

June 21, 2007

Charity Commission Direct
P.O. Box 1227
Liverpool
L69 3UG

Dear Sir or Madam:

Re: Charity Commission Consultation on draft public benefit guidance

We are writing to comment on several aspects of the draft public benefit guidance (“Draft Guidance”) that was issued by the Charity Commission for England and Wales (the “Commission”) this spring pursuant to section of the *Charities Act 2006*, c.50 (the “*Charities Act*”). We apologize for the lateness of our submission.

Let us begin by saying that we appreciate the Commission’s efforts to clarify the public benefit concept, especially in light of the fact that so few cases shed light on how the concept should be interpreted today. We are encouraged by the Commission’s commitment to focusing on what is relevant and appropriate for the modern social conditions of the day, and to taking a modern interpretation of the law.

Nonetheless, we are concerned with several aspects of the Draft Guidance, and of the “Analysis of the law underpinning Charities and Public Benefit” (the “Analysis”) which accompanies it. Briefly, we think that the Commission should focus more on the statutory context within which the public benefit guidance is being created, and less on preserving every rule and nuance of the old, common law approach. We think that more attention must be paid to the *Human Rights Act, 1998*, which has shifted the paradigm of UK law, and which must now influence the Commission’s interpretation and application of the common law authorities as well as its consideration of particular applications for charitable status. We think that the Scottish concept of “disbenefit” does not form part of the law relating to charities in England and Wales, and that is therefore likely not appropriate to refer to this concept in explicating subsection 3(3) of the *Charities Act*. Finally, we think that the Commission should clarify whether issues of terrorist activity by charities will be dealt with under its public confidence and compliance mandates, rather than under the public benefit analysis.

Each of these views is expanded in more detail below.

1. **The principle of statutory primacy**

1.1 Our first comment on the Draft Guidance relates to the importance of keeping the *Charities Act* and any other applicable legislation at the forefront of any legal guidance or analysis issued by the Commission.

1.2 The principle of statutory primacy is well known to the Commission. However, it is a principle that in our experience sometimes gets lost in the charitable sector, as a result of the long history and richness of the common law tradition of charitable trusts. As Justice Kirby noted in a recent Australian charity law case:

It is as if the legal mind finds it more congenial to apply the law as stated by judges rather than the law as stated by the legislature. This tendency must be resisted...¹

1.3 In our view, the fact that the concepts of charity and public benefit must now be interpreted as statutory rather than common law concepts in the United Kingdom may significantly change the rules which apply to their interpretation.

1.4 We frequently forget that the seminal case on the meaning of charity, the *Pemsel* decision of the House of Lords², was primarily concerned with the law of statutory interpretation rather than the definition of charity. Of a decision which spans over 60 pages, only two paragraphs in a passage in Lord MacNaghten's judgment which he described as "rather an academical discussion"³ deal with the four heads of charity and these paragraphs were not cited by any of the other judges.

1.5 The House of Lords had to determine the "true construction" of the words "charitable purposes" in an English tax statute. Lord Halsbury L.C., in a dissenting judgment, took the position that having "a mission to convert heathens without regard to their poverty at all" was not "charitable" under the English statute when the term was given its "ordinary meaning".⁴ He would have required the advancement of religion to focus on impoverished heathens or to have a relief of poverty component, a constraint which is in many ways analogous to the *Charities Act's* requirement that the enumerated charitable purposes also meet the "public benefit" test.

¹ *Central Bayside General Practice Association Limited v. Commissioner of State Revenue* [2006] H.C.A. 43 [*Bayside*] at para. 83

² *Commissioners for Special Purposes of Income Tax v. Pemsel* [1891] AC 531 [*Pemsel*]

³ *Pemsel* at p. 587

⁴ *Pemsel* at p.

- 1.6 Lord MacNaghten circumvented this problem by holding that “according to the law of England a technical meaning is attached to the word ‘charity’”. We believe the Commission must be mindful of this seminal ruling as it carries out its new responsibilities under the *Charities Act*, and consider the possibility that statutory terms such as “the advancement of the arts, culture, heritage or science” or “the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage” might also be given a “technical” meaning if the *Pemsel* approach is adopted as “existing charity law”. If the technical meaning assigned to these specific charitable purposes is far broader than their “ordinary meaning”, the statutory concept of public benefit may fulfill a function which is analogous to Lord Halsbury L.C.’s requirement that religious organizations fulfill an eleemosynary function in order to be charitable.
- 1.7 It is our further view that the Draft Guidance does not adequately reflect the interpretative powers which are given to the Commission by the *Charities Act*.
- 1.8 In creating a guiding document on the notion of public benefit, the Commission is fulfilling its statutory duty under section 4(1) of the *Charities Act* to “issue guidance in pursuance of its public benefit objective.” It is clearly important that the Commission analyze the existing common law cases as part of this process, as section 3(3) of the *Charities Act* states that the term “public benefit” is to be understood “as that term is understood for the purposes of the law relating to charities in England and Wales.”
- 1.9 However, the *Charities Act* also suggests that the public benefit guidance should not be merely a reiteration of the judicial statements of varying authority that have generally been taken as expressing the law on public benefit in England and Wales.⁵
- 1.10 Subsection 4(4) of the *Charities Act* requires the Commission to “carry out such public and other consultation as it considers appropriate” before it issues its final public benefit guidance. If Parliament had intended the Commission to merely restate or interpret the existing case law in clarifying the notion of “public benefit”, it would not have required the Commission to consider the opinions of laymen before it issued its final guidance under subsection 4(1).
- 1.11 Subsection 4 (6) states that charity trustees “must have regard” to the public benefit guidance when exercising any powers or duties to which the guidance is relevant. This statutory direction lends a weight and authority to the

⁵ Certain passages of the Draft Guidance suggest that the Commission is taking this narrower view. We refer, for example, to section C2, which states: “We will base our decisions about what is or is not charitable on the underlying case law on charity and public benefit. We will follow the courts’ approach and develop our decisions on public benefit in the context of changing economic and social conditions, including public attitudes.”

