FURTHER COMMENTS ON "ANALYSIS OF THE LAW UNDERPINNING *PUBLIC BENEFIT AND THE ADVANCEMENT OF RELIGION*"

By contrast with both the draft and the rather different final versions of the general legal analysis, we find this document confused and unhelpful. The case law may be confused - it would be surprising if it were not - but it is up to the Commission to make some shape out of it, not just to pass on the confusion to the public.

We say in the main body of our comments that "although [the Commission's] analysis of the law relating to religion and public benefit uses the same headings as the general legal analysis the approach is exceedingly different." This can be illustrated with these examples.

"Changing Social and Economic Circumstances"

For example, the general legal analysis *starts* by saying:

> 1.1 The courts recognise that there is a need for a flexible legal framework by which new charitable purposes for the public benefit can be recognised in the light of changing social and economic circumstances. The Commission has adopted this approach . . .
>
> 1.2 Similarly, what is accepted and recognised as a benefit at one time may in the light of changing conditions not be accepted as a benefit in another. What is for the benefit of the public "may vary from generation to generation" . . .
>
> 1.4 . . . indicators as to what factors might be taken into account in assessing modern conditions and how they may impact on what is a benefit . . . include where: . . .
>
> • "the habits of society have changed, and not only men's ideas have changed, but men's practices have changed, and in consequence of the change of ideas there has been a change of legislation; laws have become obsolete or have been absolutely repealed, and habits have become obsolete and have fallen into disuse, which were prevalent at the times when these wills were made" (in Re Campden Charities 18 Ch 310, 324, per Jessel MR as quoted by Lord Simonds in National Anti-Vivisection Society) . . .

- "with increasing knowledge it appears that a purpose once thought beneficial is truly detrimental to the community". (Ibid 74 per Lord Simonds)

These statements might be thought to bear heavily on some religious practices (exorcism? masses for the dead?) and to require proper scrutiny of the evidence for mainstream religious claims of public benefit.

Not so: the legal analysis relating to religion refers to "modern" conditions only (I4 and 2.11) to reassure that the law takes account of the multi-faith nature of society today - and disgracefully (1.3) to *fail* decisively to repudiate the principle that any religion is better than none ("It is arguable . . .) Anything less in keeping with modern social conditions than this is difficult to imagine.

The result is that the Commission has taken minimal account of the changed nature of religion now by comparison with 30 or more years ago. Religion is no longer wholly or even mainly a matter of traditional Anglicanism or even traditional mainstream Christianity: there has been a huge growth of Christian churches that practise exorcism, speaking in tongues, faith-healing and the like while promoting often fundamentalist, dogmatic and intolerant beliefs. Creationist beliefs are rampant in both the Christian and Muslim communities. Non-Christian religions now have a significant presence, rivalling Christianity in the size of their active participants, and while some of these are generally benign some are distinctly not so.

Nevertheless the Commission seems determined to extend to all religions, including those whose teachings are not obviously conducive to the public good and may bring disbenefits, the indulgent treatment it has traditionally given to those mainly concerned with parish charities and evensong. This is distinctly not a question of freedom of religion or belief: it is a question of whether there is sufficient public benefit to justify subsidies from public funds.

"General Consensus of Objective and Informed Opinion"

Similarly, the general legal analysis states

> 1.9 . . . when the courts reach decisions generally on what is of benefit to the public, they will have proper regard to public opinion in so far as is appropriate. Public opinion might be relevant, for example, when considering whether there is an intangible benefit, such as the general appreciation of a beautiful landscape or building. In these cases the courts can

> and will take into account any general consensus of objective and informed opinion, although that opinion alone would not necessarily decide the matter.
> 1.10 . . . Court decisions reflect ordinary life, taking into account generally accepted views on the nature and usefulness of what an organisation aims to achieve and its benefit to the public. So, whilst public opinion cannot decide what is or is not charitable, it is an important factor to be taken into account in helping us to understand what modern social conditions are, and which in turn can enable us to shape the legal understanding of what is charitable in a way that is relevant for modern society.

