



**RESPONSE TO UNITED KINGDOM CHARITY COMMISSION'S
CONSULTATION
PUBLIC BENEFIT AND THE ADVANCEMENT OF RELIGION**

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This submission focuses on one issue – the definition of religion approach articulated in the Charity Commission Draft Supplementary Guidance.

Definition of Religion

The Institute is concerned that the Commission may intend to vest itself with broad discretion to “investigate” and “evaluate” a religion’s relationship with or, in the terminology proposed by the Commission in the Charity Commission Draft Supplementary Guidance, “connection with” a “supreme being or entity.”

The most important requirement of a definition of religion is that it not be discriminatory and that it treats all religions equally. The Human Rights Act 1998 (HRA) mandates that the definition of religion under the Charities Act 2006 must be as broad as the definition of religion under the European Convention on Human Rights.[1] The Commission must provide for a broad definition that is inclusive under ECHR law, not exclusive and discriminatory.

The broad and inclusive approach of the European Court of Human Rights and its related organs to the definition of religion is best exemplified by the detailed study regarding Article 9 of European Convention on Human Rights by the Human Rights Information Centre of the Directorate of Human Rights of the Council of Europe on the treatment of religion by the European Court. The Directorate finds that the concept of religion under Article 9 is:

“Not confined to widespread and globally recognized religions but also applies to rare and virtually unknown faiths. Religion is thus understood in a broad sense.” [2]

This expansive approach is consistent with the Court’s application of a fundamental human rights policy of the European Community to religious freedom issues – “the need to secure true religious pluralism, an inherent feature of the notion of a democratic society”. [3] Similarly, the Court has emphasized the importance of “pluralism, tolerance and broadmindedness, without which there is no democratic society”. [4] As the Court has stressed, since religious entities exist in the form of organized structures,” the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords”. [5]

It would frustrate this policy of “true religious pluralism” and result in arbitrariness and unfair discrimination to interpret religion narrowly to exclude new and minority faiths.

In furtherance of this policy of “true religious pluralism”, the Court has instructed governments “to remain neutral and impartial” and has been loathe to accept any restrictions on religion, viewing any contested measures with “strict scrutiny”. [6] The European Court has also criticized and struck down measures that vest officials with “very wide discretion” on matters relating to religion. [7] In criticizing broad discretion in one case, the Court held that “the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate.”[8]

Article 14 of the European Convention of Human Rights provides that “the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground” such as sex, race or religion. The Human Rights Court has applied an extremely strict standard to differential treatment based on religion, which would be the case if charity registration were denied to a religious organization on the ground it does not meet a “traditional” definition of religion. As The European Court stated in *Hoffmann v Austria*:

“Notwithstanding any possible arguments to the contrary, a distinction based essentially on a difference in religion alone is not acceptable.”[9]

The requirement of a broad and inclusive definition of religion that does not violate the principles of equality and non-discrimination at the heart of the Human Rights Act 1998 is properly recognized in the Employment Equality (Religion or Belief) Regulations 2003 implemented by Parliament: regulation 2(1) defines “religion or belief” as any religion, religious belief or similar philosophical belief”. In the Explanatory Notes for the regulations, the Department of Trade and Industry notes:

“The reference to religion is a broad one and is in line with the freedom of religion guaranteed by Article 9 ECHR. It includes those religions widely recognized in this country such as Christianity, Islam, Hinduism, Judaism, Buddhism, Sikhism, Rastafarianism, Bahai’s, Zoroastrians and Jains....The European Court of Human Rights has recognized other collective religions, including Druidism, the Church of Scientology, and the Divine Light Zentrum. The main limitation on what constitutes a “religion” for the purposes of Article 9 ECHR, is that it must have a clear structure and beliefsystem (see X v UK (1977) 11 DR 55)”.

The Commission should adopt an inclusive definition of religion that meets international human rights standards as reflected in the Employment Equality (Religion or Belief) Regulations 2003.