Commission's interpretation of the law on public benefit which supersedes its previous role.

- 1.12 Subsection 7(4) reinforces the important role of the public benefit criteria in the *Charities Act* by clarifying that the term "public benefit requirement" means something different than the term "public benefit objective".
- 1.13 As the Draft Guidance itself recognizes, there are "a very limited number of cases" on the concept of public benefit. In addition, many of the commonly accepted public benefit principles are actually based on *obiter* judicial comments with little binding authority. Parliament must be presumed to be aware of this paucity of authority in requiring the Commission to carry out a public consultation on the concept of public benefit.
- 1.14 The wording of subsection 3(3) of the *Charities Act* also raises questions about the nature of the Commission's task.⁶ Whose "understanding" of the term public benefit is to provide the benchmark for the Commission's guidance?⁷ Is the Commission to assume that the term public benefit is "understood" correctly? How should the Commission address specific points of the law on public benefit on which there is no general consensus? What legal sources are encompassed by the "law relating to charities in England and Wales"?
- 1.15 In our view, the Commission, having recognized the sparse nature of the case law on the concept of public benefit, and having considered the language of the statutory direction under subsection 3(3), should approach its task of publishing guidance on the public benefit broadly and purposively. This may mean recognizing that not every existing understanding of the term "public benefit" is correct, and that the "law relating to charities in England and Wales" encompasses more than the common law jurisprudence. It may also mean challenging those elements of the case law that are either not binding, or that been rendered inappropriate by legislative developments.
- 1.16 This position finds support in subsection 2(8) of the *Charities Act*, which distinguishes between "existing charity law" (the charity law that is in force on the day section 2 becomes effective), and "charity law" (the law relating to charities in England and Wales after the statute comes into force). The balance of our comments will address some of the contexts within which the Commission may wish to reconsider the nature of its interpretational task.

⁶ Subsection 3(3) of the *Charities Act* states: In this Part any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.

⁷ Lord MacNaghten talked about the different understandings of a "layman", "a gentleman of education, without legal training," and a "lawyer". *Pemsel* at p.

2. **Statutory primacy and the *Human Rights Act, 1998***

- 2.1 Our second, related comment on the Draft Guidance relates to the Commission's statutory obligation to interpret the public benefit requirement in a manner compatible with the *Human Rights Act, 1998* ("*HRA*").
- 2.2 We do not purport to be experts on the scope and interpretation of the *HRA*. However, we are familiar with the language of its provisions, and with comparable Canadian and international human rights instruments such as the Canadian *Charter of Rights*. We are also aware that the UK government has stated, pursuant to section 19(1)(a) of the *HRA*, that the provisions of the *Charities Act* are compatible with Convention Rights.
- 2.3 Based on this knowledge, we were surprised to find that the Draft Guidance contains no reference to the *HRA*, either in terms of how the Commission will undertake its consultative and adjudicative functions, or in terms of the substantive legal principles the Commission will rely on in applying the public benefit criterion.
- 2.4 The purpose of the *HRA*, as set out in its Preamble, is "to give further effect to rights and freedoms guaranteed under the *European Convention of Human Rights*" (*ECHR*). Section 3 imposes a strong interpretative obligation on courts and tribunals, requiring them to read legislation in a way which is compatible with Convention rights unless such a reading is 'plainly impossible.'⁸ Section 6 requires public authorities, including the courts and the Commission, to act compatibly with the Convention unless they are prevented from doing so by statute.
- 2.5 All of these provisions are relevant to the public benefit consultation and the guidance which will ultimately be published by the Commission. The purpose of the consultation, as we understand it, is to clarify the meaning of section 3(3) of the *Charities Act*, by considering how the term public benefit is understood for the purposes of the law relating to charities in England and Wales. In general terms, the *HRA* requires that in fulfilling this purpose, the Commission interpret section 3(3) in a way which gives effect, as far as possible, to the rights and freedoms guaranteed under the *ECHR*.
- 2.6 More specifically, we would suggest that the *HRA* imposes at least two particular obligations on the Commission in the context of the development of the public benefit guidance. First, the Commission should consider how the political purposes rule is understood for the purposes of the law relating to charities in England and Wales and adopt an interpretation of that rule which is compatible

⁸ J. Wadham et al, *Blackstone's Guide to the Human Rights Act 1998*, 4th ed. (Oxford: Oxford University Press, 1997) at 59

with the *ECHR*. Second, the Commission should ensure that any judicial *dicta* that are incorporated into the public benefit guidance are consistent with the new legal paradigm which the *HRA* has created.

3. **Political purposes and the public benefit: the *Bowman* decision**

- 3.1 Section E5 of the Draft Guidance states that “charities cannot undertake political purposes because neither the courts nor the Charity Commission is in a position to judge whether a political purpose is or is not for the benefit of the public.” The Analysis, similarly, states that courts are not in a position to be able to decide the benefits of changing the law or public policy. It cites *Bowman v. Secular Society*⁹ (*Bowman*) for this proposition.
- 3.2 We believe the Commission should seriously consider whether the *Bowman* principle should continue to be understood as part of the law relating to charities in England and Wales, particularly in light of the new legal paradigm created by the *HRA*, and the inclusion of the advancement of human rights as a charitable purpose in the *Charities Act*. In our view, if the advancement of human rights is unequivocally understood as benefiting the public, then changes in the law that advance human rights must also benefit the public.
- 3.3 The first point we would make is that the *Charities Act* is silent on the issue of political purposes. This distinguishes it from other national statutes such as the *Canadian Income Tax Act*, which contains specific provisions on political spending by registered charities.¹⁰
- 3.4 The second point we would make is that the common law political purposes is based on an *obiter* judicial comment, which was itself based on a paucity of legal authority. While the Commission is, no doubt, familiar with the *Bowman* case, this point requires a brief review of the background and rationale of the decision.
- 3.5 *Bowman* concerned the validity of a bequest to a company whose objects included, *inter alia*, the promotion of the principle that human conduct should be based upon natural knowledge, and not upon super-natural belief. After lengthy reviews of the authorities on promoting anti-Christian doctrines, the majority of the Law Lords, including Lord Parker, held that there was nothing in the Society's objects that precluded it from taking the gift as absolute beneficial owner.
- 3.6 However, Lord Parker went on to consider what the Secular Society's position would have been had it taken the bequest as a trustee. In his view, the Society's objects – the abolition of religious tests, the disestablishment of the Church, the secularization of education, the alteration of the law touching religion or marriage,

⁹ [1917] A.C. 406 (HL) [*Bowman*]

¹⁰ *Income Tax Act*, R.S.C. 1985, 5th Supp, c.1, ss.149.1(6.1) and (6.2)

or the observation of the Sabbath – were “purely political objects”. It was in this context that Lord Parker made the *obiter* comment that “the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift.”

