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June 21, 2004

Francene Graham
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Dear Dr. Graham:

Re: Draft Charities Bill

1. The Joint Committee has invited written submissions with regard to the draft Charities Bill. There was no restriction that the submissions must come from persons who are residents in United Kingdom. Consequently, we are taking the liberty of sending a submission since English law has a significant influence on the interpretation and evolution of the law outside of England.

2. This new legislation will establish the Charity Commission for England and Wales and mandate that its first general function is "determining whether institutions are, or are not, charities"[1]. Given this statutory function of the Commission, it seems useful to study the draft Charities Bill in light of the *Commentary on the Descriptions of Charitable Purposes in the Draft Charities Bill* published by the existing Charity Commissioners ("CCE&W Commentary").

3. This submission will focus primarily on the "advancement of religion" and "public benefit" issues raised by the Charities Bill, given the common law expressed in the CCE&W Commentary. In particular, we will express the following concerns:

    a. removing the presumption of public benefit will have a particularly adverse effect on religious charities, many of whose functions are not susceptible of legal proof;

    b. defining the "advancement of religion" in terms of "the law relating to charities in England and Wales" may exclude certain administrative, common law and equitable sources that have historically given meaning to this term;

    c. defining the "advancement of religion" in terms of "the law relating to charities in England and Wales" does not bring any clarity to the law, but merely imports a set of legal authorities that the Charity Commissioners have labeled as unclear, ambiguous, and of persuasive value only;

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[1] Proposed Amended Clause **1C** (2) 1 of the Charities Act 1993

d. defining the "advancement of religion" in terms of "the law relating to charities in England and Wales" may exclude decisions of the Commissioners that have not been formally sanctioned by the courts;

e. enacting the Charities Bill as drafted provides no guidance on what the new standard of public benefit should be;

f. enacting the Charities Bill as drafted will require more "objective or tangible" evidence of public benefit of religion in England and Wales at a time when Australia is increasing recognition of intangible benefits;

g. defining the "advancement of religion" in terms of "the law relating to charities in England and Wales" does not grant sufficient consideration to the United Kingdom's obligations under the *Human Rights Act 1998*;

h. enacting a statutory definition of "advancement of religion" without addressing non-Christian characteristics of religion such as polytheism will make it more difficult to achieve pluralism and harmony among different religions.

a) Removing the presumption of public benefit will have a particularly adverse effect on religious charities

4. Section **1**(1)(a) states that a charity must be "established for charitable purposes only". The Explanatory Notes published by the Home Office on 27 May, 2004 state that this provision preserves the current rule that a body or trust which has non-charitable as well as charitable purposes is not a charity. We understand the historical application of this principle. We are concerned about its application once a statutory definition of charity has been enacted which removes the presumption of public benefit for advancement of religion.

5. In *Gilmour v. Coats,* the House of Lords held that the efficacy of intercessory prayer was "outside the region of proof as it is understood in our mundane tribunals"[2] and so the Court could not find that it passed the public benefit test. Once the Charities Bill removes the presumption of public benefit for the advancement of religion, how many other aspects of religion will be held to be "outside the region of proof"? The common law has been generous in allowing incidental purposes and activities that are not "charitable". Charities under the first two heads have much less risk than religious bodies of having purposes which were formerly charitable becoming non-charitable as a result of the removal of the presumption of public benefit. In this new regime, how will a religious body, with functions that cannot be proved, remain confident that it is "established for charitable purposes only"?

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b) Defining the "advancement of religion" in terms of "the law relating to charities in England and Wales" may exclude certain administrative, common law and equitable sources that have historically given meaning to this term;

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2 [1949] AC 426 at 452-453 per Lord du Parc

6. From the date the draft Charities Bill becomes law, the charitable status of organisations established for the "advancement of religion" will become a matter of statutory interpretation of section 2(2)(c) of the Bill. In an attempt to maintain continuity with the historic common law, section **2**(5) of the Charities Bill states that the "particular meaning under charity law" of advancement of religion continues to apply to the statutory term. Section **2**(6) defines "charity law" to mean "the law relating to charities in England and Wales".

7. The problem is that the term "charity law" either has no meaning or greatly restricts the jurisprudence relied upon in defining advancement of religion. I suspect that the drafters intend "charity law" to include the House of Lords decision in *Commissioners for Special Purposes of the Income Tax v. Pemsel*[3]. However, there is no doubt that Lord Macnaghten would have said he was dealing with a taxing statute. If *Pemsel* was not a tax law case, the House of Lords could not have applied English law to a charitable trust that was located in Scotland. Lord Halsbury, L.C. would not have written a dissenting judgment in *Pemsel* if he was deciding the meaning of charity in the Court of Chancery rather than for purposes of a taxing statute.[4]

8. The *Pemsel* definition had clearly become "charity law" by 1926 when the Judicial Committee of the Privy Council[5] overruled the High Court of Australia's decision in *Chesterman v. FCT*, holding that the "sensible meaning of the word 'charitable' is its eleemosynary meaning... 'Charitable' must therefore ... be understood in its 'popular' sense."[6] However, when the Australian courts had the opportunity to rule on the meaning of charity under a taxing statute in 1926, they reversed England's "quaint Chancery decisions" on the meaning of charity.[7] These cases illustrate the difficulty of determining what is included in the term "charity law". This problem is particularly acute with regard to "tax law".

