

PUBLIC BENEFIT AND FEE-CHARGING

DRAFT SUPPLEMENTARY GUIDANCE FOR CONSULTATION

RESPONSE BY HEWITSONS LLP

Other than those matters covered by specific consultation questions below, our overall assessment of this draft Guidance is it is helpful, though over-long and in places unclear.

The principal beneficiaries will be charity trustees. In this Guidance, taken together with the General Public Benefit Guidance, the Commission is ambitious in its hopes it will be thoroughly read, absorbed and applied by trustees.

As a starting point, the first quarter of this Guidance repeats principles set out in the General Public Benefit Guidance and, to this extent, is unnecessary. Straightforward cross-references would suffice, as is the case for references to the Commission's Guidance on other areas.

Question 1: Do you have any comments on our proposed approach to assessing the public benefit of fee charging charities?

There are very many factors which may affect the way in which public benefit is delivered and reported on in relation to fee charging charities. Not all factors are included here (which is acknowledged) and no such list could be entirely comprehensive. However, some of the other factors we suggest are included are noted under our response to question 2 below.

Further specific issues linked to sections C1 and C2 are as follows:

- Under section C1, it does not necessarily follow that large charities will charge fees that many people will be unable to afford, yet this is the implication given (paragraph 3).
- Some of the examples given on page 14 need a little further explanation if they are to be used. For instance, increasing fees for some beneficiaries to subsidise fees for others who could not otherwise afford the fees, may have the effect of marginalising those on middle incomes and therefore simply move the problem. This is acknowledged later in the guidance (section D2). Additionally, it is not clear how setting up a separate charity would address fee charging issues: how would the new charity be able to support the existing charity or do anything else which could not already be done by the existing charity?
- On page 14, the Commission encourages trustees of fee charging charities to find innovative ways to increase access for those on low incomes. These innovative ways need explaining, with perhaps some examples given. Indeed, many such ways are suggested later in the guidance, so perhaps a cross-reference would suffice here. Additionally, the Commission could consider

establishing a forum for the exchange of ideas in this regard (if web-based and lead by the contributors, this need not involve much resource from the Commission).

- The Commission helpfully states it will not expect charities to make changes overnight (page 14); however it would be helpful to have some guidance as to timescale, though this of course will need to take account of the circumstances of each individual charity.

Question 2: Are there any other examples of factors when assessing the public benefit of fee charging charities that you think we should take into account?

Other factors charities might take into account include (some of which are mentioned later in the guidance):

- the extent of fees concessions made available;
- the extent to which it is legitimate to presume a beneficiary has a choice between spending money on the charity's service and spending it on some other non-essential thing;
- the extent to which other indicators of public benefit, for which no or lower charges are made, may be given weight so as to satisfy the public benefit requirement; and
- the availability and impact of funding for the service from sources outside the charity.

Question 3: Do you think the key questions for trustees set out in section D3 are the right questions and are they helpful?

The questions are broadly helpful. However, some are very general and some will prove hard to assess in practice.

Further crucial questions trustees must consider are:

- Can people afford the fees?
- Are the fees reasonable in the given sector?
- How are fees paid or how are they to be paid (by the beneficiary or by a third party)?

Section D2 would benefit from a straightforward answer to the question which is asked in the title, along the lines that those who must have the opportunity to benefit from a charity are all those who are potential beneficiaries of the services concerned.

Question 4: Do you have any general comments on section D?

The example in relation to a charitable independent school opting out of charitable status, which occupies most of page 20, is an unhelpful distraction.

First, the statutory obligations referred to in relation to the sale of property are wrongly stated: a sale in the situation set out may only take place if it is considered by the trustees to be for the best *terms* reasonably obtainable (this usually equates to best price, though not always).

Second, the example in the box is too long and involved in the context of Guidance which must be applicable to a wide range of charities, notwithstanding independent schools form a significant sub-group of fee charging charities.

Lastly, whilst a sale of a charitable school's property to a non-charitable body will be problematic, for the reasons given in the example, there are ways in which a charitable school and its non-charitable subsidiary may work together to address a situation where the school could not otherwise satisfy the public benefit requirement in continuing to run the school alone. This might include a lease from the school to the subsidiary, an agreement for the subsidiary to run aspects of the school's operations, and the subsidiary's profits being transferred back to the charity with the benefit of gift aid. The analysis given in the Guidance presents restrictions without solutions.

Question 5: If you work in a particular area or field where there are additional rules or guidance that affects at what level you can set your fees, where there is a minimum or maximum, please let us know and explain what they are.

This question is perhaps best answered by charities themselves, though social housing is an obvious area for such additional restrictions.

