CULTS, RELIGION AND PUBLIC POLICY: A COMPARISON OF OFFICIAL RESPONSES TO SCIENTOLOGY IN AUSTRALIA AND THE UNITED KINGDOM

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TITLE

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ABSTRACT

The aim of this thesis is to determine whether it is practically feasible in Australia to establish an adjudicative framework, whereby deviant religious groups might be disqualified from receiving financial privileges provided to religions, which are liberally defined by the High Court. The extent to which government might engage in social control of religion (a concept developed by American sociologist Talcott Parsons in *The Social System* 1951) is examined against the potential constraint of s.116 of the Commonwealth of Australia Constitution Act 1900, which entrenches notions of religious freedom and non-establishment. An ancillary question is whether a Commonwealth adjudicative framework for charities (including religious groups) and other third sector entities might be extended co-operatively to include the Australian states.

A case study comparison is made of official responses in the Australian Commonwealth and the United Kingdom to the Church of Scientology, a group popularly and often officially characterized throughout its short history as a harmful cult. The case studies reveal that there are public policy grounds for refusing privileges to some groups which might achieve legal religious classification. The prevailing definition of religion in Australia is so broad and open that it is best utilized, if at all, as a tool of *prima facie* classification only, to which public policy parameters might then be applied in different legislative contexts. Due to the wide definition of religion and the probable inclusion of harmful groups for classification purposes, it is likely that the High Court would endorse public policy parameters for the disqualification of deviant groups from financial entitlements.

As s. 116 does not apply to the Australian states, it is unlikely that the states would initially submit to any adjudicative framework for third sector entities which includes religious groups by definition and would be potentially subject to overriding High Court determinations. However, the successful operation over time of an adjudicative framework for third sector entities at the Commonwealth level might ultimately attract state participation.

PREFACE

This project emerged from an awareness and concern about mind influencing and social control techniques utilized by groups commonly and pejoratively referred to as cults. As a member of the Legislative Council of the New South Wales parliament from 1988 to 1996 I made representations on behalf of families and friends of members of one group in particular. My enquiries into this organisation, which utilized techniques borrowed from Scientology (along with representations about several other groups), led me to propose in April 1993 the establishment of a select committee of the Legislative Council to report on harmful cult activities, including: deceitful recruitment practices; physical and financial exploitation and abuse of cult members; fraudulent fund raising activities; and the misuse of mind influencing techniques.

Members of the NSW parliament received a letter dated 21 April 1993 from the Office of Special Affairs, Church of Scientology Australia, New Zealand and Oceania, which characterized any state investigation of religious groups as an infringement of religious freedom and alleged that a report I had written in relation to the issue was 'frighteningly reminiscent' of 'persecution ... in Nazi Germany where the Jews were targeted as "cults"'. On the other hand Rabbi Pinchos Woolstone of The Jewish House, Bondi, wrote to me on 27 April 1993 in the following terms

I would ask you to do all in your power to ensure that an inquiry takes place and that appropriate legislation be enacted. I do not believe that such legislation will affect the religious or civil liberties of any honest individual or religious faith – only those who practice deceit and mind control will be disadvantaged. Further, to draw a parallel between the suffering of the Jews and others during the Nazi holocaust and NSW post legislation, is not only grotesque and vulgar, but is an indictment against those who enunciate such ideas.

Due to an intervening election and my subsequent move to the Commonwealth Parliament, the motion to establish a select committee lapsed. However, the strident reaction to the proposal by Scientologists, on alleged grounds of religious freedom, stirred my interest in the nexus between groups commonly referred to as cults, and

mainstream religion. To my mind the term cult conveyed negative connotations and should attract government concern whereas religion was something beneficial and positive, probably deserving of government support – a view somewhat modified during the course of this project.

I was aware of the landmark 1983 decision of the Australian High Court, *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria),* in which Scientology was granted religious status and the financial privileges that followed from that classification. I was also aware of the considerable controversy that had surrounded that organisation and the fact that it had been popularly categorized as a cult throughout its short history, with all the intended criticism that designation conveyed. Consequently I became interested in whether a government, consistent with notions of religious freedom, could deny privileges to organisations claiming legal religious status, but which might also be fairly described as cults due to proven allegations of harm; or however described might attract disqualification on the same grounds. I raised a similar issue in the Commonwealth Parliament during the adjournment debate on 23 September 1997. On that occasion I noted

> the ability of people behind bogus organisations to utilize a major loophole in our laws to claim exemption from taxes and other charges on the basis of religious and/or charitable exemption. There are many organisations pursuing altruistic activities which are to be applauded and encouraged. These include genuine religions which have been the driving force behind much beneficial and benevolent activity, including the propagation of values, the education of children, caring for the sick and elderly and other activities ... no government has come to grips with this question of hoaxes and parodies of religion and, as a result, many people and organisations have been financially devastated. These frauds have found religion to be the perfect cloak for their activities ... I believe that the number of bodies in Australia claiming to be religious has increased dramatically. I believe it is time to take stock of the situation to see whether the fairly relaxed position that was evidenced in the early 1980s can still be justified. If there is a way to distinguish those organisations whose principal aim is to make money by posing as a religion, we need to find it. If a tightening of the criteria for eligibility is a possible route, we need to explore that route. I call upon the Treasurer [Mr. Costello] to cause these issues to be fully investigated. I will also refer this issue to the Taxation Task Force.

Subsequently I received a courteous reply from the Taxation Task Force, noting my concerns but not pursuing the matter. However, in September 2000 the Australian Treasurer, the Hon. Peter Costello, commissioned an inquiry into the definition of charities (the Sheppard Inquiry), the findings of which are examined herein.

Questions of privilege attach to the legal term 'religion'. This is notwithstanding the difficulty in defining that term, which might, and in Australia probably does encompass groups popularly described as cults, some psychological and charismatic groups, sects, new religious movements and/or traditional or mainstream religions. Indeed, the term religion might yet come to encompass secular philosophical societies, depending on how the legal definition evolves. On the other hand the term 'cult', which is also fraught with definitional difficulties, is for relevant purposes unknown to the law, in that it does not attract legal privileges or penalties based on a legal definition of the term.

Therefore, the question that has exercised my mind is; what special characteristics entitle groups to claim privileges attaching to religious status (as opposed to protections attaching to that status) and are there circumstances under which these privileges can be withheld? In other words, with respect to the broad band of organisations that might achieve *prima facie* legal religious classification and the financial advantages attached thereto, can the wheat be separated from the chaff?

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CULTS, RELIGION AND PUBLIC POLICY

It gave me a sense of the power ... that religion has, a belief in God, how it can organize someone's life and help create a lot of those principles these men had – of bravery and putting life at risk to protect and save others. It gave me a sense of where they learned it because I would go, meet their families, and in many cases you would see ... very good parents, a father who had been a firefighter or been in the military, and the Church in which they were brought up.

Former New York Mayor Rudy Giuliani speaking to Andrew Denton about the aftermath of 11 September 2001 (*Enough Rope*, ABC TV, 18 August 2003)

The struggles for political participation and political representation took place primarily in the religious arena, with dissenters eventually winning hard-fought for political representation.

Beth Gaze & Melinda Jones, *Law Liberty and Australian Democracy* (The Law Book Company, 1984)

In his autobiography, Over My Shoulder, publisher Lloyd Arthur Esbach remembered taking lunch with ...Ron Hubbard in 1949. Hubbard repeated a statement he had already made to several other people. He said he would like to start a religion, because that was where the money was.

A story told about the founder of Scientology, L. Ron Hubbard (Jon Atack, *A Piece of Blue Sky*, Carol Publishing Group, NY, 1990)

CHAPTER I: INTRODUCTION

I: 1

OBJECTIVES, METHODOLOGY AND LITERATURE

'to ensure normative behaviour ... it would be necessary to develop a framework or code of conduct for NGOs [Non-Government Organisations], donors and recipients'[1]

The primary objective of this thesis is to determine whether it is viable under Australian law to establish an adjudicative framework whereby harmful or deviant groups, which might achieve legal religious classification,[2] can be disqualified on reasonable grounds from receiving financial privileges provided by the Commonwealth to religions generally. To this end it is necessary to determine whether notions of religious freedom, entrenched under s. 116 of the Commonwealth of Australia Constitution Act 1900,[3] may be invoked to invalidate tribunal determinations (made on grounds of public policy), to disqualify deviant religious groups from receiving Commonwealth financial privileges. An ancillary objective is to determine whether a Commonwealth adjudicative framework for charities and other third sector entities might be extended co-operatively to include the Australian States.

CULTS AND LEGALLY RECOGNISED RELIGION

Concerns about controversial groups which might achieve legal religious classification have been well documented in the popular media. These groups are often designated by

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[1] Opening quotations are drawn from the chapter being introduced.
[2] Such groups seem *prima facie* entitled to religious classification under the wide and flexible definitions provided by the High Court in the landmark case of *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120.
[3] 'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth', Attorney-General's Department & Australian Government Solicitor, *The Constitution as in force on 1 July 1999* (Canberra: Commonwealth of Australia, 1999) 53.

the pejorative term cult[4] or the often pejoratively used term sect,[5] by the general public and by rival groups.[6] Sometimes these terms are eschewed in favour of the term 'new religious movement' (or its acronym NRM)[7] said to be coined by sociologist Eileen Barker,[8] which conveys a less pejorative connotation. Sociologists Shupe and Bromley observed in 1980 that

because the word "cult" conjures up pejorative stereotypes that became the focal points of uncritical prejudice and attempts at actual repression, we have refrained from using it alone except in quotes to separate ourselves from its typical usage by advocates of anti-cultism. Instead, we employ the term "new religions", minus quotes, throughout the text because of its more neutral connotations.[9]

However, 'new religion' is also a value-laden term and is also contested. There are those who believe it conveys an unwarranted respectability,[10] those who think it trivializes

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[4] The term 'cult' has its origins in the Latin 'colere' and 'cultus', which were 'both neutral words relating to worship or veneration' and has 'only more recently taken on pejorative connotations'; the 'description "cult" for at least three decades has generally been employed judgementally, signifying little more than that the group concerned is said to be dominated by an influential figure and is dangerous or ideologically distasteful', Ian Freckelton, '"Cults", Calamities and Psychological Consequences', *Psychiatry, Psychology and Law* 5, no. 1 (1998): 3-4.

[5] Usually 'a body separated from an established Church' or 'a group deviating from orthodox tradition, often regarded as heretical', but also 'a party or faction in a religious body', or 'a religious denomination' or 'the followers of a particular philosopher or philosophy or school of thought in politics', Della Thompson, ed., *The Concise Oxford Dictionary of Current English*, 9 ed. (Oxford: Clarendon press, 1995) 1249.

[6] The 'cult label has become such a generalized currency of demonization that it sometimes gets applied by members of one Christian group seeking to expose the heretical doctrines of another', John R Hall, Philip D Schuyler, and Sylvaine Trinh, *Apocalypse Observed* (London: Routledge, 2000) 197.

[7] The NSW Anti-Discrimination Board noted 'we have been careful to use the terms "religious groups" or "religious movement"' in 'contrast with the words "cult" and "sect", popular terms often used interchangeably to refer to unpopular minority religious groups in a derogatory and emotionally charged manner ... we have preferred the term "new religious movement" to the term "cult", which has pejorative connotations in modern usage', NSW Anti-Discrimination Board, *Discrimination and Religious Conviction,* Sydney: New South Wales Anti-Discrimination Board 1984. 519.

[8] Freckelton, '"Cults", Calamities': 3.

[9] Anson D Shupe and David G Bromley, *The New Vigilantes: Deprogrammers, Anti-Cultists, and the New Religions* (Beverly Hills: Sage Publications, 1980) 24.

[10] Tom Sackville, a former British MP and Home Office Secretary, notes that the term 'new religious movement' is the one preferred by cult groups themselves, because; 'it gives cults a spurious respectability' and 'reinforces the official stance of neutrality ... if you are an organisation whose real aim is to exploit financially, and in many case physically, large numbers of vulnerable young people, being referred to by Government as a "Religious movement" is not unhelpful', Tom Sackville, 'Cults - The British Government Response', *CULT Watcher (CIFS - Cult Information & Family Support Incorporated)*, December 1999, 4. Reproduction of an article which appeared in *FAIR News*, Summer 1999.

groups with deep-seated traditional antecedents[11] and academics who contend it is inadequate to describe groups generally seen to be cults but which might not be perceived to be religious, including some psychological, therapeutic or self-help groups.[12] Furthermore, while the NRM nomenclature may be favoured by many sociologists,[13] others, including psychologists, continue to focus on the negative aspects of groups defined as cults. Psychologist Robert Lifton has noted

I am aware of the controversy surrounding the use of the word cult because of its pejorative connotation, as opposed to the more neutral new religion. I use both terms in this book, but as in past work I confine the use of cult to groups that display three characteristics: totalistic or thought-reform-like practices, a shift from worship of spiritual principles to worship of the guru or leader, and a combination of spiritual quest from below and exploitation, usually economic or sexual, from above.[14]

Despite this academic effort to differentiate between groups characterized as cults and those designated religion, to date no such differentiation has been attempted under legislation in Australia or the United Kingdom. Indeed, it has been observed that 'there is no legal definition which distinguishes between religion and cults'.[15] It is also apparent that the great majority of groups described as cults or sects or new religious movements would qualify *prima facie* as legally recognised religion.[16]

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[11] It is complained by some groups that the term 'new religion' is a 'euphemism' that is often 'intended to trivialize and impute a lack of time-tested substance to movements with roots in traditions that go back thousands of years', Daniel G Hill, *Study of Mind Development Groups, Sects and Cults in Ontario,* Ontario: Ontario Government 1980. 235.

[12] Hence it is argued that the term 'is inappropriate to describe "cultlike" groups that are not religious, or groups of devotees that form around charismatic healers who then exploit their patients and followers in various ways; or non-professional psychotherapies, even if they convert themselves to "religions" in order to obtain various tax benefits and legal protections; or cabals of Satan worshippers which, while perhaps qualifying as "religions", could hardly qualify as new', Freckelton, '"Cults", Calamities': 3 fn 20, 33-4.

[13] David V Barrett, *The New Believers: A Survey of Sects, Cults and Alternative Religions* (London: Cassell & Co, 2001) 24.

[14] Robert Jay Lifton, *Destroying the World to Save It: Aum Shinrikyo, Apocalyptic Violence, and the New Global Terrorism* (New York: Metropolitan Books, 1999) 11.

[15] In evidence from the Department of Foreign Affairs and Trade, Peter Nugent, *Conviction with Compassion: A Report on Freedom of Religion and Belief,* Canberra: Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Sub-Committee: The Parliament of the Commonwealth of Australia 2000. 177.

[16] It has been noted that among 'lay activists and professionals concerned about people caught up in cultic groups ... there was ... a consensus that whatever 'cult' referred to, the term embraced nonreligious as well

From time to time we observe in horror as another tragic episode ensues involving a group usually identified as a religious cult or sect. The most notorious of these episodes, in relatively recent memory, include the following tragedies, all involving significant numbers of deaths: Jonestown in Guyana, where in 1978 congressman Leo Ryan and four others were murdered and where followers of the Reverend Jim Jones and his People's Temple were murdered and committed suicide; the confrontation near Waco, Texas in 1993, where David Koresh and his Branch Davidian 'disciples' were consumed in fire; the sarin gas attack on Tokyo subway commuters in 1995 and other murders perpetrated by adherents of Shoko Asahara and his Aum Shinrikyo (Aum Supreme Truth); the group suicides between 1994 and 1997 of followers of Luc Jouret and his Solar Temple movement in Switzerland, Canada and France; the collective suicides in 1997 of Marshall Applewhite and followers of his Heaven's Gate movement in California;[17] and the mass suicides/murders in Uganda in the year 2000 of Joseph Kibwetere and followers of his Movement for the Restoration of the Ten Commandments.[18]

These events, inarguably involving religious groups, provoked international horror and concern, stimulating official and academic concern to understand the causes - and to develop public policy responses to the seeming inevitability of future catastrophic events involving cultic religious groups. To this list of religiously inspired or associated atrocities might now be added the New York and Washington attacks on 11 September 2001, attributed to the apparently sincere but murderous religious extremist and quasi-spiritual leader Osama bin Muhammad bin Laden and his Al Qaeda (The Base), which also involved the two elements of mass murder and suicide. The audacity of this attack has focused official attention on public policy responses to deviant religious groups with the potential for violence, particularly because the US administration was targeted.

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as religious groups, although a large majority were religious', Michael D Langone, 'The Two "Camps" of Cultic Studies: Time for a Dialogue' in *Cultic Studies Review* 1 no. 1 (2001) 2 of 16

[17] The above episodes are outlined in numerous publications, including Sarah Moran, *The Secret World of Cults: From Ancient Druids to Heaven's Gate* (New York: Quadrillion Publishing Ltd, 1999).

[18] Declan Walsh, 'Fatal Ugandan Cult', *The Catholic Weekly*, 7 April 2000. Reproduced by Cult Information & Family Support Incorporated (CIFS) in *Cult Watcher*, Vol. 2, No. 1, June 2000, 8.

THIRD SECTOR OVERSIGHT

In these responses, both military incursions initiated by the United States and the targeting of terrorist financial networks (including charities and other third sector entities) have been implemented. In Australia, under the regulatory powers of the Security Legislation Amendment (Terrorism) Act 2002, groups identified by the UN Security Council as being 'directly or indirectly engaged in terrorist acts'[19] have been proscribed, including: Jemaah Islamiah, Abu Sayyaf, the Armed Islamic Group, the Salafist Group for Prayer and Combat, and Harakat-ul-Mujahideen.[20] The predominantly religious identity of these groups is apparent.

However, most countries have inadequate mechanisms for the oversight of third sector organisations. The third sector, which broadly speaking 'encompasses all those organisations that are not part of the public or business sectors',[21] includes charities[22] and bodies sometimes referred to as NGOs (Non Government Organisations). It is partly described as the non-profit or not-for-profit sector, but also includes 'trading cooperatives and finance and insurance mutuals'.[23] Many of these organisations receive donations from the public and they are often given special financial privileges by government. The size and financial importance of sector is immense, such that

> In 1995-96, Australia's nonprofit sector earned $27 billion and spent $26 billion. The third sector ... earned $59 billion and spent $52 billion. The nonprofit sector contributed about $15 billion or 3% of the gross domestic product; the third sector 3.3% ...

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[19] 'Terrorist Act' is defined in Part 5.3 Division 100.1 as 'an action or ... threat ... made with the intention of advancing a political, religious or ideological cause ... with the intention of coercing, or influencing by intimidation, the government ... or intimidating the public or a section of the public'. The type of action required is listed in 100.2 and exceptions for advocacy and industrial action, *inter alia* are set out in 100. 2A, Security Legislation Amendment (Terrorism) Act 2002

[20] Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (Sydney: UNSW Press, 2004) 209 fns 44, 45.

[21] Mark Lyons, *Third Sector. The contribution of nonprofit and cooperative enterprises in Australia* (Sydney: Allen & Unwin, 2001) 5.

[22] Advancement of religion is one component of the common law definition of charity.

[23] In Europe, the sector is 'better known as l'economie sociale, or the social economy', Mark Lyons and Susan Hocking, *Dimensions of Australia's Third Sector: Report of the Australian Nonprofit Data Project* (Sydney: Centre for Australian Community Organisations and Management (CACOM), University of Technology, Sydney, 2000) 3.

Government funding provided only 30% of the revenue of the nonprofit sector and 14% of the revenue of the wider third sector. The sector employed just under 634,000 people. Most of these (579,000) were employed in nonprofit organisations. Third sector organisations contributed nearly 8 per cent of all jobs in Australia ... In 1997, Australians donated 2.8 billion to third sector organisations. In 1994/95, 2.3 million Australians volunteered a total of 374 million hours for third sector organisations. This was the equivalent of another $7.5 billion donation.[24]

Religious organisations constitute an important part of the sector. Data drawn from the ABS (Australian Bureau of Statistics) Economic Activity Survey for 1995-6 indicates that 5,789 religious organisations employed 17,000 people and contributed 327.5 million to GDP.[25] Despite its importance, it is questionable whether there is sufficient knowledge about money trails and adequate tools at the disposal of governments to police third sector organisations. An academic expert on terrorism has noted that

governments and private donors to Islamic and other charities are unable to control or determine the end users of their contributions. Unless there is a direct threat to the stability of their own governments or societies, or a threat to important bilateral and multilateral relationships, governments are unlikely to develop a framework for monitoring these NGOs. *To ensure normative behaviour, transparency and accountability, as well as sanctions to punish those who violate these norms and practices*, it would be *necessary to develop a framework or code of conduct for NGOs, donors and recipients.*[26]

The reluctance to develop monitoring frameworks might be partly explained by a reticence to interfere in the internal organisation of community welfare groups. This applies in particular to religious groups, which figure prominently in the third sector and which benefit from long accepted notions of religious freedom. However, religious groups were responsible for the list of atrocities outlined above, which might indicate cause for special concern. Indeed, the motivation behind acts of suicide bombing is quite often religious and this component of obedient, misguided self-sacrifice in a 'higher' cause has elevated the threat of religiously inspired terrorism to a much more dangerous level.

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[24] Ibid. i.

[25] The employment figures do not include self-employed ministers of religion, of whom 13,491 were identified in the 1996 census, Ibid. 38-9.

[26] Rohan Gunaratna, *Inside Al Qaeda: Global Network of Terror* (Melbourne: Scribe Publications, 2002) 63-4. Emphases added.

Concern about potential support for terrorism is merely one aspect of the problem. Groups that *prima facie* attract the legal designation of religion (due to the extremely wide legal definition discussed in chapter I: 2) and consequently financial privileges have figured prominently in public policy debates about abuses within and by so-called cults and sects. High profile groups which have attracted concern in several countries include: Sun Myung Moon and his Holy Spirit Association for the unification of World Christianity (sometimes referred to as 'the Moonies' or the Unification Church); the Bhagwan Shree Rajneesh and his Rajneeshis; David Berg and his Children of God; and Lafayette Ronald Hubbard and his Scientologists[27] (the group used as a case study in this thesis). The Chinese government continues to conduct a virulent campaign against Li Hongshi and followers of his Falon Gong movement (also Research Society of Falun Dafa) which is denounced as a dangerous cult.[28] Public officials have commented on the failure to develop adequate public policy responses to complaints about abuses within and by groups sometimes described as cults, sects or new religious movements, but by no means restricted to these groups alone. Indeed, there have been many instances of abuses occurring within mainstream religious denominations.[29]

POLICY DEBATE ON CULTS IN AUSTRALIA

In Australia in the 1960s (in episodes which have provided a case study for this thesis), three state governments enacted draconian legislation and executive action was taken by the Commonwealth in an effort to suppress the Church of Scientology. Despite popular and official condemnation of Scientology as a cult, with all the pejorative connotations

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[27] 'The word Scientology is taken from the Latin *scio*, which means "knowing in the fullest sense of the word", and the Greek word *logos*, meaning "study of". Scientology means literally "knowing how to know"', Church of Scientology International, *What is Scientology - A guidebook to the world's fastest growing religion* (Los Angeles: Bridge Publications, 1993) 4.

[28] Although the author eschews a religious classification, claiming ' "Falon Gong" is not a religion but a cult that brings harm to society and an illegal organisation that engages in law-breaking activities', Ji Shi, *Li Hongzhi & His 'Falon Gong': Deceiving the Public and Ruining Lives* (Beijing: New Star Publishers, 1999) 1-2.

that term conveys, the legal religious status of this controversial group was confirmed by the Australian High Court in the landmark 1983 *Church of the New Faith* decision, at least for the purpose of classification as a 'religious institution' under the Victorian Payroll Tax Act 1971. Although it was to do so reluctantly, a Victorian government of the same political persuasion as that which had first implemented anti-Scientology legislation (in the form of the Psychological Practices Act 1965) resolved in 1982 to repeal those sections of the legislation designed to suppress Scientology. In the repeal debate, the Hon. Haddon Storey noted

> The Church of Scientology is not the only religious, or pseudo-religious, organisation in the community that attracts complaints. There is a large file in the Attorney-General's Department of complaints about all sorts of sects or pseudo-sects in this State, and about the harm that can be caused to people who allow themselves to be "sucked in" by them, to their detriment. *No country that I know of has been successful in finding a formula for dealing with these sorts of problems.*[30]

At a hearing in March 2000 into Australia's efforts to promote and protect freedom of religion and belief by the Human Rights Subcommittee of the Joint Committee on Foreign Affairs, Defence and Trade, the then Australian Human Rights Commissioner, Chris Sidoti, said about the vexed issue of coercive conversions, that

> The question of cults is difficult, particularly the question of coercive conversion, whether it is conversion in or out. Anticult groups are very strident about coercive conversion in. Many of the cults or new religious movements, as they prefer to be called, are equally coercive on conversion out. When we were doing this report, this became one of the most difficult issues that we were asked to grapple with, and in the end failed to. What we did suggest is the need to examine this question of forced conversions both ways and to develop some guidelines and to involve religious communities generally and human rights lawyers in developing guidelines about what kinds of practices are acceptable and what are not'.[31]

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[29] A number of examples are examined in Muriel Porter, *Sex, Power & the Clergy* (South Yarra, Melbourne: Hardie Grant Books, 2003).

[30] Victoria Legislative Council, *Parliamentary Debates (Hansard)*, Melbourne: Victoria Parliament 1982. 24 June. 1857-8. He was speaking in debate on the Psychological Practices (Scientology) Bill 1982 (Victoria). Emphasis added.

[31] Commonwealth of Australia, *Proof Committee Hansard*, Joint Committee on Foreign Affairs, Defence and Trade (Human Rights Subcommittee), Monday, 6 March 2000. 274. The 'report' he referred to was *Article 18. Inquiry Into Freedom of Religion and Belief*, Report of the Human Rights and Equal Opportunity Commission (Sydney, 1998)

In the 1998 report he refers to, *Article 18*, the Commissioner had observed that 'some submissions also alleged that certain cults forcibly imprison members as a means of punishment or behaviour modification. Mr. McClelland of CultAware provided numerous accounts, articles and affidavits from ex-members of the Church of Scientology who allege mistreatment, malnutrition and forced imprisonment at the hands of that organisation'.[32]

These statements by public officials reveal some frustration in dealing with complaints leveled against groups pejoratively labeled cults or sects (including the Church of Scientology) but which may (and *prima facie* do) attract the legal financial privileges and protections accorded to more mainstream religious groups. As Rachel Kohn notes; 'the existence of groups in Australia which have virtually held members hostage through intimidation, deprivation and confinement has given rise to community concern about the extent to which the public should know the policies and activities of religious, spiritual and therapeutic groups, and in some cases to curtail them'.[33] This sentiment has given rise to a number of policy recommendations for dealing with the harmful practices of some groups.

In 1985 the Burdett Select Committee in South Australia noted a number of consumer complaints in relation to the Church of Scientology, which it found to be substantiated. Consequently, the Committee recommended: that the Department of Public and Consumer Affairs be requested to maintain surveillance over complaints by consumers; that they should discuss with the Church of Scientology the provision of better information to those purchasing services; and that the Department of Labour maintain surveillance over the payment of wages to people employed by Scientology. It was further determined that legislation should be considered if discussions with the two departments proved ineffective. The Committee noted; 'it would be unfair for such

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[32] Human Rights and Equal Opportunity Commission, *Article 18: Inquiry into Freedom of Religion and Belief,* Sydney: Human Rights and Equal Opportunity Commission 1998. 57.
[33] Rachel Kohn, 'Cults and the New Age in Australia', in *Many Religions, all Australians: religious settlement, identity and cultural diversity*, ed. Gary Bouma (Adelaide: Christian Research Association, 1996).

legislation to apply to the Church of Scientology alone' and therefore it 'should apply to all psychological or spiritual services for fee or reward'.[34] However, nothing came of these recommendations.

In November 2000, the Joint Standing Committee on Foreign Affairs, Defence and Trade observed that

> the existence of cults and their practices raises serious issues about the right of the State, or the international community via its legal instruments, to be involved in such issues as the individual's right to join a legal organisation, or parents' rights to raise their children in accordance with their beliefs ... society can sanction intervention ... but usually only in cases where influence is used to force a continuation of membership, or where other rights and freedoms are actually or potentially threatened.[35]

It was noted that there would be 'a considerable problem in defining the groups' that would be subjected to proposals submitted by one cult watch group, CIFS (Cult Information and Family Support Inc).[36] These proposals included the establishment of a cult register with financial reporting measures similar to those required under company law and a requirement that 'recruiters should have to wear identification badges'. Instead, the Committee recommended that 'the Commonwealth Attorney-General give consideration to the convening of an inter-faith dialogue to formulate a set of minimum standards for the practices of cults'. This recommendation was undermined by the observation that 'it may not be possible to arrive at a set of guidelines or minimum standards for the practices of cults ... it is far from clear how practical and enforceable any set of guidelines would be'.[37] However, it does reveal a desire to separate cults, which 'have clearly generated very great sadness, pain and, above all, a sense of loss for many people', from what the Committee saw as beneficial religion, including less understood groups. Hence the Committee observed that 'there are differences between cults and small but nevertheless mainstream religions that are not well understood or that some people think are "strange". These could include bodies such as Ananda Marga,

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[34] The Hon J C Burdett, *Report of the Select Committee of the legislative Council on the Church of Scientology Incorporated,* Adelaide: South Australian Parliament 1985. 8.
[35] Nugent, *Conviction with Compassion: A Report on Freedom of Religion and Belief,* 183.
[36] Ibid. 181.

Hare Krishna, the Exclusive Plymouth Brethren (sic), the Church of Jesus Christ of the Latter Day Saints (also known as Mormons or Seventh Day Adventists) or Jehovah's Witnesses'.[38]

The recommendation seems curious in light of the Committee's acceptance of an observation from the Department of Foreign Affairs and Trade that there 'is no legal definition which distinguishes between religions and cults'[39] and its observation that the CIF's submission would pose definitional problems. The Human Rights and Equal Opportunities Commission had recommended in its 1998 *Article 18* inquiry that an inter-faith dialogue be convened by the Commonwealth Attorney-General to examine ways of dealing with coercion in religious belief and practice, whether limitations should be imposed on such tactics and to 'formulate an agreed list of minimum standards for the practice of religious groups'.[40] This seems to implicitly recognize that so-called cults and religion are part of the same continuum. On this view any policy prescription targeting harmful groups or practices should encompass the broader definition of religion. The Commission, which had set out to advise the Commonwealth government on how it might implement the right to freedom of religion and belief contained in Article 18 of the International Covenant on Civil and Political Rights 1966, noted the 'very large number of submissions dealing with the issue of "cults" or new religious movements' received and concluded; 'this is a complicated area which raises a number of issues, only a few of which can be discussed in the context of this report'.[41]

Some debate and policy prescription has arisen from periodic revisions of the criminal law. An example is the Model Criminal Code Officers Committee recommendation, in September 1998, for a criminal offence of recklessly or intentionally cause harm to a person's mental health, including 'significant psychological harm'.[42] The Committee had

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[37] Ibid. 184.
[38] Ibid. 175-6.
[39] Ibid. 177.
[40] Ibid. 182. The recommendations are found at p. 62 of the *Article 18* report.
[41] Human Rights and Equal Opportunity Commission, *Article 18,* 53.
[42] Model Criminal Code Officers Committee, *Model Criminal Code,* Canberra: Standing Committee of Attorneys-General: Attorney-General's Department 1998. 12.

canvassed in a discussion paper 'the emergence of so-called "cults" and obsessive small religious groups who are said to employ high pressure "persuasive" techniques which amount to mental or emotional coercion'.[43] Representatives of the Church of Scientology had 'produced a very lengthy submission' responding to the proposed offence, arguing that the 'activities of religious groups should not be included but rather the activities of "de-programmers" should be. The Committee observed that 'the manifest inconsistency of such an approach did not appear to occur to them',[44] noting that; '"freedom of religion" is not freedom, for example, to defraud, nor is it freedom to cause significant psychological or psychiatric harm to any person'.[45]

Thus far governments in Australia have rejected or failed to act decisively upon any of these policy suggestions for dealing with abuses perpetrated by groups characterised as cults or sects or new religious movements. It might well be that this inaction is a consequence of limited understanding of a complex issue. It might reflect political sensitivities involved in dealing with the broad spectrum of religious groups, of which deviant groups are but one part. At times it reflects a sensible decision to leave well enough alone. Periodic calls for inquiries, which might have led to a greater understanding of the issues, or at least established the basis for more research, have also failed to progress. Examples of these missed opportunities include a call in 1977 by Tim Moore MP for an inquiry into the activities of the Children of God, which was defeated in the NSW parliament by one vote.[46] An inquiry at that time might have led to the formulation of a better policy response when group homes were subsequently raided in NSW and Victoria by child welfare authorities and the police, which led to the temporary removal of children but 'did not secure in convictions'.[47] My own call, in 1993, for a

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[43] Ibid. 26.
[44] Ibid. 29.
[45] Ibid. 31.
[46] Mr. Moore moved that 'a Select Committee be appointed to inquire into and report upon the activities of an organisation known as "The Children of God" and on its aims, objects and practices and to make such recommendations, if any, as it deems desirable for the control of this and similar organisations', NSW Legislative Assembly, *Parliamentary Debates (Hansard),* Sydney: NSW Parliament 1977. 24 February 4486.
[47] Kohn, 'Cults and the New Age in Australia', 154.