9. The CCE&W Commentary boldly states[8] that the criteria used by the Charity Commissioners to determine advancement of religion, as that is understood by "charity law", are set out in full its Church of Scientology decision of 17 November, 1999 ("CCE&W Scientology Decision"). In the CCE&W Scientology Decision the Commissioners enumerate eleven characteristics of religion[9] which can be discerned from the legal authorities. *R v Registrar General ex parte Segerdal*[10] is cited as the legal authority for three of the first five characteristics. The CCE&W Scientology Decision then goes on state that "the case of *Segerdal* was not concerned with charity law…"[11] On a strict interpretation of the draft Charities Bill, therefore, the *Segerdal* criteria would be excluded from the statutory meaning of "the advancement of religion" on the basis that *Segerdal* is not "charity law".

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3 [1891] A.C. 531
4 [1891] A.C. 531 at pp. 544-545
5 *Chesterman v. FCT*, [1926] A.C. 128
6 [1923] 32 C.L.R. 362 at pp. 384-385
7 *Young Men's Christian Association of Melbourne v. FCT*, [1926] 37 C.L.R. 351 at p. 359
8 *CCE&W Commentary para. 10*
9 *CCE&W Scientology Decision pp. 13-14*
10 *R v Registrar General ex parte Segerdal* [1970] 2 QB 697
11 *CCE&W Scientology Decision p. 16*

c) Defining the "advancement of religion" in terms of "the law relating to charities in England and Wales" does not clarify the law

10. According to the CCE&W Commentary, the criteria used to determine whether an organisation is advancing religion are "set out in full"[12] in the CCE&W Scientology Decision. However, the Commissioners in the CCE&W Scientology Decision concluded their thorough review of the existing case law with a pointed condemnation of the inadequacy of the existing "charity law" with regard to religion:

> "The Commissioners concluded that the English legal authorities are neither clear nor unambiguous as to the definition of religion in English charity law, and at best the cases are of persuasive value with the result that a positive and constructive approach and one which conforms to ECHR (European Convention on Human Rights) principles, to identifying what is a religion in charity law could and should be adopted."[13]

11. In light of the Commissioners' considered view of the English law, it would seem that Parliament is shirking its responsibility to bring clarity and certainty to charity law when it introduces a statutory definition of religion that is based on the "law related to charity in England and Wales". Further, given the potentially narrow scope of English "charity law" on the meaning of religion, Parliament's approach seems unnecessarily narrow in scope. The Commissioners in the Scientology decision considered it appropriate, in cases where English law was ambiguous, to consider Court decisions from other jurisdictions, principally Australia, the USA and India. Is it possible that a new Charity Commission, considering whether Church of Scientology is a religion in England under the Bill, would refuse to consider *Segerdal* because it is not a "charity law" case and give greater weight to the Court decisions recognizing Scientology in Australia, the USA and New Zealand and therefore hold that it is a religion?

d) Defining the "advancement of religion" in terms of "the law relating to charities in England and Wales" may exclude decisions of the Commissioners that have not been formally sanctioned by the courts

12. The statutory definition of "charity law" would exclude existing decisions of the Charity Commissioners that have extended the definition of charity without the formal sanction of the Court. If this is the case, one is left with the embarrassing claim that the CCE&W Scientology Decision sets out what is "charity law" when the reality is that the CCE&W Scientology Decision is not itself "charity law".

13. In our view, it would be unfortunate if decisions and opinions of the Charity Commissioners rendered prior to the statutory definition were given no weight because they do not form part of the "law" in England and Wales. While we would be reluctant to elevate the CCE&W Scientology Decision to the status of a court decision, there are many registration decisions which are progressive advancements in the Charity Commissioner's recognition of charitable purposes that would be lost

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12 *CCE&W Commentary para. 10*

13 *CCE&W Scientology Decision p. 19*

under the draft Charity Bill. As close observers of the evolution of charitable purposes in England and Wales, we are admirers of the many courageous and progressive decisions taken during the tenures of Richard Fries and John Stoker as Chief Charity Commissioners and know that these decisions relied upon sterling legal analysis of their staff. It seems that the intended liberality of Paragraph **2**(4)(a) will not have the impact intended unless the Charity Bill clarifies that "existing charity law" includes positive registration decisions under the fourth head made by the Charity Commissioners prior to the statutory enactment. In our view, the Commission should undertake an analysis of the charitable purposes set out in paragraph 33 of the CCE&W Commentary to distinguish (contrary to paragraph 34) charitable purposes that "have been extended and developed by decisions of the courts" from those that have been extended and developed by decisions of the Charity Commission.