Further responses we have in relation to section E not directly raised in the consultation questions are as follows.

- The list of factors on page 21 might also include: 'What fees are reasonable for the given sector?', 'What profit element is reasonable?' and in relation to funding sources outside the charity, 'Is there a cost of this funding to the beneficiary (for instance in the case of insurance premiums) and if so, is this a reasonable level or is it itself excluding?'
- The duties noted on page 22 for trustees in making decisions should also include that, in the case of charitable companies, there are further statutory duties, including the duty to promote the success of the company (ie, for a charity, the attainment of the objects), taking into consideration the impact on the community and the need to act fairly as between beneficiaries (amongst other matters).
- The commentary provided under *charities providing premium, intensive or long-term services*, is overlong, without providing clear guidance.

Question 6: Do you think that, where the provision of the service or facility that is charged for is one of the primary aims of a charity, trustees should, first of all, seek to provide opportunities to people who cannot afford the fees to directly access the service or facility that is charged for?

Trustees should, without doubt, consider all possibilities for providing and widening opportunities for people on low income to access directly the service or facility charged for. However, this should not be considered 'first' or even as a primary consideration. All opportunities for all potential beneficiaries to benefit should be explored. Those which are most appropriate will vary from charity to charity.

If access to core services is restricted owing to the fees charged, the charity will need to justify this position. However, this does not mean that for all such charities this will be the primary way to address the issues in relation to access.

Further specific issues on section F2 are as follows.

- The examples given of ways of providing direct access to people on low income for services for which fees are charged include, for charitable hospitals, the existence of accessible medical insurance or other benefit schemes. One of the commonest and most obvious ways in which fee charging and access issues are addressed by hospitals, however, is through the availability of public funding and this should be included as an example.
- Two examples are given where the provision of concessionary rates for state school parties would assist with fee charging and access. Whilst the point is understood that doing the same for independent school parties would be highly unlikely to widen access in relation to those on low incomes, in practice it is unthinkable charities would discriminate in this way, yet there is a suggestion in the examples that this may be the case, rather than charities relying upon the state school element of all school parties in relation to this issue.

Question 7: Is our understanding of the difference between bursaries and scholarships correct?

So far as we are concerned, the Commission's understanding on this issue is correct.

Question 8: Do you agree that ways that are designed specifically to assist people who cannot afford the charges are likely to have greater impact on increasing the opportunities to directly access the service or facility that is charged for, and are therefore more likely to be sufficient in meeting the public benefit requirement, than other measures?

We agree with this proposition, to the extent such action widens access for those in financial hardship who cannot afford the fees.

Question 9: Aside from offering bursaries, in what instances might there be a more appropriate way for educational charities to open up direct access to the educational service or facility?

There may be a number of such situations, including:

- the provision of generic educational material or where dialogue with beneficiaries is unnecessary. In such situations the material or service could be published or made widely available (for instance via the internet); and
- charities (such as independent schools) often have a 'hardship fund' to rely upon for situations where beneficiaries suffer a change in circumstances part-way through benefiting from a service, such that they become unable or substantially unable to afford the fees concerned.

Question 10: Do you have any comments on our approach to assessing the impact of measures taken to open up direct access to the service or facility that is charged for?

As stated above, assessing this impact will be problematic in practice and will differ from charity to charity and sub-sector to sub-sector.

The questions suggested on page 31 for trustees to ask themselves regarding free places or other concessions or subsidies should also include the following:

- What are we trying to achieve in making these concessions?
- Do we need to offer concessions, and if so what type, in order to satisfy the public benefit requirement?
- How will the charity fund the concessions?
- What impact on our Business Plan might this have?
- Are there any risks we can identify in offering these concessions which we will need to manage?

Some of these matters are referred to later in the guidance (for instance on page 33).

The section on page 31 and most of page 32 as to the various permutations of concessionary places is helpful but over-long.

Question 11: Do you think that it should matter whether the funding is organised by the charity itself or by another charity (such as a grant making charity) or by another body that is linked to the charity (but which may not be a charity itself) or by a local authority or by another independent third party?

No: the source of funding should not matter.

The crucial issue is access for beneficiaries. It would be unjust and illogical to prefer one type or source of funding over another.

This does have the effect that some charities are in a more fortunate position than others. For example, a charitable hospital, where all its funding comes from the NHS, is in a more fortunate position than a small isolated independent school with reserves which are inadequate to fund the concessions it would otherwise wish to. However, the principles must be seen and addressed primarily from a beneficiary position rather than any other.

Where funding is external to the charity, the trustees must continually assess and manage the risk of the continuation of the source of funding. This is dealt with on page 37.