NSW parliamentary select committee to inquire into cultic abuse,[48] did not proceed for reasons outlined in the preamble to this thesis.

Other episodes involving so-called cults have aroused considerable public concern but have failed to provoke public inquiries that might result in a better understanding of the complex of issues involved and consequently better policy prescriptions. In 1987 Victorian police raided a property at Eildon to free up to fourteen children held in a cult know as 'The Family', who had been obtained by fraud from their birth mothers by guru Anne Hamilton-Byrne for 'a scientific experiment' and held for around fifteen years. The children were controlled by cruel, often brutal discipline and the administration of drugs.[49] In 1999 Senator Grant Chapman raised concerns in federal parliament about the operation of a group in South Australia called the Vibrational Individuation program. These examples were outlined in a brief presented to the *Conviction with Compassion* inquiry by ANU sociologist Max Wallace, calling for a Senate inquiry into cultic conduct in Australia,[50] again with no apparent official action.

Issues raised in relation to so-called cults seem to come to public attention from time to time and then lapse. The issues are of intermittent rather than perennial concern to governments. This might be frustrating to those suffering harm and seeking remedies or redress, but it perhaps explains some of the policy stances taken by governments in response to sporadic episodes which heighten public awareness. If an episode is judged likely to fade away, a decision might be taken to satisfy public opinion with executive statements of concern, or to set up a low key departmental inquiry where any subsequent report might be kept under wraps, so as not to ignite further expectations. Quite often governments prefer to adopt a policy response of non-action, or decide not to decide; or

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[48] Speech on motion entitled 'Cult Activity in New South Wales', NSW Legislative Council, *Parliamentary Debates (Hansard)*, Sydney: NSW Parliament 1993. 22 April. 1429-54.
[49] Sarah HamiltonByrne, *Unseen, Unheard, Unknown* (Australia: Penguin Books, 1995).
[50] Max Wallace, *An Argument for a Senate Select Committee Inquiry into Cultic Conduct in Australia: A Submission to the Inquiry into Australia's Efforts to Promote and Protect Freedom of Religion and Belief,* Canberra: Joint Standing Committee on Foreign Affairs, Defence and Trade 1999. 21 June. 6.

fail to act through negligence or indifference.[51] Sometimes non-action may be explained by lack of available research or conflicting advice.

However, it seems defeatist to categorise issues relating to cults in that group of intractable public issues 'simply not open to solution', problems labelled by Rittel and Webber as '"wicked problems", those issues that cannot be settled and will not go away'.[52] Issues of cultic abuse are better described as sporadically occurring issues of intermittent government concern. When governments in Australia have taken action, the experience to date has been unsatisfactory and arguably counter-productive. The range of governmental responses thus far attempted in Australia, with respect to Scientology alone, has included: executive action under regulation, proscriptive and prescriptive legislation, parliamentary inquiries, a royal commission, departmental inquiries, police actions, covert surveillance, legal prosecutions, executive statements of concern, and a 'let's wait and see' response.

Greater effort is needed to structure the problems associated with religious cults before it is conceded that they are generally incapable of solution. This thesis proposes an alternative, oblique and incremental approach to the intermittent policy responses thus far attempted or omitted in Australia. It explores the possibility of dealing with some of the complaints levelled at allegedly harmful religious groups (and encouraging compliance to social norms) by potentially depriving non-conforming groups of financial privileges available to religious entities generally. This could be achieved through the mechanism of a definitions/adjudicative tribunal dealing with third-sector entitlements.

A tribunal based on the gate-keeping functions of the Charity Commission for England and Wales is the normative model examined and proposed in this thesis. It is compared with the system currently in place in Australia, which relies in the first instance on the

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[51] 'Policy behaviour includes involuntary failures to act and deliberate decisions not to act', Brian W Hodgwood and Lewis A Gunn, *Policy Analysis for the Real World* (Oxford: Oxford University Press, 1984) 21.

[52] Peter Bridgman and Glyn Davis, *The Australian Policy Handbook*, 2nd ed. (Australia: Allen & Unwin, 2000) 43.

Australian Taxation Office as gatekeeper and then on the established courts to determine any disputes about the common law definition of charity and other definitions. As an adjunct to the proposed tribunal, there is potential for the nascent inter-faith movement to provide the basis for an advisory body (possibly incorporating representatives of spiritual groups and secular ethical societies currently without the legal definition of religion). A self-regulatory approach akin to that utilized for professional bodies is not proposed as it would not provide the level of accountability (and public acceptance) required where intrusive rules need sometimes to be applied.

The tribunal prescription would involve some level of regulation or social control of 'religion', a concept expounded by American sociologist Talcott Parsons in 1951[53] and an issue explored in chapter VI of this thesis, which deals with the role of the Charity Commission for England and Wales. It is argued that a discrete level of social control of religious groups would be acceptable, on the basis that it would improve the credibility of qualifying groups and decrease the level of harm cause by non-conforming groups - by depriving these groups of government financial support or alternatively inducing conformity. A dedicated tribunal would also provide an opportunity to establish on-going research capacity in the form of a secretariat staffed by academic experts in a range of disciplines to advise the tribunal gatekeepers. Care would be required to ensure that the secretariat was not captured by exponents of one particular view in an area fraught with competing and often conflicting interpretations. Even so, if the decisions of the tribunal proved over time to be durable in light of the potential for challenges under s. 116, the possibility for future co-operative participation of the Australian states in a regime for third sector definitions and adjudication would be enhanced.

Reference has been made to religious groups which constitute a threat to national security and recent attempts to deal with targeted groups through banning legislation. While the Scientology episodes examined in this thesis seem marginal in retrospect to these concerns, it is noted that alleged threats to national security were used in part justification of draconian legislation against Scientology and sufficient interest was provoked to lead

to covert surveillance by ASIO (Australian Security Intelligence Organisation). The normative framework proposed would provide an alternative avenue for intelligence gathering by government on third sector organisations, avoiding the angst occasioned by unwarranted covert surveillance of groups that prove to offer no security risk. The adjudicative functions proposed (as well as ancillary proposals for financial reporting and investigations), based on the operations of the Charity Commission for England and Wales, would provide a more comprehensive information base upon which to make informed decisions on the necessity for covert surveillance.

METHODOLOGY

The methodology employed in this thesis is that of comparative historical analysis (legally and politically informed), focusing on official documentation. The primary sources examined include official reports (including departmental and royal commission reports), parliamentary debates (including statutes and committee reports), law reports and the media. Reference is made to source documentation produced by Scientology and its critics, along with academic research and commentary from a variety of disciplines.

Part One, entitled 'Country Case Studies', consists of comparative studies of official responses in the Commonwealth of Australia and in the United Kingdom to public concern about the Church of Scientology, a religious group popularly and sometimes officially characterized as a harmful cult,[54] but which has also achieved legal recognition as a tax-exempt religious institution in Australia. On the other hand tax-exempt status as a religious charity has been denied Scientology in the United Kingdom, through a ruling of the Charity Commission for England and Wales.

Part Two, entitled 'Gate-keeping Models, Religious Definition and Legal Context', focuses on the public policy rationales and mechanisms for the granting of special

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[53] Talcott Parsons, *The Social System* (NY: The Free Press, 1951).

[54] It has been noted that 'religious sects and cults provide a helpful lens through which to observe and analyze distinctions between healthy and corrupt religion', Charles Kimball, *When Religion Becomes Evil* (San Francisco: HarperCollins, 2002) 72.

privileges (and protections) to religious groups, under the common law of charity and other contexts. It analyses the approach taken to the definition of religion by the courts and the impact of context on that classification. The section compares the role of the Charity Commission for England and Wales with the system in place for dealing with religious institutions and religious charities at the Commonwealth level in Australia. It evaluates legal academic analysis of the role of religion in charity law and the effect of constitutional provisions on the definition of religion and the context of decision-making in Australia.

From a public policy perspective, observations are made about the efficacy of governmental initiatives under the broad framework of issue definition, analysis, implementation and evaluation offered by Hogwood & Gunn.[55] These observations include assessments of the advantages and failings of various policy instruments utilized and draw upon the work of Christopher Hood.[56] In addition, insights are drawn from the work of Stephen H Linder & B Guy Peters on aspects of policy design and in particular social regulation. Linder & Peters note that

> for social regulation ... conscious design means moving away from definitions alluding to social harms and from pat command and control solutions that these invoke. Basically, the design problem is how best to change behaviours, regardless of whether we are motivated by social cost, the public interest, or concern for vulnerable populations. Changing behaviour whether by individuals or organisations requires two kinds of mechanisms, one setting the necessary controls and another ensuring compliance.[57]

The thesis therefore consists of two major case studies, comparing in detail the way governments and public officials in Australia and the UK have responded to issues relating to Scientology over the last forty-five years. These case studies form the basis for discussion of the possibilities and limitations of government control of controversial groups, such as Scientology, which are the subject of extensive allegations of harmful

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[55] Brian W Hogwood & Lewis A Gunn, *Policy Analysis for the Real World* (Oxford, Oxford University Press, 1984) 653

[56] Christopher C Hood, *The Tools of Government* (New Jersey, Chatham House Publishers Inc, 1983) 654

[57] Stephen H Linder & B Guy Peters, 'The Logic of Public Policy Design: Linking Policy Actors and Plausible Instruments', Knowledge & Policy, Vol. 4 Issue 1/2, Spring/Summer (1991) 5 of 16 electronic journal

conduct but which also claim the privileges (particularly tax exempt status) and protections associated with legal religious classification. It was originally intended to extend the case study comparisons of governmental responses to Scientology to further countries, particularly Canada and the United States (which along with New Zealand are occasionally referred to). However, in the course of research it was found that ample comparative material was available in the two comprehensive case studies chosen to draw conclusions for the purpose of this thesis. It is anticipated that further research will be undertaken in a postdoctoral capacity to broaden the scope of the comparisons made.

ACADEMIC LITERATURE

It is in the nature of the study of comparative public policy, in the discipline of political science, that a broad range of sources must be considered. The analytical approach should be multi-faceted. Hogwood & Gunn caution that 'a particular disciplinary background ... will give a characteristic slant to an analyst's thinking: hence the need for an interdisciplinary approach' and even the reconsideration of problems or solutions 'in terms of a diametrically opposed perspective'.[58] That noted, it can be observed that much of the academic literature relating to social control (or regulation) of religion emanates from sociologists, with some specializing in the area of cults, sects and/or new religious movements and their opponents. Psychologists also make useful contributions to an understanding of the internal and external dynamics of these groups. Legal academics contribute to the literature through the examination of definitions, case law and constitutional principles (particularly religious freedom and non-establishment). The work of legal scholars specializing in such diverse fields as constitutional, charity and tax law has been referred to extensively. Religious studies scholars also figure in the literature.

With respect to Scientology in particular, notable contributions have been made by two sociologists, the late Roy Wallis and Stephen Kent. In his seminal work, *The Road to Total Freedom*, Wallis describes Scientology as 'a deviant religious movement'. Hence

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[58] Hogwood & Gunn, *Policy Analysis* 63

'the pejorative and stigmatizing terms with which Scientology was treated on occasion, suggest that this movement might fruitfully be examined from the theoretical perspective of the sociology of deviance'.[59] He applies a deviance amplification model to 'characterize the development of Scientology in its relations with the wider society in the 1960s', such that

When relatively unsystematic and transient deviant behaviour becomes the object of moral crusading and severe stigmatization, one possible outcome is that those so stigmatized experience a sense of outrage and injustice which alienates them from conventional norms and from the agents of the conventional order, and leads to the elaboration of new norms in defence against attack. The new norms and the behaviour to which they give rise are seen by the moral crusaders as further evidence of deviance and justification of their initial diagnosis.[60]

Wallis presents a critical account of the development of an 'anti-Scientology crusade' conducted by a number of discrete categories of actors, including state agencies, the medical profession, some ministers of mainstream religions, disaffected former Scientologists, relatives of Scientologists, neighbours of Scientology establishments, MPs and the press. Nevertheless, he concludes that

Amplification is not a deterministic process. The Scientology movement chose to adopt an increasingly hostile stance in part as a consequence of internal processes, a need to cope with the emergence of heresy, defection, and the threat of schism; and in part as a consequence of the character of the movement's leadership. Ron Hubbard, it would seem, has never tolerated opposition with equanimity. De-escalation appears to have occurred as a result of the severity of governmental action, and a decline in the growth rate of committed membership. However, this de-escalation may be primarily a public-relations exercise, since despite a considerable drop in moral panic and the severity of societal reaction, the movement continues to react to criticism and commentary in a manner which suggests a persisting alienation from conventional norms of behaviour in this area.[61]

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[59] Roy Wallis, *The Road to Total Freedom: A Sociological Analysis of Scientology* (London: Heinemann, 1976) 205 -6

[60] Ibid, 254

[61] Roy Wallis, 'Societal Reaction to Scientology: A Study in the Sociology of Deviant Religion', in Roy Wallis (ed) *Sectarianism: Analyses of Religion and Non-Religious Sects* (New York, John Wiley & Sons, 1975) 110-11

In arguing for the application of the deviance-amplification model as that which 'most adequately characterizes the process that developed' in response to Scientology in the 1960s, Wallis outlines two competing models. These models attempt to explain the 'question of the relationship between the development of Scientology and the reaction to it from state agencies and society at large, particularly in the way this was portrayed in the mass media'. Thus he outlines what he terms the *classic model*, where 'deviance develops as a result of processes internal to the deviant, and in due course provokes reactions of disapproval from conforming groups and individuals, and the mobilization of agents of social control'. This view 'informed most early speculation and theorizing concerning criminality', but came under criticism from proponents of the *labelling model*, whereby 'social norms and values are regarded as having at best sub-cultural rather than general cultural acceptance, and infringements of the norms are seen as regular and widespread. Deviance is therefore a characteristic attributed to another, or a label assigned to him, which he is led to accept by public degradation and stigmatization, and coercive control'.[62] Wallis presents these models as 'competing hypotheses to account for developments in the relationship between Scientology and society. While empirically rather than normatively directed, they have clear implications for the attribution of responsibility for the process, and those involved therefore tend to have an interest in promoting one theory rather than another'. This is a conflict that has embroiled scholars in the attribution of blame for conflict between New Religious Movements and society.

The leading contemporary academic observer of Scientology, sociologist Stephen Kent, has written a number of articles which are critical of the organisation in its post Hubbard form. Kent accuses Scientology, which he characterizes as a 'multi-faceted transnational that has religion as only one of its many components', of subjecting its members to 'extremely severe and intrusive punishments through security checks, internal hearings called "Committees of Evidence", and a forced labour and re-indoctrination program known as the Rehabilitation Project Force (RPF) and its harshest companion, the RPF's RPF. Taken together, these harsh and intrusive punishments likely violate a number of

[62] Ibid, 206-7

human rights clauses as outlines by two United Nations statements'.[63] Referring to an issue central to this thesis, Kent notes that

> While religious practices (in contrast with religious beliefs) are scrutinized by various governmental authorities, religious bodies nonetheless receive financial benefits and social status that few secular bodies can rival. Scientology's religious claims operate as a legitimating device ... This device allows the organisation to engage the wider culture in ways that would be closed to it if it were to adhere to Hubbard's initial scientific assertions, while at the same time these claims provide it with a degree of protection from some forms of governmental incursion (including taxes ...) in many Western countries.[64]

Kent is dismissive of Scientology efforts to obtain financial privileges generally afforded by government to religious bodies. He says that 'serious human rights issues swirl around Scientology programs that have tax exemption and operate within the boundaries of the United States ... By granting Scientology tax exemption, the United States government is cooperating with an organisation that appears to put citizens from around the world at significant mental health and perhaps medical risk'.[65] Other sociologists (while not experts on Scientology) are supportive of the organisation's claims for access to financial privileges afforded to religions. Thomas Robbins says 'the most important setback for pluralism may be the denial of official "charitable" status for Scientology (a lucrative status in terms of tax benefits)', which might be considered a 'blemish on the picture' in the UK.[66]

In Australia legal scholars have also made contributions relevant to issues examined in this thesis, in particular the legal definition of religion and the broader philosophical questions surrounding the issue of state regulation and financing of religious groups. Reid Mortensen argues for an expanded reading of the s. 116 establishment clause to require a religious equality interpretation, which he contends is a 'more just and practicable

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[63] Stephen Kent, 'Scientology: Is this a Religion ?' (Deutscher Evangelisher Kirchentag Conference 20 June) (Revised and corrected version 1 July) (1997) 2 of 19

[64] Stephen Kent, 'The Creation of "Religious" Scientology', (Paper presented at the Society for the Scientific Study of Religion, 1992) 29 of 31. Published later in *Religious Studies and Theology* 18 no. 2 December 1999: 97-126

[65] Kent, 'Scientology: Is this a Religion ?', 16 of 19

[66] Phillip Charles Lucas & Thomas Robbins (eds), *New Religious Movements in the Twenty-First Century: Legal, Political, and Social Challenges in Global Perspective* (New York & London, Routledge, 2004)14

approach to the establishment clause than the separation of church and state'.[67] Carolyn Evans draws upon Joseph Raz's liberal notion of personal autonomy, whereby people should have a great deal of control over their own destiny, and Ronald Dworkin's 'notion of "equal concern and respect"', which 'gives rise to a strong claim for religious freedom'. As 'a right in Dworkian terms ... it "trumps" all but the most serious social reasons for restricting it'.[68]

An important exponent of a strict separation of church and state has been the legal scholar Wojciech Sadurski. On his view the non-establishment provision of the Australian Constitution should be interpreted to forbid state aid to religion, while protections afforded by the free exercise provisions would be liberally applied, and include by definition other moral beliefs not normally viewed as religious. Mortensen takes exception to Sadurski's view of non-establishment, which he claims to be unjust and impractical. Indeed, apart from the redoubtable efforts of the late Mr. Justice Lionel Murphy, the concept of a strict separation of church and state has received little judicial support in Australia. However, with heightened interest in the intersection of religion and politics since the events of 9/11, it is not inconceivable that secularists will renew efforts to promote a concept of strict separation in the Australian context, probably based on the French laïcité model.[69] The views of these legal scholars and others are examined in detail in chapter V: 2, which assesses the potential impact on the normative framework proposed of competing interpretations of s. 116 of the Australian Constitution and the definition of religion therein.

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[67] Reid Grant Mortensen, 'The Secular Commonwealth: Constitutional Government, Law and Religion' (PhD thesis, Department of Law, University of Queensland, Date of Submission 7 September 1995) 248

[68] Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford, Oxford University Press, 2001) 29-30

[69] 'The set of philosophical and political ideas that first emerged in France in the period leading up to the 1789 Revolution. These ideas slowly coalesced into a coherent ideology of secular republicanism in the course of the 19th century, culminating in the famous law of 1905 that formalized the separation of the French State from all religions. The ideology of laïcité regards religion as, at best, acceptable in the private sphere although fundamentally incompatible with the institutions of a secular Republic and, at worst, antithetical to the capacity for rational free-thinking and to the primary loyalty of French citizens to their country', James A Beckford, ' "Laïcité", "Dystopia", and the Reaction to New Religious Movements in France' in James T Richardson (ed), *Regulating Religion: Case Studies from Around the Globe* (New York, Kluwer Academic/Plenum Publishers, 2004) 27-8

In February 2004 a report was published entitled *A Better Framework: Reforming Not-for-Profit Regulation.* Written by legal academic Sue Woodward from the Centre for Corporate Law and Securities Regulation attached to the University of Melbourne (and co-sponsored by Philanthropy Australia), the report recommends that 'a single Commonwealth regulatory regime replace the dual state/federal regime where companies are governed by a national scheme, and associations governed by varying state/territory based legislation. It also recommends a new independent not-for-profit advisory body to provide additional support services for the sector and that ASIC become the new regulator'. A rationale for these recommendations is the 'confusing mix of state and federal regulation and regulators, and a lack of nationally consistent reporting obligations. These factors provide significant impediments to accountability and could jeopardize donor confidence'. Prominent among those accessing the 'myriad possible legal structures for not-for-profits', were 'church auspice' groups.[70]

Recent social sciences literature and scholastic polarization

Two edited volumes have recently been published in the field, with contributions mainly from sociologists of new religious movements. The first, *Regulating Religion,*[71] edited by James T Richardson, a prominent sociologist with academic legal credentials, seeks to develop an 'historically informed sociological perspective' to the regulation of minority religions. Analysis 'falls within the broad area of the sociology of social control and more specifically, legal social control'.[72] The second, edited by Phillip Charles Lucas (a religion studies academic) and Thomas Robbins (an independent scholar), is entitled *New Religious Movements in the 21st Century.*[73] In their contribution Benjamin Zablocki and J Anna Looney refer to the 'distracting concern with litigation and government policy regarding NRMs that severely polarized the research community in the twentieth century'

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[70] Adele Ferguson, 'Charity Inc. Not-for-profit organisations are a big part of the economy, yet they are virtually unaccountable', *BRW* 24 March 2005

[71] James T Richardson (ed), *Regulating Religion: Case Studies from Around the Globe* (New York, Kluwer Academic/Plenum Publishers, 2004)

[72] James T Richardson, 'Regulating Religion: A Sociological and Historical Introduction' in Richardson (ed), *Regulating Religion* 1

and which they believe 'has begun to recede'.[74] The polarization was 'between those advocating a high level of toleration and those demanding a high level of surveillance' which 'impeded the achievement of consensus even at the descriptive level'.[75] These scholars now see an evolution in the study of New Religious Movements to greater collaborative effort with the 'sociological subspecialty called "social movements", which has hitherto defined social movements primarily as political mobilizations'. Ultimately they envision 'the evolution of a truly global perspective and perhaps even a global and transnational methodology', concluding that the most important task for the years ahead is 'systematic comparative work transcending national boundaries and national cultural perspectives'.[76]

The polarization of the research community has indeed been unfortunate. At times it descended to the level of a crude labelling of academics as being 'cult apologists' or 'anti-cultists', depending to some degree on whether the focus of research methodology was to gain privileged access to cultic organisations or to rely on the testimonials of former adherents, also referred to as leavers or apostates. Zablocki & Looney state that 'many monographic accounts of specific NRMs notoriously make no attempt to investigate leavers', that the term 'apostate' had been used to 'cast doubt on the veracity of data collected from them' and, extraordinarily, it had been a 'widespread practice until recently to ignore data gathered from leavers'.[77] Despite these admitted failures of sociological research, these scholars observe that 'input from twentieth-century NRM scholars was crucial in helping policy makers and courts get an initial handle on how to deal with new religious movements'. However, it is debatable whether the academic contribution can be cast in such a positive light and antagonisms persist. For example, in the same volume there is strong criticism of Stephen Kent 'because of his tendency to use

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[73] Phillip Charles Lucas & Thomas Robbins (eds), *New Religious Movements in the 21st Century: Legal, Political, and Social Challenges in Global Perspective* (New York & London, Routledge, 2004)
[74] Benjamin Zablocki & J Anna Looney, Research on New Religious Movements in the Post- 9/11 World in Lucas & Robbins (eds) *New Religious Movements* 314
[75] Ibid, 317
[76] Ibid, 324 - 5
[77] Ibid, 324

the testimony of ex-members',[78] which seems an unremarkable use of available research material provided the methodology is understood.

The 'severe and undignified polarization' which 'damaged the reputation of the entire field'[79] is noted here because it has public policy implications. Despite the hopes of Zablocki & Looney that scholars might now retreat from the expert witness box to the ivory tower[80] (which may or may not be appropriate), the lesson for policy makers might be to access a wide range of sometimes competing views from various disciplines and sources in a field that promises to remain highly controversial.

BACKGROUND ON SCIENTOLOGY

In 1950 a book entitled *Dianetics: The Modern Science of Mental Health*, based on the theories of American science fiction writer L. Ron Hubbard, was published in the United States.[81] Described in a later edition as a 'spiritual healing technology',[82] *Dianetics* [83] outlined a system of psycho-therapy whereby painful experiences recorded by the subconscious mind (engrams) could be stimulated and then cleared with the assistance of a therapist (auditor).[84] In the following years Hubbard formulated 'the philosophy of Scientology'. Legal religious status for the 'philosophy' was first claimed in 1954, when 'Scientologists in Los Angeles established the first Church of Scientology'.[85]

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[78] Irving Hexham & Karla Poewe, 'New Religions and the Anticult Movement in Canada' in Lucas & Robbins, *New Religious Movements* 247. The authors do not present any evidence that Kent misuses the material, relying instead on an assertion that a number of Canadian colleagues do not agree with his interpretations.
[79] Zablocki & Looney, 'Research on New Religious Movements' 325
[80] Ibid, 314
[81] Church of Scientology International, *What is Scientology ?* 47.
[82] L Ron Hubbard, *Dianetics: The Modern Science of Mental Health* (Sydney: New Era Publications Australia Pty Ltd, 1992) vi.
[83] 'The word Dianetics comes from the Greek words *dia*, meaning "through" and *nous*, meaning "soul", and is defined as "what the soul is doing to the body"', Church of Scientology International, *What is Scientology ? Based on the Works of L. Ron Hubbard*, 1998 ed. (Los Angeles: Bridge Publications, 1993) 4.
[84] Philip W Goetz, ed., *The New Encyclopaedia Britannica*, 15 ed., vol. 10 Micropaedia (Chicago: The University of Chicago, 1988) 553.
[85] Church of Scientology International, *What is Scientology ?* 48.

The Church of Scientology has been at the forefront of political action and has created significant legal precedents in its efforts to achieve official recognition as a religion.[86] These aspirations have been exceedingly controversial, reflecting substantial criticisms of the organisation and Hubbard's alleged motivations. It was noted in 1988 that

> The church has often been criticized for its scientific and religious claims and for the financial demands that it makes on its followers. In the early 1980s L. Ron Hubbard and the Church of Scientology faced numerous lawsuits in the United States and abroad for financial mismanagement amidst charges by former church officials that Hubbard used the tax-exempt status of the church to build a profitable business empire, the assets of which he secretly transferred to his own personal bank accounts.[87]

Apart from these claims of financial impropriety, other 'brainwashing' allegations and proven criminal activities perpetrated by leading Church members, the major criticism levelled against the Church is its hostile response to critics, both within and without the organisation. Central to this claim is the policy of 'Fair Game', whereby in October 1968 Hubbard had decreed in a policy letter that critics of Scientology 'may be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologists. May be tricked, sued or lied to or destroyed'.[88] Although this policy was purportedly cancelled shortly thereafter, complaints were made that the policy continued to be applied after the cancellation and the apparent continuation of the 'Fair Game' policy has attracted official condemnation.[89] (The behaviour of Scientology oligarchs in directing and participating in criminal activities, including the theft of documents from government departments, was proven in some overseas cases. This kind of activity, along with other evidence of aggressively intolerant behaviour towards leavers and critics, if shown to be ordered or sanctioned by the controlling oligarchs of the organisation in

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[86] 'The Church of Scientology has clashed with governments around the world, and is rarely out of the courts. It has been embroiled in legal fights in many countries in its attempts to be classed as a tax-exempt religion', Barrett, *The New Believers* 462.
[87] Goetz, ed., *Britannica* 553.
[88] Barrett, *The New Believers* 464.
[89] In this thesis 'official' refers to Government policy and Government authorised reports and findings, including ministerial statements, departmental reports, royal commission and judicial inquiry reports, court judgements and majority parliamentary reports - in general, those pronouncements having the imprimatur of Government.

Australia, might well constitute an acceptable rationale for some form of social control by government).

Scientology came to Australia in the mid 1950s. Although comparatively insignificant in terms of membership,[90] the activities of Scientology in Australia and official response to the organisation has constituted a remarkable episode from which public policy implications can be drawn. The Scientology experience in the United Kingdom, where L. Ron Hubbard established 'worldwide headquarters of the Church of Scientology' in 1959[91] and where Scientology claimed (circa 2001) around 100,000 members,[92] is instructive. The two countries have been chosen for a case study comparison because contrasting adjudications on Scientology and tax exempt status have occurred in them and the functions of the Charity Commission for England and Wales offer a working model of an alternative framework for the regulation and social control of third sector entities. The countries have in common similar legal and political systems and a similarly evolving cultural background, so that features of each system may serve as a model, or a *caveat*, for the other.

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[90] Gillman noted in 1988 that 'the active membership across Australia probably stands at about 2,000, with some thousands of others involved to varying degrees', Ian Gillman, *Many Faiths One Nation: A Guide to the Major Faiths and Denominations in Australia* (Sydney: William Collins Pty Ltd, 1988) 368. The Australian Bureau of Statistics Census for 2001revealed that 2,032 Australians claimed the Church of Scientology as their religion in the optional question. By comparison, the Anglican figure was 3,881,162 - ABS, *2001 Census of Population and Housing: Religious Affiliation* (Australian Bureau of Statistics, Commonwealth of Australia. <file://C:\Program%20Files\CLIB%202001\classnCountFinal.html>).

[91] Church of Scientology International, *What is Scientology ?* 48-9.

[92] An overestimation. Barrett notes that 'these numbers include people who have only had one or two introductory auditing sessions, over nearly half a century, they are cumulative rather than current ... there are around 130 Scientology churches in the world, and around 3,500 missions and other assorted small groups, in over 130 countries. The Church does not appear to have clear membership figures itself; one external estimate is that it might have as many as 750,000 members worldwide', Barrett, *The New Believers* 447.

I: 2

RELIGIOUS DEFINITION AND LEGISLATIVE CONTEXT

'the list is not exhaustive: the categories of religion are not closed'

This thesis is concerned with the provision of government financial privileges to legally recognized religions, comparing a United Kingdom model with the Australian Commonwealth model. Comparison is made in the context of similar legal/political systems and the emergence of multiculturalism, along with religious pluralism, in both countries. Religious pluralism challenges culturally based perceptions under which the term religion has been interpreted and is the predominant force behind contemporary trends to broaden the legal definition or definitions.

In Australia and the United Kingdom the term religion has been interpreted legally in two broad contexts, charity law and otherwise. Precedent has evolved under charity law, so that in order to qualify as a religious charity an organisation has to advance (or promote) religion. Advancement has to be for the public benefit. The public benefit requirement has led to the development of public policy disqualifications under charity law. As these disqualifications have developed under the common law, judicial or quasi-judicial officers retain a great deal of flexibility in applying public policy parameters to new situations. The development of the law in non-charity law contexts is more obscure, with the application of public policy disqualifications an uncertain commodity. This becomes apparent in *Segerdal*[1] (the Scientology chapel case discussed in chapter III: 1), which 'was not concerned with charity law' but with financial relief for places of meeting for religious worship.[2] It is arguable that the court there substituted a form of definitional disqualification to deny Scientology financial privileges rather than disqualifying the

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[1] *Regina v. Registrar General, Ex parte Segerdal and Another* (1970) 3 WLR 479.

[2] *Charity Commission Decision: Church of Scientology Application for Registration as a Charity* (1999) <http:www.charity-commission.gov.uk/> Accessed 29 November 2001, 49 pages) Charity Commission for England and Wales 16. See also Charities Act 1993 (c. 10) 1993 Section 3 (5) (c) provides that 'no charity is required to be registered in respect of any registered place of worship'.

organisation on explicit grounds of public policy. The court avoided putting too precise a meaning on the word religion *per se*, providing it with an attenuated double barrelled meaning, in the context of the Places of Worship Registration Act 1855, involving both deity and worship.

The definition of religion in the UK, at least for charity law, has been confirmed as 'belief in a supreme being and an expression of the belief through worship'.[3] As discussed in chapter VI: 5, there is pressure to widen this definition because emphasis on a deity is considered to be culturally biased. The landmark 1983 decision of the Australian High Court in *New Faith* rejected the UK definition for this reason and those forms of Buddhism not recognizing any deity were made an anomalous exception to the rule in *Segerdal*. While the UK Court of Appeal did not explicitly use public policy criteria to reject the Scientology application, it seems that public policy standards might have been applied to the detriment of Scientology. However, in precluding Scientology, by definition, from registration of its chapel as a place of worship, rather than clearly spelt out public policy objections, the court in that case left no guidance on whether or what range of public policy disqualifications might be applied to non-charity cases involving the definition of religion.

