

RELIGION AND NON-RELIGIOUS BELIEFS IN CHARITY LAW

(Memorandum by the British Humanist Association)

The Definition of Religion

The legal definition of “religion” for charitable purposes is in difficulty. Adequate while the only religions of any significance in the country were Christianity and Judaism, it is put under severe strain by the arrival of many other religions and cults of entirely different natures, some of them inventions (discoveries?) by single individuals in comparatively recent times. Attempts to adapt the old definition are unlikely to succeed for much longer: its three key elements - a supreme being, worship and some form of evangelism - are all lacking in one or more acknowledged religions.

Thus, Buddhism¹ in its classic forms has no gods or supreme beings. Attempts to stretch the meaning of “supreme being” so as to make out that it and other non-theistic religions do have one soon lose credibility. For example, despite the Commission’s 1999 ruling in the case of the Church of Scientology, it is scarcely credible that “the urge to exist as infinity” (whatever that means²) can be identified as a “supreme being” - the *urge*, after all, exists within a human being.

¹ “There is no place for God in the Mahayana traditions of Buddhism as well, and indeed some of the early Indian Mahayana philosophers have denounced god-worship in terms which are even stronger than those expressed in the Theravada literature. . . Buddhism is unique amongst the religions of the world because it does not have any place for God in its soteriology.” - Dr V. A. Gunasekara: *The Buddhist Attitude to God*, at http://www.buddhistinformation.com/buddhist_attitude_to_god.htm, accessed August 5, 2007. Consider also: “The [Charity Commission’s] Church of Scientology decision has expanded the English definition, but it has not resolved all of its inconsistencies. One anomaly which remains is the status of Buddhism, which is recognized as a religion even though its adherents may choose whether or not to believe in God. Rather than expand the meaning of religion to include non-theist beliefs, English law has treated Buddhism as an “exceptional case” [*R v. Registrar General, Ex parte Segerdal and another* (1970) 2 QB 697 (C.A.).at 707]. The courts have never satisfactorily answered the logical argument that if Buddhism is a religion, religion cannot be necessarily theist or dependent on a God. Dillon J.’s dismissal of the issue in *South Place* is particularly telling: “I do not think it is necessary to explore this further because I do not know enough about Buddhism”.” - Kathryn Bromley: “The Definition of Religion In Charity Law in the Age of Fundamental Human Rights” in *International Journal of Not-For-Profit Law*, vol. 3 issue 1, September 2000, consulted 4 August 2007 at http://www.icnl.org/journal/vol3iss1/ar_KBromley.pdf.

Jainism also is non-theistic: “Jainism does not fall under the broad umbrella of the Vedic (Hindu) traditions. It is a non-theistic religion with its own sacred texts and Jinas, or “Spiritual Victors”. Mahavira, the most recent Jina, lived in the sixth century BCE in northern India during a period in which the non-Vedic sramana religions proliferated. The sramana religions rejected the authority of the Hindu scriptures (Vedas) and deities . . .” - Institute of Jainology website http://www.jainology.org/viewindex.asp?article_id=jainsutrasAboutJains, accessed August 8, 2007.

² “The *eighth dynamic* is the urge toward existence as INFINITY. The eighth dynamic is commonly supposed to be a Supreme Being or Creator. It is correctly defined as infinity. It actually embraces the allness of all.” - http://www.scientology.org/wis/wiseng/wis4-6/wis4_12.htm, copied on August 4, 2007

Lacking a supreme being, such religions do not and cannot exhibit the worship (“conduct indicative of reverence or veneration for that supreme being”³) that is another required characteristic of a religion.

And the third limb of the definition, which the Commission has acknowledged has been definitively established⁴, is the promotion of the religion “by spreading its message ever wider by pastoral and missionary means” - which Judaism, for one, does not exhibit in most of its forms.

Compounding the difficulties, the Charities Act has laid down (sn.2(3)) that

“religion” includes . . . a religion which does not involve belief in a god.