14. We would recommend that the definition of "charity law" in the draft Charity Bill be amended to include positive registration decisions for which reasons were published prior to the provisions coming into force. A prior Charity Commission decision denying registration should not preclude that purpose being charitable unless the courts have ruled on the issue.

e) The Bill provides no guidance on what the new standard of public benefit should be

15. The second paragraph of the CCE&W Commentary states that "all purposes which are currently recognised as charitable, under English and Welsh law, would continue to be charitable once a new Charities Act came in force". It is not clear how this can be reconciled with section **3**(2), which states that "it is not to be presumed that a purpose of a particular description is for the public benefit". There is no point in removing the presumption if it does not impact on some purposes currently recognized as charitable.

16. The fact that the Charities Bill removes the presumption of public benefit also does not answer the question of what the new standard of public benefit will be. The Explanatory Notes to the Draft Clause, in our opinion, is quite wrong when it states "Subsection (2) of clause 3 abolishes the presumption, putting all charitable purposes on the same footing".[14] While clause 3(2) does remove the presumption of public benefit, there is nothing in the Charity Bill's provisions which articulates the principle that all heads of charity are on an equal footing with regard to public benefit.

17. Quite to the contrary, the Bill enshrines into the statutory definition the principle that different heads of charities have different standards of what constitutes "public benefit". This is the result of Section **3**(3), which gives "public benefit" the meaning "understood for the purposes of the law relating to charities in England and Wales." This meaning was articulated by Lord Simmonds when he said:

> "that it would not be surprising to find that, while in every category of legal charity some element of public benefit must be present, the courts…have accepted one standard in regard to those gifts which are alleged to be for the

[14] *Explanatory Notes p. 105*

> advancement of education and another for those which are alleged to be for the advancement of religion and it may be yet another in regard to the relief of poverty".[15]

18. It makes sense that religion should have a different standard of public benefit than the prevention of poverty or the advancement of animal welfare. However, it would be useful if there was some guidance from Parliament as to whether the standard of public benefit for religion should approximate that of, for example, the advancement of human rights.

19. The issue of differing standards is complicated by the fact that charity law recognizes that the test of public benefit may vary from generation to generation. By way of example, Lord Wright said "eleemosynary trusts may, as economic ideas and conditions and ideas of social service change, cease to be regarded as being for the benefit of the community".[16] It is hard to think of an example more fundamental to charity law than eleemosynary trusts. It would be helpful if Parliament gave some guidance on this issue because the first statutory definition of charity is an important watershed and it is important to have some guidance as to how much of the past should be incorporated into the future.

f) Enacting the Charities Bill as drafted will require more "objective or tangible" evidence of public benefit of religion in England and Wales at a time when Australia is increasing recognition of intangible benefits

20. The existing charity law is that public benefit with regard to the fourth head must amount to "tangible and objective benefits".[17] Lord Wright went on to say "that approval by the common understanding of enlightened opinion for the time being, is necessary before an intangible benefit can be taken to constitute a sufficient benefit to the community to justify admission of the object into the fourth class".[18] If the policy behind the draft Charities Bill is that "all heads of charity are on an equal footing with regard to public benefit", it would seem impossible to require tangible and objective benefits equally of all heads of charity. Indeed, Section **3**(3) can be read to imply or recognize that public benefit does have a varied meaning for different "purposes" in charity law.

21. It is possible that in the future the House of Lords will find aspects of the advancement of reconciliation, or even human rights to be "outside the region of proof as it is understood in our mundane tribunals"[19] as was the efficacy of intercessory prayer. It will be a major loss to the intended progressiveness of the Charities Bill if the Court requires "tangible and objective benefits" for all charitable purposes before they can pass the public benefit test.

