NCVO submission to the Charity Commission’s consultation on the revised Public Benefit guidance

The present submission builds on NCVO’s previous work on public benefit and charity law reform more broadly. Our specific comments to the draft guidance are based on Sir Stuart Etherington’s witness statement provided in support of NCVO’s third party intervention in the Upper Tribunal proceedings between the Independent Schools Council and the Charity Commission. More recently, NCVO examined in detail the law on public benefit and the Charity Commission’s guidance as part of the review of the Charities Act 2006 undertaken by the Advisory Group chaired by Baroness Howe of Idlicote. The recommendations made by the group on how the guidance on public benefit should be structured have also informed our response to this consultation.

As a premise, we would like to acknowledge that the Charity Commission has made intensive efforts to bring its guidance on public benefit to the attention of charity trustees. We also understand the complexity of the concept that the guidance seeks to explain, and the sheer volume of case law, which is neither comprehensive nor fully consistent. Therefore, there is an inevitable struggle to avoid the twin dangers of being too general for a specialist readership, and too technical for a lay audience.

Before outlining our comments, we also note that the draft guidance put forward in this consultation is further evidence of the Charity Commission taking a more permissive approach to its regulation of charities, particularly its light touch approach to the duties of charity trustees. We agree that it is a matter of judgement for the trustees of each charity to address and assess how their public benefit obligations might best be fulfilled in the context of their own particular circumstances. Therefore the explicit recognition that it is for the charity trustees to decide how to run their charity for the public benefit is a positive one.

However, NCVO has also always maintained that it is important to have a strong regulator that ensures standards are maintained for public trust and confidence, and policing the public benefit requirement is a key part of this. It will therefore be a priority for the Commission to fulfill its statutory duty to make sure trustees are providing a public benefit and intervene if it thinks this is not being done.

To discuss any of the points made in this submission, please contact Elizabeth Chamberlain (email: Elizabeth.Chamberlain@ncvo-vol.org.uk; tel.: 0207 520 2559).
General comments

1. The report by NCVO’s Charity Law Advisory Group included the recommendation that the guidance should adopt a triage approach, whereby the core guidance would contain the minimum necessary to allow trustees to identify whether they are administering their charity in accordance with the law on public benefit. Only those charities where significant public benefit issues may apply, principally charities which have a restricted beneficiary class, confer significant private benefits, charge high fees or engage in novel areas of charitable endeavour, need be signposted to more detailed guidance on the applicable law and the options in complying with it.

2. We therefore welcome the new online format and style of the guidance, which has clearly been tailored to allow trustees to quickly access the information they require in order to carry out their day-to-day duties: rather than wading through one weighty document, trustees can limit themselves to read higher level guidance and then “click through” to more detailed guidance if necessary.

3. This new online format makes it easier for trustees to select the parts of the guidance that are relevant to their charity, but the complexity of the law on public benefit means that inevitably the number of links is high and this can make navigation difficult. Many immediately expressed concern that the new approach with the online format is somewhat hard to follow and there may be some trustees who would prefer the option of a single document that can be printed out and referred to regularly.

4. In particular, a criticism that has been widely made – and that we share – is that in the current form, if a charity is faced with a particular public benefit issue, it is not easy to find the specific guidance it needs.

5. It is therefore useful that the Commission has – since the start of the consultation – added the option of a downloadable summary document which covers all the key points in the guidance. The Commission should also consider producing as downloadable pdf documents: the full statutory guidance, specific short guides on each section of the guidance, examples and mini case studies to better explain the practical aspects of public benefit.

6. Another key improvement, in line with the Advisory Group’s recommendation, is the better distinction between public benefit requirement of being a charity, trustees’ responsibilities to operate for the public benefit when established as a charity, and reporting requirements in respect of public benefit. However, we still think that the risk of confusion could be further reduced if the Commission considered dealing with

   a) the legal requirements for charitable status (relating solely to a charity’s purposes), and
   b) the duty of trustees to administer the charity consistently with its purposes (which must by definition be for the public benefit),

in an entirely separate document from Public Benefit Reporting.

7. In line with the Upper Tribunal’s decision, the guidance makes it clearer that how trustees comply with the duty to run the charity for the public benefit is part of their decision making framework. Therefore, although the guidance outlines what trustees’ duties are, it is not prescriptive in how these duties must be achieved. This will
generally be welcomed by the sector as, of course, every charity is different in terms of size, activity, resources, geographical scope, etc. However we are also aware that many charities, especially the smallest, often express a desire for more guidelines by the Commission. A possible solution that we recommend is the provision of more examples, showing different ways in which public benefit can be delivered.