It is not at all clear how a religion lacking a god can be said to acknowledge and worship a supreme being. The statement previously on the Commission’s website⁵ that

A Supreme Being does not necessarily have to be in the form of a personal creator god; it may be in the form of one god or many gods or no god at all in the accepted understanding of the term

passes all comprehension. And if, enlarging on their unprecedentedly wide interpretation in the Scientology decision, the Commissioners decided that the meaning of “supreme being” should be stretched - as the definition of religion has been in a significant Australian case:

. . . for the purposes of law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief⁶

- then the requirement for something supernatural would offend simultaneously many religious people who see their beliefs as fitting within some version of “natural law” and many with non-religious beliefs who would see their principled unwillingness to designate their own overarching beliefs as supernatural as being used as an excuse to exclude them.

The Charities Act, of course, also provides that a religion may involve “belief in more than one god”; but even this does not fully embrace the variety of religious belief, since some religions may have no god(s) in the sense of supreme being(s) but may (as with some forms of animism) see the world as inhabited by spirits that perhaps require local propitiation or else may (as in pantheism) see the world in itself as in some sense divine.

The Human Rights Act: Religion or Belief

Further difficulties arise from another source: the Human Rights Act. The Government, and Parliament on its advice, rejected for unclear reasons persistent proposals from this Association

³ Charity Commission decision on Church of Scientology, 1999.

⁴ By Donovan J in *United Grand Lodge of Ancient Free and Accepted Masons of England v Holborn Borough Council* [1957] 1 WLR 1080

⁵ Quoted by Martin Horwood MP as “recently . . . changed” - House of Commons debates, 25 October 2006, col 1564

⁶ *Church of the New Faith v. Commissioner for Pay-roll Tax* (1982) 49 ALR 65 (H. C. Aust.). at 74.

and several members of both Houses of Parliament to extend the charitable head of “advancement of religion” in the Charities Act by adding “or belief”, and so charity law continues to separate the advancement of religion from the advancement of non-religious beliefs and lifestances. Moreover, it does not appear to allow the mere advancement of the latter to be charitable, requiring instead that relevant organisations profess some other charitable object such as the moral and mental improvement of mankind, albeit according to the principles of the lifestance.

Nevertheless, as the Charity Commission recognises (and as was stated in their Scientology decision), the Human Rights Act (sn 6) requires that religious and non-religious lifestances must be treated equally and without discrimination by public authorities. This suggests that in practice little weight can be put on the requirement for some other charitable object towards which the non-religious lifestance is instrumental: it would constitute an illegitimate discrimination as between religious and non-religious beliefs.

Moreover, it is of limited utility to maintain religious charities as a distinct category, since (as was acknowledged in the Scientology decision) it is open to a body disallowed as religious to present itself instead under the 13th (previously 4th) head as one based on the moral or spiritual improvement of mankind, or some such purpose.

Further, the distinction, referred to in the Scientology decision (p.24), that religions had different criteria for acceptance as charities from causes falling under the then fourth head in that religion enjoyed the presumption of public benefit is not longer valid under the new Act. The view taken then by the Commissioners that it was “proper that the distinction . . . between religious and non-religious belief systems be maintained” is thus brought into question.

An Opportunity

So despite the lack of a formal acknowledgement in the Charities Act, simultaneously the common law definition of a religion is breaking down and the human rights principle of equal treatment of religions and non-religious beliefs is making inevitable incursions into previously discriminatory practice.⁷

This should not be regarded as a problem but as an opportunity - and one unlikely to occur again for decades. The radical changes made by the new Act offer an opening for fresh thought and a new, more logical approach that will be proof against the likely future decline in the importance of religion⁸ and the regard in which it is held and the likely growth in importance of minority religions⁹ and non-religious beliefs. A defensive stance on the part of the Commission, clinging

⁷ Even outside a legal context, it is difficult at the margin to distinguish a religion from a non-religious belief. Is it that religions start as cults? that religions acknowledge something ultimately transcendental rather than the naturalistic view taken by non-religious beliefs? Neither suggestion is obviously correct, and neither is useful for a legal distinction.

⁸ See Voas, D. and Crockett, A.: *Religion in Britain: Neither Believing nor Belonging*, Sociology 39.1 (February 2005), in which the authors demonstrate that the “half-life” of religious belief is one generation: “only about half of parental religiosity is successfully transmitted, while absence of religion is almost always passed on. Transmission is just as weak for believing as for belonging.”