The issues which are suggested for the trustees to consider in assessing whether to offer concessionary services, should also include whether capital as well as income should be taken into consideration in relation to beneficiary means testing.

Question 12: Do you think our approach to assessing whether or not trustees' decisions to take no further action regarding public benefit is right?

Yes, we agree with the draft Guidance on this point.

Question 13: Do you agree with our approach as regards insurance schemes?

Yes, we agree with the draft Guidance on this issue.

Question 14: Do you have other examples of ways in which organisations might provide other opportunities to benefit to people who are unable to pay the fees?

We do not have any further examples we wish to suggest.

The acknowledgement on page 45 that, in practice, charities are likely to use a combination of different ways of providing other opportunities to benefit, should be a positive recommendation. This approach will be most likely to reach the widest beneficiary group.

Question 15: Would it be helpful or more likely to mislead if we used the concept of what ways might have greater *weight* than others in any public benefit assessment?

The concept of applying weight to particular approaches or ways to provide or widen the opportunity to benefit, is not helpful and is likely to be problematic in practice.

Whether this is a viable approach depends on what is meant by *weighting*. This could be an ineffective, inconsistent or meaningless method if it is difficult to measure the weighting or to calculate what weighting should be applied. In our view, this approach is likely to be too complicated, in particular if a consistent approach to what approaches are given weighting and how this is to be done is not agreed or adopted.

Question 16: Do you think that, in assessing public benefit, opportunities to benefit that provide direct access to the service or facility that is charged for, such as offering free places, subsidies, discounted fees, or concessions, should be given more importance than ways that provide other opportunities to benefit related to the charity's aims, such as local collaborative arrangements, or should they be given equal importance?

To an extent, our response to question 6 is also applicable here.

Equal importance should be given, in assessing public benefit, to direct access opportunities and other opportunities. Equal importance would be appropriate, so

long as in either case the benefits relate to the same type of aims or activities, namely core activities or ancillary activities.

Financial concessions are perhaps one of the most straightforward ways of demonstrating access to those in financial hardship but this is not the only way. The Commission's comments towards the top of page 50 state this well: *different initiatives by charities will have different effects or outcomes. However, the overall effect must be...people who are unable to afford the fees charged by the charity are provided with the opportunity to benefit in a material way.*

Question 17: Is using the concept of what *impact* a particular way or initiative has on providing opportunity to benefit a useful one? If not, what might be a more helpful phrase to use?

The concept of *impact* is helpful but further examples are needed of how impact may be assessed.

Question 18: Do you think the Commission should, either as a matter of law or good practice, take into account the financial or other value that these additional ways of opening up direct access have compared with the income the charity makes from charging for its charitable services?

These matters should be taken in account, though the guidance should be cautious about stating this in isolation.

The relevant legal principle is that the poor must not be completely excluded even if only some of the poor benefit or benefits are indirect (*Re Resch*). The crucial issue is thus that there is reasonable access to benefits for the poor. The circumstances, financial and otherwise, of a charity should be taken into consideration but not in a formulaic way such as by stating 'charities must provide concessions to the value of X% of their annual income'. This would be too simplistic for the issues concerned and would lead to unjust results.

Question 19: Do you think that, as a matter of good practice, the trustees of high fee charging charities should consider expressing their charity's public benefit by assessing and reporting the quantified (financial, social or other) value of the benefits they provide alongside the value of the tax breaks or other benefits they receive?

We broadly agree with this.

However, the guidance should positively state that charities should not resort to a statistical auditing or balancing exercise whereby they attempt to extract a 'net gain' in order to demonstrate their public benefit compliance. More guidance and examples are needed in this regard.

Further matters on which we respond in relation to section H not particularly addressed by the consultation questions are as follows.

- Section H1 is another example of a section which is far too long in reaching the key points and any clear guidance. This section could easily have begun

with the paragraph beginning “it is likely that most charities will need to offer a package of measures...”, which appears on page 49.

- Once trustees are comfortable with the principles involved, one of the most important areas in which they would appreciate Guidance is in the assessment of the measures they have taken to broaden access to those on low incomes. One of the ways in which this might be done is suggested under section H2 (assessing and reporting on the quantified value of benefits provided, financial, social or other). However, trustees would greatly benefit from further specific assistance on issue.

Question 20: Do you think the amount of detail and examples we have provided in this draft supplementary guidance strikes the right balance?

As the Commission acknowledges just before this question on page 51, there is a very difficult balance to strike here. However, in our view, the Guidance (take together with the General Public Benefit Guidance and any other relevant guidance for a particular charity) is too long on the general principles and introductory comments and not detailed enough on certain crucial issues.