- 3.7 Since *Bowman*, Lord Parker’s *dictum* has generally been accepted by the Commonwealth courts, forming the basis and rationale for the “political purposes” rule in cases such as *National Anti-Vivisection Society*¹¹ and *McGovern*¹².
- 3.8 However, Lord Parker’s *dictum* has also been criticized as being based on a “paucity of judicial authority”¹³ or as being an inaccurate reading of the authorities that did exist. In fact, nearly a century before Lord Parker’s *dictum* “a society...for the mitigation and gradual abolition of slavery” was recognized as a charitable entity in England.¹⁴ The overtly political nature of the society’s activities was made apparent by William Wilberforce, who expressed his lack of enthusiasm for the subsequently founded Female Anti-Slavery Associations by writing “but for ladies to meet, to publish, to go from house to house stirring up petitions – these appear to me proceedings unsuited to the female character as delineated in Scripture”.¹⁵
- 3.9 There is, in other words, little to support Lord Parker’s assertion that equity had “always” refused to recognize political objects as charitable.¹⁶ The *obiter* opinion expressed by Lord Parker in *Bowman* must be considered the source of the political purposes rule, and assessed as such.
- 3.10 One should remember that Justice Kirby was considering a recent charity law case in the High Court of Australia when he said:

No court can accept, and act upon, an incorrect understanding of the law. Nor can parties expect that judges will simply go along unquestioningly with an erroneous understanding of the law, particularly where these understandings arise because they have not been questioned by the parties.¹⁷

¹¹ *National Anti-Vivisection Society v. Inland Revenue Comrs* [1948] AC 31 (HL) at 63 [*National Anti-Vivisection*]

¹² *McGovern v. Attorney General* [1982] Ch.321.

¹³ *National Anti-Vivisection*

¹⁴ R. Furneaux, *William Wilberforce* (Vancouver: Regent College Publishing, 2005) at 406.

¹⁵ *Ibid* at 431.

¹⁶ For a review of many of the criticisms of the *Bowman* principle, see Adam Parachin, “Charity, Politics and Public Benefit” (Paper presented by the National Charities and Not-for-Profit Law Section, the Ontario Bar Association and the Continuing Legal Education Committee of the Canadian Bar Association, May 2006)

¹⁷ *Bayside* at para 80

4 **Political purposes and the public benefit: the Canadian view**

- 4.1 In Canada, as in the UK, the courts have generally accepted Lord Parker's statement in *Bowman* that political purposes are not charitable because courts can not say whether proposed changes in the law are for the public benefit.
- 4.2 However, the Canadian experience belies that proposition, at least in the arena of human rights. Canadian courts can be said to have implicitly decided that certain changes in the law are for the public benefit in cases where they changed a policy, common law or statutory rule to make it conform to a more "fundamental" law or policy.
- 4.3 One of the earliest cases where a Canadian court effectively decided that a change in a common law rule would benefit the public was a charitable trust case decided before the entrenchment of constitutional rights in Canada. *Canada Trust Co.* involved a longstanding educational trust, which by its terms benefited only "Christians of the White Race" who were of British nationality or parentage.¹⁸ After receiving a number of complaints that the trust was discriminatory, the trustee applied for the direction of the court as to whether the provisions of the trust were void as being in contravention of public policy.
- 4.4 In a concurring judgment which has since become part of Canadian legal history, Tarnopolsky J.A. acknowledged that there was no Canadian or British precedent for the proposition that a discriminatory charitable trust established to offer scholarships or other benefits to a restricted class was void as against public policy. However, by looking to government statements, domestic statutes, and international instruments such as the *International Convention on the Elimination of All Forms of Racial Discrimination*, he found that the promotion of racial harmony, tolerance and equality was part of the public policy of modern-day Ontario. As such, he modified the common law rule, holding that discriminatory charitable trusts "must now be void."
- 4.5 *Canada Trust Co.* is not, strictly speaking, a public benefit case. However, it is an example of a charity law case where the court made a value judgment about a proposed change to a common law rule, based on the existence of other legal sources that expressed the societal consensus on the issue of discrimination.
- 4.6 In 1982, the British Parliament formally enacted the Canadian *Charter of Rights and Freedoms* as a part of the Canadian Constitution, at the request of the Parliament of Canada. Section 52(1) of the Constitution provides that the *Charter* is part of the "supreme law of Canada", and that any law that is

¹⁸ *Canada Trust Co. v Ontario (Human Rights Commission) (1987)*, 42 D.L.R. (4th) 263, reversed (1990), 69 D.L.R. (4th) 321 (Ont. C.A.) [*Canada Trust Co.*]

inconsistent with its provisions “is, to the extent of the inconsistency, of no force or effect.”