INTERNAL AND EXTERNAL ETHICS

The application of public policy parameters involves a question of statutory intention in each case. It is arguable that implicit in any legislative intention to privilege non-charitable religious organisations (unless expressly noted otherwise), is the rationale that these groups have an acceptable internal ethic, as opposed to having a harmful internal ethic or no ethic at all. As explored in chapter IV: 1, it seems that the rationale for privileging religious groups *per se* is that they contribute to the well-being of adherents and teach ethical standards of behaviour within the group. In the case of religious charities, it is the contribution to good citizenship, through the teaching of acceptable

[3] *Charity Commissioners: Scientology decision 1999* 14.

codes of conduct, which answers the additional public benefit requirement, so long as this benefit is publicly accessible.

The leading historical case of *Thornton v Howe* (1862)[4] (discussed in chapter IV: 2), stands for the proposition that in charity law the *prima facie* definition of religion will include all specimens of the category, including moral, immoral and amoral (or good, bad and ethically neutral) groups, with the courts retaining a subsequent discretion to apply public policy disqualifications. However, the judgement in the New Zealand charity case of *Centrepoint Trust*[5] (chapter II: 8), which applied the Australian *New Faith* decision, seems to support the proposition that a *prima facie* religious classification requires the existence of an acceptable internal ethic (with a subsequent external ethic required to substantiate the public benefit requirement of charity law). While the internal ethic required in *Centrepoint Trust* was quite liberal with respect to contemporary mores, the unpicking of a distinction between acceptable internal ethics and external ethics might yet provide the reasoning for imposing an ethical value on the *prima facie* classification of religion in non-charity law cases.

In policy terms, it is apparent that legislatures and the courts make implicit (and sometimes explicit) distinctions between moral, immoral and amoral religions; in other words between good, bad and ethically neutral religions.[6] This is particularly apparent in charity law which is in the domain of judicial law making. Even though for the purposes of charity law the *prima facie* definition of religion might include all of these groups, those religious groups considered to be 'immoral'[7] (or harmful under legal standards reflecting prevailing mores), have traditionally been subject to disqualification by the courts from receiving private bequests or statutory financial privileges on grounds of public policy. On the basis that amoral religions would not be able to show a public benefit, they too would be subject to disqualification on grounds of public policy under

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[4] *Thornton v Howe* (1862) 31 Beav 14.
[5] *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* (1985) 1 NZLR 673. 673.
[6] Moral groups might also be described as beneficial, while immoral groups might be labelled harmful.
[7] In *Thornton* the phrases used included 'adverse to the very foundations of religion, and ... subversive of all morality', and 'corrupt the morals of her followers or make her readers irreligious'. See discussion in Chapter IV:2.

charity law. In non-charity law contexts, involving both ordinary statutes and constitutional provisions, it is moot whether the requirement for a positive internal ethic might be read into the definition of religion *per se*.

ETHICAL NEUTRALITY OR MANDATORY ETHICS ?

It has been asserted that the law has reached the stage where the definition of religion is being interpreted in an ethically neutral manner. The Church of Scientology has claimed, in the context of a survey of leading decisions worldwide, including *Church of the New Faith*, that

> despite the specific cultural differences among countries, contemporary court decisions are adopting expansive definitions of religion that appear to fit perfectly within the "ethically neutral" approach taken by scholars of comparative religion. In just the past several years the highest courts in Italy, the United States, Australia, New Zealand and India all have rejected an exclusively theistic definition of religion.[8]

'Ethical neutrality' is a phrase used to describe attempts by social scientists to achieve objectivity in research. Therefore, in order not to judge the subject undergoing research, and to cast aside cultural values and potential bias of the researcher, a conscious effort is made to adopt what Bryan Wilson, a 'respected British sociologist of religion,'[9] describes as 'value-free enquiry'.[10] This apparent trend to ethically neutral classification is not particularly contemporary in concept. A similar trend can be observed in the widely inclusive *prima facie* definition of religion that emerged from *Thornton*, which was then subject to public policy disqualifications. While the possibility of definitional disqualification was reserved for immoral and irreligious cases, for a number of policy reasons explored in chapter IV, the courts allowed wide latitude to the initial classification of religion. An inclusive approach was first adopted to enable the courts to

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[8] Church of Scientology International, *Scientology: Theology & Practice of a Contemporary Religion* (Los Angeles: Bridge Publications Inc, 1998) 9.
[9] Stephen A Kent, Scientology: Is this a Religion ?' (Paper presented at the Deutscher Evangelischer Kirchentag (revised and corrected version 1 July 1997), Leipzig, Germany, 20 June 1997), 3.
[10] Bryan Wilson, 'Religious Toleration & Religious Diversity', *Institute for the Study of American Religion* Downloaded from http://www.neuereligion.de/ENG/collection/diversity/pointI.htm on 14 September 2002 (2002): 6. Ethically neutral definitions.

exercise jurisdictional authority over religion, *not* to ensure that harmful groups could access statutory privileges or even private financial bequests, although the courts were generally happy to oblige the testator in the case of the latter.

It is still possible the Australian High Court may in future require the observance of acceptable ethical standards as a mandatory minimum requirement for any classification as a religion, applicable to internal and external manifestations. Disqualification by definition is an approach supported by a widespread tendency to regard religion as beneficial, along with a corresponding impulse to exclude by definition those groups seen to be harmful, a tendency apparent in continuing efforts to discover some dividing line between cults and beneficial or 'authentic'[11] religion.

Nevertheless, it does seem from *New Faith* that the High Court has accepted a widely inclusive definition of religion so that religious classification increasingly includes all probable and indeed possible specimens of the genre, including moral, immoral and amoral groups, as discussed in chapters II: 8, V: 1 & 2, VII: 4 and VIII: 1 & 2. This approach may well be influenced by constitutional considerations as it allows a single definition for free exercise and non-establishment provisions contained in s. 116 of the Australian Constitution. Even so, as discussed in chapter V: 2, it seems unlikely that the highest courts would preclude legislatures from disqualifying obviously harmful groups from financial privileges on reasonable grounds of public policy (as applicable in charity law), particularly in view of the burgeoning variety of groups which might achieve religious classification. The establishment of a proposed adjudicative tribunal outlined in chapter VIII: 2 would provide an interesting test of this proposition. On either approach, ethical neutrality or mandatory ethics, an expanding dynamic will be apparent, due to the pressures of religious pluralism, such that the words of Murphy J in *New Faith*, that 'the list is not exhaustive; the categories of religion are not closed',[12] will be seen as a prescient observation.

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[11] A term used by comparative religion academic Charles Kimball, although he accepts a continuum between authentic and corrupt religion, Charles Kimball, *When Religion Becomes Evil* (San Francisco: HarperCollins, 2002) 72.

[12] *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120. 151.

MULTIPLE LEGISLATIVE CONTEXTS

The simple division of laws utilizing the term religion into those concerned with charity law and those 'for other purposes' has been noted. However, this broad division is not adequate to account for the different public policy rationales that exist for privileging religion, although these are rarely expressed adequately, and for the numerous contexts in which the term appears or is implicit.[13] The term religion (and associated words such as denomination) may be relevant to the common law, ordinary statutes or constitutional instruments (encompassing free exercise and non-establishment provisions). The concept may relate to individual or group protections, freedoms and/or privileges,[14] financial or otherwise. In addition, the term religion itself is elusive; some say impossible to define with any certainty.[15] It may, depending on the prevailing view, include moral, immoral and/or amoral groups, as well as, possibly, equivalent belief systems and/or non-belief.[16]

Many of these legislative contexts have been explored in this thesis. Those examined involving Scientology include: places of worship, marriage celebration, military conscription, and taxation exemptions. Others noted involving Scientology include: denominational schools,[17] employment laws, and deductible donations. Other contexts referred to include the administration of charitable trusts, charitable fundraising legislation and official prayers. Some of these examples are outlined below to compare the quite different rationales that exist for privileging religion under different contexts. All demand thought and elucidation as to why groups legally recognized as religions are given special privilege and/or protection. Different contexts also point to reasons why the

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[13] The common law definition of the word charity necessarily involves interpretation of the word religion because 'advancement of religion' is an integral common law charitable purpose.

[14] Where the term is applicable to group fiscal privileges, there is usually an implicit assumption that these groups are non-profit.

[15] 'Some writers concluded ... that the quest for a definition of religion (any definition) is misconceived and that religious systems, as we know them, have nothing in common that distinguishes them from all other belief systems: hence "religion" cannot be defined at all', Wojciech Sadurski, 'On Legal Definitions of 'Religion'', *ALJ* 63 (1989): 840.

[16] Perhaps more accurately described as non-religious belief systems.

definition of religion might be justifiably wider in some contexts rather than in others, or why a wide *prima facie* definition should be subject to public policy disqualifications.

Places of worship

Segerdal involved a consideration of the UK Places of Worship Registration Act 1855. Registration affords rating exemptions, a privilege separate to that of registered charitable registered status.[18] It seems that the requirement of public benefit does not apply in the context of places of worship registration. However, a requirement that the organisation privileged must be non-profit seems axiomatic. It is conceivable that a government might wish to privilege individual owners who establish a private chapel at home, even if this facility was not made available to the public (on the debatable rationale that private worship is beneficial). It is less likely that a government would wish to financially privilege the establishment of a chapel open to the public on the payment of fees, intended not merely for maintenance and upkeep of the chapel but for the personal profit of the owner.

Marriage celebration

The public policy rationale for a marriage celebration is to create a legally recognized contract between consenting parties and to ensure that the parties understand the nature of the undertaking they have entered. Another consideration is whether the celebrant is a competent, trustworthy person who can be relied upon to conduct the ceremony and properly record the public contract. In his second reading speech introducing the Marriage Bill 1960, Commonwealth Attorney-General Sir Garfield Barwick stated that 'laws of marriage, in the very nature of things, deal largely with matters of procedure and with the capacity of the parties to enter the marriage state ... though largely procedural, a

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[17] NSW parliamentarian Franka Arena MLC questioned whether the Athena School in Tempe, run by Scientology, was 'receiving money from taxpayers to brainwash children in this so-called religion', NSW Legislative Council, *Parliamentary Debates (Hansard),* Sydney: NSW Parliament 1997. 13 May.

[18] 'No charity is required to be registered in respect of any registered place of worship', Charities Act 1993 (c. 10) Section 3 (5) (c)

basic endeavour of a law of marriage ... is to ensure that the parties have sufficient maturity to comprehend and perform its responsible obligations'. However, for legal purposes the religious or non-religious preferences of the participants is irrelevant, so 'provision is made both for marriages with religious ceremony and observances, and for marriages before officials, without any such ceremonies or observances'. [19]

This widely inclusive rationale was extended to the definition of religious denominations in an effort to unify the differing state recognitions of religions. Barwick noted that 'because of the considerable variation in the nomenclature and organisation of the churches, all embracing expressions have had to be used to describe them'.[20] The Commonwealth might well have determined that it should make use of the structure of the churches to inculcate the importance of marriage to the participants, because of the high proportion of marriages taking place with 'religious ceremony and religious observances', amounting in 1959 to 88.6%.[21] If this is so, it seems to have been assumed that a widely inclusive definition of 'religious denomination' would not seriously erode the high standing and respected position of denominations. However, it is arguable that a case can be made for the disqualification of obviously harmful groups from recognition as recognized denominations. A religion based on a Nazi ideology would be an interesting, hypothetical case in point. In such cases, properly outlined public policy parameters should apply, to avoid accusations that the private prejudices of the Attorney applied in any particular instance.

The 1973 proclamation of Scientology, under the name 'The Church of the New Faith Incorporated', as a recognized denomination in Australia for the purposes of the federal Marriage Act 1961-73, is discussed in chapter II: 7. Senator Lionel Murphy, who as Attorney-General was responsible for the proclamation, noted his dissatisfaction with a process whereby religious denominations were recognized by law, stating

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[19] Australian House of Representatives, *Parliamentary Debates (Hansard),* Canberra: Commonwealth of Australia 1960. 19 May. 2001.
[20] Ibid. 19 May. 2004.

I think it is quite wrong that there should be incorporated in an Act of Parliament some requirement that, in effect, the Government recognizes religious denominations. I think that there should be another system ... Even if it were a little more cumbersome, it would have been much better to provide that various reputable persons should be registered to carry out these marriage ceremonies. [22]

Indeed, implementing a system under which the individual celebrant is approved directly and removing the requirement for legal recognition of particular religious denominations seems to be a common sense approach. In this context, despite Senator Murphy's view that individual registration might be more cumbersome, it is arguably a waste of time and resources to go through the exercise of determining whether a particular denomination is indeed a religion, and then issuing periodic proclamations to that effect. However, while the process continues of recognizing religious denominations, the definition of religion for this particular purpose should be widely inclusive to accommodate all tastes, to the extent that the statement by Murphy J (as Senator Murphy later became) in *Church of the New Faith*, that 'any body which claims to be religious, and offers to find meaning and purpose in life, is religious',[23] is generally applicable in this context. Indeed, the requirement that the denomination in question 'offers to find meaning and purpose in life' might even seem superfluous.

On the potential disqualification of obviously harmful groups, Senator Murphy adopted a liberal attitude. On recognition of Scientology as a religious denomination for the purposes of the Marriage Act 1961, he said, 'I suggest that ... concern about protection of the public in regard to such practices as ... were referred to in the Anderson report is not a matter for the Attorney-General of the Commonwealth to take into consideration in dealing with recognition for marriage purposes'. In his view control of harmful conduct was a matter for the states and not relevant in this context.[24] Murphy reveals a *modus operandi* of adopting an extremely wide and inclusive definition of religion so that disparate groups might be brought under the administrative purview of the

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[21] Ibid. 19 May. 2001-2.
[22] Australian Senate, *Parliamentary Debates (Hansard)*, Canberra: Commonwealth of Australia 1973. 13 March, 343-4. 350 (Reply to question from Senator Greenwood)
[23] *Church of the New Faith (High Court)* 151.

Commonwealth. There were sufficient safeguards provided under the Act to deal with non-compliance. Hence he said 'there are obligations under the Act to be observed by this body. There are penalties for non-observance. If in some way the requirements of the Marriage Act are not observed by the Scientologists, by the Church of the New Faith, or by any other church, the consequences which are provided for in the Act will be applied to that body'.[25]

In response to the assertion that the 'acceptance of loose and indefinite criteria and provisions in recognizing a church mean(s) that people practicing witchcraft ...can now apply to have their practices given benign approval and marriage ceremonies perpetrated under their rights recognized by law', Senator Murphy replied that 'some of the organisations that have been recognized as religious denominations do, in fact, recognize themselves that there are witches and that witchcraft exists. I do not know whether any of them practice witchcraft ... If ... those who accepted witchcraft as a reality should be denied recognition, I would think that the results of that would astonish even the honourable senator.[26]

To administer a regime under which religions are legally recognized and classified, in Murphy's view the Australian government might admit moral as well as possibly immoral and amoral groups. In taking this view the Attorney was undoubtedly influenced by his interpretation of the overriding context of s. 116 of the Australian Constitution, discussed in chapter V: 2 herein, to the extent that on grounds of entrenched religious freedoms and protections he would be inclined to give dubious groups the benefit of the doubt.[27] He did not think it was 'the obligation of the Australian Government to set itself up as a judge in these matters' and certainly did not wish to discriminate between religions.[28]

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[24] 'This is a function not of the Australian Government but of the States if they want to prohibit certain conduct', Australian Senate, *Hansard 1973,* 13 March, 353. In reply to Senator Greenwood.
[25] Ibid. 13 March, 349.
[26] Ibid. 13 March, 351. (Reply to question from Senator Prowse)
[27] 'It appears to me that persons have constitutional rights whether we agree with them or not', Ibid. 13 March, 349.
[28] 'I do not propose to discriminate in the way in which Senator Greenwood apparently would wish me to do', Ibid. 13 March, 349-50.

Military conscription

In a legal case involving a Scientology minister's request for exemption from military conscription under s. 29 of the Commonwealth's National Service Act 1951 (discussed in Chapter II: 8), a quite different context and different public policy rationales applied. The provisions for exemption from military service applied to an individual rather than to a group, although membership of an established religious group would have made the task of proof easier. In addition, military exemption involves questions of human rights, or individual freedoms and protections, rather than a financial privilege. Although it is not explicit from the report to hand of the decision, the sincerity of the individual applicant was probably a decisive factor, if not the decisive factor in that case. The evidence of the objector was accepted by the magistrate, lending credence to the view that he was adjudged to be sincere in his objection. The *bona fides* of the organisation to which the individual belonged were apparently not investigated (and did not need to be investigated), except to the extent that the stated aims of the organisation appeared to be religious.

The finding that Scientology was a religion was determined within the specific context of the legislation. The presiding magistrate, Mr. C. Zempilas SM, in granting Jonathan Gellie exemption as a minister of religion, said; 'having carefully considered the evidence, collected on behalf of the applicant, which was not contradicted and which I accept ... I came to the conclusion that *in the context of the National Service Act*, the Church of the New Faith is a religion'.[29] Indeed, a consideration of the sincerity of the beliefs of the applicant would seem to be the most relevant criteria in the context of military service exemptions, a factor decisive in some US Supreme Court decisions.

[29] "New Faith' Minister Granted Exemption', *Daily News*, 10 December 1970. Emphasis added.

Taxation exemptions

The exemption of Scientology from pay-roll tax in Victoria, confirmed in the leading case of *Church of the New Faith*, is discussed in this thesis, as is the applicability of religious exemption to a wide range of financial imposts. The rationale for these exemptions, or lack thereof, is canvassed in some detail, and the question of deductible donations to religious groups is also noted. In Australia, religious organisations may qualify for certain taxation exemptions as religious institutions or as religious charities. It seems that the less onerous test for qualification as a religious institution has an analogy with financial privileges granted for places of worship in the UK. Whether this is appropriate is a matter for policy decision-making, although it is noted in chapter VII: 2 that the *Sheppard Report* [30] recommends the abolition of the category of religious institution as an anomaly.

Charitable fundraising appeals

Appeals made to the public for charitable fundraising are subject to legislation in the various Australian states and in the United Kingdom. This can involve the registration of bodies and the wearing of identification by collectors. The objectives of fundraising legislation are to protect the giving public from bogus operations and to seek to ensure that funds collected are properly distributed. Properly executed legislation will also help to confirm the good name of collecting agencies and improve public response accordingly. Religious organisations are often exempted from such legislation or parts thereof. As an example, the NSW Charitable Fundraising Act 1991 does not apply to 'a religious body or a religious organisation in respect of which a proclamation is in force under section 26 of the Marriage Act 1961 of the Commonwealth ... or ... prescribed by the regulations'.[31]

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[30] Hon Ian Sheppard, *Report of the Inquiry into the Definition of Charities and Related Organisations,* Canberra: The Treasury, Commonwealth of Australia: Available online at <http://www.cdi.gov.au/html> 2001.

[31] NSW Charitable Fundraising Act No. 69 1991 S. 7 (1) (a) (b) 'Religious organisations exempt from Act'. Although 'the Minister may, by order published in the Gazette, declare that, despite subsection (1), this Act

The rationale for this privileged position of religious organisations is noted in the Ministers second reading speech, where Chief Secretary Mrs. Cohen says

the churches have steadfastly argued that the exemption should be preserved. However, the distinction between religious and other charitable activities is, at times, artificial. The bill strikes a balance between *the right for churches to operate free of control* and the need for some supervision of charitable collections from the public. Should the need arise, the Minister may by ministerial order declare the Act or part of it to apply to a specific group or organisation within a denomination. It is not expected that recourse to the ministerial order provisions will be required. The major churches have agreed to comply with the spirit of the Act. A significant feature of the bill is its emphasis on disclosure to the public – the requirement for the public to be fully informed of who is to benefit from an appeal.[32]

One distinguished legal commentator observes that the rationale for the regulation of fundraising should be applicable to 'collections broadly defined', the implication being that all fundraising exercises, including those conducted by religions, should be properly supervised.[33] The common sense of this can hardly be questioned.

CONCLUSION

The term religion is utilized in many different legal and legislative contexts (as well as being applied to individual freedoms and group rights or privileges – which are sometimes intertwined). Against this background, attempts to provide an all purpose definition are problematic. A government may wish to privilege or protect a range of entities based on a particular public policy rationale, but a constitutional court may exclude or include entities on the basis of a localized, superimposed, arbitrary definition of the term religion. As governments have the power to persecute unpopular religious groups, legal commentators often see the courts as the protectors of religious liberty.

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and the regulations apply (or apply to the extent specified in the order) to a person, body or organisations specified in the order, and such order has effect accordingly', s. 7. (2).

[32] NSW Legislative Assembly, *Parliamentary Debates (Hansard),* Sydney: NSW Parliament 1991. 17 October, 2493. Emphasis added.

[33] Gino E Dal Pont, 'Why Define "Charity" ? Is the Search For Meaning Worth the Effort ?' *Third Sector Review Special Issue: Charity Law in the Pacific Rim* 8, no. 1 (2002): 30.

However, it is also possible that a progressive government might seek to privilege or protect unpopular groups and be thwarted in this intention by a reactionary court. A progressive government might wish to protect the interests of persecuted minorities (or even majorities) within religions. This might include women and children in need of special state protection. Yet legislation might be thwarted by inappropriate legal protection of 'religious freedoms' extended to unworthy groups defined as religion by a court.

There is no international legal consensus on the definition of religion. It seems to be accepted as a rule of thumb among academic commentators that the UK definition involves a deity and worship (with the anomalous inclusion of Buddhism), the Australian definition involves supernatural belief with canons of conduct giving effect to that belief,[34] while in the United States equivalent belief systems have also been granted legal religious status. In addition, an Indian version is sometimes cited, whereby religion encompasses systems of belief conducive to spiritual well being,[35] which is wider than the supernatural requirement but possibly narrower than the US definition. [36] It therefore seems that the term religion *per se* is too imprecise for practical use as a legal definition without further clarification. The experience in different countries suggests that the quest for a definitive definition is tantalizing. The term seems best utilized, if at all, as a tool of *prima facie* classification only, to which public policy parameters can then be applied.

In part one of the thesis, which follows (chapters II & III), government responses to allegations of harm against Scientology are analysed. Chapter II examines official responses in the Australian states of Victoria, Western Australia and South Australia, along with Commonwealth (federal) responses (culminating in the 1983 *New Faith* decision). Alternative responses in New South Wales and New Zealand are examined by

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[34] This supposition is questioned in chapter II: 8 herein.

[35] *The Commissioner Hindu Religious Endowments Madras v Sri Lakshmindra Thirtha Swamiar Of Sri Shirur Mutt* (1954) SCR 1005. 1023. The case also supports the proposition that a religion must 'lay down a code of ethical rules for its followers to accept', per Mukherjea J., 1024.

[36] A thumbnail outline of these country based definitions is provided in Francesca Quint and Thomas Spring, 'Religion, Charity Law and Human Rights', *The Charity Law and Practice Review* 5, no. 3 (1999): 177-84.

comparison. Chapter III examines official responses in the UK (culminating in the Charity Commissioners' refusal to register Scientology as a religious charity). At the conclusion of chapter III comparative observations are made on the efficacy of the various public policy approaches and the consideration of claims for religious status by Scientology (in chapter III: 7 under the heading 'Issue Identification Oversights and Implementation Failures').

In part two, gate-keeping models (whereby religions are granted or refused financial entitlements), employed at the Commonwealth level in Australia and in the UK through the Charity Commission for England and Wales, are compared. An adjudicative model proposed for Australia is examined against the backdrop of legal religious freedoms entrenched in s. 116 of the Australian Constitution Act 1900.

PART ONE: COUNTRY CASE STUDIES: AUSTRALIA AND THE UNITED KINGDOM

CHAPTER II: AUSTRALIA

II: 1

PARLIAMENTARY ALLEGATIONS OF HARM IN VICTORIA (1957-63)

'a nest of charlatans ... who prey on the young '

In 1957 Scientology came to official notice as a public policy issue in the state of Victoria. That year the Chief Commissioner of Police raised concerns about its practice with the Mental Hygiene Authority. The organisation came under the 'surveillance of the Authority because of the fear that it would influence people in such a way as to be injurious to their mental health'. It was said to be of concern that people had been persuaded to spend large sums of money on Scientology courses 'consequent upon misrepresentations concerning mental health and the mentally ill'.[1]

The University of Melbourne and the Australian Medical Association (AMA) were also 'alert and alive' to the potential harm of Scientology. In 1961-2 statements were circularized by the University Vice-Chancellor 'on two separate occasions', warning students about 'city practitioners' who were offering services purporting to be psychological to assist them in their studies'. The Medical Secretary of the Victorian Branch of the Australian Medical Association, Dr. Cyril Dickson, made occasional statements to the press, which had 'resulted in scurrilous attacks on him by Scientologists'.[2]

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[1] The Authority was later re-named the Mental Health Authority under the Medical Health Act 1959, which renewed its mandate 'to formulate, control and direct general policy and administration in respect of the treatment and prevention of mental illness and intellectual defectiveness'.

[2] Kevin Victor Anderson, *Report of the Board of Inquiry into Scientology,* Melbourne: State of Victoria 1965. 4.

In May 1961 the Minister for Health, Sir Ewan Cameron, wrote to Attorney-General Rylah noting complaints of undesirable practices made against Scientology by Dr. Dickson. Sir Ewan referred to other demands for action, including approaches from private members of the Parliamentary Labour party and sought from the Attorney 'favourable consideration to a further and more extensive inquiry into such activities'. However, the Attorney was reluctant to emulate the type of amendment to the Medical Act introduced in 1960 to deal with cancer quacks, as such amendments might affect harmless operations. He was unaware of any ground upon which action under current laws could be taken and suggested 'recourse to civil action'.[3]

Media interest, including an ongoing campaign against Scientology by the *Melbourne Truth*, kept the issue on the public agenda. Describing Scientology as 'bunkumology' and 'the crank cult to end all cults', the *Truth* alleged that following IQ tests conducted by the organisation, susceptible young people were encouraged to pay for expensive Scientology courses to cure alleged homosexual tendencies or to pass matriculation. One student had allegedly been persuaded to discontinue asthma treatment and it was claimed that Scientology used aggressive tactics to intimidate its critics, with inflammatory statements from a pamphlet issued by L. Ron Hubbard cited as evidence of the aggressive attitude of the cult.[4] Other Melbourne daily newspapers 'declined in 1961 to accept advertisements' from the organisation.[5]

In October 1962, the Chairman of the Mental Health Authority, Dr. Eric Cunningham Dax, wrote to the Under Secretary of the Chief Secretary's Department complaining about an advertisement sourced [6] to Scientology. Dr. Dax alleged that the advertisement was 'very highly dangerous and may easily result in schizophrenics failing to get treatment, suicides resulting or people with hysterical symptoms becoming extremely anxious'. He asked that action be taken to 'prohibit the advertisement of treatment for nervous or mental disorders or of psychological testing'. He also suggested that the

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[3] Victoria Legislative Council, *Parliamentary Debates (Hansard),* Melbourne: Victoria Parliament 1963. 19 November. 2137. (Hon. J W Galbally).
[4] 'Challenge', *Melbourne Truth*, 2 December 1961. (the pamphlet was entitled *Why Some Fight Scientology*)
[5] Anderson, *Board of Inquiry,* 4.
[6] Through the telephone number appearing in the advertisement

existing restrictions relating to the treatment of poliomyelitis and cancer be extended to the mentally ill.[7] Again, no official action followed, although advice was sought from various departments. The conclusion was again reached by the Government that no action could be taken under existing laws, that it was 'difficult to suggest amendments to the law that would satisfactorily' deal with the problem.[8]

BACKBENCHER'S EXPOSÉ (1963)

However, Scientology, operating as the Hubbard Association of Scientologists International, had established one of its prominent Melbourne operations 'right opposite Parliament House'.[9] It was therefore not surprising that a Member of Parliament would eventually seek to raise the issue of its controversial activities and take political advantage of a perceived lack of Government action. In October 1963 a backbench member of the Labor Opposition in the Legislative Council, the Hon. J. M. Walton, formally requested Government files on Scientology, to which request the Government obliged. Largely on the basis of information gleaned from these files, Mr. Walton soon raised his concerns in parliament in the Address-in-Reply debate. The main claims made by Walton were that: Scientology processes and tactics of control caused harm to sincere but deluded followers; the organisation made fraudulent medical claims; and profits were paid to a con man, L. Ron Hubbard.

Walton alleged that Scientology conducted a 'thorough system of brain washing'. To achieve this Scientology sold courses in 'amateur psychology with all its attendant dangers', to people who had responded to invitations to do an intelligence test and answer a written questionnaire. The courses, which were conducted in small rooms, included the use of the E-meter, or galvanometer, a device he described as a 'lie detector'.[10] The E-

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[7] Victoria Legislative Council, *Hansard 1963,* 19 November. 2129. (Hon. J. W. Galbally)
[8] Ibid. 19 November. 2141. (Hon. R. W. Mack, Minister of Health)
[9] Ibid. 16 October. 1180. (Hon. J. M. Walton)
[10] The function of the E-Meter has been described thus; 'the subject ... holds two tin cans which are connected to an E-Meter in front of the auditor. In a similar way to a lie-detector, this measures electro-magnetic skin conductivity and resistance,' David V Barrett, *Sects, 'Cults' and Alternative Religions - A World Survey and Sourcebook* (UK: Blandford A Cassell, 1996) 253.

meter was used in connection with verbal questions about intimate personal details,[11] and commands continuing 'for hours at a time' until the person was completely under the control of the auditor, (the person conducting the interview).[12] He claimed he had many letters (and read details from one) containing allegations that people had suffered an impairment of mental ability as a result of taking Scientology 'treatment'.[13] Indeed, many people had been 'duped into taking expensive courses supposedly designed to increase their ability, but in fact they lay themselves open to the risk of mental disorders, change of personality, forsaking their friends, their political beliefs and even their religions'.[14]

Staff members were kept in line by regular security checks using lie detectors. If they wished to rebel they would 'always have in the backs of their minds their misdemeanours on file'. There was also 'regular talk amongst staff members of what may happen to them' if they went against HASI (Hubbard Association of Scientologists International). Rule 4 of the Scientology code stated that 'anyone misusing or degrading scientology to harmful ends' would be punished. (This also applied to outsiders who might also be threatened with court action.)[15] Hubbard had claimed that of 21 people who had attacked Scientology, 18 had died. According to Walton, 'a deranged person could easily take this literally and do something drastic or dangerous to another person'. Interestingly, Walton commented on the apparent sincerity of Scientology adherents, including staff. He said, 'of course, these people all do this in the full belief that they are doing good, but are in fact victims of the brain-washing system that they dispense to others'.[16]

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[11] Including questions such as: 'Have you committed adultery ? Are you guilty of fornication ? Are you a sexual pervert ? Have you ever been a homosexual ? Have you ever raped anyone ? Have you ever conducted an abortion ? Have you ever procured anyone for prostitution ?'. Walton said that 'all the time the person's hand is on the "E" meter. So over a period of time the collation of the answers to these questions could be considerably damaging if used against him', Victoria Legislative Council, *Hansard 1963,* 16 October. 1182.
[12] Ibid. 16 October. 1181-2.
[13] Ibid. 16 October. 1184.
[14] Ibid. 16 October. 1179.
[15] Ibid. 16 October. 1182.
[16] Ibid. 16 October. 1183.