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15 *Gilmour v. Coats* [1949] A*C 426 at p. 449*

16 *National Anti-Vivisection Society v. IRC* [1948] AC 31 at p. 42

17 *National Anti-Vivisection Society v. IRC* [1948] AC 31 at p. 49, per Lord Wright

18 *National Anti-Vivisection Society v. IRC* [1948] AC 31 at p. 49, per Lord Wright

19 *Gilmour v. Coats* [1949] AC 426 at 452-453 per Lord du Parc

22. The issue of how tangible the evidence of public benefit flowing from particular religious activities is particularly difficult. The law has repeatedly endorsed the principle set out by Romilly MR in *Thornton v. Howe*[20] that the law will not distinguish between one religion or sect and another. The principle has been that any religion is better than none, as propounded by Lord Reid in *Gilmour v. Coats*[21] and Cross J. in *Neville Estates v. Madden*[22]. Removing the presumption of public benefit could be interpreted as repealing the principle that any religion is better than none. One noted author has characterized the CCE&W Scientology Decision as establishing the principle "that no religion at all is presumed to be better than a new one". [23] Parliament should clarify whether the argument that these principles are retained as "existing charity law", a concept stated to apply only to Section 2, is defeated by the clear language in Section 3.

23. It would seem that the public benefit resulting from religion is almost necessarily intangible and not susceptible to being proved objectively in Court. The tangible benefits from religion are best demonstrated under the other heads of charity, such as an increased concern about preventing and relieving poverty, sickness, human suffering and promoting human rights, and reconciliation etc. However, it would eviscerate the religion head if it was only charitable if it could provide tangible evidence of public benefit under one of the other heads. The relief of poverty is charitable without establishing that the charitable institution is educating the poor to change their circumstances so that they will not remain in a situation of perpetual and dependent poverty. The advancement of religion head needs to be able to meet the public benefit test based entirely on the benefit ascribed to exclusively religious activities.

24. England takes a much harder line on needing tangible benefits for religion than does the rest of the world. Canadian courts have not considered or adopted *Gilmour v. Coats*[24]. Canadian jurisprudence is set out in *Re Morton Estate*, which says:

> "A bequest to a religious institution, or for a religious purpose, is *prima facie* a bequest for a 'charitable' purpose in the legal sense of the word but in a particular case a religious purpose may be shown not to be a charitable purpose." [25]

25. Australian cases have had difficulty with *Gilmour v. Coats* and several cases have suggested that contemplative religious activities may meet the public benefit test. [26] You are aware that in July 2003 the Government of Australia released exposure draft legislation that provided a statutory definition of a "charity". It has decided not to proceed with Australia's draft Charities Bill. On May 11, 2004 the Australian

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20 (1862) 31 Beav 14, pp. 19-20

21 [1949] 426 at pp. 457-458

22 [1962] Ch. 832 at p. 853: "As between different religions, the law stands neutral, but it assumes that any religion is at least likely to be better than none."

23 Peter Luxton, *The Law of Charities*, Oxford University Press 2001 at para. 4.34

24 [1949] 426 at pp. 457-458

25 (1941) 1 WWR 311(BCSC) at p. 323

26 *Crowther v. Brophy* [1992] 2 VR 97; *Association of Franciscan Order of Friars Minor v. City of Kiew* [1967] VR 732

Government announced that the common law meaning of a charity will continue to apply, but the definition will be extended to include closed or contemplative religious orders that offer prayerful intervention to the public. Parliament should reflect on the fact that Australia is going the opposite direction as England and Wales with regard to this aspect of the advancement of religion in charity law.

g) Defining the "advancement of religion" in terms of "the law relating to charities in England and Wales" does not grant sufficient consideration to the United Kingdom's obligations under the *Human Rights Act 1998* (HRA)

26. On one level, the recent statutory initiatives on the law of charity signal a heightened concern with human rights issues in the charitable sector. Section **2**(2)(h) of the Charities Bill specifically recognizes "the advancement of human rights, conflict resolution or reconciliation" as a charitable purpose, and consultations have begun to consider the scope of this new statutory head. In addition, the Commission's Policy Division is now specially charged with "ensuring that the implications of the HRA are considered in all aspects of the Commission's work". The Commission has published a guidance on "how the HRA 1998 affects us in the Charity Commission" (the "HRA Guidance"), which considers many of the rights issues raised by the charitable registration process.

27. However, Parliament's decision to define the "advancement of religion" in terms of "the law relating to charities in England and Wales" appears to be either a careless or a deliberate avoidance of one of the most volatile human rights issue facing the charitable sector – the determination of what belief systems constitute "religions" under charity law. This determination has not only financial consequences, but impacts on the dignity and the religious and equality rights of the organizations concerned. As such, it directly implicates two articles of the ECHR: article 9, which guarantees the right to "freedom of thought, conscience and religion", and article 14, which guarantees the right to enjoy freedom of thought, conscience or religion without discrimination on an enumerated ground such as "religion, political or other opinion, national or social origin", or "association with a national minority." Pursuant to s. 6 of the HRA, it is unlawful for the Charities Commission to act in a way that is incompatible with these rights