In seeking to strike the right balance, in our view examples *do* help. The value of including these for the vast majority of trustees is not be outweighed by the possibility that some may see the examples as fixed models of approach.

Question 21: At the end of sections E - G we have included some key points for trustees to note about each section. Do you have any comments on these key points sections and do you find them helpful?

These sections are helpful and we believe trustees will find them so. However, arguably, with the clear layout and use of sub-headings which is also used, this is an unnecessary addition to the length of the Guidance.

Question 22: Is there anything that you would have expected us to cover in this draft supplementary guidance that we have not included?

Other than matters dealt with under specific sections above, we also suggest the guidance strongly recommends trustees prepare a public benefit policy to assist them in compliance with their obligations in the particular way which is relevant for their own situation.

Such a policy should of course be drafted specifically for the charity concerned and, for some, the policy may be very brief. However, this will be invaluable in helping trustees make the transition from the Commission’s Guidance (which is for a great range of charities) to their own specific situation.

Question 23: Do you have any comments on the specific points made in this draft supplementary guidance that are not covered by the other consultation questions?

No, other than those dealt with above.

Question 24: What do you think of the overall clarity, style, format and language used in this draft supplementary guidance?

Overall, the guidance is written in accessible language which will be helpful for trustees. However, in a number of respects, it needs to be clearer and it certainly needs to be much shorter.

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11 July 2008

PUBLIC BENEFIT AND THE ADVANCEMENT OF EDUCATION

DRAFT SUPPLEMENTARY GUIDANCE FOR CONSULTATION

RESPONSE BY HEWITSONS LLP

Other than those matters covered by specific consultation questions below, our overall assessment of this draft Guidance is it is helpful, though over-long and in places unclear.

The principal beneficiaries will be charity trustees. In this Guidance, taken together with the General Public Benefit Guidance, the Commission is ambitious in its hopes it will be thoroughly read, absorbed and applied by trustees.

As a starting point, the first third of this Guidance repeats principles set out in the General Public Benefit Guidance and, to this extent, is unnecessary. Straightforward cross-references would suffice, as is the case for references to the Commission's Guidance on other areas. Additionally, the Annex in relation to the purposes of a school is unnecessary, as addressed in more detail below.

Occasionally, the Guidance strays into policy making or speculation in relation to the law.

Question 1: Do you agree with our understanding of *education*? Are there other aspects that we should include?

Certainly, the meaning of education is wide in both its subject matter and method of delivery. Broadly we agree with the Commission's understanding of *education* as it is understood within charity law.

The Guidance should, however, clarify the charity law meaning is broader than that which applies in education legislation, though it is instructive to allude to this latter.

Although the Guidance states the charity law meaning is broadly the same as the everyday meaning, this is not precise enough. Reference to a dictionary definition is helpful but what is needed is a forthright statement that the law does not provide a definition of *education* for charity law purposes. What is provided by case law is often a series of examples or circular statements, such as where there is an insistence on material or activity which is of *educative value*. It is not the Commission's role to provide a definition where the law does not and the Guidance should make this clear.

We do, however, recommend the Guidance suggests, taking the above into account, *education* is:

- what Trustees consider reasonable people would think it is; and
- this should be seen in the light of commonly understood meanings (such as a dictionary definition) and current social circumstances; and

- a number of activities are agreed by the Courts to fall within the charity law meaning of *education* (the Guidance should at this point proceed to list a range of such activities).

Question 2: Do you share our understanding of what advancing education is, as opposed to promoting a particular point of view?

We agree party political purposes and propaganda are not within the charity law meaning of the advancement of education and therefore not charitable purposes or activities.

However, it is not correct to state advancing a point of view is not charitable. Reference in the Analysis document to *Re Hopkins* (at the top of page 6) supports this, as do statements and examples given in the Guidance (at C4). The Guidance must clearly state the promotion of a point of view *can* be charitable, even though there are limits. For example, an academic argument supporting a particular point of view on some historic issue is capable of being a charitable activity.

The key issue in relation to advancing particular points of view is that charity law makes a distinction between advancing a point of view with the intention of broadening understanding on a subject, which is permissible, and advancing a point of view with the intention of encouraging the recipient to think in that way to the exclusion of any other, which is not permissible. Advancing a particular point of view may be a charitable activity so long as the potential beneficiary is free to make up his or her mind in relation to conclusions.

Question 3: Are there any less obvious ways of advancing education (other than those stated in the Guidance)?

We broadly agree with the commentary given in this section of the Guidance.

It would help to give some examples of vocational or experience-based education. It would also help to mark the distinction between this and general experiences in life, which are not educative in a charity law sense, as noted in Section C2.