- 4.7 Every Canadian jurisdiction also has a human rights act. These statutes generally provide that in the case of a conflict between the human rights act and any other enactment, the human rights act prevails.¹⁹
- 4.8 Since the coming into force of the *Charter* and domestic human rights legislation, Canadian courts have changed or struck down a number of laws on the basis that they are inconsistent with protected rights and freedoms. All of these changes to the law have had the effect of advancing or supporting the constitutional and human rights of particular groups of persons, as well as the general public.
- 4.9 Interestingly, many of the changes that Canadian judges have made since the coming into force of the *Charter* mirror precisely the “political objects” that were sought by the Secular Society in *Bowman*. For example, laws respecting the observation of the Sabbath were struck down by the Supreme Court of Canada in 1985²⁰. The Ontario Court of Appeal subsequently held that the secularization of public education and the abolition of religious exercises are mandated by the *Charter*²¹. Finally, the law touching religion and marriage has been dramatically altered by the courts as a result of the *Charter*’s equality provision.
- 4.10 This issue has never been dealt with by the courts in a charity law context. However, it is our view that in Canada, where there is clearly a hierarchy of laws, courts can, at the least, judge that the following purposes are for the public benefit and are therefore not “political”:
- the repeal of laws or policies that are inconsistent with the *Canadian Charter of Rights and Freedoms*;
 - the repeal of laws or policies that are inconsistent with federal or provincial human rights legislation;
- 4.11 More generally, it is our view that since it is generally accepted in Canada that the advancement of human rights is of benefit to the public, it can also be said that changes in the law that advance human rights are of benefit to the public.
- 4.12 The question which the Commission must seriously consider is whether it will ignore or override the *Bowman* principle and allow political purposes should it come to the conclusion in certain situations that a change in the law is for the public benefit.

¹⁹ See, for example, *Human Rights Code*, R.S.B.C. 1996, c.210, s.4.

²⁰ *R v. Big M Drug Mart* (1985) 18 D.L.R. (4th) 321 (SCC)

²¹ *Zybelberg v. Sudbury Board of Education* (1989) 65 OR (2d (Ont. CA)

5. **Political purposes and the public benefit: challenges posed by the *Human Rights Act***

- 5.1 The *HRA* aims “to give further effect to rights and freedoms guaranteed under the European Convention of Human Rights”. It is generally regarded as a constitutional statute, as it conditions the legal relationship between citizen and State in a general, overarching manner, and affects the scope of what are now regarded as fundamental constitutional rights²².
- 5.2 Strictly speaking, the *HRA* respects the principle of Parliamentary supremacy; where a court finds that a law is incompatible with the *ECHR*, the government is “permitted” (but not required) to amend the law.²³
- 5.3 Nonetheless, in recent years, the English courts have begun to assert that there exists a hierarchy of Acts of Parliament, within which “constitutional” statutes are regarded as more fundamental and more permanent than “ordinary” statutes. While ordinary statutes can be implicitly repealed, for example, constitutional statutes may not²⁴.
- 5.4 In addition, the enactment of the *HRA*, and the interpretative presumptions set out therein, is a strong indication that the protection and advancement of human rights is an integral part of the public policy of the modern-day United Kingdom.
- 5.5 This indication is strengthened by subsection 2(2)(h) of the *Charities Act*, which provides that “the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity” is a charitable purpose.
- 5.6 In light of these important statutory developments, we believe the Commission should consider a number of questions before concluding that the *Bowman* principle should continue to restrict how the term public benefit is understood in England and Wales. For example:
- Is it generally accepted in the UK that human rights are more fundamental and more permanent than the rights or interests protected by other legal regimes, and that the advancement of human rights benefits the public?
 - If so, why can it not be said that a change in the law that advances human rights also benefits the public?

²² *Thoburn v. Sunderland City Council* [2003] 2 WLR 247, per Laws L.J.

²³ *HRA*, s. 19.

²⁴ *Ibid.*

- If there is indeed a hierarchy of Acts of Parliament in the United Kingdom, as the *Thoburn* case suggests, can it still be said that the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit?

5.7 The existence of the *HRA* may also cause the Commission to reconsider the extent to which it relies on judicial pronouncements regarding changing conditions and public opinion in its public benefit guidance. We refer, for example, to the inclusion in the Analysis of the statement in *Gilmour v. Coats* that only a radical change of circumstances should compel the court to hold that something that was charitable is no longer charitable. It is not difficult to imagine a situation where in order to further a party's Convention rights, a court or the Commission will find itself compelled to conclude that a longstanding charitable purpose is no longer charitable. Does the enactment of the *HRA* constitute a "radical change of circumstances"? This is something the Commission should consider.

6. **The notion of disbenefit**

6.1 In our view, the use of the term "disbenefit" in the Draft Guidance presents problems from the perspective of the statutory interpretation of the *Charities Act*.

6.2 As the Commission is aware, the *Charities Act* does not refer to the notion of disbenefit. Nor is the term "disbenefit" a common law term of art.

6.3 Given the Draft Guidance's reference to "Scottish charity law", it seems reasonable to assume that it draw its inspiration from the Scottish *Charities and Trustee Investment (Scotland) Act*, which provides:

"In determining whether a body provides or intends to provide public benefit, regard must be had to how any... disbenefit incurred or likely to be incurred by the public in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence."

6.4 The difficulty arises from the fact that section 3(3) of the *Charities Act* states:

"In this Part any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales."

6.5 A strict reading of section 3(3) suggests that it would be improper for the Commission to apply the Scottish interpretation of "disbenefit" when construing the *Charities Act* concept of public benefit in the law of England and Wales. It

would seem preferable for the Commission to remove any reference to the term “disbenefit” when articulating guidance on the potentially negative impact of any charitable purposes.

- 6.6 In determining the interaction of the *Charities Act*, with Scottish charity law, it is important to remember the facts of the *locus classicus* of the common law of charity, the *Pemsel* decision of the House of Lords. As you will recall, *Pemsel* arose because the commissioners of the *Income Tax Act, 1842*, which applied throughout the United Kingdom, refused to refund tax paid by a Scottish trustee on income earned in a trust for missionary activities. If Scottish charity law applied, then the trust was not charitable within the ordinary meaning of charity because there was no eleemosynary component. The tax refund was only payable if the technical legal meaning of charity in English law was applied. The basis of the Commissioners for Special Purposes of the Income Tax’ argument was that the Statute of Elizabeth had been enacted for England only, and that a narrower concept of charity had historically been articulated in the Scottish courts²⁵.
- 6.7 In rejecting this argument, Lord MacNaghten offered a strong argument in favour of interpreting statutory terms in accordance with the system of law from which they are drawn.