The most important feature of any test to qualify as an organization that fulfils the purpose of the advancement of religion is that it treats all religions, including faiths that are not part of the Judeo-Christian tradition, equally. As the University of Derby Religious Research Centre, in its January 2000 publication and definitive study entitled Research Project on Religious Discrimination, and Interim Report for the Home Office emphasizes: 1) the rights which the Convention and the Human Rights Act convey must apply equally to new religious movements and minority faiths; 2) no distinction may be made between different kinds of belief; and 3) no legal basis exists to separate out minority faiths from world religious traditions.

It is simply inappropriate as a matter of European Human Rights Convention policy to discriminate based on differences such as worship, one’s relationship with the transcendental or religious practices and beliefs. Moreover, the Commission – indeed, any government official or entity –

is simply not qualified to conduct such an “evaluation” and “investigation” of complex religious beliefs in the realm of the transcendent and metaphysical.

Yet, in its Draft Supplementary Guidance the Commission proposes to evaluate a minority religion’s beliefs and scriptures in order to determine if the religion maintains a relationship with “a supreme being or entity” that, in the opinion of the Commission, meets the criteria for religion under the Charity Act 2006.

Such an “investigation” and “evaluation” of a religion as proposed by the Commission would contravene the clear human rights dictates of the European Human Rights Court. The Court has, time and again, stated that this very process is prohibited because it violates the right to freedom of religion protected by Article 9 of the Convention and will inevitably lead to discrimination against minority religions.[10] How can government officials untrained in matters of

religion make subjective judgements about such issues? It raises the substantial risk that the government will improperly entangle itself in religious affairs, improperly evaluate religious beliefs and improperly assess benefits flowing from religious belief and practice.

Moreover, it is not constructive for the Commission to propose vague guidelines regarding the evaluation of religions for the definition purpose yet state that there are “a number of religions that are capable of meeting the definition of a religion”, using the nine historic faith communities as examples of religions who meet the Commission’s religion criteria.[11] This provides the appearance of “the end justifies the means” approach, assuring these religions that they meet the criteria while leaving other minority faiths out, subject to a proposed ambiguous test that contravenes Convention law and that provides for subjective and discretionary judgments by officials which could conceivably lead to discrimination.

In addition, the Commission strongly implies that a movement could be somehow classified as a religion in general, but not meet the criteria for religion for purposes of charity law. Yet, the European Court of Human Rights allows no such distinction. A group that qualifies as a religion under the Convention must meet the criteria for religion under the Charity Act – otherwise, the Act contravenes fundamental human rights standards and is incompatible with the Convention.

The House of Lords (Lords of Appeal) judgment in *Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others* is quite instructive on this prohibition of evaluating religious beliefs and instead focusing on sincerity of belief:

“The European Court of Human Rights has rightly noted that '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. The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held”. [12]

One neutral and inclusive approach that provides a practical, working test is the one adopted by the United States Supreme Court, other high courts and numerous international religious experts which focuses on sincerity of belief – a test cited with approval in *Williamson*. Whether the belief is sincerely held is a legitimate inquiry under American law because it allows the government to reject organisations that merely purport to be religious but are engaged in shams. The inquiry is the objective one of:

- 1) Whether a given belief is sincere and meaningful so that it occupies a place in the life of its possessor that parallels the place that traditional religious beliefs occupy in the lives of believing majorities; and
- 2) Whether there is a system of moral practice directly resulting from an adherence to the belief.

This approach eliminates the risk of bias or incorrect evaluations and misinterpretations by government officials that are not equipped to be oracles of theological verity. This test also has practical utility. If a religion has thousands, tens of thousands, or millions of members who sincerely believe in the religion's precepts and attempt to conform their life to the moral, ethical and spiritual principles flowing from their faith, the government should have no authority to refuse to recognize its bona fides.[13]

Another approach to the definition of religion that meets international standards and is regularly embraced by experts in religion as the most definitive study of the definition of religion is the decision of the Australian High Court in 1983. In that decision, the Court determined that religion involved (1) belief in a supernatural being, thing or principle, and (2) acceptance of canons of conduct in order to give effect to that belief.[14]

The objective and broad approach to defining religion taken by Australia's High Court was discussed at length and followed by the High Court of Auckland, New Zealand in *Centrepont Community Growth Trust v Commissioner* [1985] 1 NZLR 673.