Lastly, it would help to note education can be part of a broader purpose or activity, as with regeneration charities.

Question 4: Are there other types of organisation (other than those noted in the Guidance) that advance education?

There are a number of charities which are similar to charities involved in professional education or education on a particular subject, including charities for the advancement of industry and commerce, business efficacy, models of good governance and efficacy of charities.

Question 5: Do you agree that, for education to be advanced, it is necessary for there to be a sufficient structure or process related to those whom it is intended to educate?

The focus on structure employed in this section may be reliant on the use of the dictionary definition given in Section C1. However, education can be a defined

process which is nevertheless apparently unstructured. This should be clarified and examples given.

For example,

- University, especially post-graduate, education can (dependent on the subject) often be delivered in a way which allows the student significant freedom to choose the structure or methodology;
- people with learning difficulties may have education designed in an apparently very unstructured way, based on practical experience and life skills;
- pre-school and Foundation Stage children are often educated in a way which is relatively unstructured. The current Free-flow strategy is typical of this;
- observational and experience-based education is often not structured beyond an invitation to observe and learn however the recipient wishes; for example exhibitions; and
- there is a range of learning styles or approaches, reflecting the range of potential beneficiaries; for example visual, auditory or kinaesthetic learning.

Question 6: Do you agree that professional education is capable of being charitable in a similar way to vocational education?

We agree with this proposition.

The key issue in this context is private benefit. Beyond this (and possibly fee-charging issues) we do not see why the issue is different or more complex for professional education than for vocation education, as suggested by the draft Guidance.

We were not aware separate guidance for professional bodies and professional education is forthcoming, prior to the reference in this draft Guidance. This Guidance is already over-long and we do not agree separate guidance in relation to professional bodies and professional education is necessary.

Question 7: Do you think we have accurately described *education*, the advancement of which can be charitable if it is also for the public benefit? If not, please let us have your comments, supported by examples where possible.

We have no further comment on this issue: please see our responses above.

Question 8: Do you agree with what we say about how organisations can clearly show the benefit of education they provide? If not, please explain your reservations. Are there any other examples that you think it would be helpful for us to include to illustrate the need to show the benefit of education?

This section is not as clear as it should be.

The key issues in relation to the benefits of education being clear are:

- the concept of *educative value* is subjective. If charities are not to be at the whim of the Commission, the Tribunal or the Courts, this must mean educative value is judged by the standard of the reasonable person. This is stated on page 21 of the Guidance; and
- many educative values are not easy to assess: for example the benefit of artworks, written opinions, or capacity building. There should be guidance on how charities should assess such values or benefits.

We have the following comments in relation to specific issues.

- The first sentence under *educational value or merit* should be rewritten, “not all experience will necessarily be of public benefit” to comply with legal principles and to be logically probative.
- The division of *educative value* into subject matter and delivery is confusing and takes the issue no further. Both elements must be present. Both may be subjective. The issue is one of judgement as to both subject and delivery.
- The examples given on page 20 are too specific to be of analogous value. Also, it is not in line with legal principles to state that material which is either superficial or unverified is necessarily incapable of advancing education.
- The comments under *increasing useful knowledge is a benefit* are confusing and contradictory. To say *useful* does not mean necessarily *practically useful* begs the question, what else *useful* could mean in this context. The term *nonsense* needs qualification if it is to be used.
- Structure may be an important factor, but the example given on page 21 in relation to Derby winners proves nothing. In fact, the date concerned may prove to be of educative value itself: structured, not nonsense and capable of adding to the store of useful knowledge (useful as capable of increasing knowledge).
- The benefit of persuading people to support a particular viewpoint is not incapable of proof, it is simply a political purpose the Courts have stated they are not *willing* to judge. This comment is confusing.

Question 9: Do you think we have explained sufficiently clearly about benefits having to be related to an organisation’s educational aims? Are there other issues that arise in this context that you think it would be helpful for us to include?

The principles in this section are correctly stated but not all the examples are helpful.

- The example in relation to the plant biology charity on page 22 is not clear as to the charity’s objects. The discovery concerned may well be a relevant benefit.

- Linked to this, it is not clear if an unintended benefit, which nevertheless fell within a charity's objects, should properly be accepted as a public benefit applicable to that object. We submit it should.

The separate treatment of schools' purposes in this section and in the Annex is unnecessary in the context of the already over-long Guidance. Extensive coverage of independent schools' issues in the charity press in relation to public benefit does not qualify this area for different treatment.

Question 10: Do you think we have explained the impact of restrictions on the beneficial class sufficiently clearly? Do you agree with our understanding?