Where there are two countries with different systems of jurisprudence under one legislature, the expressions in statutes applying to both are almost always taken from the language or style of one, and do not always harmonize equally with the genius or terms of both systems of law...

...you must taken the meaning of legal expressions from the law of the country to which they properly belong, and in any case arising in the sister country you must apply the statute in an analogous or corresponding sense, so as to make the operation and effect of the statute the same in both countries. Thus you get what Lord Hardwicke calls “a consistent, sensible construction”. A simpler plan is now recommended. Though the words have a definite legal meaning in England, you must not, it is now said, look at that meaning unless it be in vogue north of the Tweed. You must put out the light you have, unless it penetrates to the furthest part of the room. That was not Lord Hardwicke’s view. He seems to have thought reflected light better than none.²⁶

²⁵ *Pemsel, supra* at 534-36.

²⁶ *Ibid.* at 579-80.

- 6.8 The House of Lords has recently cited Lord MacNaghten’s view that reflected light is better than none in considering the difference in interpreting Scottish law.²⁷
- 6.9 While this interpretation of *Pemsel* supports the radical view that it is appropriate for the Commission to import the Scottish interpretation of the concept of “disbenefit” into the meaning of public benefit, it is doubtful that such an interpretation is consistent with section 3(3) of the *Charities Act*.
7. **The terrorism issue**
- 7.1 The Draft Guidance is silent on the issue of terrorism. Given the examples of potential disbenefits set out in the Draft Guidance²⁸, it is not unreasonable to imagine that the issue of terrorism in the charitable sector might be dealt with as a “disbenefit” issue.
- 7.2 Our view is that the Commission’s concerns about terrorism and related problems should not be dealt with under the concept of public benefit.
- 7.3 In fact, it would likely be imprudent for the public benefit guidance to detail Commission policies with regard to terrorism, because such publications sometimes give rise to “safe harbour” policies which effectively protect certain terrorist conduct by not prohibiting it.
- 7.4 Instead, the Charity Commission should develop its policy and program initiatives aimed at preventing charities from becoming involved in terrorist activities based on its statutory mandate “to increase public trust and confidence in charities”²⁹.
- 7.5 If the Charity Commission finds that it must interfere with the management or administration of specific charities suspected of facilitating terrorism, it should do so under its “compliance objective” which is “to promote compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
- 7.6 It is important that the British public understands that the Commission is mindful of the terrorism issue. Therefore, we believe it might be wise for the Commission to clarify that it will not be considering terrorism in the context of the public benefit guidance, but that it will address terrorism under its statutory mandates relating to public confidence and compliance.

²⁷ *Davidson v. Scottish Ministers* [2005] UKHL 74.

²⁸ Draft Guidance, section E4 lists things that are dangerous to health, and things that promote violence towards others as things that might be considered a ‘disbenefit’.

²⁹ *Charities Act*, s. 7

We trust that these comments are of some assistance to the Commission as it seeks to issue meaningful guidance on the concept of public benefit set out in the *Charities Act*. We wish you all the best in your endeavours.

Yours sincerely,

Blake Bromley
Principal

Kathryn Chan
Principal

June 30, 2008

Charity Commission Direct
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Dear Sir or Madam:

Re: Charity Commission Consultation on draft supplementary guidance on Public Benefit and the Advancement of Religion

We are not a charity but are writing to comment on several aspects of the draft supplementary guidance on Public Benefit and the Advancement of Religion (“Draft Guidance”) that was issued by the Charity Commission for England and Wales (the “Commission”) in February 2008 pursuant to the *Charities Act 2006*, c.50 (the “*Charities Act*”). We are grateful that the Commission is accepting submissions from outside England and Wales.

Our submission will focus much more on the law underpinning the Draft Guidance than the Guidance itself. Our concern is that the Commission has focused too much on preserving rules and nuances of the old, common law, and has thus rendered the Draft Guidance inadequate in interpreting complex modern issues in light of the *Charities Act* and the *Human Rights Act, 1998* (“HRA”). Much of this case law is contradictory and an inappropriate basis for providing guidance on the meaning of religion today, or the meaning of public benefit.

We have set out our views in numbered paragraphs for ease of reference.

4. **The primacy of the statutory scheme**

- 1.17 The Draft Guidance fails to give enough weight to the statutory language of the *Charities Act* and the extent to which it necessitates a revised interpretation of the common law.
- 1.18 In our view, the fact that the concepts of charity and public benefit must now be interpreted as statutory rather than common law concepts in the United Kingdom may significantly change the rules which apply to their interpretation.
- 1.19 The *Charities Act* defines nine separate charitable purposes in terms of “advancement”. Consequently, the meaning of “advancement” with regard to religion must be substantially the same as the meaning of “advancement” with

regard to arts, amateur sport and human rights and should be distinguished as a matter of statutory interpretation from the meaning of “promotion” (which is used in relation to the efficiency of the armed forces).