28. However, the Commissioners have so far taken a very cautious approach to their mandate to interpret the common law in a way that is compatible with religious freedom. In the CCE&W Scientology Decision (which is, according to the HRA Guidance, the leading resource on how Articles 9 and 14 affect the Commission's determinations of the charitability of "religious" organizations) the Commissioners concluded only that any <u>discretion</u> which they might have in applying the existing law to the registration of charities should be exercised in accordance with the principles of the ECHR. Such discretion might arise "where the provisions of the common law were ambiguous, or where the legal authorities…were not binding on the Commission, but of persuasive value". Because the "belief in God" criteria was ambiguous in English law, the Commissioners attempted to conform to ECHR principles by examining foreign legal authorities and expert opinion before expanding the historic criteria slightly to include belief in any supreme being. However, faced with the clearer cases on the meaning worship, human rights principles were not

considered. More significantly, perhaps, while the Commissioners did consider whether the different tests of public benefit for religious and non-religious organizations were compatible with Articles 9 and 14, they never directly addressed the central issue of whether the legal criteria being used to determine Scientology's status as a "religion" were in themselves discriminatory, or violative of religious liberty.

29. It is important to note the degree to which England's definition of religion for charitable purposes is out of step with the rest of the world. As the Commissioners themselves acknowledged, jurisdictions such as India, Australia and the United States have adopted a much broader definition of religion, which encompasses non-theistic religions and supernatural beliefs. As Gino Dal Pont writes, this expansion of the definition of religion is based on the growing recognition of the preeminent role of religious freedom and equality rights.

> "The principal reason for the breadth of the definition of 'religion' is that it promotes religious liberty, which is enshrined in the Australian Constitution[27] and in the New Zealand Bill of Rights, [28] and it is moreover consistent with the law's concern with protecting minorities. [29] The law's protection in this context is not directed to safeguarding the tenets of each religion – *it is accorded to preserve the dignity and freedom of persons to adhere to the religion of their choice*. [30] The broad characterization of 'religion' recognizes that some, mostly Eastern, religions are not theistic, and thereby releases the law from Judaeo-Christian notions. [31] It is in this context that the definition adopted the Church of the New Faith case is broader than the definition adopted by the English courts. "[32]

30. As a general principal, foreign cases have persuasive value only for the Commission, and must generally be accorded less weight than the English jurisprudence. However, the *HRA* represents the domestic implementation of regional and international treaties on the preeminence of human rights. In this circumstance, where a domestic statute based on international standards, and there is a growing consensus of opinion on the meaning of those standards, there is a strong argument that the law from other jurisdictions should be given greater weight.

31. It may be that the cautious approach of the Commissioners is defensible, given the limits of their statutory role and the HRA's statement that public authorities must act in accordance with legislation notwithstanding that it may be incompatible with Convention rights. However, it is harder to defend the cautious approach of a

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27 Australian Constitution s. 116

28 *New Zealand Bill of Rights Act 1990* (NZ) s. 13

29 *Church of the New Faith v. Commissioner of Pay-roll Tax* (1983) 154 CLR 120 at 131-132 per Mason ACJ and Brennan J

30 *Church of the New Faith v. Commissioner of Pay-roll Tax* (1983) 154 CLR 120 at 132 per Mason ACJ and Brennan J

31 *Church of the New Faith v. Commissioner of Pay-roll Tax* (1983) 154 CLR 120 at 140 per Mason ACJ and Brennan J

32 *Charity Law in Australia and New Zealand*, Gino Dal Pont, Oxford University Press 2000 at p.149

government which claims to be championing the advancement of human rights in its reform of the charitable sector.

h) Enacting a statutory definition of "advancement of religion" without addressing non-Christian characteristics of religion such as polytheism will make it more difficult to achieve pluralism and harmony among different religions

32. If the advancement of religion is to become a statutory purpose that relies only on existing charity law, it is unlikely that Hinduism qualifies as a religion because it is polytheistic. There is no decided case in England that polytheistic religions are charitable. The Hindu organizations presently registered by the Charity Commissioners do not change the "law" on this issue. Similarly, some religions have theological doctrines which would be illegal or immoral if practiced in England. An example of this type of theological issue is polygamy. It would be helpful if the Charities Bill would make it clear that the proposed statutory changes will not reverse some of the positive registration decisions on registration taken by the Charity Commissioners without having decided cases upon which to base those registrations.

33. The law of what is a religion in England evolved in a historical context of brutal religious strife and political machinations. The origins of religious charity law were the antithesis of pluralism. In today's modern world there is a great need for religious pluralism and harmony between different religions. It would seem the better way forward is to find the public benefit in religion in the intangible benefit to society of having people take their religion seriously and incorporate the values promulgated into their daily lives.