To substantiate his allegations of fraudulent medical claims, Walton cited from what he claimed was the main Scientology textbook, entitled *Dianetics – A Modern Science of Medical Health.*[17] The book contained the claim that 'dianetics will help the reader to eliminate any psychosomatic illness'. It was also claimed in the book that dianetics 'offers to medical doctors, psychiatrists, psychoanalysts ... a new theory and technique which makes accessible for therapy, diseases and symptoms which hitherto were unusually complex and obscure'. He cited further claims in *Dianetics* to the effect that 'dianetic therapy' had been tested in 270 unselected cases and that 'psychosomatic ills' had 'all responded as intended by the therapist, without failure in any case'. The 'psychosomatic ills' referred to included 'arthritis, migraine, ulcers, allergies, asthma, coronary difficulties (psychosomatic – about one-third of all heart trouble cases), tendonitis, bursitis, paralysis, (hysterical), eye trouble (non-pathological)'.[18]

Noting that Scientology claimed to be a non-profit organisation, Walton claimed that the Hubbard Communications Office received 10 per cent of all moneys received by HASI as well as the money from the sale of books. He said' 'as this company is apparently just a business name registered by Hubbard ... we can assume Hubbard is receiving 10 per cent'.[19] Of Hubbard himself, Walton said 'some of his friends believe him to be honest and sincere, and others believe him to be the greatest "con man" of all times. At this stage, I am inclined to believe in the latter'.[20] Profits available to be paid to Hubbard were maximized because once people had been indoctrinated into Scientology, they worked long hours with no fixed wage, so that the return to those working for Scientology was poor and 'often around £10 per week'.[21]

On the basis that a number of respected authorities believed the organisation to be harmful, and on the material he had obtained from the Government file, Walton demanded an inquiry into an organisation which he claimed had already dealt with over 10,000 people in Australia. He said; 'I believe it is the clear duty of the Government to

[17] Walton complained that Scientology did not print dates on their books, Ibid. 16 October. 1182.
[18] Ibid. 16 October. 1181.
[19] Ibid. 16 October. 1183.
[20] Ibid. 16 October. 1180.
[21] Ibid. 16 October. 1183.

conduct an inquiry, and if it fails to do so then it will be failing the people of this State who are entitled to know what dangers may or may not lurk in the practice of scientology'.[22] He asked rhetorically; 'should an organisation that practises psychotherapy be permitted to operate without having to fulfill the requirements of the Medical Act ?' Walton therefore called for government action to be taken 'even if amending legislation is required'. Noting that it was difficult for those such as the daily papers to obtain 'substantiated information',[23] he concluded that if Scientology 'is doing good and with no risk of harm, then we should be told. If it is the charlatan organisation which the evidence suggests it is, then it should be suppressed. Only an inquiry conducted by competent persons could decide the question.[24]

OPPOSITION CENSURE MOTION

While Walton had done the initial spadework, courtesy of the Government's files, the potential to embarrass the Government was soon seized by the Leader of the Opposition in the Legislative Council, the Hon. J. W. Galbally. In November 1963, Galbally moved an Adjournment Motion in an attempt to censure the Government. The adjournment was moved; 'for the purpose of discussing the deliberate and obstinate failure of the Government to take appropriate action against a group of charlatans who for monetary gain are exposing children of tender age, youths and adults to intimidation and blackmail, insanity and even suicide, family estrangement and bankruptcy, despite repeated warnings from the Mental Health Authority and other informed and responsible persons and bodies'.[25] Seven members spoke in the adjournment censure debate from a House of thirty-four; four from the Government parties and three from the Labour Party Opposition. Debate for the Opposition was led by Galbally and Walton. Speakers for the Government included the Minister of Health, the Minister of Immigration and the Leader of the Country Party in the Legislative Council.

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[22] Ibid. 16 October.1185.
[2323] He pointed out that a reporter was smuggled in but 'he was discovered and ejected', apparently having failed the 'lie meter' test, Ibid. 16 October. 1183.
[24] Ibid. 16 October. 1184.
[25] Ibid. 19 November. 2127.

The Opposition claimed that Scientology: caused significant harm to vulnerable adherents, to critics, to families and society as a whole; targeted the vulnerable, caused mental as well as other health problems and damaged families; engaged in intimidation of its critics and implicit blackmail of its followers; touted fraudulent medical claims; made false claims about its founder; was morally repugnant and claimed religious status to avoid taxation; overcharged for courses while exploiting underpaid labour to the financial advantage of its founder; and was a threat to national security. In addition, the Opposition commented upon evidence for as well as scope of the alleged problem, and possible Government action.

Galbally alleged that Scientology was '*a nest of charlatans who ... prey on the young*', specifying children as young as six, as well as university students and the mentally sick.[26] Attempting to categorize the type of people he felt were most susceptible to the 'danger' presented by Scientology, he said; 'it attracts people who have perhaps some insipient mental illness or who are not quite normal – gullible people. Untold harm comes to them'.[27] Indeed, he said; 'there must be thousands of neurotics in Melbourne who are desperately in need of trained psychiatric treatment but who are seriously retarding their recovery by dealing with people like Hubbard'.[28] He cited examples of complaint. One was from a mother who was concerned that her son had undergone a change in personality, had lost weight and become aggressive towards his family, as well as being discouraged from maintaining social contacts outside the Scientology organisation. [29] Another was from the brother of a patient who had suffered a nervous breakdown. After becoming involved with Scientology, and allegedly as a result of that involvement, 'he did not keep in touch with his doctor' and had been persuaded by Scientology to 'give them all the money he had in the bank'.[30]

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[26] Ibid. 19 November. 2128. Emphasis added.
[27] Ibid. 19 November. 2131.
[28] Ibid. 19 November. 2135.
[29] Ibid. 19 November. 2130.
[30] Ibid. 19 November. 2138.

Galbally claimed that Scientology engaged in intimidation of its critics and a form of implicit blackmail over its followers. As an example of intimidation of critics, he noted the case of Dr. Dickson, the representative of the British Medical Association. Dr. Dickson had received complaints from victims of Scientology and had made a public statement (adverse to Scientology). As a consequence he was the subject of a complaint made by a Scientologist to the Chief Commissioner of Police. The letter of complaint stated; 'Dr. Dickson is using smoke-screen tactics to cover up his own irregularities. In view of this, I suggest you investigate the activities of Dr. Dickson and his Association'. According to Galbally this intimidation was a tactic that 'runs right through the activities of these scoundrels'.[31]

His Labor colleague, the Hon. D. G. Eliot, noted the example of a well- known Catholic priest, Dr. L. Rumble, who claimed he had been intimidated by Scientology, apparently as a result of his criticism of the organisation. A letter from the Scientology Director of Government Relations to the Catholic Church declared that 'Dr. Rumble is now being investigated. Any facts brought to light of interest to security services will be given to them'. Dr. Rumble had cited a passage from the Scientology letter which made clear its intentions and set out official Scientology policy, namely that 'it is the policy of this Association throughout the world to investigate every attack on "scientology". We have found that the attackers have always had something to hide. Facts uncovered in these investigations have generally been given to Government security services, police ...'[32]

The implicit blackmail of Scientology followers was achieved by the holding on file of answers to invasive personal questions that adherents felt compelled, under the duress of the E-meter, to answer frankly. Galbally felt that this security check was the 'hub of the matter because the questions and answers' were kept and 'a great hold ... maintained over the victims'.[33]

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[31] Ibid. 19 November. 2128.
[32] Ibid. 19 November. 2158.
[33] Ibid. 19 November. 2131-2.

As to fraudulent medical claims, Galbally cited claims by Hubbard that Scientology could cure '70 percent of man's illnesses', and further that Scientology was the only 'specific (cure) for radiation (atomic bomb) burns. Scientology process given to people burnt by radiation can alleviate the majority of the difficulty'.[34] Arguing that these dubious touts constituted 'medical quackery', Galbally submitted that 'the Government should have introduced legislation along the lines of that dealing with the cancer quacks and the poliomyelitis quacks' (as had been suggested by Dr. Cunningham Dax, the Chairman of the Mental Health Authority).[35] Walton, who had earlier cited from the publication entitled *Dianetics*, now quoted from a publication entitled *Scientology 8-80*, which boasted; 'with this book, the ability to make one's body old or young at will, the ability to heal the ill without physical contact, the ability to cure the insane and the incapacitated, is set forth for the physician, the layman, the mathematician, and the physicist'. He regarded this as a clear case of 'quackery'.[36]

Galbally also claimed that Scientology engaged in misrepresentation of the qualifications of its founder, L. Ron Hubbard. Citing a document allegedly written by Hubbard himself, he noted claims that Hubbard held many degrees, was trained in nuclear physics and that 'Dr.' Hubbard had been 'given many honours for his work in the field of the mind'. All this was dubious, with the Department of Health in Washington confirming that Hubbard held no degrees.[37] Suggesting moral turpitude in the alleged 'pornographic' nature of Scientology publications and the serial marriages of Hubbard, Galbally noted that one former wife had 'called him a paranoid schizophrenic and accused him of torturing her while she was pregnant'. She had also claimed that 'medical advisers had concluded that Hubbard was hopelessly insane'.[38]

In addition, Galbally claimed that Scientology had avoided taxation in America by registering 'under the name of a religious organisation, the idea being that they could

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[34] Ibid. 19 November. 2132.
[35] Ibid. 19 November. 2135.
[36] Ibid. 19 November. 2145.
[37] Ibid. 19 November. 2132.
[38] Ibid. 19 November. 2134.

obtain certain taxation benefits when purchasing motor cars and such-like'.[39] On the question of labour exploitation, he cited a complaint from the family of a young man who had been induced to give up his occupation and work for 'eleven or twelve hours per day' as a janitor for Scientology while at the same time he owed 'astronomical sums' for courses conducted by Scientology and had been issued with a letter of demand. This young man had gone out of his mind and allegedly ended up in a mental institution. Indeed, Galbally claimed that there were 'plenty of examples on the file of people who have had their money taken from them', and that 'great harm is being done to the community by these activities'.[40]

Walton re-iterated his concerns about the conditions of pay of people working in Scientology. He alleged that Hubbard had decided to dispense with wages and pay instead by commission, which was a one-sided incentive scheme to solicit people to undertake courses, where the agent received '£8 a week for working much longer than a 40-hour week'. He alleged that the 10 percent of takings paid to Hubbard from an allegedly 'non-political, non-profit-making, non-sectarian' organisation, amounted to more than £2,000 a week from collections in Victoria alone. He said that Hubbard sat 'like a Lord in England with millions of pounds behind him and 10 per cent of the collections regularly coming in from Victoria, South Africa, Berlin, the United States of America ... and other countries ... To-day, the organisation is completely owned and controlled by and the profits go to none other than the organizer of the society'.[41]

Walton even expressed concerns for national security. He said that 'if, as is claimed, the association sends people into Government Departments ... who are then brain-washed and divulge Government secrets, and those secrets are sent overseas for individuals other than citizens of this country to peruse, I believe this constitutes a strong security danger'. He claimed to have evidence that this was happening. It added emphasis to his concern that Scientology was 'trying to take over this country'. His fear of a Scientology attempted takeover was supported by extracts quoted from a letter supplied to the

[39] Ibid. 19 November. 2133.
[40] Ibid. 19 November. 2130-1.
[41] Ibid. 19 November. 2150.

Commonwealth Security Police, at their request, from a former Scientologist of five years standing. The letter had compared Scientology's use of 'brain washing methods' with that used in Communist Russia and claimed; 'the goal of Scientology is to clear every person in Australia and to make Australia the first Scientology continent'. The letter also cited with approval the opinion of a Dr. Sargent, author of *Battle for the Mind*,[42] who believed that 'indoctrination' was 'the most serious problem threatening Western Civilization'.[43] Indeed, Walton alleged that Hubbard could 'almost be compared with Hitler who tried to dominate the world ... it is not beyond possibility that domination of the world is his objective'.[44]

The Opposition made some limited comment on the evidence of the alleged harm and the purported scope of the problem. Most of the evidence, which consisted mainly of letters of complaint, media attacks and propaganda issued by Scientology, was to be found on the Government files.[45] The Opposition line was that there was sufficient material contained therein for the Government to have taken legislative action, or at least to have commenced a more rigorous investigation.[46] Otherwise, Opposition attempts to quantify the problem were quite vague. Referring to the possible extent of the problem, Galbally claimed that 'there are twenty scientologists for every doctor of medicine in Australia. So, we are not just dealing with a few people here'.[47] Walton made the claim that 'thousands of people throughout the world are prepared to follow him (Hubbard) to the extent disclosed in the files which have been examined'[48] and Elliot suggested that 'apart

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[42] William Sargant, *Battle for the Mind: A Physiology of Conversion and Brain-Washing*, 2nd ed. (London: Pan Books, 1959).
[43] Victoria Legislative Council, *Hansard 1963,* 19 November. 2146.
[44] Ibid. 19 November. 2153.
[45] Walton claimed, 'there is sufficient evidence on the file already, in the newspapers, in the wealth of literature that is available from the organisation, and from people who have at some time or another been brave enough to attack scientology', Ibid. 19 November. 2145.
[46] Walton said, 'our contention in this matter is that the Government failed to take action when asked to do so by Ministers, heads of Departments, leaders of the Australian Medical Association, the Vice-Chancellor of the University of Melbourne and many other responsible organisations in this community', Ibid. 19 November. 2153.
[47] Ibid. 19 November. 2128. It has been noted earlier that he claimed that 'thousands of neurotics' might be affected.
[48] Ibid. 19 November. 2153.

from the number of people who are attracted to scientology there are a number of people who have consistently criticized it'.[49]

Suggested action

Galbally felt that 'if the Government thought in 1961 that the existing legislation was not competent to deal with the matter, it had a duty to frame a Bill which would encompass these people'. What he had in mind was amendments to the Medical Act 1958 similar to those effected in 1960 to deal with cancer quacks.[50] Walton felt that the Government should legislate in a similar vein to recent action taken to protect people from door-to-door salesmen. He said, 'such people are losing only money; in this instance people are losing their health'. He felt that the health legislation should be revised, so that published touts for healing could be dealt with. He also urged the Government to ban E-meters, as in the United States of America, saying 'it might not wipe them out but it would be a crippling blow to them'.[51] Walton concluded with a call for government action, citing the example of the US government using taxation laws to 'nail' the notorious gangster Al Capone when other means failed.[52]

Mr. Elliot was not satisfied with Government utterances that public ridicule was possibly the best way to handle the issue. He demanded that the Government look 'closer at the whole system of healing so that only qualified people are allowed to have contact with an individual who may be suffering from inadequacy, frustration or fear'.[53] He felt that the Government should 'go through this organisation with a fine-tooth comb', in the same manner that it was prepared to undertake 'intricate company investigations', where only money, 'not people's minds and lives are at stake'. He condemned the Government 'for its inactivity over the years in relation to the matter'.[54]

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[49] Ibid. 19 November. 2157.
[50] Ibid. 19 November. 2137.
[51] Ibid. 19 November. 2145.
[52] Ibid. 19 November. 2154.
[53] Ibid. 19 November. 2157.
[54] Ibid. 19 November. 2159.

GOVERNMENT RESPONSE

The Censure Motion was lost on party lines, [55] but concern about the activities of Scientology was expressed during debate by members of the Government. It was noted that the Government had serious concerns about the activities of Scientology and that some action had been taken while other action had been considered but rejected. Comment and suggestions were also made by Government members concerning the apparent sincerity of Scientology adherents' and other possible courses of Government action.

The Minister of Health, the Hon. R. W. Mack, said that he had no argument with a great deal of what Galbally had said about the 'activities of members of the Hubbard organisation'. He assured the House that the Government had not treated the matter in a 'light vein'. He offered the opinion that 'at the top of the organisation I believe there is a wicked man and I believe it is a wicked organisation'.[56] The Leader of the Country Party, the Hon. P. T. Byrnes, indicated that his Party would not vote against the Government, but said 'that does not diminish our regard for what has been said this evening'. He contended that Scientology 'is a festering sore in the community and is causing untold damage'.[57]

The Minister of Health revealed that the Attorney-General's Department had taken proceedings against Scientology with respect to filing of accounts under the Companies Act.[58] He thought that the *Melbourne Truth* was doing a community service in 'bringing this thing to the public view' and he had encouraged them 'to continue this service by again ridiculing the mumbo-jumbo that was printed and advertised'. Advice had also been taken on the feasibility of legislation to impound E-meters, but was not pursued because 'such action itself was not sufficient to kill' the organisation, it would not 'have stopped these people from proceeding along the lines on which they now proceed but

[55] The vote was 9 Ayes and 23 Noes, Ibid.
[56] Ibid. 19 November. 2140.
[57] Ibid. 19 November. 2154.
[58] Ibid. 19 November. 2140.

without the use of the "E"-meters'. In addition, files had been made available to the Police Department but 'it was unable to take action'. A conference had been held between the permanent head of the Department of Health, the chairman of the Mental Health Authority, the Chief Health officer and the Under-Secretary, but 'they found it difficult to suggest amendments to the law that would satisfactorily deal with it'.[59]

Therefore the matter had been considered, re-considered after an exposé in the *Melbourne Truth* and considered again after the matter had been raised in parliament by Walton. However, in conclusion, the Minister's continuing advice was; 'there is at present no legislation under which action can be taken ... it is not easy to draft the type of legislation that would have the desired effect'.[60] On the difficulties in finding a legislative solution, the Hon. R. J. Hamer, Minister of Immigration, noted that sincere Scientologists could not be charged with criminal conspiracy nor could they be charged with obtaining money by false pretences. The reason was, he said; 'in their own minds they consider their actions to be perfectly justified and they feel they are conferring tremendous benefits on the people who come to their organisation'. He cited with approval the view of the Attorney-General that 'action which might be contemplated could bring a lot of unexpected guests to the party'. He noted that amending the Medical Act with a 'blanket prohibition' against the practice of any sort of medicine except by a registered medical practitioner, would be problematic. It would offend chiropractors, osteopaths, chemists, herbalists, and on the fringes faith healers and even some 'religious orders'. He noted that the Chairman of the Mental Health Authority had cautioned that some church groups could be caught. He argued that the best way to deal with activities of this sort was to give them adequate publicity, as 'that is what Parliament and the press are for'. His advice was to 'laugh this thing out of our community'.[61]

Hamer agreed with Galbally that Scientologists were 'charlatans'. However, he expressed some puzzlement that many of them appeared to be sincere. He said 'it is an extraordinary thing that amongst them are people who have no *mala fides* towards the

[59] Ibid. 19 November. 2141.
[60] Ibid. 19 November. 2143.
[61] Ibid. 19 November. 2156-7.

general public; there are amongst them people who believe that they are serving the community, who believe in what has been called this "mumbo-jumbo" which has been published. Strange though it may seem, they believe there is merit in Hubbard's claptrap'.[62] While Scientology was a 'sham organisation', which attracted 'people who suffer from a sense of inadequacy, who lack self confidence and have a sense of failure', nevertheless 'the people who receive the treatment believe in it', as do 'the staff'. Hamer continued; 'we are not faced locally with a gang of people who have set out on some conspiracy to fleece the public. They are devoted adherents and believers in this cult'. He even felt that for many of these people, 'quite apart from any brainwashing techniques ... the treatment – if one can call it that – which they receive does work'.[63] With respect to Hubbard, his opinion was that 'if he is sincere ... he is probably at least partially insane'.[64]

Country Party Member, the Hon. P. V. Feltham, canvassed the possibility of charging Scientologists with a common law conspiracy, but pointed out it would be hard to prove that 'devotees ... made a false pretence knowing it to be false and not believing in the truth of what they were saying'. He said that the Medical Act was 'wide open' and 'very outdated', it being surprising that there was no provision outlawing the carrying on of medicine or surgery without being registered, the only relevant provision being that a non-legally qualified practitioner could not recover fees. He thought that the Masseurs Act covered the situation, in that it provided a definition of 'massage' and then further provided that 'no person should carry on the practice of being a masseur without being registered'. Therefore, taking the Masseurs Act as a model, the Medical Act might be amended to 'deal with people who ... set out to cure mental or nervous disorders, or any disorder of the mind of the type that Mr. Hubbard purports to cure'.[65]

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[62] Ibid. 19 November. 2140.
[63] The rejoinder to this by Mr. Elliot was that 'most illnesses cure themselves and some of the cures claimed by this institute have been brought about purely by the effluxion of time and the order of Mother Nature', Ibid. 19 November. 2157.
[64] Ibid. 19 November. 2156.
[65] Ibid. 19 November. 2139-40.

Mr. Byrnes suggested that any evidence should be referred to the Statute Law Revision Committee, a parliamentary committee that apparently had had some success advising the Government on how to deal with bogus companies. He felt that Parliamentary action was long overdue and that referral to the Committee would be the best way 'in which the law might be amended to deal with this problem without delay'.[66]

GALBALLY'S SCIENTOLOGY RESTRICTION BILL (1963)

After the predictable defeat of the censure motion, the Opposition continued to press the matter. On 21 November 1963, Galbally announced his intention to present a bill on behalf of the Labour Party, 'to protect the community', in view of 'the public alarm and the expressed inability of the Government to present legislation this sessional period to deal with improper practices of scientologist'. He added that his proposal would 'not interfere with the fundamental liberty or freedom of thought, assembly and expression', but would 'prohibit the taking of fees by people who are engaged in the practice of or the teaching of scientology'.[67] The measure would also 'prohibit the use of the E meter by unauthorized persons'.

Subsequently, Galbally introduced into the Legislative Council a Private Member's Bill, on 26 November 1963.[68] The object of his succinct, (it consisted of three clauses only), Scientology Restriction Bill was; 'to prohibit the teaching and practice of Scientology for fee or reward and the use in relation to such teaching or practise of any apparatus or device for recording or measuring personal reactions, impulses or characteristics'.[69] During discussion on procedural aspects of the bill, the Minister for Agriculture, the Hon G L Chandler, rose on a point of order to announce that 'since the discussion on this matter in this Chamber last week, the Government has indicated that it will have an

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[66] Ibid. 19 November. 2154-5.
[67] Ibid. 19 November. 2322.
[68] Victoria Parliament, *Victoria Legislative Council Bills Introduced Session 1963-64* (Melbourne: Victoria Parliament, 1964) 173.
[69] Victoria Legislative Council, *Hansard 1963,* 26 November. 2386.

inquiry into the whole of the scientology set-up'.[70] This, however, did not prevent Galbally from persevering with his Bill.

The Bill was directed specifically against Scientology or its imitators. For the purposes of the proposed Act Scientology was defined as; 'the system or purported system of the study of knowledge and psychotherapy advocated in the writings of Lafayette Ronald Hubbard and disseminated by the Hubbard Association of Scientologists International, a company incorporated in the State of Arizona in the United States if America, and includes any system or purported system associated with or derived from the same'.[71] Clause 3 (a) prohibited the receipt of any fee or reward for the 'teaching practice or application of scientology'. Clause 3 (b) prohibited the use in relation to 'teaching practice or application of Scientology of 'any apparatus or device for recording or measuring the reactions impulses or characteristics of any person, whether for fee or reward or otherwise'. Under clause 3 anyone found guilty of accepting money or infringing the blanket ban on Scientological use of the E-meter, was liable to a scale of penalty ranging from £50 for a first offence and up to £250 for any subsequent offence, or 'to imprisonment for a term of not more than two years'.

Galbally submitted that his Bill was designed to place Scientology under an exact copy of the provisions recently applied to cancer quacks under amendments to the Medical Act. These amendments had prevented unqualified persons from holding out the ability to cure cancer for fee or reward, and had received bi-partisan support. The objective of his Bill was clear. Noting that Hubbard had claimed fees in excess of £100,000.00 per year, he said; 'we are not dealing with a small show in any way whatsoever. I believe that, by preventing it from taking money, we shall cause this organisation to wither and die, without interfering with the rights of people to forgather if they so desire'. His Bill would apply exclusively to Scientology, but, he claimed; 'it cannot be said that this measure in any way interferes with the right of Scientologists or anybody else to practise their art,

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[70] Ibid. 26 November. 2388.
[71] Scientology Restriction Bill (Vic) 1963

craft or whatever it may be'. His Bill was aimed at Scientologists 'charging fees. That is all'.[72]

He had requested of the Parliamentary Draftsman that the Bill should be 'tightly and narrowly drawn', saying 'I should not like to see the day come in this community when we say that we are going to ban an organisation. I regard action of that type as an infringement of our liberty; it also represents an infringement of the rights under the charter of liberties as laid down by the United Nations'.[73] When it was pointed out by interjection that the E-meter was prohibited outright, Galbally responded that he 'was not proposing to forbid the use of the E-meter among scientologists', and 'had so advised the Draftsman ... if the provisions are too wide, that aspect may be corrected when the Bill is in Committee'.[74] Later, however, he re-considered this concession.[75]

Galbally re-iterated that he was concerned to protect from Scientology young people, such as university students, and those 'people who are not happy, some who are gullible, some who are frustrated, and so on', who 'fall easy prey to these people'. He described how Scientology operated, which was essentially by advertising and offering free personality-IQ testing or by accosting people on the street, getting them to answer invasive, offensive questions.[76] They were then subjected to an E-meter test, with the invariable result that they would be told that their 'IQ is too low, that there is a personality defect, or something like that', such as the 18 year old university student who was told he was homosexual. All this would lead to people undertaking paid courses to cure such alleged personality defects. Galbally noted 'the E-meter is the stock in trade of the Scientologist; it enables him to say "Your IQ is not high; it ought to be much better; you should come to us for one of our long courses"'. He noted that the Government had

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[72] Victoria Legislative Council, *Hansard 1963,* 27 November. 2520.
[73] Ibid. 27 November. 2527.
[74] Ibid. 27 November. 2528.
[75] When his Bill was re-introduced in 1965, Galbally said, 'it is proposed that the E-meter shall be banned. We say that these people should not be allowed to use the E-meter at all because it is a fake', Victoria Legislative Council, *Parliamentary Debates (Hansard),* Melbourne: Victorian Parliament 1965. 21 September. 131.
[76] Examples included 'Have you a girl friend ?; Have you had intercourse with a cannibal or a pig ?; Have you ever slept with a member of a race of another colour ?; Have you ever committed culpable homicide ?', Victoria Legislative Council, *Hansard 1963,* 27 November. 2525.

even considered classing Scientology 'as an unlawful game under the Police Offences Act in the same way as is Fan Tan', alleging that 'within the last week a Bill was prepared'.

Galbally also raised the issue of alleged Scientology harassment and 'persecution' of critics and potential customers. He noted that Dr. Dickson of the Department of Health had been the subject of 'not less than 50 letters of protest' on the departmental file after he had complained about Scientology, alleging that he had 'communist affiliations' and requesting that action should be taken against him. The university student who had been told he was homosexual had been written to 'perhaps twenty times', to attempt to persuade him to continue Scientology courses.

Responding to the news that the government was to launch an inquiry into Scientology, Galbally argued that there had already been two departmental inquiries and that a third inquiry could not be justified, on the basis that 'there is nothing that is not in the departmental file that we ought to know about Scientology'.[77] He surmised that part of the reason for going to another inquiry, rather than take immediate action, was that Scientology had orchestrated a letter writing campaign to MPs. He said; 'people were asked to write to their local members of Parliament stating the benefits they had received from Scientology'.[78]

Galbally ended his second reading speech with an impassioned plea for the 'protection from charlatans who indulge in intelligence quotient testing' of 'kiddies in this community who are trying to lift themselves up and live a life in the adolescent world of doubts, fears and self consciousness'. He concluded with the pledge; 'I regard this issue as being more important than any other with which we have previously dealt in this House. It is sacred to me and my party, and we will never be deterred or intimidated in

[77] Ibid. 27 November. 2532.
[78] Ibid. 27 November. 2534.

what we know – and what we think everybody who looks into this problem knows – is right and just'. [79]

The Galbally Bill presented an opportunity for a bi-partisan response to the issue. However, the Government used its control of the House to discontinue debate on the Bill. On 5 December 1963, the Minister for Health announced; 'the Government does not propose to proceed with debate on this Bill this session ... the Government has appointed a Board of Inquiry to investigate Scientology'.[80] To this, Mr. Galbally could only express his dismay.[81] Early the next year he attempted to revive debate, which was deferred while the inquiry was in progress. His criticism of the inquiry was that it was 'the laughing stock of Victoria' and an expensive farce.[82] He believed it was in the public interest that Scientology should be 'stopped at once from charging fees'. His own Bill would achieve that, but it would not prevent Scientologists from 'going into their ethereal flights and so on, or sitting around worshipping Theta and all that other mumbo-jumbo'. Determined to 'fight tooth and nail' to have his Bill proceeded with,[83] Galbally opposed the Government's motion to adjourn debate, where he was again defeated on the numbers.[84] He was to re-introduce his Bill again in September 1964[85] and yet again in September 1965.[86]

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[79] Victoria Legislative Council, *Hansard 1963,* 27 November. 2534.
[80] Which had been appointed on 27 November 1963, the day after Galbally had introduced his Private Member's Bill, Anderson, *Board of Inquiry,* 4.
[81] Victoria Legislative Council, *Hansard 1963,* 5 December. 2968.
[82] Just how expensive was later revealed by the Premier in answer to a question. Mr. Bolte announced that the cost so far had been £14,244 7s 3d and that the estimated full cost was £23,353.00, Victoria Legislative Assembly, *Parliamentary Debates (Hansard),* Melbourne: Victorian Parliament 1964. 9 September. 104.
[83] Victoria Legislative Council, *Hansard 1964,* 25 March. 3371.
[84] Ibid. 23 March. 3372. The vote was 23 Ayes and 9 Noes.
[85] Ibid. 30 September. 480-1.
[86] Victoria Legislative Council, *Hansard 1965,* 15 September. 40.

II: 2

EXECUTIVE RESPONSE: THE ANDERSON BOARD OF INQUIRY (1963-65)

'a serious medical, moral and social threat'

Kevin Victor Anderson QC was appointed on 27 November 1963 to 'inquire into, report upon, and make recommendations concerning Scientology as known, carried on, practised and applied in Victoria'. He concluded his report to parliament on 28 September 1965.[1] While Galbally had questioned the need for an inquiry, he could hardly have quibbled with the choice of Anderson,[2] or with the vigour and industry with which he conducted his brief. Jon Atack, author of an exposé of Scientology, afterwards noted that Anderson had 'conducted his inquiry with considerable showmanship and ferocity, taking nearly two years to investigate and present his immense report'.[3]

SCOPE AND METHOD OF INQUIRY

Proposed areas of investigation included: 'fees charged or remuneration received by persons or organisations'; whether the organisation engaged in 'unlawful, improper, harmful or prejudicial practices'; the use of apparatus in the practice of Scientology; the result of treatments used for illnesses; whether children were treated in a manner that was

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[1] Kevin Victor Anderson, *Report of the Board of Inquiry into Scientology,* Melbourne: State of Victoria 1965. 3.
[2] He was described later in the UK as 'a distinguished leader of the Melbourne bar', Sir John G Foster, *Enquiry into the Practice and Effects of Scientology,* London: UK House of Commons 1971. 4.
[3] It was noted that 'the report was 173 pages long and had nineteen appendices. The evidence of 151 witnesses was gathered into a supplement of 8,290 pages', Jon Atack, *A Piece of Blue Sky: Scientology, Dianetics and L. Ron Hubbard Exposed* (NY: Carol Publishing Group, 1990) 154-59.

'harmful or beneficial'; and employment conditions. There was also a proviso that the list should not derogate 'from the generality' of the terms of reference.[4]

The Board was 'not bound by the rules of evidence', but proceedings were conducted in general 'along lines conventionally followed by judicial and quasi-judicial tribunals'. This included legal representation, evidenced by the number of solicitors and barristers appearing on behalf of various parties. Evidence was taken orally from 151 witnesses, (including 17 'highly qualified experts in many fields'), and in general was heard in open session. Even on those occasions where the Board considered that evidence should be heard in camera 'the scientology interests were permitted to be present, to participate in proceedings, to lead evidence and test evidence by cross-examination'.[5] When it became apparent to Anderson that few Scientology witnesses were possessed of 'any qualification which entitled them to speak authoritatively on scientific or technical matters', he repeatedly pointed out this deficiency. This defect, however, was 'not remedied'.[6]

Scientology had been given every opportunity to present its case. Of the 151 witnesses in total, 100 had been called by Scientology, which then instructed counsel to withdraw from participation in the enquiry.[7] L Ron Hubbard failed to appear, even though 'the Board had indicated from time to time that it would have found his evidence informative and important'.[8] Although there was no provision for written submissions, a huge amount of written evidence was examined.[9] Scientology initially co-operated with the inquiry, and 'the contents of 35 steel or wooden filing cabinets and a large quantity of other records', kept at the Scientology offices in Melbourne, were tendered. The Board witnessed 'demonstration sessions of scientology processing' and listened to Hubbard's

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[4] Anderson, *Board of Inquiry*, 3.
[5] Ibid. 5, 6, 178.
[6] Ibid. 6.
[7] Ibid. 8.
[8] Ibid. 7.
[9] Apart from the 'colossal task of recording nearly 4,000,000 words covering nearly 9,000 pages' by the Chief Government Shorthand Writer, Ibid. 173.

tape-recorded lectures.[10] While other witnesses tendered documentation, it is apparent from the lists of exhibits tendered that the vast bulk were Scientology documents.[11]

FINDINGS AND CONCLUSIONS

The report of the one-man Board of Inquiry was in some respects a *tour de force*. It laid bare every conceivable aspect of Scientology as practiced in Victoria. Its conclusions were unremittingly hostile to the organisation. Anderson didn't mince his words, finding

> Scientology is evil, its techniques evil, its practice a serious threat to the community, medically, morally and socially; and its adherents sadly deluded and often mentally ill ... The Board has been unable to find any worth-while redeeming feature in scientology. It constitutes a serious medical, moral and social threat to individuals and to the community.[12] Though Scientology affords for some people an escape from the realities of life, it is not in any way a healthy diversion or recreation. It is quite the reverse. It robs people of their initiative, their sense of responsibility, their critical faculties and sometimes their reason. It induces them mentally to debase and enslave themselves.[13]

The one man Board made a number of specific findings, which in summary were that Scientology: propagated falsehoods and deceptions;[14] was a money making business; made false scientific claims;[15] utilized potentially harmful hypnotic techniques,[16] (which involved uncovering past lives);[17] made unjustified claims for the E-meter,[18] (which was used in 'processing' sessions);[19] used techniques for domination and enslavement;[20] was

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[10] Indeed, Anderson said that his report was 'based to a very substantial extent' on Hubbard's writings, for which he stood 'sufficiently condemned', Ibid. 4 -5, 7.
[11] Appendix 4 of the report lists 439 unrestricted and 182 in camera documents, a total of 621, Ibid. 179-86.
[12] Ibid. 1,2.
[13] Ibid. 15.
[14] Ibid. 12. 160
[15] Ibid. 169. 12
[16] Ibid. 14.
[17] Anderson noted that Hubbard claimed to have discovered the thetan to explain hallucinatory incidents induced by hypnosis, as being incidents that had occurred in a past life. The thetan was therefore 'the person, the "I", which' Hubbard 'declared had survived the deaths of countless bodies to which it had been successively assigned over the untold trillions of years in the thetan's existence', Ibid. 13.
[18] Ibid. 94. The function of the E-Meter has been described as; 'the subject ... holds two tin cans which are connected to an E- Meter in front of the auditor. In a similar way to a lie detector, this measures electro-magnetic skin conductivity and resistance', David V Barrett, *Sects, 'Cults' and Alternative Religions - A World Survey and Sourcebook* (UK: Blandford A Cassell, 1996) 253.
[19] Anderson noted that 'the processes are conducted by Scientologists who are called "auditors" and the individual who is undergoing processing is called the "preclear"', Anderson, *Board of Inquiry,* 17.

harmful to mental health; [21] misused sincere but vulnerable people, (causing them to 'shun proper medical and other treatment);[22] negligently used untrained personnel;[23] made unjustified healing claims;[24] targeted the vulnerable in advertising;[25] contained scope for internal coercion;[26] promoted family discord; was hostile to the medical profession and critics; was morally undesirable;[27] and was not a religion as claimed.