Unreasonable restrictions is a subjective concept, yet the commentary on this refers to a further series of subjective concepts (legitimate, proportion, etc). We suggest *unreasonable* in this context should simply mean not *directly relevant* to the benefit concerned, judged by the standard of a reasonable person. This, coupled with the examples given, would be clearer.

Question 11: Do you think that restricting the opportunity to benefit to a group of people who are established in their profession or vocation impacts on whether the beneficiary class can be a section of the public?

We do not think the circumstances justify this restriction.

Please see also our responses to question 6.

Question 12: Do you agree that a beneficial class restricted to the children of particular professionals may, in some circumstances, not be a sufficient section of the public? Is our example here helpful? Are there other examples?

This is a highly specific area, relevant only to a narrow group of charities. The case law is inconclusive and the Guidance should say so.

Beneficiary classes defined by contractual or personal connection appear to be restricted by the Courts to poverty charities and the Guidance should not prospect in relation to other areas.

The examples given do not help: why are children of doctors not an acceptable beneficiary class, if children of missionaries are? This is not explained.

Question 13: Are there any other ways in which access to education might be restricted and which might affect whether that education is for the public benefit.

Social issues might conspire with the nature of a type of education or provider to exclude some people.

For example, those with poor social circumstances (such as poor or low self-esteem, social capacity, expectations, role models, guidance from others, language or communications skills, organisation, or motivation) may find it hard to access a structured pattern of learning and / or deal with the charity concerned.

Question 14: Are there any ways, other than by fee-charging, that might exclude people in poverty from the opportunity to benefit and which impact on the ability of an educational organisation to meet the public benefit requirement, which would be useful examples here?

Ancillary expenses of education, such as transport, purchase of equipment, support for living expenses, etc, may exclude people in financial hardship from some educational benefits.

For example, a university course in medicine might require (in addition to the payment of tuition fees) living expenses which are beyond the reasonable reach of such people, books and medical equipment necessary for the studies may be beyond their means, and the compounding effect of the length of the course in relation to the financial burden may be sufficient to put off those who start from a position of financial hardship.

The Guidance should give positive examples of how charities may overcome these kinds of issues.

Question 15: Is it clear enough how private benefit might jeopardise the aims of the organisation being for the public benefit?

This section is clear.

However, the examples could be more relevant. For example, free accommodation for teachers or subsidised fees for parent-teachers at independent schools are relevant, common and challenging examples which it would have been helpful to address.

Question 16: What do you think of the overall clarity, style, format and language used in this draft supplementary Guidance?

Overall, the Guidance is written in accessible language which will be helpful for Trustees.

However, in the number of respects it needs to be clearer, as noted above.

The Guidance should certainly be far more succinct.

Question 17: Is there anything that you would have expected us to cover in this draft supplementary Guidance that we have not included?

Please see our responses above as to this.

Additionally, we suggest the Guidance strongly recommends trustees prepare a public benefit policy to assist them in compliance. This will need to be suitable for the particular charity concerned and, for some, may only be brief. However, this would help trustees make the transition from the Commission's Guidance, which needs to be applicable for a great range of charities, and their own circumstances. It would also help trustees build public benefit consideration into the everyday life of the charity.

Question 18: Do you agree with our analyses of the purpose of the school in a modern context?

Please see our response to question 9 above.

Question 19: Do you consider that a school with narrow aims focused on educating those who have the opportunity to attend it, can only educate people from other educational establishments in ways that are ancillary and incidental to the education of its beneficiaries? And that these wider educational activities, going beyond its stated aims, would not count in the public benefit assessment?

Please see our responses to question 9 above.

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10 July 2008

PUBLIC BENEFIT AND THE PREVENTION OR RELIEF OF POVERTY

DRAFT SUPPLEMENTARY GUIDANCE FOR CONSULTATION

RESPONSE BY HEWITSONS LLP

Other than those matters covered by the specific consultation questions below, our overall assessment of this draft Guidance is it is helpful, though over-long.

The principal beneficiaries will be charity trustees. In this Guidance, taken together with the General Public Benefit Guidance, the Commission is ambitious in its hopes it will be read, absorbed and applied by trustees.

As a starting point, the first third of this Guidance repeats principles set out in the General Public Benefit Guidance and, to this extent, is unnecessary. Straightforward cross-references would suffice, as is the case for references to the Commission's Guidance on other areas.

Question 1: Do you agree that there is no distinction between the relief of poverty and the relief of those in need by reason of financial hardship?

It would be helpful to explain that, whilst in general parlance poverty can mean deprivation which does not relate to financial matters, in the charity law context it means significant financial or material disadvantage.