As this definition is from a Commonwealth country, and as it is neutral, inclusive and meets international human rights standards, it should be the criteria for religion used by the Charity Commission.[15] Moreover, the House of Lords in *Williamson* cited the Australian High Court decision as an "illuminating" judgment, noting that the "trend of authority (unsurprisingly in an age of increasingly multi-cultural societies and increasing respect for human rights) is towards a 'newer, more expansive, reading' of religion" as reflected in that decision.

Religion can be defined in different ways for different purposes, depending on the social policy a country or other governmental body is seeking to accomplish. Often one governmental authority assumes primary responsibility for determining whether a system of beliefs is a religion, and other agencies look to the rulings from this authority as guidance in making their own determinations. In the United States, for example, the Internal Revenue Service generally is the first governmental authority to pass on whether a particular group is religious and therefore can qualify for coveted tax-exempt status as a charitable organization. State and local tax authorities will then issue their own determinations based on the Internal Revenue Service's conclusions.

The IRS has established fourteen criteria[16] that, in its view, define a Church. These provide an objective and neutral test.

- A distinct legal existence
- A recognised creed and form of worship
- A definite and distinct ecclesiastical government
- A formal code of doctrine and discipline
- A distinct religious history
- A membership not associated with any other church or denomination
- An organisation of ordained ministers
- Ordained ministers selected after completing prescribed studies
- A literature of its own
- Established places of worship
- Regular congregations
- Regular religious services
- Schools for religious instruction of the young
- Schools for the preparation of its ministers.

The 14 point, objective and neutral test used by the Internal Revenue Service to define “Church” provides a practical means to serve this purpose by establishing criteria designed to show that a religious organisation has substance while eliminating sham organisations that are the cause of public concern and lack the legitimacy that are proven by these elements. This approach, unlike the proposed approach by the Charity Commission in its Draft Supplementary Guidance, provides an objective and neutral test that protects against religious discrimination.

Conclusion

The Commission should ensure that it employs a broad and inclusive definition of religion that meets international human rights standards and complies with the principles of non-discrimination and equality in matters of religion. The

Employment Equality (Religion or Belief) Regulations 2003 meet these standards and provide a model approach. The sincerity of belief test, the Australian High Court test and the Internal Revenue Service criteria provide other examples of objective and neutral criteria that will promote fair and equal treatment, not discrimination.

[1] Indeed, the government attested in writing pursuant to Section 19 of the HRA during the legislative process of the Charity Act 2006 that it is “compatible with the European Human Rights Convention.

[2]Article 9 of the European Convention on Human Rights (Strasbourg, December 1992) page 6.

[3] Manoussakis Others v. Greece, (59/1995/565/651) (26 September 1996), paragraph 44.

[4] Manoussakis, paragraph 41.

[5] Metropolitan Church v. Moldova (44701/99) (13 December 2001), paragraph 118.

[6] Metropolitan Church, paragraph 117; Manoussakis, paragraph 44.

[7] Manoussakis, paragraph 45.

[8] Manoussakis, paragraph 45; Metropolitan Church, paragraph 117.

[9]Hoffmann v Austria (1994) 17 EHRR 293, para. 36.

[10] These principles were reiterated by the Court in 2006 and 2007 in two cases: The Moscow Branch of the Salvation Army v. Russia, no. 72881/01, §§ 74 and 75, ECHR (October 7, 2006) and Church of Scientology Moscow v. Russia (application no. 18147/02) (April 5, 2007).

[11] These religions are Baha'i, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Sikhism and Zoroastrianism.

[12] R (Williamson) v Secretary of State for Education and Employment [2005] 2 WLR 590.

[13]Likewise, the Zimbabwe Supreme Court in its often cited case, In Re Chickweche, 1995 (4) SA 284 (ZC), found that the Rastafarian movement met the

criteria for religion, stating that: “The Court is not concerned with the validity or attraction of the Rastafarian faith or beliefs; only with their sincerity.”

[14] Church of the New Faith v Commr for Payroll Tax (1982) 154 CLR 120

[15] The Charity Law Association and interfaith groups also have recommended this definition be adopted in previous years in submissions to the legislature.

[16] Not all 14 criteria must be met to be defined as a Church – it is sufficient if an organisation meets the majority.