The activities of Scientology were orchestrated by governing director Lafayette Ronald Hubbard, the 'founder and master',[28] through 'a world-wide organisation (HASI) which promotes the practice of scientology and canvasses for adherents in most of the countries of the Western World',[29] allegedly all for personal profit. Therefore 'the practice of scientology is a business, and its attraction lies in the opportunity it affords for making money'.[30] The Board had asked the Victorian State Audit Office (VSAO) to examine the financial records of the Hubbard Association of Scientologists International and the Hubbard Communications Office at Spring Street, Melbourne. That investigation revealed that 'the system of accounting appears to be based on instructions issued by the Hubbard Communications Office World Wide under the direction of Hubbard ... A very large measure of financial control is exercised by HCO.WW'.[31] From the details provided by the VSAO officer, it appears that a 10 per cent levy on the weekly corrected gross income was paid to the Hubbard Communications Office World Wide.[32] Commenting on the 'large income ... of the scientology organisations in Melbourne for the six years ended 30th June 1963', Anderson found

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[20] Ibid. 160 - 1
[21] Ibid. 161.
[22] Ibid. 160.
[23] Ibid. 12. 14
[24] Ibid. 14.
[25] Ibid. 14. 164. 'Appeal is made in the advertisements to the anxious, the worried, the inadequate, the lonely, the gullible, and (thought he may not know of his conditions) the mentally ill'.
[26] Ibid. 14. 165
[27] Ibid. 15.
[28] Ibid. 13.
[29] Ibid. 1.
[30] Ibid. 170.
[31] Ibid. 22.
[32] Ibid. 23.

For the five-year period from 1 July 1958 to 30 June 1963, the total amount of money remitted to the HCO.WW in England by the Melbourne HASI and the Melbourne HCO was £26,166, averaging £5,233 a year, or £101 a week. Included in the sum was £17,183 for managerial expenses and service charges, which in turn included most of the 10 per cent on gross receipts.[33]

It was noted that 'scientology has been the cause of grave strain and tension in families, both in respect of relations within the family amongst its members and in respect of financial stringency resulting from excessive spending on scientology'. The number of spousal witnesses prepared to give evidence was small because they either did not want to exacerbate the situation with Scientology partners or they were concerned that 'the other spouse might be victimized by HASI on account of his or her inability to handle and control the non-scientologist'. One witness alleged that if there was no prospect of getting a 'non-conforming spouse into scientology, then the scientology spouse would be advised to consider giving up the marriage'. This evidence was reinforced by an article written by Hubbard, entitled 'Why some fight scientology', which was distributed as a pamphlet and then reprinted in the Scientology *Communication* magazine.[34] In that article Hubbard stated that

Unfortunately the person who does not want to study scientology is your enemy as well as ours. When he harangues against us to you as a "cult" as a "hoax" as a very bad thing done by very bad people he or she is only saying "Please, please, please don't try to find me out". Thousands of such protesting people carefully investigated by us have been found to have unsavoury pasts and sordid motives they did not dare (they felt) permit to come to light. The wife or mother who rails against a family member who takes up scientology is, we regret to have to say, guided by very impure motives, generated in the morass of dread secrets long withheld. The father, husband or friend who frowns upon one knowing more about the mind is hiding something he feels would damage him. "You had better leave scientology alone !" is an instinctive defence, prompted in all cases investigated by a guilty conscience.

Anderson was concerned about the effect that this article could have on a 'scientology-indoctrinated person' who might accept 'without question the truth of Hubbard's dangerous assertions'.[35] Towards the medical profession, Hubbard had

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[33] Ibid. 39.
[34] Vol. 5, No. 1. No dated provided.
[35] Anderson, *Board of Inquiry,* 145.

an irrational obsession about the techniques of psychiatric treatment. He is completely intolerant of opposition or criticism, and he resorts to almost incoherent, hysterical, low grade abuse whenever he believes himself or scientology to have been attacked and often when no such occasion exists. His special targets are psychiatrists and psychologists, whose realm is the mind.

Anderson noted that 'concerning psycho-surgery and ECT, which have their proper use in the successful treatment of the mentally ill, Hubbard makes a number of completely untrue and unjustified statements'.[36] Hence

The frequency and the intensity with which he (Hubbard) vilifies psychiatrists and their work are the more serious because of the effect upon preclears, many of whom, when most needing psychiatric attention, are terrified at the thought of going to a doctor. This is one of the most wicked sides of scientology, for having made a massive onslaught on the person's mental integrity by its pernicious practices, it then effectively prevents him from seeking assistance from a source likely to cure or ameliorate his condition.[37]

Hostility to critics extended to having them investigated by inquiry agents. This was threatened against Dr. Rumble, a Catholic spokesman who had advised people to have nothing to do with Scientology and who described the word Scientologist as a high-brow term analogous to describing a fruit-shop proprietor as a 'Fruitologist'. Dr. Dickson, the Medical Secretary of the Victorian Branch of the AMA had been investigated by inquiry agents employed by Scientology as had the Hon. J. W. Galbally.[38] Anderson noted that 'Hubbard readily appreciated the value of discrediting any opposition and stifling criticism by denouncing any attack on scientology as communist inspired'. He found that 'this technique has been repeatedly practiced in Victoria'.[39]

Scientology not a religion

Anderson was emphatic that Scientology could not be classified as a religion, noting that 'Scientology in Victoria does not remotely resemble anything even vaguely religious, and no serious claim was made that it did'.[40] He found that 'in fact, Scientology is not a religion'. In any event, he felt the question was irrelevant, saying the inquiry was 'not

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[36] Ibid. 130.
[37] Ibid. 132.
[38] Ibid. 156.
[39] The technique had been inspired by 'McCarthyism' in America. Ibid. 155.
[40] Ibid. 167.

concerned to determine whether the beliefs that were held by Scientologists were religious or otherwise'.[41] He was of the view that 'notwithstanding its weird theories and peculiar practices based on them, it (Scientology) is a system of beliefs which any person is at liberty to hold, just as whoever wishes may believe that the moon is made of green cheese'. [42] The same freedom of belief applied whether Scientology was a religion or not.[43]

There was a clear distinction between practice and belief, that 'the carrying into practice of such (Scientology) theories by pernicious techniques from which grave harm results is quite a different matter ... those who claim that their beliefs constitute a religion cannot, under the cloak of such "religion", pursue a course which is evil and a danger to the mental health of the community ... nor are they entitled to proselytize by calculated deception'. The stark point was made that 'a group of people, by claiming that its particular religion requires the killing of human beings by way of sacrifice, does not obtain a licence to kill according to its creed'.[44]

Legal authority supported the view that the Government could legislate to proscribe harmful practices even if Scientology were to be categorised as a religion.[45] In *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* [46], the High Court held unanimously that 'the Parliament of the Commonwealth was not prevented from making laws prohibiting the advocacy of doctrines or principles which, though advocated in pursuance of religious convictions, were prejudicial to the prosecution of a war in which the Commonwealth was engaged'. This meant that 'even where there are constitutional guarantees as to freedom of religious beliefs the advocacy of such beliefs may be curtailed or prohibited in the national interest'. The Chief Justice in the *Jehovah's Witnesses* case, Sir John Latham, had referred with approval to some United States decisions 'dealing with restrictive action which the government was entitled to take to curtail or punish allegedly religious practices, even though constitutional safeguards for

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[41] Ibid. 147.
[42] Ibid. 169.
[43] 'They have the same freedom, even though it is not a religion'.
[44] Anderson, *Board of Inquiry,* 147.
[45] Ibid. 167.
[46] *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 CLR 116.

the freedom of religious belief existed'. *Reynolds v. The United States*[47] was cited, in which Waite C J had said that where plural marriages were not allowed by law

> can a man excuse his practices to the contrary because of his religious beliefs ? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Anderson noted that 'where there are no constitutional guarantees, the position of the State would be at least as strong', which was presumably a reference to the constitutional position of the State of Victoria being unfettered by federal constitutional provisions. [48]

Indeed, Scientology had made a belated attempt to present itself as a religion and protested that its members were being 'persecuted because of their religious beliefs', only when it became apparent during the course of the inquiry that it had been revealed in an unfavourable light. Apart from the occasional reference to Scientology as a 'religious brotherhood' and claims for some affinity with Buddhism during the inquiry,[49] Anderson noted that Scientology was very concerned to establish itself as a 'precise science' rather than a religion and cited an undated pamphlet from the HASI which stated that 'the HASI is non-religious – it does not demand any belief or faith and is not in conflict with faith', as support for his finding.[50]

As to the earlier adoption of ecclesiastical titles by Scientologists in the period about 1955-58, Anderson found that this was an early attempt to 'exploit the favourable attitude which the community usually adopts towards ministers of religion'. He said these attempts were along lines suggested by Hubbard, being specific directions issued by him to assume clerical garb and titles to facilitate entry to hospitals 'to inveigle the sick and distressed into Scientology'. He also dismissed claims that the 'founding churches of Scientology', which had been established in the United States, were religious in nature, stating that 'on such evidence as the Board heard ... one would not classify their practices as those of a religion'. He submitted that 'their beliefs did not appear in

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[47] *Reynolds v. The United States* (1878) 98 US 145.
[48] Anderson, *Board of Inquiry,* 167-8.
[49] Ibid. 147.
[50] Ibid. 149.

evidence' in the issued handbook which dealt merely with the conduct of rituals or under a section headed 'The Church of Scientology Creed', which asserted the inalienable right of man to be free and 'that the spirit alone may save or heal the body'. In any event, he held that the organisation in Victoria had not developed such churches.

Anderson considered claims that the E-meter was a 'valid religious instrument used in Confessionals', that 'in the early days of Scientology in Victoria weddings were performed' and that 'some Scientologists claim to be "doctors of divinity" ... bestowed by a hubbardian institution in America'. He dismissed the claims for the E-meter, saying that 'in the course of being audited with an E-meter, a preclear is forced to tell his most intimate and shameful secrets and he does not make such disclosures as part of a religious practice'. He dismissed the wedding claim by simply noting that the weddings were 'supplementary to the conventionally recognized nuptials'. He felt no need to comment further on the status of the Hubbard degrees.[51]

An interesting passage in the report deals with a statement issued by Hubbard to the effect that the London and Commonwealth offices of Scientology would be 'transferred to Church status when the founding Church of Washington DC is given full tax exemption'. A Scientology witness, Mr. Williams, is reported to have 'repudiated the suggestion that tax exemption had anything to do with the proposal to give "Church Status"'.[52]

Anderson devoted some time to an examination of Hubbard's attitude towards established religion. He concluded

> Scientology is opposed to religion as such, irrespective of kind, or denomination. The essence of Hubbard's axioms of Scientology is that the universe was created not by God, but by a conglomeration of thetans who postulated the universe. Sometimes God is referred to as the Big Thetan. Many of the theories he propounds are almost the negation of Christian thought and morality.

Anderson found that 'Scientology is opposed to all forms of punishment, and Hubbard has told his followers that 'purgatory and hell is a total myth, an invention just to make

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[51] Ibid. 147-8.
[52] Ibid. 148.

people very unhappy and is a vicious lie'. Therefore 'deluded preclears are able to shut their eyes to the reality of normal human problems which they may have ... without the obligation of accounting, according to Christian belief, for this life's conduct'.[53] From Anderson's strong Catholic,[54] Christian perception, which he found to be a community value, Hubbard was heretical. He concluded; 'in a community which is nominally Christian, Hubbard's disparagement of religion is blasphemous and a further evil feature of Scientology'.[55]

RECOMMENDATION, OPTION AND ADVICE

The conclusion of the one-man Board was unequivocal; 'the Inquiry has revealed the real nature of Scientology and its serious threat to the mental health of the community, and it is evident that its continued practice should not be permitted'.[56] However, arriving at the right remedy proved to be more problematic. Anderson found that existing laws of fraud, negligence, breach of contract, assault – with potential for civil actions (the efficacy of which he was not prepared to express a view upon) and the even more fraught areas of treason, sedition, blasphemy and conspiracy, were 'not adequate to deal with the problem', which he described as 'a special course of conduct not adequately controlled by law, namely the invasion of the field of mental health and propagating of harmful psychological practices'. In addition, he noted that some practices 'are merely on the fringe of existing laws which have not been designed to deal with the particular problems which scientology presents'.[57]

Anderson made one major recommendation, presented one option and gave a piece of advice. These concerned: the registration of psychologists and control of Scientology, an option for dealing with personnel files, and advice on enforcement problems.

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[53] Ibid. 153.
[54] See Kevin Victor Anderson, *Fossil in the Sandstone - The Recollecting Judge.*
[55] Anderson, *Board of Inquiry,* 152.
[56] Ibid. 167.
[57] Ibid. 168.

Recommendation to register psychologists

Anderson pointed out that 'despite the affinity between psychology and medicine no assistance in the control of the practice of psychology is to be obtained from Victorian legislation relating to the medical profession'. Referring to existing law under the Medical Act 1958, he noted that 'in Victoria there is no statutory prohibition on the practice of medicine or surgery as such by other than legally qualified medical practitioners'. He noted that the only form of control exercised was through Section 24 (1), which prevented unregistered practitioners from recovering any charge in a court of law for operations, advice or prescriptions, and Section 24 (3) which prevented unregistered practitioners from using various medical titles. He stated that the rationale behind this was that medicine could only effectively be practiced in association with a hospital system from which those unqualified were excluded, but that no similar safeguards had yet developed in respect of psychology, where, he submitted, the 'problem of the unqualified psychologist is substantial'.[58]

He therefore made recommendations aimed at suppressing Scientology first through public exposure, but in the long term by controlling Scientology through controlling the practice of psychology. The latter would be achieved through registration and then prohibiting unregistered practitioners from conducting potentially harmful psychological practices, including hypnosis,[59] the use of intelligence tests and the use of E-meters. While the legislation proposed was aimed specifically at Scientology, 'the method recommended of dealing with scientology necessarily involves the surveillance of practices and conduct by persons other than scientologists'. [60] He therefore canvassed the need for wide exemptions to the provisions of the proposed legislation.

Anderson suggested that various social workers, officials of marriage guidance organisations, teachers in universities, personnel officers, ministers and other individuals

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[58] Ibid. 169-70.
[59] Hypnosis to be defined in terms similar to that in the English Hypnotism Act 1952 (15 and 16 Geo. and 1 Eliz. 2, c.46) p.169 and 'enlarged to describe more specifically scientology processes which involve a series of commands, repetitive or otherwise, designed or intended to be used for the purpose of inducing the absence or lessening of inhibitions and repressions', Ibid. 171.
[60] Ibid. 172.

engaged in recognized or usual activities of any bona fide religion, along with qualified medical practitioners and dentists, should *prima facie* be exempted. This was because various techniques of psychology, 'are in varying degrees of constant application in almost every occupation and walks of life'. [61]

Legislative option to deal with personal files

Anderson also canvassed the desirability of dealing with the records kept by Scientology which contained 'details of intimate and secret matters relating to preclears', (the vast majority of Scientologists who had not been credited with achieving the sought after state of 'clear' – something akin to nirvana). These were obtained during 'processing' sessions, where Scientologists were asked exhaustive lists of questions about their personal life and beliefs.

While he was concerned that these records could be used for coercion, blackmail or extortion, Anderson was also concerned that prohibiting by legislation the disclosure of their contents might 'give them an entirely unjustified quality of importance'. Acknowledging that copies of these files were held in England, and that the threat could therefore not be entirely removed, he concluded that 'the Board now sees no practicable way of procuring the files which are still in possession of the HASI, short of legislation requiring their surrender for the purpose of destruction'.

Predicted enforcement problems

In another caveat, Anderson noted that while he had made recommendations aimed at the 'curtailment' of Scientology in Victoria, he cautioned that 'while scientology is permitted to flourish in other States, any action taken in Victoria could not be fully effective'. Anderson forecasted the bombardment of Victorian residents with Scientology literature from interstate, and the movement of Victorians interstate for training and processing courses. He was also skeptical about the efficacy of prohibiting Scientology by name,

[61] Ibid. 171-2.

pointing out that the HASI had already registered a new name[62] and that such action might bestow the quality of martyrdom upon Scientologists.[63]

RECEPTION OF THE ANDERSON REPORT

The report was tabled in the Legislative Assembly on 5 October 1965 and ordered to be printed.[64] It was sensationally reported the next day. For example, on page one, after reporting that Anderson had recommended the banning of Scientology and noting the £37,500 cost of the inquiry, *The Australian* luridly quoted Anderson, under the sub-heading 'perversion'. The paper reported; 'it should not be thought that the foregoing examples exhaust the case in which matters of sex or perversion were dealt with in an obscene and uninhibited way, nor that they mark the limits of mental depravity reached'.

It was noted that 'one section of the report, Appendix 19, which dealt with moral laxity, was too obscene to be printed as part of the whole report for public circulation'. [65] An extensive article followed, which paid particular attention to such claims, for example, that during processing normal sexual inhibitions were lowered and 'teenage female auditors discuss the most intimate and disgusting sexual matters with their male preclears'.[66]

It might have been expected that the Bolte Government would take some time to consider, and indeed treat with some caution the potentially controversial recommendations of this sensational, emphatic report. However, its response was exceedingly prompt, with legislation being introduced into the Legislative Assembly less than five weeks after the tabling of the *Anderson Report.*

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[62] Ibid. 167. The College of Applied Philosophy
[63] Ibid. 169.
[64] Apart from Appendix 19, which was considered to be 'objectionable', being 'obscene' and 'not ordered to be printed'. Members and others could inspect it with the permission of the Speaker, but no copies could be taken, Victoria Legislative Assembly, *Parliamentary Debates (Hansard),* Melbourne: Victorian Parliament 1965. 481-2.
[65] 'Report calls for ban on scientology', *The Australian*, 6 October 1965.
[66] 'Scientology Report - The Exposure of an Evil. QC finds cult debased and a fraud', *The Australian*, 6 October 1965.

Copies of an anonymous letter distributed to MPs and an authentic, threatening Scientology communication to the Premier, had certainly done nothing to dissuade the Government from its determination to act, and probably strengthened its resolve. On 26 October 1965, the Premier reported to parliament that he had received two cables from L. Ron Hubbard. The first threatened to sue the State of Victoria for £10,000,000 if it did not reprimand Anderson. The second stated that

> the only way you can minimize following Profumo in political decline is by publicly repudiating Anderson and Galbally for misconduct. Stop. If you and your Cabinet proceed with the folly of passing a Bill based on collusion, intimidation and perjury we will be able to collect even greater damages from the State of Victoria'.

Premier Bolte referred to the contents of these cables as 'nonsensical' and 'piffle', not wanting to dignify them by raising a question of privilege.[67] They only illustrated that Anderson's 'findings were right in every aspect'. He announced that a Bill to implement the findings would be introduced 'a fortnight from today'.[68]

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[67] Although the matter of a threatening letter sent to all Members, in which it was alleged that they would be subject to damages claims if a party to proposed 'criminal proceedings', was raised the next day in the Legislative Council. The Minister of Agriculture, the Hon G. L. Chandler, said the letter 'intrudes upon parliamentary privilege' and should be condemned. Galbally noted that he had been threatened before and that 'these people have reached the limits of human effrontery', Victoria Legislative Council, *Parliamentary Debates (Hansard),* Melbourne: Victorian Parliament 1965. 26 October. 999 – 1000.

[68] Victoria Legislative Assembly, *Hansard 1965,* 26 October. 1039-40.

II: 3

PSYCHOLOGICAL PRACTICES ACT (1965)

'protection of the public from unqualified persons and certain harmful practices'

On 10 November 1965, 'a Bill to provide for the registration of psychologists, the protection of the public from unqualified persons and certain harmful practices, and for other purposes', was brought into the Victorian Legislative Assembly. The Psychological Practices Bill was presented by Mr. Manson, Minister without Portfolio.[1] Following extensive debate in both Houses and Opposition support for part of the legislation severely curtailing Scientology, the Bill was assented to on 14 December 1965.[2]

The legislation followed the recommendation of the Board of Inquiry and provided for the establishment of a Victorian Psychological Council with wide powers to regulate the practice of psychologists.[3] The 'practice of psychology' as applied to individuals or groups was given a broad definition: the evaluation of behaviour or cognitive processes or adjustment through the interpretation of tests for assessing mental abilities, aptitudes, interests, attitudes, emotions, motivation or personality characteristics; methods of assisting emotional or behaviour problems at work, family, school, or within personal relationships; and the use of tests, techniques or devices for assessing mental abilities, aptitudes or personality.[4]

Teachers engaged in 'the ordinary course of teaching or research' in prescribed educational institutions were exempted. Medical practitioners, priests or ministers of recognized religions (those authorized to celebrate marriages under Commonwealth law

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[1] Victoria Legislative Assembly, *Parliamentary Debates (Hansard),* Melbourne: Victorian Parliament 1965. 10 November. 1342.
[2] Victoria Parliament, *Acts of Parliament 1965* (Melbourne: A C Brooks, Government Printer, 1965) 661.
[3] The fact that the Council was to comprise four psychologists, three medical practitioners and one other indeterminate appointee was subjected to some criticism that psychologists were not to be allowed to control their own profession
[4] Psychological Practices Act (Vic) 1965s. 2 (1) (a) (b) (c)

or those authorized by the Minister) and students, were also exempted. There was provision to add to or amend the list of exemptions by executive fiat published in the *Government Gazette*.[5]

Hypnotism, for entertainment, demonstration or performance purposes 'to which the public are admitted whether on payment or otherwise', was banned, except for registered psychologists and medical practitioners and except in cases where special permission was granted by the Council, and only then under the supervision of a medical practitioner. Exemption was provided for dentists in the course of their practice.[6] Hypnotism was banned entirely on or by those under the age of 21. It was defined as mesmerism or similar acts inducing sleep or trance where susceptibility of the mind to suggestion or direction was increased (or intended to be), but not including self-induced states.[7]

Draconian provisions were aimed at Scientology. Section 30 (1) banned the use of a 'galvonometer E Meter' or other instrument for detecting (or being represented to detect) emotional reactions (unless registered, exempted or given consent). Section 31 (1) imposed a ban on the teaching, practice or application of Scientology for fee or reward, and also made it an offence to advertise or hold out to be willing to teach Scientology. These sections were apparently modeled on Galbally's Bill, with the addition of a the blanket ban on advertising the teaching of Scientology, whether for fee or reward or not. [8] Section 32 required any person to hand over all Scientology records relating to individuals for destruction or other disposal by the Attorney General, who had the power to order the seizure of Scientology records not surrendered. These sections provided for substantial fines ($500 for using an E Meter and $200 for failing to surrender documents) and even imprisonment (2 years) for non-compliance with s.31 (1).

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[5] Ibid. s. 2 (1) (2) (3) (4) (5) (6) & (7)
[6] Ibid. s.26
[7] Ibid. s. 2 (1)
[8] A distinction not specifically alluded to in the parliamentary debate on the Bill.

PARLIAMENTARY DEBATE

In the Legislative Assembly, the Minister without Portfolio, Mr. Manson, said the Bill was introduced as 'a direct result of the findings of the Board of Inquiry ... a most damning indictment of Scientology', which needed to be 'restrained'.[9] Ten Government members and seven Opposition members spoke in the Second Reading debate from a House of sixty-six members. The Bill received partial support from the Opposition, which was in favour of implementing the specific anti-Scientology provisions and referring the remaining provisions to a Select Committee. In addition, several Opposition members, and some Government members, canvassed the issue of religion relating to Scientology claims and the implications for other religions.

In the Legislative Council, the Bill was introduced by the Hon. V. O. Dickie, Minister of Health, who gave due credit to Mr. Walton and Mr. Galbally for their role in the matter.[10] However, those gentlemen were strident in their criticism and the Opposition again attempted, unsuccessfully, to refer those provisions not dealing specifically with Scientology to a Select Committee. Four members from each side contributed to the Second Reading debate from a House of 34 members. Again, serious reservations were raised by members on both sides of the House about religious issues and the effect these might have on the ultimate success of the legislation.

Mr. Manson argued that a Bill with as wide an application as possible was preferred, as banning various pieces of equipment (a reflection on the Galbally Bill[11]) would 'merely have checked the organisation temporarily and Scientology might once again flourish in another guise'. Because Scientology, 'in addition to the mumbo jumbo' surrounding it, also contained 'elements of psychological practice and hypnotherapy', much more effective restrictions would be imposed 'in addition to banning scientology itself and the

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[9] Victoria Legislative Assembly, *Hansard 1965,* 10 November. 1342.
[10] Victoria Legislative Council, *Parliamentary Debates (Hansard),* Melbourne: Victorian Parliament 1965. 10 November 1990.
[11] Galbally's Scientology Restriction Bill (in terms identical to the original) had been introduced into the Legislative Council again, Ibid. 15 September. 40.

organisations practising it'. Section 39 (1), which provided that no unregistered person 'shall practise psychology for fee or reward' was aimed 'specifically at any revival of scientology, with its pernicious practices, under another name or guise'.[12] He noted that legislation in Victoria concerning the 'practice of a variety of professions' was in general 'not unduly restrictive'. Apart from nurses and physiotherapists, where there were 'specific bans on practice by unregistered or unenrolled persons', the general approach was to prevent the unqualified practitioner from being paid or from recovering fees in court. While unqualified people could experiment, only the very dedicated would persevere. The present Bill approached 'the problems created by the practice of scientology in a variety of fashions', imposing a much more restrictive regime than usual.[13] Indeed, the Minister of Health made a frank admission about the objective of the legislation, stating that 'Mr. Feltham was kind enough to say that the definition of "psychological practice" was a very good definition if it was desired to ban scientologists. That, of course, is what the Bill sets out to do'.[14]

The Deputy Leader of the Opposition, Dr. Jenkins, stated that 'Members of the Opposition desire to be associated with the Minister in his commendation' of the *Anderson Report.* The position of the Opposition was; 'while we respect and tolerate the views of others we are not willing to tolerate a practice that presents grave social and moral evils and the teaching processes of which are largely based, one feels on examining the report, on the hopes of financial return'. However, the Opposition felt that 'the part of this Bill dealing with scientology could well have been passed separately to ensure the control of scientology whilst consideration was given to other aspects of registration'. This was despite Anderson's caveat that suppressing Scientology by name would prove ineffective. Dr. Jenkins pointed out that Anderson's concern was for the long term but that as a temporary measure the banning of the practice of Scientology would allow 'sufficient time to give further consideration to the evil and also to come out with a better solution of the problems surrounding the registration of psychologists'.[15]

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[12] Victoria Legislative Assembly, *Hansard 1965,* 10 November. 1342 - 45.
[13] Ibid. 10 November. 1343.
[14] Victoria Legislative Council, *Hansard 1965,* 10 November. 2397.
[15] Victoria Legislative Assembly, *Hansard 1965,* 24 November. 1872.

While indicating that the Opposition did 'not object to the broad principle of the Bill', another concern was that the Bill was designed as a dragnet whereby exemptions would be in the hands of the Minister rather than in the hands of the proposed Council or even parliament.[16] The Opposition was also keen to tighten the provisions dealing with confiscated auditing records. The Bill provided that the records could be destroyed or 'otherwise disposed of as the Attorney-General thinks fit' whereas he Opposition felt that the records should be destroyed.[17] (Walton had earlier asked whether the Government would seize and destroy the files relating to personal matters of Victorian residents.[18])

The Leader of the Opposition, Mr. Stoneham, supported the immediate implementation of those provisions aimed specifically at Scientology, saying it was a 'sham' to regard the Bill 'as a measure for the registration of psychologists' when the underlying aim was to stamp out Scientology. Members were 'unanimous that the evil of scientology in Victoria must be banned' and that 'the abolition of scientology should be enacted as quickly as possible', in line with 'the definite recommendation from Mr. Anderson'. He moved an amendment to implement those clauses dealing with Scientology, with the remainder of the Bill to be 'examined by a select committee representative of all parties'.[19] The amendment, which was defeated along Party lines, was proposed on the basis of concerns expressed by the Australian Association of Social Workers and other criticisms of the Bill expressed in debate by both the Opposition and Members of the Government.[20] Mr.

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[16] Ibid. 24 November. 1876.
[17] Ibid. 24 November. 1873.
[18] Victoria Legislative Council, *Hansard 1965,* 27 November. 1086.
[19] His proposed amendment was that the Bill (excluding clauses 30, 31 and 32), should be 'referred to a Select Committee of this House for examination and report'. It was defeated by 38 votes to 15. Clauses 30 and 31 were similar to those contained in the Galbally Bill concerning the banning of the E meter (except in this Bill it could be used with the consent of the Council only) and the teaching, practice or application of scientology for fee or reward, except that here the words 'or who advertises or holds himself out as being willing to teach scientology' did not stipulate 'for fee or reward', thus resulting in a blanket ban on the teaching of Scientology. Clause 32 dealt with the government confiscation of 'scientological records', the auditing files of 'pre-clears', Victoria Legislative Assembly, *Hansard 1965,* 24 November. 1907 – 8.
[20] Indeed, nearly all Government speakers expressed concerns with some aspects of the Bill, leading Opposition Member Mr. Holding to suggest that 'the Government would be severely embarrassed if a conscience vote were permitted', Ibid. 24 November. 1903.