⁹ The 2001 census showed about 6% of the population adhered to non-Christian religions, for whose followers Home Office research (Home Office Research Study 274: Religion in England and Wales: findings from the 2001 Home Office Citizenship Survey (March 2004)) has shown religion

to such wreckage from the old definition of religion as can be salvaged, would surely come to be seen as weak and conservative in a way that tomorrow's courts, let alone public opinion, would deplore. If Parliament decides that religions include polytheistic and atheistic religions, then attempts to rescue and force into unnatural meanings the terms of a definition based so squarely on the Judaeo-Christian tradition have to be called in question.

A straightforward acceptance of the implications of these changes in the Act is important for another reason: no longer will conformity to the definition of a religion offer any bulwark against accepting onto the register bodies of dubious public benefit - or be needed for that purpose. This role may not have had any basis in law but it certainly seems to have been the informal motivation behind, for example, straining so hard to prove that Scientology was not a religion according to the English legal definition. This is now, with the Human Rights Act, irrelevant. Instead, such bodies can now be challenged from the start to demonstrate the public benefit they bring, whether they be new age religions, South Sea cargo cults, or the inventions of a science fiction novelist.

The Human Rights Act together with the removal of the presumption of public benefit from religious charities facilitates a new start: one to which the courts, were any challenge to be brought, would surely be sympathetic. New statute law must surely prevail over interpretations based on the meagre accumulation over centuries of sometimes dubious judgements in often atypical cases.

A new approach

Any new approach should of course build on past practice where it is relevant and helpful but it should discard it where it is not compatible with the Human Rights Act¹⁰ or with modern thinking - the "common consensus of opinion amongst people who are fairminded and free from prejudice or bias" (to quote again the Commission's judgement on Scientology) or the "general consensus of objective and reasoned opinion" (to quote the Commission's draft guidance on public benefit).

The most obvious fresh approach is to abandon any separate definition of "religion" and instead find a definition of "religion or belief" as a single concept. Insofar as the Human Rights Act forbids discrimination on the basis of religion or belief, it is no longer necessary to distinguish religions from non-religious beliefs nor does such a distinction serve any purpose. Indeed, in a post-Human Rights Act judgement in the House of Lords, Lord Nicholls of Birkenhead made it plain that the law seldom has any need to make any such distinction:

the difficult question of the criteria to be applied in deciding whether a belief is to be characterised as religious . . . will seldom, if ever, arise under the European Convention.¹¹

matters far more than to the Christian population: they placed it first, second or third in a list of 15 factors important to their identity, Christians 7th, and the population as a whole 9th.

¹⁰ Section 3 of the Human Rights Act requires that "primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights" - a requirement given a wide interpretation by the House of Lords in *Ghaidan (Appellant) v. Godin-Mendoza (FC) (Respondent)* [2004] UKHL 30.

¹¹ *R v Secretary of State for Education ex parte Williamson* [2005] UKHL 15, per Lord Walker at paragraph 24. Extensive extracts from his and other law lords' judgements in this case are relevant - see Annex.

Similarly, in same case Lord Walker of Gestingthorpe said that it was

unnecessary for the House to grapple with the definition of religion [because] article 9 protects, not just the *forum internum* of religious belief, but ‘freedom of thought, conscience and religion’. . .¹²

A potential difficulty comes from the breadth of meaning of the word ‘belief’ in ‘religion or belief’. The word in ordinary English usage has as its most common meaning what the Oxford English Dictionary defines as “Mental acceptance of a proposition, statement, or fact, as true, on the ground of authority or evidence” - as in (for example) “It’s my belief that reading books is the best way to extend one’s vocabulary” or “I’ve got no belief in homeopathy”.