There is no reference to these principles in the legal analysis relating to religious charities - yet it is about religion that ideas have changed over the last few decades far more than about the benefits from education, relief of poverty or any other charitable purpose. The Commission appears to be going out of its way to avoid facing up to the requirements of the law in relation to religious charities. It is highly implausible to claim, for example, that "the general consensus of objective and informed opinion" is that saying special prayers for the dead or sitting with a corpse before burial is a public benefit, and it is questionable whether such opinion would take that view either of the saying of masses open to the public.

"Must Be Capable of Proof"

Similarly, the general legal analysis is clear that public benefit has to be demonstrated by evidence:

> 2.2 . . . Whether or not there is a benefit is a question of fact and must be answered by the courts in the same manner as other questions of fact, by means of evidence cognisable by the courts.
>
> 2.3 . . . whether there is a benefit: "is a question to be answered by the court on forming an opinion upon the evidence before it".
>
> 2.4 The benefit must be capable of proof, through factual and positive evidence where necessary. Expressions of opinions and beliefs are not enough. Factual evidence produced must be sufficient so that the courts are capable of evaluating it. . .
>
> 2.6 If the benefit is not capable of proof, the benefit cannot be recognised. . .

> 2.9 Where it is something which is too vague, indescribable or uncertain, or incapable of proof, . . . then this cannot be recognised as a benefit.
>
> 2.10 "An assumed prospect or possibility of gain which is vague, intangible or remote could not justly be treated" by the courts as establishing that the purpose is actually of benefit.

There are similar references to evidence and proof in the legal analysis relating to religious charities, but the Commission makes it plain that its notion of evidence and proof fall far short of what would be expected in ordinary life. In 1.6, it is said that:

> A religion must be capable of producing beneficial effects and evidence will need to be given to demonstrate that its beliefs, doctrines and practices have this capability.

- one might comment that capability is not the issue: what is needed is evidence that the charity actually produces the benefit.

Much more importantly, in 3.8 the Commission suggests that the "moral and spiritually improving impact" of a religious purpose

> might be shown in the consequential effect that the beliefs and practices promoted by the particular teachings, codes and doctrines have on the followers and others (encouraging them to act as more responsible members of society).

The whole question is begged in the word "consequential". Who is to say that a churchgoer is a better person *because* s/he attends church? There is no persuasive evidence that religious people are better than non-religious. Government studies have shown, for example, that the non-religious are as likely to be involved as the religious in voluntary work in the community[1].

<u>*Lack of Benefit; debatable benefit; disbenefit*</u>

In their general legal analysis (para 2.8) the Commission states that "lack of benefit may be
supported by expert evidence". This is patently relevant to religious claims.

---

[1] Home Office (2001) *Religion in England and Wales: Findings from the Home Office 2001 Citizenship Survey*, Home Office Research Study 274

Similarly, in 2.13, the Commission says "Where the element of public benefit is so debatable that the courts regard it as being incapable of proof one way or the other, the courts would inevitably decline to recognise the particular organisation as charitable." This likewise will often be the case with religious organisations, especially when they claim public benefit for specifically or purely religious activities (holding services, saying prayers etc).

On disbenefit, see our main comments.

It is important that the Commission gives active consideration to the possibilities of lack of benefit, debatable benefit and disbenefit and is open to representations from the public on the subject.

Any religion better than none

1.3 This paragraph is extraordinary in making no mention of the Human Rights Act, let alone modern social conditions or public opinion. To quote from old cases that "any religion is at least likely to be better than none" and that "it is better for man to have a religion . . . rather than to have no religion at all" and then comment merely that it is "arguable" that similar benefits may be available "from other moral codes" is at best gravely misleading, at worst incompetent indulgence of religious delusions. The Commission refers in a footnote to Article 9 of the ECHR but ignores the Human Rights Act, which (as noted in our main text) at sn 6 outlaws discrimination between religious and non-religious beliefs and at sn 3 requires that statute law (and so a fortiori the obiter dicta of long dead judges) be interpreted to conform with the Convention. The quotations in this paragraph should have no place in a summary of the modern law unless to reject them as no longer in any way applicable. The final sentence of the paragraph is silly: the "proposition" that "any religion is at least likely to be better than none" cannot be "interpreted" to have the tautologous meaning suggested: it is simply now wrong and to be rejected.