Question 2: Do you think our approach to poverty as a relative concept is reasonable?

Broadly, this approach is reasonable.

It would be helpful to give the example of professional benevolent associations which, where charitable, will now need to pay even closer attention to their public benefit delivery.

Additionally, the Guidance should demonstrate an awareness of the fact that relative poverty also has relevance as a concept in the fee-charging context. In the recent *Odstock* decision, the Commission stated relative lack of financial means in an affluent part of the country may not necessarily equate to poverty or financial disadvantage within the charity law meaning.

On the issue of assessing the means of someone who is asset rich yet income poor, charity law follows a similar approach to benefit law, in that a degree of a person's capital assets are reasonable to take into consideration when assessing their financial means, even if they have relatively low income.

Question 3(a): What examples of the sorts of activities charities preventing poverty undertake would it be helpful to include?

Examples might include micro business support, counselling, community wardens, employment or unemployment advice, addressing benefit dependency, and campaigning on poverty issues.

Question 3(b): Are there any activities that such charities would like to undertake that they do not feel able to at present?

This section needs some adjustment now in light of the revised CC9 Guidance on *Campaigning and Political Activities by Charities*.

Question 4: How would charities working in this area interpret the circumstances in which a person would be at risk of becoming poor?

In our experience, such charities would be likely, when acting properly, to exercise a judgement of risk based on evidence, research, trends and any other relevant circumstances.

They should have an agreed way of working in this regard, which might amount to a policy but which also needs to be flexible enough to respond to changing conditions.

Question 5(a): What other benefits related to the aims of poverty charities which flow from their activities would you find it helpful to include?

We have no further comments on this issue.

Question 5(b): Are there any circumstances in which it might not be for the public benefit to relieve poverty?

Other than the points already made in the Guidance in relation to particular activities which might be undertaken (for instance, campaigning), we have no further comment.

Question 6(a): Do you agree that, although an narrowly restricted beneficial class may sometimes be a sufficient section of the public for a relief of poverty aim, it is unlikely to be a sufficient section of the public for a distinct aim to prevent poverty?

We agree with this statement, although this is a very academic distinction and will be of little practical impact for most charities.

Question 6(b): Do you agree that there may be circumstances in which a restricted beneficial class might be for the public benefit in the case of a charity established for the prevention *and* relief of poverty?

Yes.

Question 6(c): Do you agree that as the relief of need by reason of financial hardship is indistinguishable from the relief of poverty, the rules regarding a restricted beneficial class would be the same for both?

Yes.

Question 6(d): Do you agree that the rules regarding a restricted beneficial class are generally limited to the relief of poverty and do not apply to other charitable purposes previously within the first head of charity such the relief of need by reason of age, youth, sickness or disability?

Yes.

Question 7(a): Would you welcome further guidance on the work carried out by benevolent funds?

Yes, this would be helpful.

In particular, the size of the employer is an important consideration. Whilst there are particular considerations in relation to the nexus between the beneficiary and the employer (which are set out in the Guidance and the accompanying Analysis of the Law document), the relief of poverty of the employees and ex-employees of a large organisation is a very different prospect from that in relation to a small employer.

It is also important to distinguish other industry-specific charities, such as those for the advancement of education within a particular trade.

Question 7(b): Do you agree that the charitable aims for benevolent funds for a restricted beneficial class must generally be limited to the relief of poverty?

Yes. It is difficult to see how they would be truly *benevolent* funds if this were not the case.

Question 8: Should family poverty trusts continue to be regarded as charitable, following the removal of the presumption of public benefit?

To the extent a family poverty trust can demonstrate public benefit within the law, they must continue to be considered charitable until the Courts or Parliament decide otherwise.

Whilst it is tempting to think it is questionable having such a restricted beneficial class is still justifiable following the removal of the presumption, the law on public benefit is the unaltered by the Charities Act 2006, notwithstanding any questions raised elsewhere, including in the Commission's Guidance: it is only the public benefit requirement which is new.

Question 9: What do you think of the clarity, style, format and language overall used in this draft supplementary Guidance?

Generally, the Guidance is clear, useful and will readily understandable by trustees, the principle beneficiaries of this guidance.

There are one or two exceptions. For example, in section E7 on the principle that any private benefits must be incidental, it is manifestly the case the over-provision of benefit to individuals would affect public benefit, since such people would no longer be in poverty. Additionally, this is not the same as unjustifiable private benefit.

Additionally, as stated at the beginning of this response, the Guidance is over-long for trustees, particularly taking into consideration other related Guidance including the General Public Benefit Guidance published in January.

Question 10: Is there anything else you would have expected us to cover in this draft Guidance?