The European Convention’s protection of freedom of belief extends to all manner of beliefs. One judgement¹³ of the European Court of Human Rights called Article 9 “a precious asset for atheists, sceptics and the unconcerned”. And in a commentary on Article 18 of the International Covenant on Civil and Political Rights (which is essentially similar to Article 9 of the ECHR) the United Nations Human Rights Committee said:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.¹⁴

Moreover, “belief” also includes specific religious beliefs - particular creeds or elements of a religion, such as each of the Thirty-Nine Articles, including, for example:

XXII: The Romish doctrine concerning Purgatory, Pardons, worshipping and adoration as well of Images as of Relics, and also Invocation of Saint, is a fond thing vainly invented, and grounded upon no warranty of Scripture; but rather repugnant to the word of God.

Even wider, in the passage just quoted, Lord Walker went on to say:

Plainly these expressions cover a wider field than even the most expansive notion of religion. Pacifism, vegetarianism and total abstinence from alcohol are uncontroversial examples of beliefs which would fall within article 9.

Such a wide application of the word “belief” is obviously welcome where it is a matter of defending someone against discrimination - but it is not suitable for application in decisions about the conferring of legal privilege such as charity status.

However, there is no need to accord that legal privilege to everything recognised as a belief.¹⁵

¹² *ibid*, paragraph 55.

¹³ *Kokkinakis v Greece*: (1994) 17 EHRR 397, para 31

¹⁴ Human Rights Committee, 1993 (General Comment no 22(48) (Art. 18) adopted on July 20th 1993, CCPR/C/21/Rev.1/Add.4, September 27th 1993, p1.)

¹⁵ There is of course an initial requirement in any case that the profession of beliefs - whether religious or not - is “neither fictitious, nor capricious, and that it is not an artifice” - Supreme Court of Canada in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 27, per Iacobucci J at para 52. This

The privilege can be limited to types of belief that offer an analogy with religion in charity law. Other beliefs may qualify under some other head of charity (as perhaps might pacifism or vegetarianism); others again may not qualify for charity status at all.¹⁶

First, it should be observed - and this casts some doubt on Lord Walker's breadth of interpretation and similar *obiter dicta* - that the wide meaning of the word "belief" in English contrasts with the much narrower meaning of the words used in the French and German versions of the Universal Declaration and the European Convention on Human Rights. The French term is *conviction* and the German (in the 'manifest' clause) is *Weltanschauung* or "world-view". The use of the English word "conviction" is problematic because it has penological associations, which the French word lacks, but without this unfortunate association it expresses a significant aspect of what is required. Both "conviction" and *Weltanschauung* suggest deep or ultimate beliefs which are parallel to those of a religion. It is proper, therefore, that "belief" in the phrase "religion or belief" should be so interpreted.

Moreover, case law on the interpretation of 'religion or belief' also helps. There are European Court of Human Rights cases that deal with circumstances in which a narrower definition is needed. Baroness Hale of Richmond, in a House of Lords judgement¹⁷, said

Convention jurisprudence suggests that beliefs must have certain qualities before they qualify for protection. I suspect that this only arises when the belief begins to have an impact upon other people, in article 9 terms, when it is manifested or put into practice. Otherwise people are free to believe what they like.

Such a narrower definition is plainly needed to delimit beliefs that are worthy of public privilege - such as recognition as charities. Thus,

[Belief means] more than just 'mere opinions or deeply held feelings'; there must be a holding of spiritual or philosophical convictions which have an identifiable formal content.¹⁸

The term 'beliefs' . . . denotes a certain level of cogency seriousness cohesion and importance.¹⁹

may have provided a better answer to the question about registering Pastafarianism as a charity for the Commission witness at the Public Administration Select Committee on 12 July 2007 (question 51) rather than trying to find a way this ersatz religion did not fit the present definition.

¹⁶ There is little risk of the European Court of Human Rights (should a case even reach it) endorsing any challenge to this differential treatment of beliefs, given (a) that several of the cases quoted here - and on which our proposals (below) rely - specifically draw such a distinction; (b) the Court is reluctant to breach the national 'margin of appreciation' in matters of religion - as was shown, for example, in the *Visions of Ecstasy* case (*Wingrove v the United Kingdom* (1997) 24 EHRR 1) - or probably in matters of tax exemption on merit, as with charity law.

¹⁷ In *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others* [2005] UKHL 15 - on which see further at the Annex.