Adverse to the foundations of religion

1.4 The phrase "adverse to the foundations of religion" is quoted without explanation or recognition that it too belongs to the day when religion was assumed to be a public benefit. "Adverse to the foundations of religion" does not mean the same as "subversive to morality". It is "adverse to the foundations of religion" to argue that there is no god, that the use of reason is preferable to blind faith and that morality needs to be based on human considerations - but those are humanist views and the advancement of Humanism is compatible with charitable status. We suggest that the Commission needs either to define what is now meant by "adverse to the

foundations of religion" in terms acceptable to the modern age or else rule that it is no longer part of modern law.

Other comments

2.4 This is surely carelessly drafted, suggesting as it does that tending to the moral and spiritual improvement of the public is not in itself for the public benefit!

2.8 We query this as an adequate interpretation of the law - see our comment on 3.3 below - and refer also to our comment on the draft guidance in Appendix 3 at F3 (example at top of page 33).

2.11 We point out in passing that organisations promoting non-religious belief systems may have been registered but - in contrast with religious organisations - not for promoting those systems.

2.25 At (c)(ii), given the provisions of the Human Rights Act, the final sentence should read "This would particularly need to be considered if the sole purpose of an organisation is to convert people from one religion or non-religious belief to another": it is just as provocative for the non-religious to be harassed and targeted by evangelists as for followers of some other religion, and the Commission is bound by sn 6 not to discriminate between religious and non-religious beliefs.

Public Benefit from the holding of religious services

3.3 The paper fails to address the question, very relevant in the present day, whether it suffices as proof of public benefit that religious services are open to the public or whether it is necessary that some members of the public actually attend. Congregations are now much smaller than previously and casual visitors to religious services are rare. We suggest that claims of benefit of this nature should require evidence to substantiate the number of persons attending who are not communicants or members of the regular congregation and some indication of the benefit provided to them or to society through an effect on them.

Neville Estates v Madden

3.9 We find it utterly extraordinary that the Commission should quote without reservation Cross J in Neville Estates v Madden. The view there expressed is so contrary to other cases suggesting that worship in closed

bodies carries no public benefit as to be effectively irreconcilable. It is quite incompatible with Re White [1893] 2 Ch 41 (quoted on page 7): "A society for the promotion of private prayer and devotions by its own members and which has no wider scope, no public element, no purpose of general utility . . . would not be . . . charitable. . . "and with the other cases there quoted (Gilmour v Coats; Re Warre's Will Trusts; and Re Hetherington). It should be remembered that some of the cases (e.g., Cocks v Manners (1871)[2]) suggestive of a lax interpretation of the requirements for qualification as charitable date from the days of mortmain, when there was a clear inducement for laxity in order to preserve inheritances in the hands of the family.

The idea that society benefits from people pursuing a religion in private is not a "reasonable premise" (3.19) but a prime example of the Commission's prejudice in favour of religion. It is the sort of sentiment that would not be approved by "the common understanding of enlightened opinion for the time being". If the Commission cannot go so far, with so many cases to back them, then their pusillanimity knows no bounds. Would they agree that (an extraordinary scenario to imagine) a humanist community, meeting in private for their own benefit and with the incidental enjoyment of their own social facilities would impart a benefit to the larger community simply by living in it - when they were not turning their backs on it?

At the very least, the Commission should state that very strong evidence would need to be led to prove such a proposition and should indicate what sort of evidence that would be. We have the gravest concern that, given the Commission's general approach, such claims will be waved through in private with minimal scrutiny on the basis of being a "reasonable premise".

Other comments

3.16 We are very surprised that the Commission has any doubt that there can be no public benefit from religions whose practice "includes an act which would be against the law".

3.27 Employment of trustees: we comment on this under F5 of the draft guidance.

---

[2]Cocks v Manners (1871) LR 12 Eq 574 concerned a gift for a closed Dominican convent: Sir John Wickens V-C stated at p585 as follows: "A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word "charitable" is used in its popular sense or in its legal sense" - http://www.istr.org/conferences/dublin/workingpapers/ohalloran.pdf.