34. One of the criteria for religious charities meeting the public benefit test under the existing law is that the body be "advancing" religion. In the twenty-first century the concept of advancing religion is not as widely supported, or politically correct, as it has been the past. We all tend to forget that in the *Pemsel* case Lord Macnaghten was determining whether "maintaining, supporting, and advancing the missionary establishments among heathen nations"[33] was charitable. However, today, those who oppose maintaining the "advancement" of religion as a head of charity would see the language in *Pemsel* as supporting proselytizing by fundamentalist zealots. While the language should be more moderate, if religion is to have the impact on its adherents that justifies according it an intangible public benefit, one must expect that enthusiastic adherents will want to "share the faith".

35. A sensitive issue in today's world is whether fundamentalist zealots "advancing" religion are doing so in ways that are conducive to or supportive of terrorism. The test of public benefit applied to religious purposes must not be driven by fears fostered by those with particular political agendas in the "war on terrorism". There is undoubtedly a problem in that some religious charities do, either directly or indirectly, fund terrorism. However, in the present climate it would be very harmful to have the uncertainty as to what the standard of public benefit with regard to the advancement of religion be exploited to pander to religious or racial bigotry. Charities can foster the growth of pluralism which is needed to counter the dangerous extremes promoted by

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[33] *Commissioners for Special Purposes of the Income Tax v. Pemsel*, [1891] A.C. 531 (H.L.) at 541

radical religious fundamentalists. This can best be accomplished by defining public benefit for religion in a way that recognizes the intangible benefit of individuals engaging in genuine religious activities.

Conclusion

Thank you for considering the issues addressed in this letter. The Charities Bill will have a significant impact on the evolution of charity law, particularly the advancement of religion, in many countries outside of England and Wales. We would welcome an opportunity to respond to any questions arising out of your consideration of this submission or clarify any of the points we have raised.

Yours sincerely,

Blake Bromley

Kathryn Bromley

July 2, 2004

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Re: Second Submission on Charities Bill

1. We write further to our submission of June 21, 2004, which focused on the "advancement of religion" and "public benefit" issues raised by the draft Charities Bill. In that submission, we noted that England has fallen behind jurisdictions such as Australia, India, and the United States, which have broadened the definition of religion in recognition of the preeminent status of religious freedom in constitutional democracies.

2. We want to add to our submission because on June 30 the Supreme Court of Canada released an important judgment on the scope of religious freedom in Canada, and the scope of "religion" itself: *Syndicat Northcrest v. Anselm,* 2004 SCC 47. The majority judgment sets out the following "outer definition" of the term "religion":

> "Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith."

3. The majority also held that freedom of religion protects sincerely held beliefs, irrespective of whether they are "objectively recognized by religious experts as being obligatory tenets or precepts of a particular religion." This holding will have a significant impact on the methodology of the bodies charged with determining what constitutes a "religion" for purposes of charity law, especially when confronted with newer and "different" religions.

4. In our view, the adoption of a "subjective, personal and deferential definition of freedom of religion" by Canada's highest court strengthens the argument that granting "religious" charitable status to a narrow range of organizations based on Judaeo-Christian notions of religion is a violation of religious freedom under the Canadian *Charter of Rights and Freedoms* and, quite possibly, the UK *Human Rights Act of 1998*. It also strengthens our view that England should not define the "advancement of religion" head in terms of "the law relating to charities in England and Wales".

5. We are concerned that the consultation papers and draft Charities Bill do not recognize how fundamentally different the origins of the English law on religious charities are from the intellectual roots of the protection of religious freedom in documents such as the *European Convention on Human Rights* and national constitutions in countries such as Canada and Australia. These human rights documents generally have "supra-statutory" authority and can not be ignored by a "mere" legislative body such as Parliament. The philosophical and political starting point for these guarantees of religious freedom is not only different from, but antithetical to, the legal recognition of "the advancement of religion" as defined in the draft Charities Bill. As the leading Canadian case on religious freedom states:[34]

> "With regard to freedom of conscience and religion, the historical context is clear. As they are relevant to the *Charter*, the origins of the demand for such freedom are to be found in the religious struggles in post-Reformation Europe."

6. The Queen Elizabeth I who drafted "the Charities Uses Act 1601(4)" referred to in Section 1(3) of the Draft Bill was the same queen whose first legislative act was to make religion part of the Oath of Allegiance[35]. Having arrogated theological infallibility to Parliament[36], her second legislative act was to enact a narrow Protestant definition of religion in "*An Act for the Uniformity of Common Prayer and Service in the Church, and Administration of the Sacraments*"[37]. Her legislated theology subsequently became more specific as she required allegiance to the "39 Articles of Religion"[38]. Elizabeth I's Parliament passed three separate statutes indexed under the heading "Religion" but all having the title "*An Act to retain the Queen's Majesty's subjects in their due obedience*".[39] Roman Catholics were "disobedient"[40] and their freedoms were to be curtailed[41]. In Elizabethan England the only religion accorded full legal rights was the Church of England. Christians who did not accede to the uniform beliefs of the Church of England were considered "Dissenters" and were subject to various degrees of discrimination. Elizabeth I was so opposed to citizens holding contrary religious beliefs that she created penal sanctions for religious offenders.[42] The "public benefit" of religion in Elizabethan England was primarily political and was