¹⁸ *McFeeley v UK*: (1981), 3 EHRR 161

¹⁹ *Campbell and Cosans v. UK*: (1982), 4 EHRR 293 para 36 - this case related to Article 2 to the first protocol ("the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions"). As Baroness Hale said, "The

In post-Human Rights Act legislation, the Government has used several formulations or definitions for ‘belief’ or ‘religion or belief’. That in the Employment Equality (Religion or Belief) Regulations (2003 No. 1660), whose concern is to outlaw discrimination, was relatively wide:

In these Regulations, “religion or belief” means any religion, religious belief, or similar philosophical belief.

Similarly with the Equality Act, where section 44 reads:

In this Part—

- (a) “religion” means any religion,
- (b) “belief” means any religious or philosophical belief,
- (c) a reference to religion includes a reference to lack of religion, and
- (d) a reference to belief includes a reference to lack of belief.

Moreover, the Act substituted these definitions for that just quoted from the Employment Equality regulations, significantly removing the word ‘similar’.

However, in a context not of discrimination but of granting recognition and privilege, the Communications Act 2003 (sn.264) requires public service broadcasters to provide programmes dealing with “religion and other beliefs”, and states that

“belief” means a collective belief in, or other adherence to, a systemised set of ethical or philosophical principles or of mystical or transcendental doctrines.

There is therefore a variety of definitions and descriptions, even in a context of narrowly defining beliefs that merit some privilege. They - in particular the Communications Act and the descriptions in *McFeeley v UK* and in *Campbell and Cosans v. UK* - provide the groundwork for a new definition of “religion or belief”.

Such a definition can also, as suggested above, build on the common law definition of religion. Evangelism may not be a universal characteristic, but it suggests that a religion or belief must be important and potentially of widespread application. A supreme being may be eschewed by many, but it again suggests importance together with a relationship of the individual to the universe. Worship may be too narrow a requirement, but it suggests worth or value²⁰. The impression is of something supervening, valuable, powerful, capable of giving direction to one’s life. The suggestion by two of the judges in the Australian case²¹ which found Scientology to be a religion is on the same lines: that (to quote the Commission in their Scientology decision) the ideas in question reflect the ultimate concerns of human existence; an element of comprehensiveness; forms and ceremonies.

European Court in *Campbell v Cosans v United Kingdom* (1982) 4 EHRR 293, 303, para 36, equated the parental convictions which were worthy of respect under the first Protocol with the beliefs protected under Article 9: they must attain a certain level of cogency, seriousness, cohesion and importance; be worthy of respect in a democratic society; and not incompatible with human dignity. No distinction was drawn between religious and other beliefs.”

²⁰ When many schools were embarrassed by the reassertion of the need for daily worship in the Education Reform Act 1988 there was much consideration of the word’s etymology: worth-ship, being or considering something of great value or worth.

²¹ *Church of the New Faith v. Commissioner for Pay-roll Tax* (1982) 49 ALR 65 (H. C. Aust.).

A definition, however, to be useful must be reasonably short and simple. It needs to reach the essentials and omit the rest. Given that the courts are obviously unable to pass judgement on the validity of a religion or belief, the definition will naturally refer to function and form rather than to content²². (It is the content of the common law definition in the shape of *worship of a supreme being* that has created significant difficulty.)

What then are the common characteristics of religions and those non-religious beliefs within the relevant range indicated by the judgements and descriptions quoted above? We suggest:

- 1 - They makes claims about the nature of the world we live in and of human life.
- 2 - They draw implications for the way one lives - typically establishing a basis of morality and values.

Both elements are important. A free-floating ethical code without claims about the nature of the world would fall short of what is required (though it may qualify for charitable status by some other route). Equally, claims about the nature of the world are what scientists advance all the time. It is the relatedness of one to the other that is distinctive.

Thus, the Christian and other creation myths posit a father-child relation between the creator god and mankind, with a duty of obedience to his commands and the moral code he endorses. In Buddhism and other eastern religions, a factual claim about a cyclical life of reincarnations is linked to a code of behaviour conducive to progression up the chain of life towards the desired Nirvana. In Humanism a naturalistic interpretation of life leads to a moral code based on the need for people to live together in concord for the benefit of all.