Stoneham also felt that the Bill had been 'rushed' in an act of 'political skullduggery', to avoid giving any credit to the Labor Party, which had taken the initial action.[21]

In the Legislative Council, Galbally, who had done so much to bring Scientology into the spotlight, was troubled by the result. In his reply on behalf of the Opposition, he thanked the Government for the kindly references to the role played by Walton and himself, but declared; 'I assure the House that I will have no part whatsoever of this Bill. The whale said to Jonah, "If I hadn't opened my big mouth, this would not have occurred", and the House may think that if I had not said so much three years ago, we might not have found ourselves in this pickle to-day.' [22] The Bill was 'a direct assault on freedom of speech, thought and ideas', placing 'practically the whole of the adult population under the thumb of the Executive', with the Government adopting 'a tactic familiar to Goebbels and the infamous leaders of the Nazi world'.[23] His Bill did not seek to ban Scientology, but merely sought to 'stop these people from gorging on the community and charging fees'.[24] He declared

> I have never advocated that scientologists should be banned. I believe we should not interfere with freedom of thought and association. History is full of examples of people who have been banned and persecuted. I am not putting up any case for scientologists; their principle is bad. The early Christians were an anathema to the Roman Empire. In my view, the scientologists are a short-term problem, and once they are stopped from charging fees, it will be the end of them. The Government prefers to think otherwise. It has been said that they will appear in some other form. But I think that danger is exaggerated.[25]

Galbally was particularly scathing of the definition of psychological practice, which he alleged was wide enough to catch football coaches and newspaper leader writers.[26] (His colleague the Hon. P. V. Feltham alleged it would catch 'social workers, marriage guidance counsellors, sociologists, business administration advisers, management counsellors, industrial training officers, probation officers, Gallop poll workers,

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[21] Ibid. 24 November. 1907-8.
[22] Victoria Legislative Council, *Hansard 1965,* 7 December. 2371.
[23] Ibid. 7 December. 2372.
[24] Ibid. 7 December. 2373.
[25] Ibid. 7 December. 2374.
[26] Ibid. 7 December. 2371.

personnel officers in industry, and even the members of Alcoholics Anonymous'.[27]) Galbally was critical of the fact that people seeking exemptions would have to apply to the Minister alone, and alleged that nuns and lay preachers would not enjoy the religious exemption afforded to priests and ministers. [28] After advising the House that it 'could pass the clauses in the Bill which dealt with scientology and scrap the rest', he concluded 'this Bill is too silly to contemplate and the country will quickly rise up in arms against it'.[29]

Mr. Walton also had concerns. He wondered where the legislation would leave hypnotherapists (who used hypnotism as an essential part of their practice), stating that the Hypnotherapists Association was now threatened with extinction and pointing out that in Canada legislation enacted to control hypnotism made provision for hypnotherapists. He reiterated that the Opposition wanted Scientology controlled, not banned (which he submitted was the effect of the government's legislation),[30] and complained that the expensive[31] Anderson inquiry had delayed legislative action for two years.[32]

As in the Legislative Assembly, an amendment was moved in the Legislative Council on behalf of the Opposition by the Hon. Archibald Todd, seeking to refer the Bill, excepting clauses 30, 31 and 32, (the anti-Scientology provisions), to a Select Committee for examination and report.[33] The House divided and the amendment was defeated 22 to 9

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[27] Ibid. 7 December. 2380.
[28] Ibid. 7 December. 2374.
[29] Ibid. 7 December. 2376.
[30] The fact that his Labour colleagues in the Legislative Assembly used banning terminology loosely with respect to the Galbally Bill reveals some lack of communication within the Labour caucus about the distinction made by Galbally between his proposal and the Government's Bill. Indeed, it was revealed in earlier debate that Galbally had not attended the 'committee meeting that was held' on the Bill by the Labour Party, Victoria Legislative Assembly, *Hansard 1965,* 24 November. 1887. (Mr. Lovegrove)
[31] The inquiry had cost £35,293, comprising £26,988 in fees to the Board and assisting counsel, £7,066 reporting expenses, £269 rent and £970 incidentals, Ibid. 27 October. 1108. (Mr. Bolte, Premier and Treasurer)
[32] Victoria Legislative Council, *Hansard 1965,* 7 December. 2386-87.
[33] Ibid. 7 December. 2395.

on party lines.[34] Although Galbally had spoken in opposition to the principle of banning, and pointed out the distinction between his proposal and clauses 30, 31 and 32, it should be noted that the Opposition was prepared to support these anti-Scientology provisions which amounted effectively to banning the organisation. When the amendment was defeated, the Opposition did not oppose the second reading of the Bill.

The religious issue

Little credibility was given to Scientology claims for religious status. Debate focused on the clause enabling ministers of religion to be exempted from the registration provisions of the Bill. In general Members did not countenance the possibility that Scientology might be considered a religion. Mr. Sutton, for the Opposition, noted that 'Mr. Anderson stressed that Scientology is not a religion; hence Parliament cannot be accused of violating freedom of conscience in suppressing it as a menace to the community.'[35] Nevertheless, two Government members did raise concerns that the legislation might be in violation of Scientology claims for the free exercise of religion. Mr. Holden said that

> it is the right of every man and woman throughout the world to choose his or her own *set of ethical and moral codes that he or she proposes to live by.* If he wants to call it a religion, he is entitled to do so. Scientology is recognized in New Zealand and America as a religion and scientologists celebrate marriages.[36]

Mr. Birrell felt that 'someone in this House should go on record to say that in banning this practice – one which is very hard to defend – we are opening up a broad field ... this provision will cause difficulty for Government's in the future'. Nevertheless, he said that he 'did not disagree with the contents of Mr. Anderson's report and stated; 'all Honourable members must agree that the practice (of Scientology) cannot be allowed to continue without some response from a responsible Parliament, and this is a very dramatic response'. In contradiction to this, he noted that another controversial group, the

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[34] Ibid. 7 December. 2397. Except that Government member, the Hon. G. J. Nicol, who supported those provisions dealing specifically with Scientology but was opposed to the remainder of the legislation, was absent from the vote.
[35] Victoria Legislative Assembly, *Hansard 1965,* 24 November. 1881, 83.
[36] Ibid. 24 November. 1898. Emphasis added. Despite this he also said 'the Bill does not ban any religion'.

Exclusive Brethren (which he felt probably benefited some people) had already become the target of those who wanted to apply the reasoning behind this Bill to others seen by some as 'fringe operators in the spiritual-moral field', noting that 'Parliament will get itself into a certain amount of difficulty in treating this subject in this way. In dealing with borderline cases it will deal with what some people might well think are worth-while practices'.[37] For his trouble he was castigated by the following speaker from the Opposition, Mr. Floyd, who decried his 'silly contribution of a nebulous nature, noting that 'all night' he had been listening 'to Government back-benchers telling us how silly the Bill is. These things should have been settled in the party room'.[38]

For the Opposition, Dr. Jenkins flagged the issue of exemptions for recognised religions. He noted that the list of religions recognized under Commonwealth law for the celebration of marriage did not include those other than a list of Christian churches and the Jewish faith. He felt that this might be rectified by the proclamation of other religions, but was adamant that the matter warranted 'closer consultation and examination.'[39] The issue of exemptions for ministers of 'recognized religions' was also explored extensively by Government member Mr. Holden. Referring to the *Australian Government Gazette* No. 48 of 30 May 1963, he noted that the religions listed consisted of 48 in number, of which 47 were Christian religions and the other was Judaism. He noted that this list of exemptions, which depended on federal action, could be extended under another provision which allowed the Victorian Governor in Council to publish an order in the *Government Gazette* declaring that the proposed Act or any provision thereof did not apply to any person or class of persons. He felt this was unacceptable as any religious group not listed under the federal proclamation, such as the Hindus, would have to go 'cap in hand' to ask for an exemption from the Minister. However, the fact that the Governor in Council could extend the list of exemptions also meant that he (the Minister), could refuse to recognize any religion not listed. Stating that 'everyone is entitled to his own beliefs, and it should not be necessary for any religion to have to

[37] Ibid. 24 November. 1913.
[38] Ibid. 24 November. 1913-14.
[39] Ibid. 24 November. 1876.

approach a Government and ask for an exemption', he concluded that the clause should be re-drafted.[40]

Opposition Member Mr. Lovegrove noted that the Commonwealth proclamation related to the celebration of marriage, to which some religions 'take a different view'. The implication was that they might not desire to be registered under the Commonwealth marriage provisions, which reflected a Western customary bias. He pointed out that religions not recognized federally included religions that 'are not only equally worth of the consideration of the House, but they preceded by thousands of years the Christian and Jewish faiths'. He concluded with the caveat that 'when one enters this field of religion one does so only with the best of advice, and one does not do it with purely political motivation.'[41]

A most extraordinary (some might say courageous) contribution, came from Government member the Hon. G. J. Nicol, who declared that the Bill was 'a measure which started out to authorize an execution' but which would, in fact, 'cause a massacre'. It was a 'complete negation of many of the freedoms guaranteed under the Atlantic Charter', particularly the 'freedom of religion and the freedom of speech'. He was scathing of the *Anderson Report*, alleging the Board had exceeded its terms of reference, allowed crusading zeal to outweigh sound judgement, used intemperate language and lacked weight and balance (owing to the fact that it was compiled by one individual). He was also critical of the proposed delegation of power from parliament to the executive, as the proposed Council was to report to the Minister who was also responsible for deciding upon exemptions after casting a very wide net (a power he referred to as the dragnet clause).

Pointing out that the only denominations at that time authorised to celebrate marriages under Commonwealth legislation were the Christian and Hebrew religions (which would therefore be automatically exempted from the provisions of the act), Nicol warned that

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[40] Ibid. 24 November. 1897-8.
[41] Ibid. 24 November. 1910-11.

the legislation threatened a serious interference with religious practice.[42] He condemned the fact that it would be left in the hands of one man (the Minister of Health) to say if other denominations[43] were 'proper religions'. Indeed, urging the Government to delay all but those sections dealing with Scientology, he said

> not only do we authorize a body outside this Parliament, the Commonwealth Government, to determine what is a religion, but we also place great power in the hands of one individual. Once again, let us take the long view. It is not inconceivable that a person charged with the administration of this legislation could be a complete religious bigot. By the use of the powers in this Bill, he would be able to ban what is perfectly acceptable as a normal and proper religion ... this Bill can be supported in its entirety only by people who are inert, inanimate or who lack the moral courage to insist on a thorough and complete examination of its provisions by a competent committee before it is passed into law. I say a plague on any Government which is so obdurate that it will not listen to the extremely widespread expressions of doubt, dissatisfaction and fear of legislation of this type. I hope the House will deal with it as I believe it should be dealt with – by throwing it into the wastepaper basket.[44]

An Achilles Heel exposed

In response to questions posed by Mr. Galbally, the Government admitted that the provision relating to the exemptions of ministers of recognised religions, and in particular the position of nuns, might pose a problem. The Minister also noted that it has 'been published in the press recently that adherents of scientology who originally claimed that it was not a religion are now seeking its registration under Commonwealth legislation as a religion for the purpose of celebrating marriages'. In order to receive further advice on the matter he resolved that 'progress be reported on clause 2', so that he could be certain that the Government was not in any way interfering 'with beliefs of any recognized religion'.[45]

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[42] Declaring 'this Bill represents one of the most serious expressions of interference with religious practices that I have ever been unfortunate enough to come across'

[43] Including 'Buddhist, Moslem, Shinto, Confucian, Bai'Hai and many others'

[44] Victoria Legislative Council, *Hansard 1965,* 7 December. 2382 – 5.

[45] Ibid. 7 December. 2401-2.

When debate resumed on the Bill, the Minister said he had been advised that in law the definition of 'priest or minister' had a wide definition to include the functionaries of religions 'ordained to carry out the particular responses of the services'. Non-functionaries, as distinct from the laity, such as 'nuns, Christian brothers, lay readers, lay teachers, deaconesses and so forth', would be exempted under the category of teachers, or if not acting in a teaching capacity, were otherwise unpaid for their services and therefore not caught by the legislation.[46] He also undertook to delay the proclamation of those sections dealing with hypnotism, to enable him to further examine the situation of hypnotherapists.[47] The legislation passed without division and without any amendments to clause 2,[48] despite clear warning about its potential to undercut a fundamental purpose of the Act, the suppression or 'banning' of Scientology. It therefore contained an Achilles heel. Perhaps the Minister had been reassured that Scientology would get nowhere in its efforts to achieve registration under the Commonwealth *Marriage Act* 1961, but that is a matter of conjecture.

RAID ON SCIENTOLOGY HEADQUARTERS

Sections of the Psychological Practices Act 1965, empowering the Attorney General to issue a warrant for the seizure of Scientology documents, were proclaimed in the mid-afternoon of 21 December 1965. At around 5pm, police, reportedly in the company of two officers of the Attorney-General's department[49] (and Health Department officials), entered Scientology headquarters and asked the organisation's secretary to hand over files and records. A search was conducted of the premises, files burning in drums at the rear of the building discovered and a search made of the adjacent alley, where a file had allegedly been passed through a window and placed in a car. It was reported that about 4,000 personal files on clients[50] were seized and taken away in a table-top truck to be

[46] Ibid. 7 December. 2414.
[47] Ibid. 7 December. 2417.
[48] The Government did move minor amendments, (which were agreed to), with respect to advertising by registered psychologists, Ibid. 7 December. 2419.
[49] 'Thousands of Files in Scientology Raid', *The Age*, 22 December 1965.
[50] 'Scientology files seized in raid', *Sydney Morning Herald*, 22 December 1965.

delivered to the Attorney-General,[51] where they would be "studied by officials of the Crown Law and Health Departments, who would report to him 'in due course'".[52] It was reported the next day that police were hunting for files that had allegedly been taken elsewhere, that 400 files taken from Scientology headquarters were being examined and that 'signs advertising free introductory lectures about scientology had been removed, but two large illuminated signs were still standing'.[53]

Three months later the Victorian Government approached the Federal Postmaster-General to see if action could be taken to stop Scientology literature being posted through the mail from addresses in Victoria. The Government was advised that the Federal department had no power to intervene, but Chief Secretary, Mr. Rylah, warned that 'anyone found posting illegal Scientology pamphlets or dropping them into letter boxes would be liable to prosecution', presumably under state law.[54]

SCIENTOLOGY REPLY: 'KANGAROO COURT'

The Scientologists did not take these developments lying down. In response to the *Anderson Report* the Scientology organisation, in accordance with Hubbard's edict to always attack rather than defend,[55] later published a lengthy document entitled *Kangaroo Court.*[56] The document began with a diatribe which stated

only a society founded by criminals, organized by criminals and devoted to making people criminals, could come to such a conclusion ... the foundation of Victoria consists of the riff-raff of London's slums – robbers, murderers, prostitutes, fences, thieves – the

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[51] 'Scientologists burn papers during raid', *The Australian*, 22 December 1965.
[52] 'Scientology files to be examined', *The Herald*, 22 December 1965.
[53] 'Hunt for hidden scientology files', *The Australian*, 23 December 1965.(The free introductory lecture signs would probably have offended against s. 31 (1), but a large sign, perhaps merely depicting the name 'Scientology', would not have been caught by the section.)
[54] 'New Scientology probe sought', *The Age*, 11 March 1966.
[55] ' "If attacked on some vulnerable point by anyone or anything or any organisation, always find or manufacture enough threat against them to cause them to sue for peace ... Don't ever defend, always attack"', Russell Miller, *Bare-faced Messiah - the true story of L. Ron Hubbard* (London: Michael Joseph, 1987) 241.
[56] Church of Scientology, *Kangaroo Court: An Investigation into the Conduct of the Board of Inquiry into Scientology: Melbourne, Australia* (East Grinstead, Sussex, England: Hubbard College of Scientology, 1967).

scourings of Newgate and Bedlam ... the growth of ideas which require freedom of expression and security under the law, is stunted under a system which still applies the old grim solutions to problems which have passed away ... the niceties of truth and fairness, of hearing witnesses and weighing evidence, are not for men whose ancestry is lost in the promiscuity of the prison ships of transportation.[57]

The tract is a long criticism of the alleged excesses of the Anderson inquiry, including the allegation that it was a biased witch-hunt. The author makes an audacious attack on the integrity of the inquiry and upon the inquirers, Anderson and Just. It is alleged that Anderson, 'bullied and intimidated witnesses', was 'bigotted (sic), extremely biased, pompous and obsessed with his own importance', was incompetent and prejudged the issues. It is also alleged that 'early on in the Inquiry, Anderson and Just began a systematic campaign of vilification' against Scientology.[58]

Kangaroo Court asserts the religious nature of Scientology, describing it as 'a religious philosophy, designed and developed to make the able more able'. It is claimed that 'Scientology, though not based on Buddhism, regards itself as the spiritual successor of Buddhism and shares certain beliefs with Buddhism and early Christianity, amongst others'. The Electrometer, or E-meter, is described as an 'aid to confession'.[59] The author alleges that Anderson found that Scientology was not a religion 'against the weight of the evidence', in the process displaying his 'prejudice and incapacity', having 'prejudged the question'. Anderson is quoted from the Inquiry transcript as having said; 'as I understand it, Scientology is not a religion; it is not taught as such, so I am not concerned to investigate it along those lines'.[60]

In *Kangaroo Court* it is submitted that there is 'ample evidence to demonstrate beyond a shadow of a doubt that Scientology is basically a religion'. The definition relied upon was that found in *Webster's New 20th Century Dictionary*, which defined religion as 'belief in divine or superhuman power or powers to be obeyed and worshipped as the creator and ruler of the universe; expression of this belief in conduct and ritual'. In

[57] Ibid. 255.
[58] Ibid. 11, 12, 14.
[59] Ibid. 4-5.
[60] Ibid. 38.

addition, *Kangaroo Court* refers to the Articles of Incorporation of the Hubbard Association of Scientologists International, which state its purpose to be to 'establish a religious fellowship association for the research into the spirit and human soul and the use and dissemination of findings.' It is submitted that there were several statements in the transcript of the *Anderson Report* confirming the religious claims of the organisation. Examples included

a Scientologist is a first cousin to the Buddhist, a distant relative to the Taoist ... the creed of the Scientologist is freedom for all things spiritual on all dynamics' and 'Scientology is a religion in the oldest sense of the word, a study of wisdom. Scientology is a study of Man, as a spirit, in his relationship to life and the physical universe ... it is non-denominational ... Scientology tries to help an individual to realize his full spiritual potential in life'.[61]

However it is alleged that both Anderson and Just 'had fixed opinions that Scientology was not a religion or system of beliefs'. The claim is made that 'the Board could not reconcile them (Scientologist's views on spiritual matters) with the Board's own personal Roman Catholic beliefs'.[62]

The *Jehovah's Witnesses* case referred to by Anderson was cited to support the contention that Scientology fell within a broad definition of religion. The Chief Justice Sir John Latham was quoted saying; 'the scope of religion has varied greatly during human history. Probably most Europeans would regard religion as necessarily involving some ideas or doctrines affecting the relation of Man to a Supreme Being. But Buddhism, one of the great religions of the world, is considered by many authorities to involve no conception of a God ... it is not an exaggeration to say that each person chooses the content of his own religion.'[63]

It is claimed in *Kangaroo Court* that 'the gulf between science and religion has been bridged, and a search into the relationship between mind and spirit has produced results far beyond the original expectations of Scientologists. Scientology is a religion. It has

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[61] Ibid. 38-9.
[62] Ibid. 47. Parenthesis added.
[63] Ibid. 41.

been a religion since its inception as an inquiry into the human condition'.[64] The overall conclusion of the document was defiant, and possibly prophetic, stating; 'we will be here teaching and listening when our opponent's names are merely miss-spelled references in a history book of tyranny'.[65]

RAMIFICATIONS IN OTHER STATES

The Scientology organisation was not alone in its criticism of the Anderson inquiry. Hubbard's unauthorized biographer, the UK journalist Russell Miller, noted that 'the storm caused by the *Anderson Report* was not merely restricted to ephemeral headlines: it provoked further and continuing media investigation into Scientology and prodded governments into taking punitive measures against the church. The reaction, sociologist Roy Wallis[66] noted, was comparable to an international moral panic'.[67] Miller was highly critical of the tenor of the *Anderson Report*, saying that to 'condemn the church as "evil" was to brand its followers as either evil or stupid or both – an undeserved imputation.'[68] Whether its followers deserved the imputation or not, Anderson's condemnation of scientology and the Victorian government's response had inexorable ramifications elsewhere, with other Australian state governments moving to implement draconian legislation against the cult.[69]

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[64] Ibid. 48.
[65] Ibid. 255.
[66] Roy Wallis, *The Road to Total Freedom: A Sociological Analysis of Scientology* (London: Heinemann, 1976).
[67] Miller, *Bare-faced Messiah* 254.
[68] Ibid. 253.Saying of the *Anderson Report*; 'It was not difficult to "detect" a note of unrelieved denunciation ... in its intemperate tone, its use of emotive rhetoric and its tendency to exaggerate and distort, it bore a marked similarity to the writings of L. Ron Hubbard'
[69] There might well have been a silver lining for Hubbard in such governmental reaction. Jon Atack, a former Scientologist, claimed that the ban 'probably did Scientology more good than harm. It provided free publicity, and because it had the trappings of a witch-hunt, made Scientology the underdog, gaining Hubbard much needed support', He also claimed the ban was ineffective, noting 'it was impossible to ban Scientology. The followers in Victoria simply changed their name to the "Church of the New Faith", and carried on where they had left off', Jon Atack, *A Piece of Blue Sky: Scientology, Dianetics and L. Ron Hubbard Exposed* (NY: Carol Publishing Group, 1990) 159-60.

II: 4

CRACKDOWN IN WESTERN AUSTRALIA (1966-68)

'banning of the organisation of Scientology absolutely imperative'

In July 1966 the Western Australian Cabinet had requested Crown Law to advise on controlling Scientology and a draft Bill had been produced in October. However, on advice from the Minister for Police the Bill was deferred. Subsequently the Minister for Health was requested to 'submit the matter to other Ministers for Health in an endeavour to secure an Australia-wide ban'.[1] Scientology was listed on the agenda of a meeting of federal and state health ministers held in Darwin in July 1968. A post conference statement: deplored the continued activities of the cult in some states, reaffirmed the view of the Anderson inquiry, indicated that a close watch would be maintained, and if warranted the ministers would recommend that their states act individually to legislate against Scientology.[2]

Returning home from the Darwin Health Ministers Conference, the Western Australian Health Minister, Mr. MacKinnon, claimed that 'WA was becoming the stronghold for the scientology cult in Australia'. By September that year he had been authorized by Cabinet to draft legislation to ban or control Scientology.[3] A Bill was introduced into the Legislative Council on 2 October 1968.[4] After lengthy debate, the Scientology Act 1968[5] was assented to on 13 November 1968.[6]

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[1] WA Legislative Assembly, *Parliamentary Debates (Hansard),* Perth: WA Parliament 1968. 10 October. 1518. (Mr. Graham - question to the Premier).
[2] 'Government Checks Scientology', *The West Australian,* 1 July 1968.
[3] 'Victorian Report on Scientology', *The Advertiser,* 11 September 1968.
[4] WA Legislative Council, *Parliamentary Debates (Hansard),* Perth: WA Parliament 1968. 2 October. 1378.
[5] Scientology Act (WA) 1968 No.63
[6] Western Australia Parliament, *The Statutes of Western Australia* (Perth: Government Printer, 1968) 484.

SCIENTOLOGY ACT 1968

The Act stipulated that 'a person shall not practice Scientology'.[7] The word 'practice' included the application and teaching and the carrying on of business in connection with and prohibited the demand or receipt of any fee, reward or benefit 'for, on account of, or in relation to, the practice of Scientology'.[8] The use of galvanometers, or E. meters, 'on or to another person', was restricted to legally qualified medical practitioners, students using the instrument pursuant to studies at a university or institute of technology and any person or class of persons exempted under an Order in Council. Otherwise the use of galvanometers was banned.[9]

Provision was made for the surrender or confiscation of Scientology records, which included documents, files or registers, gramaphone records, wires, tapes or other thing used for recording and which could be reproduced, relating to the 'the practice of scientology on, by, or in relation to, any particular person'. Failure to surrender records would lead to the obtaining of a warrant by police to enter premises by day or night with force if necessary.[10] The penalty for a first offence of 'practising' Scientology was $200, with a $500 fine or imprisonment for one year or both for subsequent offences. The unauthorised use of a galvanometer incurred a $200 fine and failure to surrender or obstructing a police officer also incurred a $200 fine.[11]

In the Legislative Council, where it was introduced, the Hon. G. C. MacKinnon, Minister for Health, described the measure as preventing Scientology from 'practising its techniques' in Western Australia while at the same time endeavouring to protect the 'individual and his particular beliefs'.[12] Five Government members and three members of the Opposition Labor Party spoke in the debate from a House of thirty members. The

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[7] Scientology Act (WA) s. 3 (1)
[8] Ibid. ss. 2, 3 (2)
[9] Ibid. s. 4 (1) (2) (3)
[10] Ibid. s. 5 (1) (2) (3) & s. 2 for definition of 'scientological record'
[11] Ibid. ss. 3 (2), 4 (1), 5 (1) (4)
[12] WA Legislative Council, *Hansard 1968,* 3 October. 1450.

Bill was forced to a division and passed on party lines. [13] It was transmitted to the Assembly on 10 October 1968.[14]

In the Legislative Assembly, six Government members and seven Opposition members spoke in the debate, from a House of fifty-one members. The Bill encountered scathing criticism, particularly from the Labor Deputy Leader, Mr. Graham, who led the debate for the Opposition. It was introduced by Mr. Ross Hutchinson, the Minister for Works, who insisted that the legislation was directed 'against the association and not against individual beliefs'.[15] At the conclusion of the Minister's second reading speech, the Opposition responded immediately by calling for a division, without debate, on a motion to delay debate on the Bill for 12 months. The motion was defeated on party lines.[16] After lengthy debate, the legislation itself passed the second reading stage by a vote of 23 Ayes to 19 Noes.[17]

The Opposition then moved again that the Bill be referred to a select committee for further consideration. Mr. Graham proposed that the select committee would 'take evidence in Western Australia, from Western Australians, in respect of Scientology activities in Western Australia'. Mr. Jamieson said it would give Scientologists the opportunity to show to parliament that they 'are endeavouring to improve the situation'.[18] This proposal was again defeated along party lines.[19] Several further amendments proposed by the Opposition were also defeated in Committee, with the Bill emerging without amendment on 5 November 1968.[20] The Deputy Leader of the Labor Party announced that control of the Upper House permitting; 'when a Labor Government is elected ... high on the list of priorities will be the repeal of this rotten piece of legislation'.[21]

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[13] Ayes 17, Noes 8, with one pair, Ibid. 9 October. 1579.
[14] Ibid. 10 October. 1626.
[15] WA Legislative Assembly, *Hansard 1968,* 15 October. 1699.
[16] 20 Ayes and 24 Noes, Ibid. 15 October. 1707-8.
[17] Ibid. 1 November. 2658.
[18] WA Legislative Council, *Hansard 1968,* 1 November. 2661. (Mr. Jamieson)
[19] WA Legislative Assembly, *Hansard 1968,* 1 November. 2662.
[20] Ibid. 5 November. 2673.
[21] Ibid. 23 October. 2064.

GOVERNMENT POSITION

The Minister for Health outlined the alleged harm caused by Scientology. This consisted of: medically fraudulent claims to cure diseases' [22] attacks on conventional medicine' the use of hypnotic control to extract money, [23] and attacks on defectors and other critics. It was also claimed that: the Government had sufficient evidence of harm to proceed with the legislation; the legislation aimed at the organisation, not individuals; and Scientology claims for religious status were fraudulent, absurd or irrelevant.

The Minister felt that the 'method of pillorying private individuals who ... decide to leave the organisation', was the 'paramount' reason which made 'banning of the organisation of scientology absolutely imperative'. He acknowledged that many religious organisations 'take action against those who have left their organisation', including the Christian churches, which in extreme circumstances 'excommunicate their members, denying them the sacraments and the privileges of membership', which is a 'dreadful punishment' to someone of 'deep and abiding faith'. However, Scientology went much further, that

> there is no other organisation which writes to husbands, wives, children, or friends, ordering them to dissociate from the expelled member on pain of expulsion themselves. I know of no other organisation which writes about people the sorts of things that scientologists circulate about their defectors. They claim to do this to protect their fellow members. This I do not believe. [24]

As evidence of this belligerent attitude, the Minister quoted at length from a pamphlet written by L. Ron Hubbard entitled 'Critics of Scientology'.[25] The pamphlet contained Hubbard's instructions on how to deal with defectors or critics of Scientology, including politicians, noting

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[22] WA Legislative Council, *Hansard 1968,* 3 October. 1451-2.
[23] Ibid. 3 October. 1452.
[24] Ibid. 3 October. 1452
[25] From *Communication*, Volume 9, No. 3, Ibid. 3 October. 1452.

we are slowly and carefully teaching the unholy a lesson. It is as follows: "We are not a law enforcement agency. But we will become interested in the crimes of people who seek to stop us. If you oppose scientology we promptly look up – and will find and expose – your crimes. If you leave us alone we will leave you alone" ...we do not find critics of scientology who do not have criminal pasts. Over and over we prove this. Politician A stands up on his hind legs in a Parliament and brays for a condemnation of scientology. When we look him over we find crimes – embezzled funds, moral lapses, a thirst for young boys – sordid stuff.[26]

The pamphlet outlined Hubbard's 'fair game' policy, whereby a person declared to be in the condition of 'enemy' could be 'deprived of property or injured by any means by any scientologist without any discipline of the scientologist. May be tricked, sued or lied to or destroyed'. The Minister felt that the fair game policy 'alone would be sufficient to ban the organisation'.[27] In the Legislative Assembly, the Minister for Works, Mr. Hutchinson, declared; 'by this statement alone, even without all the corroborative evidence which can be brought to bear, the cult of scientology has placed itself beyond the pale'.[28]

The Government relied heavily upon the *Anderson Report*, which had been endorsed by the Mental Health Committee of the State Health Council of Western Australia. Agreeing that Scientology was a 'medical, moral and social danger and a threat to family and home life', the Committee had recommended that Anderson's recommendations should be implemented in Western Australia. Specifically, a public information programme warning of the dangers of Scientology procedures should be conducted periodically, along with warnings about and restrictions on the advertising of intelligence and personal efficiency testing.[29]

The Minister for Health did not provide detailed evidence about the alleged harmful activities of Scientology in Western Australia. Instead, he tabled documents disseminated by Scientology and quoted extensively from them. He noted that 'there have been people

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[26] The Minister noted that 'such a pernicious and almost overbearingly threatening attitude is a worry in our community', Ibid. 3 October. 1453.
[27] Ibid. 3 October. 1454.
[28] WA Legislative Assembly, *Hansard 1968,* 15 October. 1706-7.
[29] WA Legislative Council, *Hansard 1968,* 3 October. 1451.

in my office, Sir, who after having been subjected to scientology have told me – and I have no reason to disbelieve them – that they had for a considerable period of time been most confused and suffered dreadful mental difficulties'. He vindicated the Government's position with a broad brush, saying 'there is sufficient proof in the *Anderson Report*. There is proof in their (Scientology's) ordinary advertisements, and there is proof in the number of people in this State who have written to the various newspapers, many of the representatives of which have been to my office to see me'.[30]

In the Legislative Assembly, the Minister for Works also relied heavily upon the recommendation of the State Health Council,[31] although he agreed that 'there was no direct ban ordered, or rather, recommended in the *Anderson report'*. As the Council was a reputable organisation set up 'under legislation on our Statute book to deal with matters medical', its view had to be taken seriously. The Council believed that Scientology constituted a 'medical, moral, and social danger' and was 'a threat to family and home life'. Therefore, the Government felt it could 'do nothing else but place restrictions on the organisation and prevent it from teaching its false doctrines to other people'.[32] However, the Minister did admit in response to interjections that only one person from his electorate had approached him personally to complain about having been declared an 'enemy' by Scientology.[33] His colleague Mr. Grayden gave some support, noting that 'for months past, members of Parliament have been presented with case after case of individuals who have had their family life disrupted and who, themselves, have been affected by the activities of this organisation. I can cite several cases in South Perth alone. They are shocking cases'.[34]

As to to firmer evidence, it was revealed in answers to questions that one Scientologist in Western Australia had been convicted and fined £50, with £56 costs, on 29 September

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[30] Ibid. 3 October. 1451-2.
[31] He revealed later in answer to a question from Mr. Bertram that the State Health Council had recommended that Scientology be 'outlawed and that the Crown Law Department be asked to advise on the best means of preventing the practice of Scientology', WA Legislative Assembly, *Hansard 1968,* 24 October. 2101.
[32] Ibid. 15 October. 1707.
[33] Ibid. 15 October. 1706.
[34] Ibid. 1 November. 2612.

1959, for holding himself out as being willing to treat a person for epilepsy, contrary to s. 19 of the Medical Act.[35] Departmental psychiatrists had advised the Government that 13 patients had been seen at various clinics for mental treatment following 'a sojourn in scientology'. This was in addition to 'a list of 16 cases noted in the Victorian Mental Health Department'.[36] Noting these figures, the Minister for Works said

> a further comment I wish to make about evidence is that scientology has not been working very hard in this State, except during certain periods when it apparently bumped up its membership a good deal. If its membership continued to grow there would be a great deal of evidence, and we have to grasp the nettle now. In regard to the cases that have been quoted, I would say it is my belief that they represent the top (sic) of the iceberg and there is more underneath.[37]

His colleague in the Legislative Council, the Hon. N. E. Baxter, had earlier made the observation; 'if the lives of only half a dozen people in the State are ruined by an organisation of this nature, I think Parliament is justified in banning it from operating'.[38]

The Government insisted that the legislation was designed to attack the organisation, not the individual. It was therefore not an infringement of any claimed civil liberties right of individual religion or belief, (and if it was it was warranted on reasonable grounds). The individual could still, 'for the purpose of study or for his own edification ... own books of or about scientology and ... read them himself'. The injunction against the 'practice' of scientology meant that a person could not 'pursue the organized procedures as laid down by the scientology organisation ... in relation to any particular person'. What was banned was 'the high-pressure salesmanship, the indoctrination, the hypnotic, repetitive auditing, and the subsequent recording of the most intimate of details with regard to the customer or preclear'.[39] However, attempted clarification revealed just how restrictive the Bill was. It was explained that 'practice' meant that

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[35] Ibid. 15 October. (Mr. Graham to the Minister representing the Minister for Justice).
[36] Ibid. 24 October. 2100. (Mr. Bertram to the Minister representing the Minister for Health)
[37] Ibid. 1 November. 2654.
[38] WA Legislative Council, *Hansard 1968,* 9 October. 1571-72.
[39] Ibid. 3 October. 1455. (The Hon. G. C. MacKinnon, Minister for Health)

an individual who is reading a book on dianetics or a Hubbard textbook could keep that book in his library and no action would be taken. However, a publication such as the paper which was produced and carried the picture of the Minister for Health on the cover could not be kept ... Cabinet directed that a person holding individual beliefs or a person having books in his own library should not be penalised unless he started teaching or practising it by, or in relation to, another person ... he begins to practise when he is applying it in relation to another person ... as a matter of fact the definition contained in the Bill specifically contains the word "includes" because the dictionary definition of the term "practice" did not include teaching, because teaching is not a practice. A lawyer who teaches at the University is actually not practising, to come down to the refinements.[40]

Religious claims

The question of the religious claims of Scientology became an important issue in the debate. The Minister for Health noted claims by Scientology for religious status, which he felt were false and based on sordid reasons, presumably to gain commercial advantage.[41] However, he did not feel that any organisation should be banned because 'it is a false religion', saying that 'a religion may be true to its adherents; it may be false to its enemies. This does not alter the fact that to those who do believe in it, it is in fact a true religion'. His was that 'if a person believes in reincarnation, the retention of the Barracks Arch, or in not having a pool in King's Park, or anything else, he is entitled to his individual beliefs'.[42]

However, there were limits to the 'history of tolerance which British speaking peoples have shown to all sorts of beliefs' (and action had been taken in the UK 'to restrict the activities of L. Ron Hubbard and his organisation'). Pope Paul VI, who in 1965 had promulgated a declaration on 'Christian education and religious freedom', was cited with approval. The declaration stated that 'in spreading religious faith and in introducing religious practices everyone ought to refrain from any manner of action which might seem to carry a hint of coercion or of a kind of persuasion that would be dishonourable or

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[40] Ibid. 1 November. 2663. (Mr. Ross Hutchinson).