Specific points

8. In ‘What makes a charity’ the distinction between the benefit and who benefits is not sufficiently explained. The example refers to quite different types of charity and therefore does not help clarify the difference.

9. In ‘Who benefits and what the benefits are’ the distinction between ‘the public at large’ and ‘a sufficient section of the public’ as equally valid answers to the question ‘Who benefits?’ could be made clearer with more examples.

10. Poverty as the sole exception to the requirement that all purposes must demonstrate both aspects of public benefit could be better explained and in particular the distinction between ‘poverty relief’ and ‘poverty prevention’, where it should also be recognised that the exception is harder to apply.

11. In the section ‘Charging for services – restrictions excluding the poor’ there is a risk of confusion caused by the language used where it refers to the ‘minimum’ requirement for the benefit provided for the poor as more than ‘minimal’ or ‘tokenistic’. This is a rather circular approach, and doesn’t reflect the fact that in its decision, the Tribunal does appear to indicate that there will be an objective standard that will be applied to determine what level of benefits for the poor is “minimal” and that trustees must act within the range of decisions within which a reasonable body of trustees would make.

12. In the same section, when addressing the ‘kinds of benefits’ the guidance requires that benefits for the poor or for people who cannot afford the full fees must be ‘the same or related to’ charged for benefits. However this wording seems too narrow: the benefits should certainly be related to the purpose but there is a vast difference between the educational benefit provided in a direct structured way for pupils in a school and the educational benefit provided indirectly through a partnership regarding use of facilities with a local state school, which is presumably acceptable as it is one of the examples given.

13. In ‘Restricting who benefits’ the need for a connection between the purposes and any restriction on who can benefit is not apparent in relation to geographical restrictions. Sometimes there is a purposive element in the restriction, e.g. a particular geographical area is run down and therefore needy, so any charitable activity there will be of help to the inhabitants and it may be that providing housing for the poor is more valuable in that area than elsewhere, in which case there is a link. In other cases the charity may be addressing a widespread need e.g. tackling obesity and has to start somewhere so starts where the trustees are based and limits beneficiaries in practice for purely pragmatic reasons. The example given of preserving endangered species is not particularly helpful: one might set up a local nature reserve or wildlife centre which
would be geographically restricted in so far as at least the direct benefits were concerned.

14. In ‘Benefits to people who are not beneficiaries’ it is stated that the amount of any permissible incidental benefit must be ‘reasonable’. The CC was criticised by the Upper Tribunal in the ISC case for using the concept of reasonableness on its own on the basis that this was the wrong test and it is not for the CC to judge whether a benefit to the poor is reasonable. Admittedly the trustees in applying their judgement must act “reasonably” i.e. within the range of decisions which could be made by a reasonable body of trustees, and there is a level of provision below which no reasonable trustees would go, but the Tribunal ruled that it is not for the Commission to impose its idea of what the reasonable level of provision is or the method of provision. Equally it should not be for the CC to judge whether an incidental benefit is reasonable in the circumstances. The wording could be improved, clarifying that to be properly regarded as an incidental benefit (i.e. not one which it is the organisation’s purpose to provide) a benefit will normally be significantly less valuable than the main charitable benefit provided to the beneficiaries.

15. As noted by another commentator, under the ‘Clear benefits’ section there is a list of 13 ‘Examples of benefit’. However, most of the items listed are examples of activities which may or may not lead to benefits rather than the benefits themselves. For example, "giving the public access to an historic building" is an activity which may be of benefit if helps people better to understand history or gives them some feeling of inspiration of some kind. Similarly, giving medical care is an activity. The benefit which flows from this is that people become well. One of the criticisms we made to the previous guidance was that in certain parts it failed to distinguish between purposes, activities and benefits, so it is important that this revised guidance is clearer about how public benefit differs from descriptions of purposes and activities (even where it appears obvious that benefits will almost always flow from certain activities).

16. In relation to the ‘Different types of benefit’, confusion could arise from the fact that in some passages wider benefits appear to be classed on an equal footing with direct and indirect benefits (“direct, indirect and wider benefits will all be relevant benefits to be taken into account if they flow from a particular way a charity can carry out its purpose”), yet in others they are treated differently (“wider benefits to society from what a charity does cannot be used to justify a restriction”). It would therefore be helpful if the guidance were clearer about the weight attached to wider benefits, and that such benefits can only be counted at all if they relate to the charity’s purposes.