But that is not all. From the Communications Act one can take the need for *collective* belief: a solipsistic belief shared with no-one is unconvincing as an object of official favour. From *Campbell and Cosans v. UK* we can take the threshold of “a certain level of cogency, seriousness, cohesion and importance”.

Thus one can venture a minimum working definition for a “religion or belief” on the lines of:

A collective belief that attains a sufficient level of cogency, seriousness, cohesion and importance and that relates the nature of life and the world to morality, values and/or the way its believers should live.

This categorises religions as beliefs, which is valid whereas the reverse is not. The “and/or” formulation is needed because some beliefs put a predominant emphasis on orthopraxy rather than orthodoxy or moral behaviour²³. The limitation to believers of the teachings about how to live is needed because some beliefs confine their rules in that way - e.g., Judaism.

Other elements in the sources are unnecessary or inappropriate. For example, it is unnecessary to specify that the belief may be religious (whatever that means) or not. Words on the lines of

²² “In principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed” - *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 306, 335, para 117.

²³ The words ‘morality’ and ‘values’ could theoretically be omitted from the definition but are needed to give the right colour to “the way believers should live”.

“philosophical principles or mystical or transcendental doctrines” or “spiritual²⁴ or philosophical convictions” offer examples of the nature of the belief rather than defining it: as examples they may be useful references when interpreting the definition but they do not need to form part of it. The idea of “ethical” is already contained in the proposed definition. Similarly, the idea of “identifiable formal content” is present in the words “cogency” and “cohesion”. The notion that “the ideas in question reflect the ultimate concerns of human existence” is suggestive but more poetic than useful. Comprehensiveness; forms and ceremonies are common but not necessary features of a religion or belief.

The Second Test: Public Benefit

It must, of course, be recognised that even if this definition of a “religion or belief” for the purpose of head (c) (advancement of religion) and part of head (m) (relevant non-religious beliefs) is accepted, it will embrace non-religious beliefs that are dubious candidates for public support. But so will it embrace religions of a very dubious nature: the Raelians with their suicide leaps to flying saucers have a religion; the Jonestown cult was religious.

Charity law has claimed in the past to stand neutral as between religions:

Before the Reformation only one religion was recognized by the law and in fact the overwhelming majority of the people accepted it...But since diversity of religious beliefs arose and became lawful the law has shown no preference in this matter to any church and other religious body. Where a belief is accepted by some and rejected by others the law can neither accept nor reject, it must remain neutral...²⁵

But, as Kathryn Bromley has observed in her paper “The Definition of Religion In Charity Law in the Age of Fundamental Human Rights”:

The law’s claim of neutrality is sustainable only because it is meaningless. It is meaningless because it is entirely self-referential, depending on charity law’s own definition of religion to set the parameters of equal treatment. All religions may be equal in the eyes of the law, but only because not every religion comes within

²⁴ The word “spiritual”, although normally associated with religion, does not have any necessary connection with it and, especially insofar as it relates to “the human spirit”, is used by (for example) some humanists. Ofsted, in guidance issued on the nature of “spiritual education” (one of the functions of schools since at least the 1944 Education Act) stated: “Spiritual development relates to that aspect of inner life through which pupils acquire insights into their personal existence which are of enduring worth. It is characterised by reflection, the attribution of meaning to experience, valuing a non-material dimension to life and intimations of an enduring reality. ‘Spiritual’ is not synonymous with ‘religious’; all areas of the curriculum may contribute to pupils’ spiritual development.” - Ofsted *Handbook for the Inspection of Schools* (1994). More recently they have stated: “Spiritual development is the development of the non-material element of a human being which animates and sustains us and, depending on our point of view, either ends or continues in some form when we die. It is about the development of a sense of identity, self-worth, personal insight, meaning and purpose. It is about the development of a pupil’s ‘spirit’. Some people may call it the development of a pupil’s ‘soul’; others as the development of ‘personality’ or ‘character’.” - Ofsted, *Promoting and evaluating pupils’ spiritual, moral, social and cultural development* (March 2004)

²⁵ Gilmour v. Coats [1949] 1 All ER 848 (H.L.), at 457

the law's scope of vision.²⁶

With the Human Rights Act, that Nelson touch²⁷ is no longer acceptable.