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34 Dickson J's judgment in *Regina v. Big M Drug mart Ltd.* 1985 18 D.L.R. (4th) 321 at para 118

35 The *Act of Supremacy,* (1558-59) 1 Eliz. c. 1. "*An Act to restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all foreign Powers repugnant to the same*"

36 The Act of Supremacy said that Parliament could not be adjudged to have made "any Error, Heresy, Schism or Schismatic Opinion" in the determination of any religious matters or ecclesiastical causes. (1558-59) Eliz. c. 1, XXXV

37 (1558-59) 1 Eliz. c. 2

38 "*An Act to reform certain Disorders touching Ministers of the Church*" (1571) 13 Eliz. c. 12

39 (1581) 23 Eliz. c. 1; (1587) 29 Eliz. c. 6; and (1592) 35 Eliz. c. 1

40 "*An Act against Jesuits, seminary priests, and other such like disobedient persons*" (1585) 27 Eliz. c. 2

41 (1592) 35 Eliz. c. 2. "*An Act for restraining Popish Recusants to some certain places of abode*"

42 See statutes such as (1581) 23 Eliz. c. 1; (1587) 29 Eliz. c. 6; and (1592) 35 Eliz. c. 1

measured in terms of her subjects' "due obedience". A "papist" might not recognize the Queen's right to the throne[43].

7. When considering the "particular meaning under charity law" of the advancement of religion, it is important to note that later legislation which broadened the scope of legally recognized religions was also tied to very specific theological doctrines. The first tolerance statute was the *Toleration Act* of 1688[44] which gave Protestant Dissenters some relief from the criminalization of their religious beliefs. The *Toleration Act* recognized the charitable status of nonconformist Protestant religions which believed in the Trinity, but excluded Roman Catholics and Jews. The *Unitarian Relief Act, 1813*[45] removed the theological commitment to the Trinity. George III had given his Majesty's subjects in Quebec the right to "the free exercise of the religion of the church of Rome"[46] back in 1774. However, similar freedoms were not extended in England until the *Roman Catholic Relief Act* in 1791.[47] The second *Roman Catholic Relief Act* was passed in 1829[48] but only the final statute in 1832[49] enabled Roman Catholics to claim charitable status as a lawful religion. Jews had to wait until 1846 and the enactment of the *Religious Disabilities Act*[50] before achieving legal recognition in charity law. This was only two years after the Protestant Dissenters who had to wait until the *Nonconformist Chapels Act, 1844.*[51]

8. This history of expanding the definition of religion through Parliament rather than the courts is unique to England. Parliament having conferred the title of "Defender of the Faith" on King Henry VIII in 1544, his daughter Elizabeth was zealous in legislating a narrow theology for lawful religion. However, it is important to note that these legislative "toleration" initiatives to mitigate some of her zeal have never been extended to the Muslims, Hindus, and those of other faiths who make up a significant portion of England's population today. Nor have the courts completed what Parliament has left undone.

9. By stating that "the advancement of religion" has the particular meaning given to it under "the law relating to charities in England and Wales", the Charities Bill seems to

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43 (1558-59) 1 Eliz. c. 3 "An Act for Recognition of the Queen's Highness to the Imperial Crown of the Realm

44 1688 (1 Will & Mary), c. 18. "*An Act for exempting their Majesties protestant subjects, dissenting from the church of England, from the penalties of certain laws*"

45 1813 (53 Geo. III), c. 160. "*An Act to relieve Persons who impugn the Doctrine of the Holy Trinity from certain Penalties*"

46 (1774) 14 Geo. III, c. 83, s. 5. "*An Act for making more effectual provision for the government of the province of Quebec in North America*"

47 (1791) 31 Geo. III, c. 32. "*An Act to relieve, upon Conditions, and under Restrictions, the Persons therein described, from certain Penalties and Disabilities to which Papists, or Persons professing the Popish Religion, are by Law subject*"

48 (1829) 10 Geo. IV, c. 7. "*An Act for the Relief of His Majesty's Roman Catholic Subjects*"

49 (1832) 2 & 3 Will. IV, c. 115. "*An Act for the better securing the Charitable Donations and Bequests of His Majesty's Subjects in Great Britain professing the Roman Catholic Religion*"

50 (1846) 9 & 10 Vict. C. 59. "*An Act to relieve Her Majesty's Subjects from certain Penalties and Disabilities in regard to Religious Opinions*"