- 1.20 The UK government has stated, pursuant to section 19(1)(a) of the *HRA*, that the provisions of the *Charities Act* are compatible with Convention Rights. The Commission has a statutory obligation to interpret the public benefit requirement in section 3(3) in a way which gives effect, as far as possible, to the rights and freedoms guaranteed under the *European Convention on Human Rights* (*ECHR*). This is particularly relevant to the guidance on religious proselytizing.
- 1.21 Section 1(1) of the *Charities Act* requires a charity “to be subject to the control of the High Court”. Consequently, when considering illegality, it is inappropriate for the Draft Guidance to consider the laws of other countries.
- 1.22 It is important to consider the implications of the inclusion of polytheism in the s. 2(3)(a) definition of religion. We are of the view that this provision reflects both a statutory departure from the common law and a statutory affirmation of the registration policy of the Commission. However, if the registration decisions of the Commission had the force of law, then there would have been no need to include this specific statutory provision. Arguably, all the clarifications in s. 2(3), such as that on sport, deal with purposes which the Commission had previously determined to be charitable but for which there was no common law authority. Consequently, we are concerned that this clarifying provision has the effect of undermining the jurisprudential authority of other registration decisions of the Commission that are not otherwise clearly supported by the common law.
- 1.23 Clearly, Parliament could have enacted these clarifications even if the Commission’s decisions were law. Our concern arises from the fact that the *Charities Act* defines the term “charity law” to mean “the law” in a way which suggests, in our opinion, a distinction between decisions of the courts and the Commission. If the Commission had the authority to make law, Parliament would not have limited it to providing Guidance on public benefit. Nor are the objectives, functions and duties of the Commission set out in Part 2 of the *Charities Act* consistent with an interpretation that the Commission has the authority to create charity law.

5. **Statutory primacy and the *Human Rights Act, 1998***

- 2.7 In creating a guiding document on the notion of public benefit, the Commission is fulfilling its statutory duty under section 4(1) of the *Charities Act* to “issue guidance in pursuance of its public benefit objective.” It is clearly important that the Commission analyze the existing common law cases as part of this process, as section 3(3) of the *Charities Act* states that the term “public benefit” is to be

- understood “as that term is understood for the purposes of the law relating to charities in England and Wales.”
- 2.8 However, the *Charities Act* also suggests that the public benefit guidance should not be merely a reiteration of the judicial statements of varying authority that have generally been taken as expressing the law on public benefit in England and Wales.
- 2.9 Subsection 4(4) of the *Charities Act* requires the Commission to “carry out such public and other consultation as it considers appropriate” before it issues its final public benefit guidance. If Parliament had intended the Commission to merely restate or interpret the existing case law in clarifying the notion of “public benefit”, it would not have required the Commission to consider the opinions of experts and laymen before it issued its final guidance under subsection 4(1).
- 2.10 Subsection 4(6) states that charity trustees “must have regard” to the public benefit guidance when exercising any powers or duties to which the guidance is relevant. This statutory direction lends a weight and authority to the Commission’s interpretation of the law on public benefit which supersedes its previous role.
- 2.11 There are a very limited number of cases on the concept of public benefit and many of the commonly accepted public benefit principles are actually based on *obiter* judicial comments of little binding authority. Parliament must be presumed to have been aware of this paucity of authority when it required the Commission to carry out a public consultation on the concept of public benefit.
- 2.12 In our view, the Commission, having recognized the sparse nature of the case law on the concept of public benefit, and having considered the language of the statutory direction under subsection 3(3), should approach its task of publishing guidance on the public benefit broadly and purposively. This may mean recognizing that not every existing understanding of the term “public benefit” is correct, and that the “law relating to charities in England and Wales” encompasses more than the common law jurisprudence on charitable trusts. It may also mean challenging those elements of the case law that are either not binding, or that have been rendered inappropriate by subsequent legislative developments.
6. **Law Underpinning Guidance of Dubious Relevance**
- 4.13 The Commission will have to determine the extent to which it will seek to reconcile the historical common law statements on public benefit with a frankly incompatible “modern context.” This submission will focus on the *Analysis of the law underpinning Public Benefit and the Advancement of Religion* (“Analysis”)

and set out some of the logical inconsistencies and irreconcilably conflicting principles that arise from that law.

- 4.14 Analysis #1.1 cites *Holmes v. Attorney General* for the legal principle that charitable status is not conferred for the benefit of a religion's adherents but for the interests of the public. This proposition does not deal adequately with the fact that certain types of religiously mandated donations can, as a matter of religious law, only be spent on needy persons who are adherents of the particular sect of that religion.
- 4.15 Analysis #1.3 cites the longstanding common law rule that the law stands neutral between different religions. This proposition is completely contradicted by the fact that the law has historically rejected polytheistic as well as other religions. It also ignores the history of the various toleration statutes which moved England very slowly towards accepting even Christian churches which were not the established church. While the *Charities Act* has remedied that particular lack of neutrality, it has also removed the presumption of public benefit. If the law determines that one religion has a public benefit and another religion does not, it is not being neutral between religions.
- 4.16 Analysis #1.3 cites the common law proposition that the law assumes that any religion is better than none. This rule stems from an era when the law would not have defined religion, as does paragraph 2(3)(a)(ii), as not involving belief in a god.
- 4.17 To extend the proposition that any religion is better than none to "thought" and "conscience" under Article 9 of the *ECHR*, as Analysis #1.3 does, is to ignore that s. 2(3)(a)(ii) retains the word "religion" when excluding the definition to include belief systems that do not involve a belief in god. This suggests Parliament chose not to include "thought" or "conscience" under this head of charity.
- 4.18 Analysis #1.4 cites the legal proposition that religious organizations having doctrines adverse to the foundations of religion cannot be for the benefit of the public. This implies that humanist organizations cannot be charitable under this head of charity. Nor can a humanist organization be charitable under Section 2(4) unless it is analogous to some other listed charitable purpose because humanism is not within the spirit of the advancement of religion.
- 4.19 Analysis #1.4 cites the legal proposition that religious organizations having illegal practices cannot be for the benefit of the public. This implies that Islamic and other organizations which condone or promote polygamy cannot be charitable.
- 4.20 Analysis #1.5, which seeks to discount the propositions set out in *Thornton v. Howe*, should also point out that this decision was written during the period when the *Mortmain Act, 1736* applied to disallow testamentary charitable bequests.

The court was seeking to find this ridiculous bequest charitable so that the gift would fail and it would not be forced to assist a silly charitable purpose.