Further, the claim that

“As between different religions, the law stands neutral, but it assumes that any religion is at least likely to be better than none”²⁸

was always dubious: now it is grotesque. Quite apart from its incompatibility with the Human Rights Act, no serious attempt could be made today to maintain that to be a humanist is inferior to being a member of no matter what stray religious cult. Whatever neutrality the law can maintain will now have to extend to non-religious beliefs.

Thus, when it comes to decisions about granting charity status, reliance, as Parliament has accepted, will have to be placed squarely on the requirement for public benefit. We have already submitted to the Commission our preliminary thoughts on the application of the rules on public benefit to religious charities²⁹: here we make a few additional points.

- (a) We have noted the Government's assurances given in Parliament by Ed Miliband that the Government, the courts and the Charity Commission have recognised that religious activities bring benefits not only to those who take part in them, but to the whole of society. Religion has an important role to play in society through faith and worship, motivating charitable giving and contributing in other ways to stronger communities. Both those dimensions will thus usually be apparent from the doctrines, beliefs and practices of a religion. The Charity Commission is clear that most established religions should not have any difficulty in demonstrating their value to society from their beliefs.³⁰

We would observe that this and other assurances do not mean that no religious charities will have difficulty in establishing the public benefit they provide: “usually”, “most” and so on leave the door open, in particular to the need for the Commission to reflect emerging public opinion so as to keep the law, if not up-to-date with modern thinking, then at least not too far out-of-date.

We would also observe that Parliamentary assurances have no legal force. For example, statements by the Government in the plainest terms about the meaning of the term “public authorities” during the passage of the Human Rights Act have been overturned by the courts right

²⁶ International Journal of Not-For-Profit Law, vol. 3 issue 1, September 2000, consulted 4 August 2007 at http://www.icnl.org/journal/vol3iss1/ar_KBromley.pdf

²⁷ Consider also: “Neither does this Court, in this respect, make any distinction between one sect and another ... If the tenets of a particular sect inculcate doctrines adverse to the very foundation of all religion, and are “subversive of all morality” they will be void, but a charitable bequest will not be void just because the Court might consider the opinions foolish or devoid of foundation...” - *Thornton v. Howe* (1862) 31 Beav. 14.

²⁸ *Neville Estates v. Madden* [1962] Ch. 832 at 853)

²⁹ BHA Response to Charity Commission Consultation on Draft Public Benefit Guidance, May 2007.

³⁰ Ed Miliband as Minister of State for the Cabinet Office (Commons Hansard, 25 October 2006, col. 1609)

up to the House of Lords.³¹

(b) The test of public benefit must be applied even-handedly, in particular as between religions and non-religious beliefs. It may be possible for a Minister in Parliament to suggest otherwise:

it is right that public benefit must be shown, but . . . , at least for religion, the obligation will not be onerous . . . Religions have nothing to fear.³²

but the Commission are bound by law to be even-handed. If the public benefit of a putative non-religious belief that promotes practices disliked by the tabloids is to be called in question, then so must aggressive proselytising unaccompanied by good works and holy begging in the fashion of some Indian mystics.

(c) Next, concerning public worship, we note that Ed Miliband, in the passage just quoted, also stated:

We have accepted, and I think others have, too, that making provision for people to attend acts of worship is clearly a public benefit. It is clear in case law, and it will remain part of the charity law of this country.

In the absence of any proof of objective benefits from prayer, this suggests that the public benefit lies in meeting the private felt needs of members of the congregation. If this is accepted, two observations follow:

(i) it opens to question whether there is not public benefit from removing the felt need, e.g., by proselytising in favour of mere atheism; and

(ii) insofar as demand for such facilities for worship may decline, the public benefit from excess provision of facilities must be called in question.