51 1844 (7 & 8 Vict.), c. 45. "*An Act for the Regulation of Suits relating to Meeting Houses and other Property held for religious Purposes by Persons dissenting from the United Church of England and Ireland*"

be embracing a historical pattern of only selective and incremental inclusion of those who do not conform to particular religious beliefs. This historical pattern was rejected most dramatically by the United States with the enactment of the First Amendment, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Canada did not include an "establishment clause" forbidding religious legislation in its Constitution or Charter of Rights, but does recognize “freedom of conscience and religion” as the first of the “fundamental rights” of Canadians.The Supreme Court of Canada referred specifically to the Tudor and Stuart periods and Oliver Cromwell’s “Commonwealth” as the historical eras that caused Canada to enshrine freedom of religion in its *Charter of Rights and Freedoms*.

10. We would argue that the Draft Bill further enshrines England’s anti-pluralistic legislative history into the modern law of charity through section **1**(3), which states:

> “A reference in any enactment or document to a charity within the meaning of the Charitable Uses Act 1601 (c.4) or the preamble to it shall be construed as a reference to a charity as defined by this section.”

11. Given that the draft Bill distinguishes between the preamble and the statute, it seems reasonable that the various institutions mentioned in the 1601 statute will become charities by statutory reference. These include “any Cathedral or Collegiate Church within the Realm”. However, the question remains as to whether Westminster Cathedral is only a charity “within the meaning of the Charitable Uses Act 1601” if it maintains the theological doctrines mandated by Parliament in 1601.

12. This submission is not the place to outline the significance to modern charity law of preserving all the charitable purposes covered by the phrase “to or for any charitable uses before expressed, at any time since the beginning of her Majesty’s reign”. Nevertheless, it is amusing to think that a twenty-first century charities statute may expressly preserve the “charitable uses” ordered by a Protestant royal family on land and property, primarily monasteries and chantry endowments, seized from Roman Catholic charities.

13. In our view, Parliament should be cautious about incorporating the anti-pluralistic and tortured history of the “advancement of religion” into this new beginning in charity law. Almost every other area of charity law is to be celebrated as the courts have led the way in extending legal rights and protections to progressive and important issues of public policy. The record in relation to religion is less sterling. The courts in England have yet to accept polytheism into the legal definition of religion, even though the religious status of many polytheistic religions would be accepted without question by the person in the street. The Charities Bill presents an opportunity for England to break with its legal legacy of religious exclusion. Parliament should provide the sector with a creative and forward-looking framework for this break.

14. Some guidance can be taken from the Charities Bill’s handling of the advancement of sport as a new charitable head. Section **2**(5) discreetly legislates a break with “charity law” of the past. Section **2**(3)(c) provides what the Supreme Court of Canada might call an “outer definition” of sport. It will not satisfy everyone and courts will be asked

to refine the definition in the future. However, the courts will not have to begin their inquiry by trying to work their way around *Re Nottage*[52].

15. Developing an appropriate definition of "religion" for the charitable sector is admittedly more complex than defining the outer bounds of "sport". As both English and Canadian judges have acknowledged, "the State" in all its forms is ill-equipped to judge the merits of a religious belief, or to determine contentious matters of religious doctrine.[53] However, some form of definition is necessary to give meaning to the term. In performing this difficult task, one would not want to disregard the historical significance of the House of Lord's decision that the purely religious activities of a 'fringe' religious group like the Moravians were charitable in 1891[54]. However, it is equally undesirable to transform England's historically narrow legal definition of religion into public policy by defining the "advancement of religion" in terms of its "particular meaning under charity law."

16. The Charities Bill provides a historic opportunity for Parliament to address the many issues raised by the "advancement of religion" head. Before enacting this legislation, we believe that Parliament has a responsibility to at least consider the disjuncture between England's historical and often politically-driven recognition of a narrow range of "religious" charitable purposes, and its emerging human rights obligation to recognize a wide range of beliefs that are "linked to one's self-definition and spiritual fulfillment". In doing so, it may want to consider whether the spirit of the toleration legislation is best continued by not burdening the advancement of religion head with its "particular meaning" under the law relating to charities in England and Wales.

Conclusion

Thank you for considering the issues addressed in this letter. It is important that the Charities Bill retains the advancement of religion as a head of charity. While religion remains charitable, its peculiar history in English law necessitates distinguishing its treatment in the legislation. We would welcome an opportunity to respond to any questions arising out of your consideration of this submission or clarify any of the points we have raised.

Yours sincerely,

Blake Bromley Kathryn Bromley

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52 [1895] 2Ch. 649

53 *Syndicat Northcrest v. Anselm,* 2004 SCC 47 (released June 30, 2004)

54 *Commissioners for Special Purposes of the Income Tax v. Pemsel* [1891] A.C. 531