- 4.21 Analysis #1.6 cites the legal proposition that the question of whether a trust is beneficial to the public is an entirely different one from the question of whether a trust is for the advancement of religion. The Commission needs to provide Guidance on how and to what extent it will separate its analysis and consideration of these two different questions.
- 4.22 Analysis #1.6 cites the legal proposition that the question of public benefit is a question of fact to be answered like any other question. However, *Gilmour v. Coats* dealt with the issue of “public” much more than “benefit.” The case did not require the religion to produce “beneficial effects” but decided against the religion on the basis that it was not public.
- 4.23 Analysis #1.8 cites the legal proposition that the opinion, motives and intentions of the promoters are immaterial. Consideration should be given to limiting this proposition to the question of whether the organization is a religion because these cases were determining that question and not the public benefit question.
- 4.24 Analysis #1.9 – 1.11 do not acknowledge that there are no cases applying a fact test to the “benefit” issue separately from the “public” issue. To the extent that *Re Hetherington* stands for the proposition that celebrating a religious rite in public is a sufficient public benefit, the law is that the only question of fact to be determined is whether the presumed benefit is public.
- 4.25 Analysis #2.3 cites the legal proposition that religious services that instruct or edify the public are charitable. Again, the focus of the court in *Cocks v. Manners* was on the meaning of “public” rather than “beneficial.” The Commission will have to decide which religious teachings “improve” the public as in Analysis #2.4 if it distinguishes the concepts of benefit and public.
- 4.26 Analysis #2.6 cites *Re Joy* for the legal proposition that suppressing cruelty to animals is charitable but improving yourself through prayer is not. This statement is somewhat anomalous and does not recognize that the charitable status of suppressing cruelty to animals is based on the theory that a person who is cruel to animals is likely to be cruel to humans, and thus suppressing cruelty to animals improves the human person. It is surprising that prayer is an unacceptable way to improve an individual while animal issues were admitted to the law of charity on the basis that prevention of cruelty to animals improved the moral character of an individual.
- 4.27 Analysis #2.6 cites *Re Warre’s Will Trusts* for the legal proposition that the law takes no notice of any benefit which might come from prayer. This case also dealt with prayer taking place in a non-public manner and supports the emphasis

which the law places on public versus benefit. It is problematic to require a charity to establish its public benefit and then categorically exclude public benefit from prayer even if it could be established as a question of fact.

- 4.28 It is our opinion that Analysis #2.7 goes farther than *Gilmour v. Coats* in saying the benefit of prayer is “incapable of proof” and that *Re. Warre’s* should not be followed. Until the presumption of public benefit was removed no court was asked to consider whether prayer was beneficial to the commonweal as opposed to being beneficial to the soul of the penitent.
- 4.29 Now that the courts are required to seek and adjudicate on the public benefit of religion, they will be required to consider the possibility that there is a benefit to the commonweal to having every member of the Church of England praying for the health and wisdom of the Queen and of England’s political leaders every time they follow the rites in the Book of Common Prayer. It is not clear why praying for the Queen and the realm is any less beneficial when praying in private rather than praying in a public rite.
- 4.30 Analysis #2.8 cites *Re Hetherington* for the common law rule that attending a public religious service constitutes a public benefit recognized by the court. The only “fact” taken notice of by the court is that the service was open to the public. As in the prayer question, the law deals with the question of whether the activity is public and not the benefit flowing from the activity.
- 4.31 Analysis #2.9 cites a number of legal cases which are better understood as addressing the issue of what is “exclusively” charitable than the meaning of public benefit.
- 4.32 Analysis #2.10 cites *Bowman v. Secular Society*, which is a very problematic case to bring into this debate because of its discussion on the blasphemy laws and its conclusion which effectively precludes humanism from being charitable.
- 4.33 Analysis #2.11 is of dubious authority. Unless prior decisions of the Commission which are not directly supported by the courts constitute “existing charity law” under Section 2(8), the prior decisions to register non-religious belief systems under the fourth head of *Pemsel* can no longer be followed. Subsection 2(2)(m) is different to the fourth head and refers explicitly to the meaning of public benefit under Section 2(4). Humanism and rationalism are not purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs 2 (2)(a) to (l). They only can come under subsection 2(2)(m) pursuant to 2(4)(b) if there is “existing charity law” authority for them being a charitable purpose. Unless the Commission has authority to make “charity law”, it will require a court decision to bring them into 2(2)(m) by relying upon 2(4)(c).

- 4.34 Analysis #2.12 relies on a decision of the Commission rather than of the courts and it is not useful when seeking to provide Guidance in a changing era to say that “the following general principles are firmly established.”
- 4.35 Analysis #2.13 illustrates the problem of relying on old common law cases when considering religion. It cites the Court of Appeal decision *Keren Kayemeth Le Jisroel*, in which Slessor L.J. said: “the word ‘Jew’ in English law has almost always been confined to persons practicing the Jewish religion; the disabilities of Jews have not attached to persons of Jewish race which have become baptized.” The court is referring to the fact that it was not until the *Religious Disabilities Act, 1846 (Jews)*, 9 & 10 Victoria, c. 59 that the Jewish religion was recognized as being lawful and therefore charitable.
- 4.36 Analysis #2.20 should address the question of whether a statute that has been certified as compliant with the *Human Rights Act 1998 (HRA)* has, through that process, rebutted the presumption against the alteration of the common law. The *HRA* is generally regarded as a constitutional statute, as it conditions the legal relationship between citizen and State in a general, overarching manner, and affects the scope of what are now regarded as fundamental constitutional rights.³⁰
- 4.37 Analysis #2.21 does not distinguish between religions adopted in foreign common law jurisdictions in the British Empire under the “subject to local circumstances” doctrine and the “law relating to charities in England and Wales.” If religions accepted in colonial jurisdictions under the “subject to local circumstances” doctrine formed part of the law of England and Wales, then ancestor worship would be charitable under the advancement of religion head because it was accepted in Singapore.
- 4.38 Analysis #2.24 fails to recognize that the 13th head of charity under the *Charities Act* is narrower than the 4th head of charity under *Pemsel*. When clarifying the law, Parliament chose not to add a head dealing with “the promotion of moral or spiritual welfare or improvement.”
- 4.39 Analysis #2.25 acknowledges that the charity definition of religion is narrower than the Human Rights concept of religion. Guidance is necessary to better understand the differences and the extent to which European jurisprudence is included in “the law relating to charities in England and Wales.”
- 4.40 Analysis #2.25 is correct in saying that the advancement of a general religious sentiment is charitable because that is analogous with the advancement of religion and therefore falls under the 13th head.