(d) We reiterate our view that evidence is vital. The Commission's summary of the law on public benefit repeats this point time and again. Given its reliance on the accumulation of case law on the matter and its disavowal of any creative role in revising the law³³, the Commission has no basis for ignoring this requirement, however embarrassing to certain religious charities. The notion of "intangible benefits" as an escape hatch from the difficulty cannot serve unless judicious evidence of those benefits can be produced. We do not see this as likely to lead to charities being removed from the register but to the objects of some being amended so as to limit themselves to those benefits that can be demonstrated by evidence.³⁴

³¹ YL v Birmingham City Council [2007] UKHL 27 - see <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd070620/birm-1.htm>

³² Ed Miliband as Minister of State for the Cabinet Office (Commons Hansard, 26 June 2006, col. 96)

³³ Public Administration Committee, uncorrected minutes, 12 July 2007, at QQ36, 37 - see <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmpublicadm/uc904-i/uc90402.htm>

³⁴ We listed in our comments on the consultation on public benefit a series of types of benefit that religious charities might claim to provide. We were interested to see that the Canadian Roman Catholic archbishop Thomas Collins recently listed the contributions he saw religion making to society: "Religion enhances local communities in which human relationships can flourish. Religious communities make massive contributions to the common good of all society through deeds of charity and social action."

(e) We were glad to see that the Commission volunteered in evidence to the Public Administration Select Committee that “Of course, in assessing public benefit in religion, there is the issue about the extent to which religion may be harmful to society.”³⁵ Objections from religious charities to the notion of disbenefit are unsurprising (“they would say that, wouldn’t they?”) but can carry no weight.

(f) As quoted in the Commission’s decision on Scientology, “the contrary of beneficial to the public” is not “detrimental to the public” but “non-beneficial to the public”³⁶. Neutrality as to the public interest is not enough. For this reason we question that the mere conduct or performance of worship - as, for example, in a modern-day chantry or even religious services that are minimally attended - can in itself be seen as charitable.

(g) The question of public benefit must be contestable, as in any process where a decision is based on evidence. There can be no place for private nods by the Commission to charities backed by a file note that it has demonstrated its public benefit. But evidence of harm done will not be forthcoming from the charity itself, and the Commission cannot be expected to go digging for it. This must mean that the Commission will need to invite the public to submit evidence on the question of benefit. This is a requirement that will be particularly important in the early months and years after the removal of the presumption of public benefit, diminishing as a firm foundation of decisions builds up.

(h) Disbenefits will have to be plain, material and substantial and cannot be mere matters of disagreement. For example, ultra-Protestant objections to the intrinsic damage to society and souls proceeding from Roman Catholicism do not qualify; but a record of causing psychological harm, breaking up families, covering up child abuse, encouraging suicide, or (as was acknowledged by the Commission to the Public Administration Select Committee³⁷) limiting the freedom of adherents to leave the religion would all be relevant.

For this reason we were dismayed at the Commission’s response to the Committee’s questions about fostering intolerance.

Q48 Chairman: ... if a religion, or a religious organisation, was in the business of preaching intolerance of other groups, would that mean it would fall foul of charitable status?

Dame Suzi Leather: Religious organisations are not free to break the law, so a church which was promoting religious hatred, criminal acts, is not acceptable, but that is a matter for the criminal law; but it is perfectly within charity law for religious organisations to have tenets of faith with which not everybody in society agrees.

Q49 Chairman: So it can propagate intolerance?

Dame Suzi Leather: I think there is a certain tolerance of intolerance, but it is not

Religious communities bring to bear on current issues the wisdom of their heritage. Religious communities endow society with beauty.” - a detailed report is to be found at <http://www.zenit.org/article-20187?l=english> (accessed August 5, 2007).

³⁵ *ibid*, Q46, correcting ‘accessing’ to ‘assessing’.

³⁶ *In Re Coats’ Trust v Gilmour* 1948] Ch. 340, 347 per Lord Greene MR

³⁷ *loc. cit.* Q50

acceptable to break the law.

The suggestion here, which we hope was the result of unpreparedness for the question, is that no matter what the harm done by a religion by way of fostering divisions and intolerance in society, it is only when it steps over the mark and breaks the law that it becomes liable to any sanction, and then not from the Commission. We do not think such a position would be sustainable in the face of what would undoubtedly be outraged public opinion. It should form no part of the Commission's thinking as they decide how to apply the rule on public benefit to religious charities.

16 August 2007