the law underpinning Public Benefit and Fee-charging*.

- The approach was not universally challenged by all responders. Some responders (such as the National Council of Voluntary Organisations and the Education Review Group) were supportive of our approach.

- A number of responders wished to see specific guidance aimed at charitable independent schools; others were concerned that the fee-charging guidance had been 'hi-jacked' by issues specifically concerning fee-charging educational charities.

Actions taken:

Our guidance covers issues that will be of relevance to, and applicable by, all fee-charging charities.

We appreciate that some trustees have expressed a desire for very specific, detailed guidance for fee-charging charities. However, the fee-charging sector is diverse and individual charities' circumstances vary widely. What might be relevant for one sort of fee-charging charity might be irrelevant and inappropriate for another. It would therefore be impractical to produce tailored guidance for each type of fee-charging charity, but we have included illustrative examples of ways in which fee-charging charities with different charitable aims might provide opportunities to benefit. We have prepared the guidance to ensure it has relevance for all fee-charging charities, not just those that advance education.

Signpost – see Annex C

- Many fee-charging charities said they would welcome further guidance on setting fee levels, determining what is affordable and on means testing (whether provided by the Charity Commission or which the Charity Commission could signpost from its fee-charging guidance).

Actions taken:

Public Benefit and Fee-charging includes guidance on setting, and assessing the impact of charging, fees and on providing, or funding, free or subsidised access.

Signpost – see Annexes A and B