It would be helpful to know how the Commission will assess public benefit for poverty charities in reality, in particular for small charities, given the Commission's proportionality framework.

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30 June 2008

PUBLIC BENEFIT AND THE ADVANCEMENT OF RELIGION

DRAFT SUPPLEMENTARY GUIDANCE FOR CONSULTATION

RESPONSE BY HEWITSONS LLP

Other than those matters covered by the specific consultation questions below, our overall assessment of this draft Guidance is it is helpful, though over-long.

The principal beneficiaries will be charity trustees. In this Guidance, taken together with the General Public Benefit Guidance, the Commission is ambitious in its hopes it will be read, absorbed and applied by trustees.

As a starting point, the first third of this Guidance repeats principles set out in the General Public Benefit Guidance and, to this extent, is unnecessary. Straightforward cross-references would suffice, as is the case for references to the Commission's Guidance on other areas.

Question 1: What would be the most appropriate terminology for the Commission to use to describe the object or focus of a religion?

The terms *entity* or *principle* are not correct terminology. The Charity Commission's Scientology Decision makes clear religion must include a god, deity or supreme being.

Taking into account the partial definition in the Charities Act 2006 section 2 (3), appropriate terminology to use as the object or focus of a religion is *god, gods or supreme being*, where that supreme being is a sentient being as opposed to an entity or principle.

The South Place Ethical Society case as well as the Scientology case makes clear worship may not be applied to a principle.

Question 2: Do you have any comments on the suggestion for a description of a coherent belief system given in the Guidance?

A *sufficient level* (of cogency, etc) should be judged objectively rather than subjectively. For this reason it might be helpful to rephrase this as *a level of cogency, seriousness, cohesion and importance sufficient for a reasonable person to appreciate it as such*.

Question 3: What would be the most appropriate terminology for us to use to describe *worship* or other forms of relationship with a supreme being or entity?

It would be helpful, in the context of current social culture, to rephrase *worship* as *worship, reverence or commitment*.

Question 4: If you are a follower or an adherent of a religion, do you have a different expression to describe your relationship with your supreme body or entity?

Not applicable.

Question 5: Do you agree with our examples of when a religion can be said to be advanced?

Yes.

Question 6: Do you wish to suggest any other examples of ways in which religion can be advanced?

No.

Question 7: How can the advancement of a religion by pastoral work be more clearly distinguished from social work of a similar kind?

This should be clear from the context of the objects of the religious charity concerned. These should be to advance the religion by the activities chosen by the charity's adherents or promoters.

This needs to be followed through in the activities of the charity and in the way it then demonstrates this through public benefit reporting and in other ways.

This emphasis and distinction from social work-focused charities should be made clear in the Guidance.

Question 8: Would it be helpful to offer more guidance on the limitations imposed on the advancement of religion by human rights and discrimination legislation?

A brief cross-reference to the Race Discrimination Act 1976, the Equality Act 2006 and other relevant legislation would be helpful as to whether religious charities can advance a particular kind of discrimination in the face of an apparent conflict with statute.

Question 9: Is it clear enough how the Commission's assessments in the light of current social and economic conditions will affect their assessment of organisations established to advanced religion?

The assurances in this Guidance and the General Public Benefit Guidance are clear enough.

Question 10: Are there other examples of ways in which it can be showed that the advancement of religion is for the public benefit?

There is no need for further examples.

Question 11: Is the often inherently intangible nature of religion dealt with clearly enough?

The Guidance should explain further how intangible benefits may be assessed by a charity and the Charity Commission in order to consider whether the public benefit requirement is satisfied.

Whilst the General Guidance gives examples of how intangible benefits may be assessed in demonstrating and reporting on public benefit, this is an example of how specific relevant examples in this Supplementary Guidance would be helpful for trustees.

Question 12: Is it common for a charity for the advancement of religion to have more than one aim? Is it clear enough what the aim of an organisation established to advance a particular religion is and what activities fall under another charitable purpose?

It is common for religious charities to have more than one aim, especially those with a community focus in their objects as well as activities.

It is not always clear to the trustees of those charities which is the religious aim (as a matter of law, rather than in their own eyes) and which is not. Some further brief explanation will assist here.

Question 13: Do you have any comments on our suggested approach towards charities undertaking activities in a foreign country which might be subject to local legal challenge?

The approach suggested here and in the guidance on charities working overseas is helpful.

Question 14: Is there anything you would have expected us to cover in this draft supplementary Guidance that we have not included?

No.

Question 15: What do you think of the clarity style format and language used in this Guidance?

Overall the guidance is clear and easy to digest for trustees. However, as stated above, it is too long and repetitious.

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