[41] The Minister said, 'personally, I do not believe that scientology was thought of as a religion, or is, in fact, a religion', a view also expressed in the *Anderson Report*. However, that was not 'sufficient reason to ban scientology', although it might 'add weight to our desire to control the cult', WA Legislative Council, *Hansard 1968,* 3 October. 1451.

[42] It is interesting that he placed religious beliefs on the same level as all other beliefs.

unworthy, especially when dealing with poor or uneducated people. Such a manner of action would have to be considered an abuse of one's right and a violation of the right of others'.[43] The Minister felt that Scientology had commenced 'to enforce a set of rules which cut across the liberties of other people'. Under those circumstances the Parliament could and should act.[44]

The allegedly false nature of Scientology religious claims was a common refrain among Government Members. In the Legislative Assembly, Mr. Manning felt that Scientology was not a religion because it did not have a centre of worship and because members were 'free to take part in any religion they wished'. Scientology was a business, not a church, and 'the organisation only terms itself a church or religion as a matter of convenience to suit itself'.[45] To the interjection that Scientology performed marriages in the United States, he replied; 'it does not make the organisation a church'. In a later interjection, his colleague Mr. Court noted in support; 'you cannot call them a church and a commercial concern at the same time'.[46] Their colleague in the Legislative Council, the Hon C. R. Abbey, was particularly succinct in his view, which was that 'nobody in his right mind would agree that scientology could be classed as a religion'.[47]

Nevertheless, while speaking in support of the Bill, Government Member Mr. Cash raised the possibility of a contrary interpretation of the religious question arising in a court of law.[48] He observed that 'a lot of these people seemed to be sincere in their beliefs'.[49] Noting that there was a difference of opinion on both sides of Parliament, as well as in the community, as to whether Scientology might be described as a religion, he made the interesting observation; 'if it is not a religion the discussion is confined to

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[43] WA Legislative Council, *Hansard 1968,* 3 October. 1451.
[44] Ibid. 3 October. 1450.
[45] WA Legislative Assembly, *Hansard 1968,* 23 October. 2071.
[46] Ibid. 23 October. 2075.
[47] WA Legislative Council, *Hansard 1968,* 9 October. 1576.
[48] 'The final fate of this legislation could well rest on judicial interpretation some time in the future', WA Legislative Assembly, *Hansard 1968,* 1 November. 2628.
[49] Ibid. 1 November. 2624.

individual rights generally. If it is a religion, is there any special protection of religious rights over community rights?'[50]

Mr. Cash noted that there had been several High Court opinions of the matter. He quoted from Chief Justice Latham in the *Jehovah's Witnesses* case, where he said, in discussing s. 116 of the Australian Constitution; 'it is not an exaggeration to say that each person chooses the content of his own religion. It is not for a court, upon some a priori basis, to disqualify certain beliefs as incapable of being religious in character'. From this he deduced that 'these opinions of the Chief Justice seem to encourage the scientology cult easily to regard itself as a religion'.

On the other hand, in the same case, Mr. Justice Starke had pronounced that; 'the constitutional provision (s. 116) does not protect unsocial actions or actions subversive of the community itself ... the liberty and freedom of religion guaranteed and protected by the Constitution is subject to limitations which it is the function and duty of the courts of law to expound'. Mr. Justice McTiernan had observed that s. 116 did not 'create an absolute guarantee of the free exercise of any religion'.[51]

Furthermore, the freedom of religion guaranteed by the European Convention on Human Rights 1950, which was taken from the 1948 Universal Declaration, contained 'far reaching restrictions in the interests of what is necessary in a democratic society for the protection of public safety and order, health or morals, or the rights of others'. The critical question was whether 'the legislation is reasonably necessary for the protection of the community?'[52] On this point he was adamant; 'the Government sincerely believed from the evidence that was placed before it that action should be taken, and the question of whether it was right or wrong, constitutionally or not, could well be decided elsewhere'.[53]

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[50] Ibid. 1 November. 2626.
[51] Ibid. 1 November. 2627-8.
[52] Ibid. 1 November. 2628.
[53] Ibid. 1 November. 2627

OPPOSITION RESPONSE

The Opposition opposed the legislation, contending: it is wrong in principle, ineffective and counter-productive to ban any organisation *per se*, (legislation to correct a wrong should apply generally); there was insufficient evidence and little precedent to take the action proposed; the matter should be referred to a select committee to investigate further; the Bill was likely to infringe religious freedoms; and the Bill infringed the rights of individuals as well as the organisation.

The Leader of the Opposition in the Legislative Council, the Hon. W. F. Willesee, noting that parliament was continually amending and strengthening statutes, for example the Justices Act, the Criminal Code and the Police Act, said, 'we can strengthen them for any occasion; but the basic principle behind every Act which is written into the Statute book is that it is for the right of the individual, and we do not ban organisations'.[54] In the Legislative Assembly, the Deputy Leader of the Opposition, Mr. Graham, describing the legislation as 'the blackest episode in the political history of Western Australia', indicated two areas where the Government might have obtained some support from the Opposition. First, the Opposition would support Government warnings to the public about the dangers to mental health of psychological techniques practised by unqualified persons, as recommended by the *Anderson Report*.[55] Second, if the Government were to show that 'comparatively diabolical things were being done', then that would 'indicate some changes were necessary to 'legislation already in force.[56]

The Hon H. C. Strickland observed that 'the Premier of New South Wales, who is a Liberal premier', had refused to introduce legislation of a similar nature to this Bill'. This was on the basis that such legislation 'might not be a success' or that banning would not be 'the right step'. He doubted the efficacy of a ban, that 'banning scientology will not cure the problem because scientologists could call themselves anything and still practise medical quackery unless the Minister takes action through the proper channels'. He

[54] WA Legislative Council, *Hansard 1968,* 3 October. 1566-67.
[55] Ibid. 23 October. 2031.
[56] Ibid. 23 October. 2070.

suggested that a select committee could investigate so as to recommend the type of action that might be taken, such as legislation covering the persecution of adherents who desired to leave the faith. He said that this was already done 'with unions in a minor way: and one cannot chase a person with a small debt forever ... there is no reason why this particular organisation should not be prescribed and legislated against'. However, 'human rights' must be considered in a democracy. There should be 'evidence of treason, or something very serious in connection with the affairs of state against an organisation before we can ban it completely'. Indeed, banning would 'offend a large number of people who sincerely and faithfully believe that scientology is a system of teaching which they prefer to the teachings of other sects'.[57]

Mr. Fletcher agreed that Scientology had used religion 'as a convenient cloak to try to join with other religions in order to receive the protection which such a belief might afford' and that it was 'legally denied the right of marriage ceremonies'. Nevertheless, 'if they enjoy being cranks, they have every right to be cranks. They should have no less right than anybody else'. He recalled the wartime furore over attempts to curb the activities of the Jehovah Witnesses and noted that the thinking of the Australian community was not to interfere with the rights of the individual.[58] He said it was effrontery to bring in a ban on scientology while Britain had not banned fascists, nor indeed had Australia, and 'Nazis still exist in America, as does the Ku Klux Klan'.

He suggested, with some reservation, that if laws were not adequate, then compliance legislation should be enacted similar to State and Federal arbitration laws. There penalties could be imposed, as 'on the trade union movement where a cheque book can be taken off a trade union and a bank account frozen, and a trade unionist can be liable, as can a union official. The union office can be closed down'. He submitted that any attempt to ban the organisation (as was attempted with the Commonwealth's *Communist Party Dissolution Bill*) would merely drive it underground while he would rather see it out in the open, noting that the Communist Party had an office in Perth. He also submitted that

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[57] Ibid. 9 October. 1569-71.
[58] WA Legislative Assembly, *Hansard 1968,* 1 November. 2607.

the Bill before the house 'will make martyrs of the Scientologists'. In a prescient observation, he suggested that following the High Court decision to uphold the right of the Communist Party to exist, 'then it is conceivable that the High Court of Australia would also uphold the rights of the Scientologists to exist on this continent. In fact, a considerable surprise might be pending'.[59]

Mr. Jamieson argued for a minimal, watch and see approach. He suggested that 'we should watch this organisation and make sure that it does not transgress the laws of the land ... if we leave it at that we will not get into any trouble. If one organisation is banned then sure enough another one will need to be banned'.[60] For his part Mr. Bertram pulled no punches. He described the Bill as involving 'the extermination of thought, opinion and belief',[61] using 'a sledgehammer where a very nominal and indifferent instrument would suffice to deal with such mischief as may be shown to exist'.[62] He cited the warning made by prominent conservative, Mr. St. John QC in NSW, that the Governments should be wary of banning movements like Scientology as this would set a dangerous precedent 'if we banned the ideas of religions of people who have not been convicted of any offence under our laws'.[63]

Mr. Lapham, on the disputed question whether the Bill aimed to ban Scientology, pointed out that the marginal note to clause 3 (1) said 'Practice of scientology prohibited'. He also quoted from an article in *The West Australian*, which noted that 'Britain has not proscribed scientology but has merely taken steps to curb its growth. [64] NSW has decided against a ban'.[65] He said, 'we can control the organisation in any way we wish without banning it, which 'is the most harsh of all the remedies available to us'. While not

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[59] Ibid. 1 November. 2609-10.
[60] Ibid. 1 November. 2624.
[61] Ibid. 1 November. 2635 - 37.
[62] Ibid. 1 November. 2638.
[63] Ibid. 1 November. 2637.
[64] The previous speaker for the Government, Mr. I. W. Manning, had quoted from a statement by the British Minister for Health setting out the steps taken to curb scientology which included a ban on student visas and work permits for foreign and other commonwealth nationals who wished to study or work at scientology establishments in the UK, concluding with ' "we shall continue to keep a close watch on the situation and are ready to consider other measures, should they prove necessary"', Ibid. 1 November. 2647.
[65] Ibid. 1 November. 2649.

embracing the *Anderson Report*, he suggested that the Parliament had already made the public aware by the very debate it was having. If the Government proposed to adopt the recommendation for registration of psychologists, then 'there would not be one dissentient voice in this House'.[66]

Mr. Willessee was concerned about the 'cruel attitude' Scientology displayed to those who wished to leave it. However, he concluded that no victimisation had been proved before a court of law, nor had it been established that any very palpable wrong' had been occasioned to any individual.[67] Mr. Graham rebuked the Government for not producing any substantial evidence peculiar to Western Australia to warrant the legislation. He criticized the Anderson Board of Inquiry for being a one-man show[68] and using extreme language.[69] He also questioned the validity of the Government's reliance on the report, disputing the Government's interpretation of Anderson's recommendations.[70] Indeed, he alleged that the Government

> relies on flimsy pretext. It has failed to produce evidence, because it does not have to do it. It has the numbers. The Government is going on unsubstantiated documents and telephonic hearsay. On these rotten foundations the Government is proceeding with the most serious, reactionary step of the century to follow in the footsteps of Nazi Germany'.[71]

He noted that in response to his question, asking 'about anything at all which any person attached to scientology had done in breach of a law', the Minister had only been able to produce one charge. He noted 'that was nine years ago' and it was not 'the dirty offences about which we have heard so much'. Furthermore, the individual involved had been

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[66] Ibid. 1 November. 2651.
[67] WA Legislative Council, *Hansard 1968,* 9 October. 1566.
[68] 'It was a one-man show conducted by a single individual. Incidentally, strong statements have been made in the mother country in connection with this manner of trial by a single individual under these circumstances ... never in the history of Australia has there been a Royal Commission which has brought down a softer and more gentle report with less effectual recommendations than the board of inquiry into scientology'
[69] 'As a matter of fact, the verbiage employed by this gentleman (Anderson), is so extreme that one would expect if there was anything like truth in his assertions the Freemantle gaol would be filled several times over', WA Legislative Assembly, *Hansard 1968,* 1 November. 2660.
[70] Ibid. 23 October. 2031.
[71] Ibid. 23 October. 2062.

'expelled or excommunicated from the scientology organisation before the case went to court'.[72] Referring to his other question, asking the Minister for Lands how many complaints he had received regarding Scientology, the answer in his opinion was ' "a lemon"; the Minister not indicating whether there were two or 10 complaints'. Even though Mr. Graham had asked for details of any complaints omitting the names, the Minister in his view had inadequately responded with the statement; 'details of these complaints cannot be provided because accurate records were not kept at the time, but the general tenor of these complaints related to what can only be described as persecution'.[73]

While 'not espousing the cause of scientology',[74] while not being 'an apologist or advocate for scientology', Mr. Graham believed that Scientology had a right to be heard and he was therefore 'presenting its case'.[75] (Later he referred to Scientology as a 'cult' and said, 'I am not called to embrace this organisation and its activities, or even to apologise for them'.)[76] He noted Scientology claims that there were 6,000 active members in Western Australia and produced a petition and many sworn statements from Scientologists attesting to the benefits of membership of the organisation. From this he concluded; 'on the evidence supplied, the scientology members are decent, responsible citizens'.[77] Weighing the numbers of evidenced supporters[78] with detractors, Mr. Graham said; 'on the basis of tittle-tattle and at the utmost of six complaints - I think there were only three or four – this Government has introduced the Bill before us'.[79]

His colleague Mr. Jamieson, commenting on the Government's numbers, said; 'if there are 13 people out of 11,000 in mental institutions because they were associated with scientology, there may also be another 13 not in institutions because they have associated with scientology'. This added further justification to his view that the Government of the

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[72] Ibid. 213 October. 2037.
[73] Ibid. 23 October. 2036.
[74] Ibid. 23 October. 2042.
[75] Ibid. 23 October. 2058.
[76] Ibid. 1 November. 2658-9.
[77] Ibid. 23 October. 2059.
[78] He claimed elsewhere by interjection that he had 'about 100' statements supporting Scientology, Ibid. 1 November. 2654.
[79] Ibid. 23 October. 2057.

day should maintain a 'watching brief' only.[80] Mr. Bertram castigated the government for 'putting the stigma of criminality upon 6,000 people', which he noted was a guess at the real number of Scientologists. Indeed, the Minister had not been able to advise the parliament how many Scientologists there were in Western Australia. Implicit in this criticism was the point that it was impossible to ascertain the extent of the harm allegedly caused within the organisation if the overall numbers of people involved was not known. Therefore the Government was basing its information on 'what happened in Victoria three or four years ago', an abdication of its responsibilities in WA. Examining the Government's response to questions, he was able to ascertain that its case boiled down to stating that 13 cases out of 11,029 admissions to mental institutions in five years, which he submitted did not constitute a serious problem in health.[81]

Infringement of religious freedom

Mr. Willessee observed that many individuals obtained 'some solace' from Scientology in a manner similar to 'accredited religions', many of which were 'quite new' but which 'satisfy the needs of some people'. However, in his view Scientology was likely to 'fizzle out'. [82] His lower house colleague, Mr. Graham, said that he 'did not intend to ... argue in connection' with the debate whether Scientology was or was not a religion. Nevertheless, he went into some detail about the principle of religious freedom to show that the Government was 'completely out of step with its own political party, and other political parties, and with Australian sentiment'.

Noting that 'this legislation seeks to interfere with the exercise of religion', he cited s. 116 of the Constitution Act of the Commonwealth of Australia. Mr. Graham also quoted extensively from the judgement of Chief Justice Sir John Latham in the 1943 wartime *Jehovah Witnesses* case, involving s. 116. The Chief Justice had said

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[80] Ibid. 1 November. 2623.
[81] Ibid. 1 November. 2368.
[82] The Minister noted that 'the Billy Graham cycle is somewhat within the same scope as this but in different terms', WA Legislative Council, *Hansard 1968,* 9 October. 1566.

it is sometimes suggested in discussions on the subject of freedom of religion that, although the civil government should not interfere with religious opinions, it nevertheless may deal as it pleases with any acts which are done in pursuance of religious belief without infringing the principle of freedom of religion. It appears to me to be difficult to maintain this distinction as relevant to the interpretation of s.116. The section refers in express terms to the *exercise* of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. It protects also acts done in pursuance of religious beliefs as part of religion.

In addition, Mr. Graham quoted from Article 18 of the United Nations Universal Declaration of Human Rights, proclaimed on 10 December 1948 and to which Australia had subscribed and was a signatory of. The declaration supported freedom of thought, conscience and religion, including the right to change religion or belief, the right to worship in community with others in public or private, and the right to manifest this right in teaching, practice, worship and observance. He also cited the platform of the Australian Labor Party supporting 'freedom of speech, education, assembly, organisation and religion', which he called 'elementary rights'. Furthermore, he quoted from a document issued by the Liberal Party supporting civil liberties, entitled '*We Believe: A Statement of Liberal Beliefs*', which advocated the prevention of 'racial, religious and political discrimination and intolerance' and freedom of worship and religion.

His argument was one of principle alone. He noted that the Government was in a 'position of absolute authority, with a majority in both House of Parliament and without a written constitution'.[83] This was implicit acknowledgement that section 116 of the Australian Constitution applied only to laws enacted by the Commonwealth Parliament and therefore only provided moral persuasion in the Australian States. Arguing that it was the role of Government to 'protect the weak from the strong', he alleged that the Government was picking on a small group. He argued that the Government 'would never attempt to do anything in connection' with 'other religious bodies that might contravene certain concepts of the Government'. Indeed, he felt that the legislation indicated 'the necessity for a Bill of rights to be passed by the Commonwealth Parliament to ensure that

[83] WA Legislative Assembly, *Hansard 1968,* 23 October. 2035.

no Government should be recreant to its trust ... and nibble away the rights of the people'.[84]

Mr. Jamieson raised the difficult in actually defining religion when he said, 'I do not know what a church is'.[85] He could see no real difference between the Scientologists and other high powered evangelistic groups, which as they start up have weird ideas but which 'seem to straighten themselves out as they go along'. In this respect he referred to the changing public perception of the Salvation Army and likened Scientology to the Jehovah Witnesses, organised by Judge Rutherford.[86] He noted that a number of other groups conducted 'peculiar' practices, including the Plymouth Brethren[87] and the Dutch Reformed Church,[88] and that 'the Moslem faith was originally almost entirely founded on coercion'. Elements of coercion were indeed practised by 'many faiths' with departing members 'consigned to Coventry'.

Mr. Jamieson noted that the practice of Yoga, which entailed standing on your head for hours, would not do much for ones mental health.[89] The Catholic confessional had similarities to the practice of auditing. He referred to the local aboriginal practice of pointing the bone by the 'mapam man', noting that 'nothing has been done about those people and yet they have been physically killing people[90] for years'.[91] He pointed out that 'right through the ages religions and sects have always caused some mental disquiet. It is true the various branches of the Christian church are now fairly liberal', but that that mixed marriages were once frowned upon and that the stigma of living in sin surely affected the health of those involved.[92] Mr. Bertram made a particularly interesting observation. He said

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[84] Ibid. 23 October. 2042.
[85] Ibid. 1 November. 2620.
[86] Ibid. 1 November. 2622.
[87] Who put 'all sorts of restrictions on their members, and refusing to let them live with one another, and refusing to let them listen to a radio. Surely such practices must affect the mental health of those people', Ibid. 1 November. 2623.
[88] Ibid. 1 November. 2624.
[89] Ibid. 1 November. 2621.
[90] He referred to the practice of pointing the bone as 'psychological killings'
[91] WA Legislative Assembly, *Hansard 1968,* 1 November. 2622.
[92] Ibid. 1 November. 2623.

the member for Mirrabooka said that it is not a religion, but a former Chief Justice of the High Court,[93] upon whose word I am happy to rely, said that it could be a religion. *It matters not what motives or mischiefs might have been in the mind of the founder. That is irrelevant. It is the state of mind of the people who engage in a philosophy that matters, and it is their religion.*[94]

Targeting the individual

Mr. Graham scorned Government assurances that the right of the individual to practise Scientology would not be interfered with, stating that the plain words of the Bill said 'a person shall not practise scientology'. He noted that the definition of the word 'practice' 'included 'the application and teaching of', which included these other things in addition to the core meaning. He challenged the Government to provide written advice that his interpretation was incorrect. On the basis of his contention that the 'practice' of Scientology meant reading its books, he ridiculed the provision requiring the surrender of Scientological records to the Commissioner of Police, likening it to the burning of books on the *Unter den Linden* after Hitler became Chancellor of Germany. He criticized the provisions allowing police under warrant from a Justice to enter and search premises for such records. Mr. Tonkin, the Leader of the Opposition, claimed that the Bill enabled a policeman, armed with a warrant, to conduct a search of premises at any time of the day or night looking for a book on Scientology, and that there were examples already where warrants had been executed on other matters without justification.[95]

In reply to the contention that the Government had borrowed the legislation from Galbally's Scientology Restriction Bill, Mr. Graham said, 'Mr. Galbally who was one of those most critical of scientology has stated unequivocally that he could not and would not support legislation for the banning of this and like organisations'.[96] The point was emphasised in a series of interjections made by Mr. Graham during the speech of Government member Mr. Graydon, who quoted extensively from Galbally. Mr. Graham

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[93] Presumably a reference to the general statement made by Latham CJ in the *Jehovah's Witnesses* case
[94] WA Legislative Assembly, *Hansard 1968,* 1 November. 2636. Emphasis added.
[95] Ibid. 1 November. 2643-44.
[96] Ibid. 23 October. 2039.

repeated asked Mr. Graydon to point out where Galbally had proposed banning the organisation, stating that Galbally's Bill had dealt with fees and not with banning. Graydon could not oblige, but contended in reply that the WA Bill did not ban anything.[97] However, the WA legislation went further than the Galbally Bill in two important respects. It banned outright, rather than just for fee or reward, the teaching of Scientology and demanded in addition the surrender of Scientological records. Both Bills banned outright the use of E-Meters in the practice of Scientology.

FAILED ENFORCEMENT OF THE ACT

To conclude the second reading debate, Mr. Hutchinson had re-iterated that 'the purpose of the Bill is to stop the practice of scientology; to stop the spreading of scientology throughout the State of Western Australia'. He admitted that some members of the Government would harbour 'doubts about the banning principle', which he saw as analogous to the British Government banning the entry of Scientologists, but was adamant that the legislation, (which he claimed was 'stronger than that introduced in Victoria'), was absolutely necessary 'to protect the people from the malign influence of this organisation'. He declared that Scientology was as bad as 'a drug pusher who through comparatively innocuous ways can induce a person into the habit of drug taking; and this organisation in a like way has taken people's money and conditioned their minds to the detriment of their health', by 'processes allied to those used in brainwashing techniques'.[98]

Following the passage of the legislation, the spokesman for Scientology in WA, Mr. Michael Graham, announced that the church would defy the ban, carry on as normal and indeed refuse to pay any fines if they were incurred. He also claimed that the organisation had unlimited funds to take the matter on appeal through every court and to the United Nations if necessary.[99] On 28 January 1969, police raided the Perth Scientology headquarters and seized material. The Hubbard Association of Scientologists

[97] Ibid. 1 November. 2616.
[98] Ibid. 1 November. 2652-3.
[99] 'Scientology set to fight', *The Age*, 4 November 1968.

International, along with fifteen individual Scientologists, were prosecuted.[100] Subsequently, and in what was reported to be the first test of the legislation, the 'Hubbard Association of Scientologists Incorporated' was convicted on 11 April, 1969 by Stipendiary Magistrate Mr. D. J. O'Dea and fined $200.00 for having practised Scientology between 13 November 1968 and 28 January 1969. The magistrate said that circumstantial evidence linked the defendant with Scientology, being the writings of L. Ron Hubbard contained in several books seized by the police. The defendant had called no evidence. Mr. Graham announced that the decision would be appealed to the Supreme Court.[101]

This decision was vindicated. On 3 December 1969, the Full Court quashed the conviction in a decision highly critical of the Crown case. The prosecution had submitted a mass of material 'merely on the basis that it was seized at the premises said to be or to have been occupied by the Hubbard Association of Scientologists'. It had therefore 'not been established that the association was carrying on business at any time within the stated period'. In addition, the Court held; 'there was no evidence to suggest that the practice of auditing and the use of E meters was being carried on in the premises'. Mr. Graham announced that he expected the remaining charges against individuals to be dropped,[102] and indeed they were. No further charges were laid.[103]

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[100] '15 Charged in WA's First Scientology Hearing', *The Sun*, 28 March 1969.
[101] 'Hubbard's men fined $200 - first test', *The Age*, 12 April 1969.
[102] 'Hubbard group's conviction quashed', *The West Australian*, 4 December 1969.
[103] In response to a Question On Notice in the W.A. Assembly from Mr. W. A. Manning, the WA Attorney-General, (Mr. T. D. Evans), revealed that of the sixteen cases which had come before the courts for breach of s. 3 of the Act, one conviction had been reversed on appeal and 'accordingly it appears that the remaining 15 cases were subsequently withdrawn', WA Legislative Assembly, *Parliamentary Debates (Hansard)*, Perth: WA Parliament 1973. 17 April. 967.

II: 5

SUPPRESSION IN SOUTH AUSTRALIA AND THE COMMONWEALTH (1968-72)

'possible indoctrination of children with its pernicious theories and illusory goals'

Moves to introduce anti-Scientology legislation had also proceeded in South Australia, where a Liberal Country League Government had been formed on 17 April 1968 under Raymond Steele Hall, following the general election on 2 March 1968.[1] At the July 1968 Conference of Federal and State Health Ministers in Darwin, concern had been expressed that Scientology was moving to other states as a consequence of the 1965 clampdown in Victoria.[2] In September 1968 it was reported that the South Australian Cabinet had been 'thoroughly investigating' concerns about Scientology 'in light of increasing complaints ... made by members of the public'.[3] There was particular apprehension that Scientology proposed introducing classes for schoolchildren in Adelaide. Therefore the State Cabinet was moved to deliberate on the need for legislation, 'to curb undesirable practices claimed to be taking place under the name of scientology'.[4]

On 3 September 1968, Chief Secretary Degaris announced the decision to introduce legislation along similar lines to Victoria. On the same day the Liberal Premier, Mr. Hall, responded to a question from a Government member, Mr. Evans. The question concerned the intentions of the Adelaide Scientology Centre to 'provide a five-day

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[1] The election had been extremely close, with the House of Assembly divided 19 ALP and 19 LCL, with one independent, Mr. Stott, who sided with the LCL. The Hall Government therefore replaced the Labor Ministry of Don Dunstan, who had been in office between 1 June 1967 and 17 April 1968, having replaced Labor Premier Francis Walsh, (Labor had governed since 10 March 1965), Colin A Hughes, *A Handbook of Australian Government and Politics 1965-1974* (Canberra: Australian National University Press, 1977) 49-50.

[2] 'Scientology Curb Planned in SA', *The Advertiser*, 4 September 1968.

[3] 'Curbing a Cult', *The Bulletin*, 14 September 1968.

[4] 'Scientology Discussed', *The Advertiser*, 3 September 1968.

children's course in Scientology during September', for the purpose of improving 'the mental capacity of children, thereby improving their capacity for life'. Mr. Evans cited the fact that the British Government 'had moved to restrict the activities of this cult' and that the British Minister for Health had noted that 'children were being indoctrinated'.[5] In response, the Premier said that Scientology was 'an extraordinary mixture of mythology and paranoid phantasy. From the evidence it is a form of brain-washing, the object of which is to inculcate automatic obedience in an individual to the organisation'. There was 'convincing evidence of the destructive nature of scientology', it was 'dangerous to mental health' and 'the possible indoctrination of children with its pernicious theories and illusory goals' was 'a definite threat to the future mental health and emotional stability of these young people'[6]

A spokesman for the Church of Scientology in South Australia reportedly threatened the Premier with legal action[7] should he express his opinions outside Parliament. Scientology also requested the establishment of a Select Committee 'before the introduction of any legislation which might seek to impose burdens on the practice of minority religious groups'.[8] The South Australian Council for Civil Liberties cautioned against the Victorian model, which imposed 'a blanket ban which removed the necessity of proving, by ordinary processes of law, that Scientologists are, in fact, guilty of misconduct'. A Council spokesman observed that 'the law should seek to eliminate ... not the belief in itself, but the various forms of misconduct which are attributed to its adherents'.[9]

The Scientology (Prohibition) Bill was introduced into the Legislative Council by the Chief Secretary on 26 September 1968.[10] Following the deliberations of a Select

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[5] SA House of Assembly, *Parliamentary Debates (Hansard),* Adelaide: South Australian Parliament 1968. 7 August. 487-8.
[6] Ibid. 3 September. 984-5.
[7] 'Cult threatens critics', *The Australian*, 10 September 1968. The article referred to a press conference where Scientology spokesman Mr. Broadbent threatened legal action against unnamed critics, who the writer supposed were Premier Hall, Chief Secretary and Minister for Health Degaris and Andrew Jones, the Federal member for Adelaide.
[8] 'Scientology Curb Planned in SA'.
[9] 'Curbing a Cult'.
[10] SA Legislative Council, *Parliamentary Debates (Hansard),* Adelaide: South Australian Parliament 1968. 26 September. 1454.

Committee on the Bill in the Legislative Council, the Bill was passed with amendments on 6 February 1969.[11]

SCIENTOLOGY (PROHIBITION) ACT 1968

The purpose of the Act[12] was 'to prohibit the teaching, practice or application of the system of study known as Scientology and for other purposes'.[13] It prohibited the teaching, practice or application of scientology for fee or reward and prohibited anyone from advertising that he was willing to teach or assist in the practice or application of Scientology or any stage, aspect or phase of Scientology. The applicable penalties were $200 for a first offence, $500 or two years imprisonment for subsequent offences.[14] The prohibition on advertising applied whether or not any fee was contemplated. The Act banned the use of a galvanometer, with academic and professional exceptions.[15] It required the surrender, or seizure of 'Scientological records', defined as any type of record taken in the course of practice, application, teaching or testing of Scientology. Such records could be destroyed after six months.[16]

As with the Western Australian legislation, which was introduced a week later, the legislation encountered resistance from the Labor Party Opposition on principle, although Labor members in general were critical of Scientology. In the Legislative Council, the Hon. A. J. Shard, Leader of the Opposition, moved in his reply to the Minister's Second Reading speech that the matter be referred to a Select Committee for examination, to which the Government agreed. A *contretemps* arose in the Select Committee concerning accusations of bias by a Scientology witness, who was then cautioned by the Legislative Council. This action led to the withdrawal of the two Opposition members of the Select Committee and ended any potential for a bipartisan approach.

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[11] SA House of Assembly, *Hansard 1968,* 6 February. 3468.
[12] South Australia Parliament, *South Australian Statutes 1969* (Adelaide: A B Jones, Government Printer, 1970) 1.
[13] Scientology (Prohibition) Act (SA) 1968 No. 1 of 1969. Assented to on 13 February 1969.
[14] Ibid. s. 3 (1) (a) (b)
[15] Ibid. s. 3 (2) (a) (b) (c). A penalty of $200 applied for the unauthorised use of a galvanometer
[16] Ibid. ss. 4, 5 (1) (2), 6, 7. A penalty of $200 applied for interference with the execution of a warrant

The Bill, as amended by recommendations of the select sommittee, was approved by the Legislative Council on 5 December 1968, after the House divided on the third reading of the Bill.[17] Six Government members and all four members of the Labor Party Opposition spoke in the second reading debate, from a House of twenty members. There was no division on the second reading because the parties had agreed to refer the Bill to the Select Committee. In the House of Assembly, the Bill was opposed on the second[18] and (unusually) third reading,[19] where it passed on the casting vote of the Speaker. Six Government members and ten Opposition members spoke in the second reading debate, from a House of thirty-nine members.