³⁰ *Thoburn v. Sunderland City Council* [2003] 2 WLR 247, per Laws L.J.

- 4.41 Analysis #2.25 should point out that the key issue in the foundational case on modern charity law, *Pemsel*, was whether proselytizing to the heathen in a distant land was charitable without having any other object such as relieving poverty or advancing education.

5 **Concluding Observations**

- 5.1 While the Commission is primarily concerned with the law in England and Wales, it might take notice that the Supreme Court of Canada in *Syndicat Northcrest v. Anselem*³¹ specifically chose to clarify that the state is not the arbiter of religious dogma. It held at paragraph 50 that:

In my view, the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, “obligation”, precept, “commandment”, custom or ritual. Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.

- 5.2 The definitions of religion in the both the law and the Guidance are entirely self-referential and consequently of little value in determining public benefit. The definition is constantly adjusted to be politically correct and protect the adjudicator from discriminating between religions. It is not possible to determine that some religions have the requisite degree of public benefit and others do not with such a fluid, flexible and ultimately fickle basis for making decisions.
- 5.3 The Commission and the courts will have to seriously revisit the question of prayer. When the two essential attributes are faith in a god and worship of that god [Analysis #2.13 (3)] it makes absolutely no sense to exclude the primary form of communication with and worship of god, being prayer, from the legal analysis. This might have been possible when there was a presumption of public benefit of religion, but can no longer be ignored. If the law can find no public benefit in prayer, and prayer is not only integral, but imperative, to religion, a more fundamental question arises as to whether religion is charitable. Will opponents then challenge religion on the basis that a church fails to meet the “established for charitable purposes only” definition in subsection 1(1)(a)? How can an institution be exclusively charitable when its primary activity is communicating with a supreme being in ways in which there is no possibility of the law taking judicial notice?

³¹ <http://scc.lexum.umontreal.ca/en/2004/2004scc47/2004scc47.html>

- 5.4 If worship of god is recognized by the law as being charitable, why should not contrition, penitence, remorse and repentance for one's wrongdoings not even be of greater public benefit? Surely, the public benefit of religion is the extent to which it improves the conduct of adherents in their daily lives and interactions with others rather than the extent to which they please god by worship.
- 5.5 The Commission specifies that a charity must have an identifiable benefit but that benefit does not have to be quantifiable. How then can a court rule that prayer/religious contemplative activity is or is not beneficial towards the public, especially when that prayer is directed towards the peace and well-being of the commonweal as well as the leaders of the nation? Certainly, the Christian Scriptures contain exhortations to pray for the public good. The Apostle Paul articulated an aspiration of public benefit which should be respected by any court when he wrote:

"I urge, then, first of all, that requests, prayers, intercession and thanksgiving be made for everyone-- for kings and all those in authority, that we may live peaceful and quiet lives in all godliness and holiness. This is good, and pleases God our Savior, who wants all men to be saved and to come to the knowledge of the truth." (1 Tim 2:1-4 NIV)

- 5.6 If one goes back to the Old Testament, one finds that even "pagan" rulers valued the public benefit of the prayers of even those of different religious beliefs. King Darius the Great of Persia commanded that the expenses of the Temple services held by the Jews in Jerusalem should be paid out of the royal treasury so that the priests might "pray for the well-being of the king and his sons" (Ezra 6:6-8). His son, Artaxerxes, also understood the public benefit of prayer when he ordered that the priests in that same temple and all who served there should be free of all taxes and excise (Ezra 7:24).
- 5.7 If one goes back only as far as World War II, one remembers that in May 1940 Adolph Hitler's Blitzkrieg left over 300,000 British forces pinned against the English Channel. On May 26, His Majesty King George VI declared a National Day of Prayer and the Archbishop of Canterbury led prayers from Westminster Abbey that the hopelessly stranded British troops would be delivered. Hitler chose to use his air force rather than his tanks to finish the battle. However, a severe thunderstorm grounded the German planes and the normally violent English Channel was calmed by an extremely thick blanket of fog. An armada of boats able to sail the calm seas and protected from aerial detection by the fog ferried 335,000 troops from Dunkirk back to England. Winston Churchill called it a "miracle of deliverance." The question for the Commission and the courts is whether this would be accepted as a factual example of prayer having a public benefit.

- 5.8 The analysis of public benefit will have to extend to social impact of religious doctrines which have never been previously considered by the courts. One of the greatest societal challenges faced by England and other European countries is the decline in birth rates and the consequent demographic impact on the economic health of the nation. Certain religions have strict dogmas and teachings on birth control which may be problematic when considered only from the perspective of sexual rights of individuals. However, they have a public benefit when considered from the perspective of population growth, demographics and the long term economic health of the nation.
- 5.9 The analysis of public benefit of religion in the future will necessarily have to expand to include consideration of the economic benefits of religious congregations. It will have to consider the research of academics like Professor Ram Cnaan (http://works.bepress.com/ram_cnaan/ who studied the social services provided by congregations in Philadelphia. He found that 88% of them had at least one social program and the primary beneficiaries were children. He conservatively estimated the financial replacement value of all congregational social services in Philadelphia to be \$247 million annually. It is difficult for every charity to quantify the value of its own social services. However, the Commission must develop the expertise to recognize the cumulative public benefit of religious institutions engaged in social service delivery.

We trust that these comments are of some assistance to the Commission as it seeks to issue meaningful guidance on the concept of public benefit as it applies to the advancement of religion within the *Charities Act*. We appreciate the difficulty of the law and the regulator dealing with issues of god, faith and personal beliefs. We wish you all the best in your endeavours.

Yours sincerely,
BENEFIC LAW CORP.

Per:



Blake Bromley
Principal