SCIENTOLOGY (PROHIBITION) BILL SELECT COMMITTEE

The Leader of the Opposition in the Legislative Council, Mr. Shard, proposed in his second reading response that the matter be referred to a Select Committee, to report generally on the need for 'measures to protect the public from any harm which may be caused by the teaching or practice of scientology'.[20] It was subsequently agreed that these words be withdrawn and the matter be referred to a Select Committee on the Bill, so that 'investigation should be largely confined to consideration of the Bill itself'. This procedure had apparently 'worked successfully on a number of occasions when contentious matters' had come before the Council.[21]

The Select Committee consisted of five members of the Legislative Council, with at first three from the Government benches and two from the Opposition.[22] However, the Committee soon encountered controversy when it reported to the House that its Chairman, Mr. Hill, had been accused of bias by a Scientology witness. The witness, Mr.

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[17] The vote was 14 Ayes and 4 Noes, SA Legislative Council, *Hansard 1968,* 5 December. 3051.
[18] The vote was 18 Ayes and 18 Noes, SA House of Assembly, *Parliamentary Debates (Hansard),* Adelaide: South Australian Parliament 1969. 5 February. 3414.
[19] The vote was again 18 Ayes and 18 Noes, Ibid. 5 February. 3426.
[20] SA Legislative Council, *Hansard 1968,* 3 October. 1651.
[21] Ibid. 8 October. 1686. (The Hon. G. F. Gilfillan).
[22] The Hons. C. M. Hill, C. D. Rowe & V. G. Springett for the Government and the Hons. S. C. Bevan & A. J. Shard for the Opposition, Ibid. 10 October. 1809.

Klaebe, alleged in evidence before the committee that he had telephoned the Chairman, (prior to the election of the committee),[23] and had been told that he had 'made up his mind on the matter. Before the Select Committee he sought reassurance that "the hearing and evidence tendered will be examined in a completely impartial manner and not subject to bias in a (sic) way, shape or form'. He followed this up with a letter to the Committee, alleging that Mr. Hill was 'unduly biassed (sic) against Scientology' and formally charging him 'with that suggestion', which he pointed out 'the Honourable Gentleman was not prepared to deny'. As the letter appeared to 'reflect upon the conduct of the Chairman', a report was made by the Select Committee to the Legislative Council in accordance with the standing orders.[24]

Mr. Klaebe was subsequently hauled before the Bar of the Legislative Council[25] and admonished by motion to refrain from a repetition of such conduct in the future. The President informed him that

in the opinion of the House the writing and sending of the letter was highly improper conduct and the House, without proceeding to the question whether that conduct constitutes a contempt ... issues a warning to you to refrain from a repetition of such conduct in the future, which could be attended with most serious consequences. To deliberately attribute to the chairman of a Select Committee a lack of impartiality is a contempt of the Legislative Council, which, on being duly established, can be severely punished. Honourable members ... when sitting as members of a Select Committee ... are, whatever they may have said before, under a strict duty to be impartial, and they invariably discharge their duties'.

However, Mr. Klaebe's position was not without support. The four Labor members of the Legislative Council opposed the censure motion[26] and all spoke in the debate. The Hon. A. J. Shard expressed concern that the motion might prejudice future evidence before Select Committees because of the apprehension of witnesses of being censored.

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[23] Ibid. 12 November. 2342. (The Hon. S. C. Bevan).
[24] Special Report of the Select Committee on the Scientology (Prohibition) Bill 1968, Ibid. 5 November. 2160.
[25] It was the first time this had occurred in 101 years, 'Called To Bar Of Council', *The Advertiser*, 7 November 1968.
[26] The result of the division on the motion was 14 Ayes and 4 Noes, SA Legislative Council, *Hansard 1968,* 12 November. 2346.

He also felt that Mr. Klaebe had 'some justification, however slight it may be'. The Hon. S. C. Bevan felt it was reasonable for Mr. Klaebe to 'assume that the chairman of the committee could be biased' and therefore the motion was not justified.[27]

The Klaebe incident led to a request by the two Labor members of the Committee to be discharged in protest. Mr. Shard felt that the censure motion had 'interfered with the civil rights of an individual who had given evidence before the committee. The person was given no opportunity to argue his case'.[28] (He later said that seeing Mr. Klaebe at the Council bar was 'frightening and sickening' and he had taken his stand in order to 'highlight the procedure'.[29]) Mr. Bevan asked to be relieved from the committee 'on the same grounds'.[30] Their request was agreed to and they were replaced by two Government members.[31]

The removal by request of the Labor members was unfortunate, as it deprived the Select Committee of possibly valuable Opposition input and ended any chance, (albeit remote), of a consensus Bill emerging or of alternatives potentially advanced by Labor being considered. It was perhaps also unfortunate that the deliberations of the Select Committee were somewhat confined to an examination of the Bill in question, as greater consideration of alternative approaches might have gained bipartisan support, whatever the membership of the committee. At that stage there was also the possibility that some Labor members might support Government measures, as the issue was being treated by the Labor parliamentary caucus as a free conscience vote.[32]

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[27] Ibid. 12 November. 2342.
[28] He had consulted with his colleagues in the Parliamentary Labor Party and had their unanimous approval in seeking to be discharged.
[29] SA Legislative Council, *Hansard 1968,* 14 November. 2489.
[30] Ibid. 13 November. 2400.
[31] The Hons. L. R. Hart & R. A. Geddes, Ibid. 14 November. 2490.
[32] The Hon. A. J. Shard had said in debate; 'I have not received instructions from our Party to oppose the measure; we can vote on it as we desire as it is a social measure', Ibid. 4 December. 2982.

The final report of the Select Committee[33] was tabled on 3 December 1968[34] and the second reading debate on the Scientology (Prohibition) Bill proceeded. Several prospective witnesses declined to appear because under the rules their evidence would be recorded and made available for public inspection. As a consequence they 'feared repercussions from scientologists and others'. Attention was drawn to 'changes made by scientologists in their policy of "disconnection" during the period of the Committee's investigation and also to an "International Amnesty" granted to scientologists from 1st November published in Issue No. 42 of *The Auditor'*.[35] Referring to the Klaebe incident, the Committee noted that although pressures were 'laid upon the Committee, it carried out its inquiries fully cognizant of its clear duty to the Legislative Council to present its findings without fear or favour'. It was found that

Scientology is being practised in South Australia with some very undesirable results. These include, that scientology has been, and could continue to be, a serious threat to mental health. Scientology has been harmful to family life in this State and has caused financial hardship to some citizens. People who have severed their connection with scientology have been subjected to unjust and unreasonable pressures by scientologists.

The Committee recommended that the definition of 'scientological record' be tightened to remove any apprehension that mere books on the subject would be caught, and [36] that the use of galvanometers should be generally banned with some exceptions. These proposals were accepted by the Government and were incorporated into the Bill under consideration. Although not strictly encompassed in its brief, the Select Committee also recommended that consideration be given to the registration of trained professional psychologists.[37]

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[33] South Australia Parliament, *Proceedings of the Parliament of South Australia 1968-69 (Blue Book)* (Adelaide: South Australia Parliament, A.B. James, Government Printer, 1969) P.P. 96.
[34] SA Legislative Council, *Hansard 1968,* 3 December. 2882.
[35] A Scientology periodic publication.
[36] The Select Committee noted, 'individuals within our society should not be denied the right to read general literature concerning scientology and should be permitted to own and hold such literature if they so desire without the fear that such literature may be confiscated by the State'
[37] Select Committee of the Legislative Council on Scientology (Prohibition) Bill, *South Australia Report of the Select Committee of the Legislative Council on Scientology (Prohibition) Bill, 1968,* Adelaide: South Australia Parliament 1968. 3.

GOVERNMENT POSITION ON THE BILL

The rationale underpinning the Scientology (Prohibition) Bill was enunciated by the Minister of Health, Mr. DeGaris, in his second reading speech to the Legislative Council.[38] He alleged that Scientology 'has inflicted and is capable of inflicting untold distress and harm to the mental health and social fabric of the community'. Following the enactment of the *Psychological Practices Act* (1965) 'a number of scientology executives' had 'since left Victoria and taken up residence in this State'. This indicated to the Government the 'effectiveness' of the Victorian legislation, upon which the South Australian Bill was modelled.[39]

While in Victoria a two-pronged approach had been taken, involving both registration of psychologists and the restriction of Scientology, the Government had heeded the advice of the South Australian Branch of the Australian Psychological Society against legislation 'controlling psychologists being linked with the suppression of scientology'.[40] Government member Mr. Wardle added an interesting perspective when he noted that 'this legislation will be justified until scientology arrives at a point where its practices are such that it can be allowed freedom in the community', at which point the legislation could be repealed.[41]

The harm caused by Scientology allegedly consisted of: medical and commercial fraud, (such as making unfounded claims to cure ills and advertising promises of illusory goals); dangerous hypnotic techniques used by untrained people; [42] attacks on critics; and preying on the vulnerable. The Government also commented on: evidence of the alleged harm; scepticism of Scientology religious claims; and the apparent sincerity of many adherents.

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[38] The second reading speech of the Premier in the House of Assembly was in virtually identical terms
[39] 'This Bill is based on those provisions of the Victorian Act which relate to the suppression of scientology', SA Legislative Council, *Hansard 1968,* 1 October. 1492.
[40] Ibid.
[41] SA House of Assembly, *Hansard 1968,* 11 December. 3255.
[42] SA Legislative Council, *Hansard 1968,* 1 October. 1491.

Mr. DeGaris alleged that a person 'who sees scientology for what it is and desires to break away from it and even to criticize its tenets publicly', was labelled a 'suppressive person' in the 'jargon of the cult'. This meant he could 'expect considerable vilification from scientologists together with a co-ordinated campaign of poison pen letters and telephone calls'. Furthermore, he 'must live in fear of something far worse'. Here the Minister cited from Hubbard's official journal *Communication,*[43] where Hubbard had said; 'we do not find critics of scientology who do not have criminal pasts ... if you oppose scientology we will probably look you up – and will find and expose your crimes'.[44] This had 'frightening implications for a person who has laid bare his innermost secrets and thoughts in auditing sessions ... who knows that his revelations have been recorded ... the knowledge that the scientology centre possesses a complete record of a person's most intimate revelations places that person in a totally frightening degree of moral subjection', a position 'no responsible Government ... could be expected to tolerate'.[45]

His lower House colleague, Mr. Giles, referred to the document issued by Scientology entitled 'Code of Reform',[46] in which the organisation attempted to respond to critics of some of its more controversial policies. The document purported to cancel the policy of 'disconnection' from families, 'security checking as a form of confession', the writing down of 'confessional material' and 'declaring people fair game'. Mr. Giles felt that the document, which had been produced after the 'Bill had been introduced in the Victorian Parliament to ban scientology in that state', was an expediency designed to allow the organisation to operate in South Australia. He submitted that 'these are to be altered simply to make the organisation legal here or in any other State. An organisation that so changes its code is not built on a solid foundation. We do not change our basic beliefs in Christianity simply because someone raises an objection'.[47]

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[43] Vol. 9, No. 3
[44] SA Legislative Council, *Hansard 1968,* 1 October. 1491.
[45] Ibid. 1 October. 1492.
[46] 29 November 1968
[47] SA House of Assembly, *Hansard 1968,* 11 December. 3242.

The 'distress and harm' occasioned by Scientology was evidenced by the Victorian *Anderson Report*, which had 'rapidly achieved a wide measure of acceptance as a definitive and impartial study of the subject and its effects on the community'. Hubbard, who according to 'expert psychiatric evidence' noted by Anderson, was of 'unsound mind',[48] appeared to 'exercise absolute and total control over scientological activities throughout the world'. This of course included South Australia. The evidence upon which the Government had based its concern that senior Scientology executives had fled Victoria to set up an Australian headquarters in WA was not revealed. It might have been gleaned from former Scientologists turned informant, from media reports or from information passed around the table at the Health Minister's conferences in 1967-68.

The Scientology suppressive measures had been adopted from the Victorian legislation, which dealt also with the registration of psychologists. This was done after the Government had received advice from the South Australian Branch of the Australian Psychological Society. The Society had expressed some opposition to 'legislation controlling psychologists being linked with the suppression of scientology'. The Government agreed that 'legislation regulating a legitimate profession should be introduced only after the fullest discussion with the members of the profession concerned'.[49] Following the investigations of the Scientology (Prohibition) Bill Select Committee the Government could point to further evidence. The Hon. C. D. Rowe, a member of the Committee, said that 'members listened to everyone who wanted to tender evidence' and 'made extensive inspections of documents submitted to us'.[50]

Rejection of religious claims

In his second reading speech, Health Minister DeGaris characterised Scientology as a 'so-called' science. He did not directly confront the issue of Scientology religious claims. However, he did concede the apparent sincerity of many Scientology adherents, saying; 'in introducing this measure the Government does not impeach the good faith of

[48] SA Legislative Council, *Hansard 1968,* 1 October. 1490.
[49] Ibid. 1 October. 1492. (DeGaris)
[50] Ibid. 4 December. 2977.

numbers of adherents of scientology, but it does suggest that their beliefs are misguided'.[51] This point is interesting because it became a significant issue in the landmark decision of the High Court in *Church of the New Faith (1983)*.

Other Government members did comment with some scepticism on Scientology claims for religious status. The Minister for Agriculture, the Hon. C. R. Story, noted that 'this matter has suddenly become a religion ... I have found no mention of scientology being a religion until the last nine or 10 months ... in my reading of what is happening in other countries, I have found practically nothing about scientology being a religion'. To the interjection by Mr. Shard that Scientology was a religion in California, he replied, 'but that is quite a different situation there'.[52] His colleague, the Hon. V. G. Springett, alleged that 'when things began to get a little hotter it (Scientology) began to take the name of a church'.[53] Mr. Story also commented unfavourably on the Scientology practice of fair game, noting; 'as a practising Anglican, I can withdraw at any time I want to. I can go to the Salvation Army and nobody will hurt me. I am not sure that the honourable member is on firm ground when he wants to get out of scientology'.[54]

OPPOSITION RESPONSE

The response of the SA Labor Opposition closely paralleled the position taken by Labor in Western Australia. According to the Labor Leader in the Legislative Council, the Bill constituted 'the grossest invasion of the normal private rights of citizens' he had 'seen in a measure'.[55] His leader in the House of Assembly, the Hon. D. A. Dunstan, described the Bill (as amended by the recommendations of the Select Committee) as 'the grossest infringement of private liberties and a complete negation of the rule of law'.[56]

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[51] Ibid. 1 October. 1492.
[52] Ibid. 4 December. 2976.
[53] Ibid. 4 December. 2977.
[54] Ibid. 4 December. 2976.
[55] Ibid. 3 October. 1650. (The Hon. A. J. Shard).
[56] SA House of Assembly, *Hansard 1968,* 11 December. 3223.

The Opposition response was that: banning was wrong in principle, ineffective and counter-productive, while legislation to deal with harm should apply generally; there was insufficient evidence to justify the legislation and the matter should be referred to a Select Committee to investigate; and the Bill was an infringement of freedom of religion and association. However, in taking this stance the Opposition was at pains to point out that it did not approve of Scientology and when in Government had taken steps to curtail its growth.

The Hon. D. A. Dunstan summed up the Opposition's in principle argument when he said

> surely people in this community are to be allowed to practise what they believe to be right, even if we disagree with it. If they are in the minority, they still have the right to their own views and the practice of them, so long as those views do not interfere with others in society. Where they interfere, the interference should be proscribed by a general rule of law relating specifically to the harm involved and not to a system belief or its practice.[57]

Members of the Opposition suggested a number of areas in which generic legislation might apply to correct perceived harm. Mr. Shard noted with approval the recommendation of the Select Committee of the Legislative Council that consideration be given to the registration of trained professional psychologists and submitted 'we could make laws regarding the E-meters and other things', without infringing on the rights of Scientologists.[58] The Hon. A. F. Kneebone, suggested that 'an Act to provide that anyone who harassed anyone else could be brought to order and prosecuted. That would apply to any type of sect or religion'.[59]

Mr. Dunstan stated that he believed the Victorian legislation to be wrong.[60] He noted that when he had been Premier he considered the proper course to be, 'to register all psychologists in South Australia in due course and to prohibit psychological practices *for fee or reward*, except when carried out by trained and registered psychologists', without

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[57] SA House of Assembly, *Hansard 1968,* 11 December. 3223.
[58] SA Legislative Council, *Hansard 1968,* 4 December. 2974.
[59] Ibid. 4 December. 2978.
[60] SA House of Assembly, *Hansard 1968,* 11 December. 3224.

the matter being 'tied up with the suppression of scientology'.[61] In this way, if any evil was to occur 'through people with mental disabilities being involved in unauthorized psychological practices or psychological practices by the untrained for fee or reward, such as it is suggested are conducted by the scientologists, the matter would be able to be dealt with'. He also considered it 'vital to place on our Statute Book a law prohibiting unreasonable personal harassment', applying 'to a whole series of practices and to all persons, not only to Scientologists', being 'something like our peace complaints law'. He gave examples of such behaviour, which included; 'constantly following people about and picketing a person's property'. [62] He noted that poison pen letters and offensive telephone calls were already unlawful under the Post and Telegraph Act.[63]

Mr. Hudson submitted that 'the undesirable activities associated with scientology could be effectively controlled in other ways'. He noted with approval that the *Anderson Report* had suggested a program of public awareness, so that 'the public should be repeatedly warned of the dangers to mental health of psychological techniques practised by unqualified persons'. In addition, he noted Anderson's recommendation for the registration of psychologists and felt that the problem lay in scientologists and others engaging in psychological treatment for fee or reward. He felt that the 'rackets associated with scientology' for monetary reward would 'immediately disappear if registration of psychology was introduced'.[64] The overall solution was to register psychologists and at the same time provide an individual civil remedy against personal harassment. That would be the correct way to handle 'the practices that are objectionable and carried out by scientologists'.[65]

With respect to the efficacy of the proposed governmental course of action, Mr. Loveday was of the view that 'banning an organisation was counter-productive because it 'excites curiosity'.[66] Mr. Virgo noted that 'the United Kingdom Government has now decided not

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[61] Ibid. 11 December. 3225. Emphasis added.
[62] Ibid. 11 December. 3226.
[63] Ibid. 11 December. 3225.
[64] Ibid. 11 December. 3228.
[65] Ibid. 11 December. 3233.
[66] Ibid. 11 December. 3240.

to ban scientology ... the New Zealand Select Committee has adjourned *sine die* and ... the New South Wales Government has declined to ban its practice, while the Tasmanian and Queensland Governments right from the outset have declined to ban scientology'.[67] He felt that the proposed legislation would be ineffective because moves were not being made at a Commonwealth[68] level and people could go over the border to practise Scientology. In addition, he said that he preferred organisations, such as the Communist Party, to be out in the open where they can be watched and steps taken to protect the people if they 'stepped out of line'.[69]

Opposition demands for the establishment of a Select Committee in the Legislative Council were predicated on the view that there was so far insufficient evidence to justify the legislation. Mr. Shard said; 'I do not believe that the Council should proceed with a measure so sweeping and so threatening to the ordinary private rights of citizens unless a grave public mischief justifying this departure from normal standards is established clearly upon credible evidence related to what happens here in South Australia'. He noted that the NSW Government was 'reluctant to act precipitately in imposing restrictions that might encroach on a wide field of freedom of the individual'.[70] Despite the subsequent appointment and report of the Legislative Council's Scientology (Prohibition) Bill Select Committee, the position of the Opposition did not change.

In his former capacity of Attorney-General, Mr. Dunstan had received 'a few complaints ... about scientology in South Australia'. These were investigated following 'the urgings of the Victorian Chief Secretary'. However, he had found that the people involved in Scientology in SA[71] 'could not in any way be said to be mentally unstable or unsatisfactory citizens' and had claimed to have 'derived personal benefit from it'. Having re-examined the file of the Chief Secretary before the present Bill was

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[67] Ibid. 11 December. 3245.
[68] 'If Government members feel so strongly that scientology should be banned, why do they not have their Commonwealth colleagues convince Gorton (the current Liberal Prime Minister) that it should be banned'
[69] SA House of Assembly, *Hansard 1968,* 11 December. 3246.
[70] SA Legislative Council, *Hansard 1968,* 3 October. 1651.
[71] As opposed to Victoria where 'one of the people involved' in the Anderson inquiry had taken down the 'South Australian Labor movement for a considerable sum'

introduced, he could find 'no more cogent evidence' than when he was AG. With respect to the Scientology (Prohibition) Bill Select Committee, Mr. Dunstan said; 'I do not consider there is anything adequately established on the evidence there to justify some of the findings of the committee or to justify the statements in the second reading explanation which are not taken from the evidence before the committee but which are nearly all taken from the Anderson report'.[72] Mr. Hudson claimed that 'members of the committee were out to reach specific conclusions and to provide justification for its conclusions: they were not concerned to find an alternative way to achieve the desired result without going in for a kind of prohibition'.[73] Mr. Virgo felt that 'the Select Committee was a cooked up affair', with the Attorney-General being dictated to by 'a group of people in the Legislative Council who, in turn, are dictated to by the Adelaide Club'.[74] Mr. Hurst said

> I have not received even a single letter requesting me to support this measure. On the contrary, I have received letters from individuals and constituents of mine informing me that they have benefited by scientological teaching ... Not a single Government member has produced any evidence of any public demand that this Bill be introduced: all the Government has relied on is what happened in Victoria.[75]

He was also critical of the alleged "fear of repercussions" referred to in the Select Committee's report, noting that if 'members opposite had had one meagre piece of evidence, that evidence would have been trotted out; but they do not have a case and certainly have not made one out'.[76]

Infringement of religious freedom

Mr. Shard noted that 'the same sort of complaints as those that are made with regard to scientology have been far more frequently made to Government concerning the

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[72] SA House of Assembly, *Hansard 1968,* 11 December. 3224.
[73] Ibid. 11 December. 3228.
[74] Ibid. 11 December. 3244.
[75] Ibid. 11 December. 3248.
[76] Ibid. 11 December. 3249.

Watchtower and Bible Society and the Exclusive Order of Plymouth Brethren'.[77] This theme was continued by his Leader in the House of Assembly, Mr. Dunstan, who submitted that concerns could also be expressed about the writing of Judge Rutherford, 'the originator of the Watch Tower and Bible Society. He said

> if we are to take Joseph Smith's writings, he also considered that he had had some transcendental experiences, discovered tablets of the same kind as those discovered by Moses, and established his own dynasty and a religion which brought great pressure to bear on people who subsequently sought to dissociate themselves from it. Are we going to ban the Mormons or the Jehovah's Witnesses, the Exclusive Order of Plymouth Brethren, or the Christadelphians ?[78]

The former Premier and Attorney-General also noted that Scientology auditing sessions contained some parallels with confessionals in the Roman Catholic church.[79]

Other members of the Labor Party Opposition grappled with the issue of religion. The Hon. A. F. Kneebone said 'I am not convinced that scientology is a religion', noting that a number of aggressive cults had recently been springing up 'masquerading as religions'. These 'so-called religions' seemed to be doing all they could to 'cause divisions, even in the home'. This was in contrast to efforts by mainstream Christian religions to achieve unity. However, the Government was guilty of 'muddled thinking' in singling out one group when there were possibly 'other ways of combating the disturbing effects and actions of some of these groups'. It was not 'logical to assume that the Government may in the future take similar action against some other group'.[80]

However, Mr. Hudson was concerned that the Government would proceed to ban other groups who adopt a 'particular spiritual philosophy or religious approach'. Sects that might well qualify included the Christian Scientists, whose 'parents may prevent their children from being treated by a doctor' or the Jehovah's Witnesses, 'who refuse a blood

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[77] SA Legislative Council, *Hansard 1968,* 3 October. 1651.
[78] SA House of Assembly, *Hansard 1968,* 11 December. 3223.
[79] Although the point might have been made that Roman Catholic priests were not authorised to record or communicate to others the confessions of penitents, Ibid. 11 December. 3225.
[80] SA Legislative Council, *Hansard 1968,* 9 October. 1748.

transfusion for their children'.[81] He pointed out that 'freedom of religion is one of the basic four freedoms. It is part of our basic civil liberties and should not be tampered with in this way, particularly when there are alternative ways of handling the problem'.[82] He quoted at some length from Latham C. J. in the *Jehovah's Witnesses* case, who said 'there are those who regard religion as consisting principally in a system of beliefs or statement of doctrine. So viewed religion may be either true or false. Others are more inclined to regard religion as prescribing a code of conduct. So viewed a religion may be good or bad'. His own view was that

> where the element of faith is involved in the holding of a particular belief or set of beliefs, it is not possible to argue on any rational basis with that confrontation. It is a matter supremely for the individual. Because it is not possible to develop logical arguments about whether items of faith are true, it is not possible to properly analyse what is or is not religion or what is or is not religious in nature. It is because of this element of faith in particular that religion is peculiarly an individual matter, and the right to worship is one of the fundamental civil rights of the community, not just the right to worship a God but the right of the individual to worship generally in the way he sees fit.

He argued that the only qualification to this right was where the liberties of others were impinged. Therefore the Opposition supported anti-harassment laws with universal applicability rather than a specific law 'prohibiting one religious or semi-religious sect and holding the beliefs of that sect up to public ridicule'. He also made the familiar analogy with the attempted banning of the Communist Party. Even though that was a much more serious matter, involving the totalistic demands of the Central Committee of the Communist Party that members adhere strictly to the particular world of the Central Committee, the Australian community had sensibly rejected the banning proposal.[83] It had been rejected because the community was aware that 'if Communism was banned it would lead to some of the forms of totalitarianism that were objected to in Communism itself'. Mr. Hudson expressed concern that more religious leaders[84] in the community had

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[81] SA House of Assembly, *Hansard 1968,* 11 December. 3229.
[82] Ibid. 11 December. 3230.
[83] Ibid. 11 December. 3232.
[84] It was revealed by his colleague Mr. Hughes that the Rev. K. B. Leaver (Principal of Parkin Theological College) had appeared before the Scientology (Prohibition) Bill Select Committee and had 'supported scientology and opposed the ban', Ibid. 11 December. 3255.

not come forth in support of the rights of the individual 'to believe what they want to believe as long as they do not interfere with the basic rights of others'.[85]

Opposition disapproval of Scientology

The Leader of the Opposition in the Legislative Council commenced his second reading reply with the statement that the former Labor Government in South Australia

made its opposition to and disapproval of scientology quite clear. Under our Government, the Attorney-General refused to register further businesses or companies associated with scientology. He refused to countenance the registration of a so-called church of scientology and it was made clear that no facilities would be given by a Labor Government for the spread of the cult which not only seemed patently absurd but, to people with any kind of mental instability to start with, could conceivably be potentially dangerous.[86]

Later he said; 'I am not concerned one iota with scientology but I am concerned with the civil rights of the people ... I do not believe in scientology: nor do I support it or have any sympathy for it'.[87] For his part, Mr. Dunstan, having referred to Scientology as a cult,[88] said 'I must confess that I hold no brief for the writings of Mr. Hubbard; I think they are the greatest nonsense. But the same could be said by most people of numbers of other writings'.[89] He concluded, 'however much we disagree with the writings of Hubbard or the practice of scientology as matters in which we would not be involved, we have not the right to prohibit such practices by those who gain some benefit from them'.[90]

A small hiccup

In the Committee stage of the bill, the Government was embarrassed by the revelation that the Church of the New Faith had been successfully registered by Scientologists as an

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[85] Ibid. 11 December. 3233.
[86] SA Legislative Council, *Hansard 1968,* 3 October. 1649.
[87] Ibid. 4 December. 2972.
[88] SA House of Assembly, *Hansard 1968,* 11 December. 3222.
[89] Ibid. 11 December. 3223.
[90] Ibid. 11 December. 3226.

association under the provisions of the Associations Incorporation Act. Although he had 'blocked' registration of the name 'Scientology', the Attorney stated that he had had no power to refuse incorporation of the Church of the New Faith as it was not a proscribed organisation at the relevant date, though he said 'it may well be proscribed within the next few weeks or days'. He did not explain how the term 'Scientology' could be blocked, presumably as it was formed 'for a purpose contrary to public policy', which was one of the grounds set out in s. 7 (1) of the Act, while the name 'Church of New Faith' could not be.[91]

VALENTINE'S DAY RAID

On Valentine's Day, 1969, twenty-four hours after the Scientology (Prohibition) Act had been assented to by the Governor[92], a group of eight detectives and police raided Scientology headquarters. The organizing secretary, Mr. T. B. Minchin, was searched under personal warrant and Scientology material was confiscated, including 'pamphlets, charts pinned to walls and other documents', which were loaded into a van.[93] Scientology staff claimed that 'practically every scrap of paper on all four floors was taken away as well as a tape recorder and other equipment'.[94]

The raid led to a Question Without Notice in the House of Assembly on 19 February 1969, where the questioner Mr. Corcoran stated that he did not believe it to be reasonable for 'everything in sight' to be taken during the raid. In response the Attorney-General, the Hon. Robin Millhouse, said that the documents had been taken away to be evaluated and checked. He believed that the police had acted quite properly in their actions. With respect to a television programme relating to the raid, he claimed that the protestations of the scientologists were part of a deliberate campaign. This was being conducted according to a plan of action set out in one of the documents seized during the raid, 'the

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[91] SA House of Assembly, *Hansard 1969,* 5 February. 3421.
[92] Ibid, p. 3575
[93] 'Cult Raided', *Herald,* 14 February 1969.
[94] Where it was also reported that the street connecting two thoroughfares was blocked off for the raid, 'Police raid scientology centre', *The Australian,* 15 February 1969.

gist' of which was that 'the best means of defence is offence'. The Attorney said, 'the methods suggested by Mr. Hubbard in his plan are of the most unscrupulous nature: anyone who dares to criticize Scientology should immediately himself be attacked and the filth and slander laid on thick, so no quarter is given to anyone who attacks Scientology'.[95] Despite the confiscation of documents and other items, no prosecutions followed, despite the allegation that Scientologists 'continued to practice in South Australia under the name of the Church of the New Faith'.[96]

SCIENTOLOGY RIPOSTE: 'WHATEVER HAPPENED TO ADELAIDE ?'

In 1972 Scientology produced a report [97] condemning the Scientology Prohibition Act and attacking the evidence of witnesses who had appeared before the Select Committee. The document drew parallels between the legislation and a Nazi directive signed by Reinhard Heydrich in 1941, authorizing action against listed occult groups, which included, *inter alia*, astrologers, fortune tellers, followers of Christian Science and Theosophy. The Nazi directive authorized the confiscation of material and the arrest of 'persons who have devoted themselves to secret teachings and secret sciences as their main occupation'. Those devoting themselves part-time to such activities were to be sent to concentration camps or Labour Exchanges.[98]

A main objective of the report was to prove the religious identity of Scientology and seek to invoke human rights protections of religious freedom. Presenting itself as a persecuted religious minority, Scientology cited the UN Charter (in particular s. 55 protection of 'human rights and fundamental freedoms') and complained that 'Churches of Scientology across the World have been denied these fundamental rights for which millions died'.[99]

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[95] SA House of Assembly, *Hansard 1969,* 19 February. 3702-3.
[96] 'Fresh approach in SA to scientology', 1972.
[97] Church of the New Faith (Scientology), *'Whatever Happened to Adelaide' - A Report on the Select Committee on the Scientology (Prohibition) Act to the Government and People of South Australia* (Sydney: Church of the New Faith, 1972).
[98] Ibid. 3, 56 Appendix 6.
[99] Ibid. 3.

COMMONWEALTH SUPPRESSION

Along with effectively banning legislation in three states, executive attempts were also being made to suppress Scientology at a federal level. In September 1968, fifty copies of the infamous publication entitled "Kangaroo Court" were seized by the deputy customs officer in Adelaide and forwarded to Canberra for examination.[100] In July 1969 Scientologists demonstrated outside the Australian consulate office in New York against the states legislation, and presented a petition to the Consular-General seeking Federal intervention to "stop the repression of religion in Australia." [101]

In May 1972, a prospective English migrant, Mr. Geoffrey Silver, claimed that he had been denied entry to Australia as an assisted migrant because he noted Scientology as an employer on his application form. He claimed that he had been told this 'off the record' by a migration officer and that he had also been denied other entry visas.[102] His story was confirmed in Federal parliament in November, when in answer to a Question Without Notice on the matter, the Minister for Immigration, Mr. Forbes, said that consideration of Mr. Silver's application had included his association with scientology, and that 'assisted passages were not granted to known adherents of scientology.'[103] The Australian consulate in New York had been subjected to another protest and received a letter to pass on to the Immigration Minister, demanding that Silver be allowed to enter Australia.[104]

A decade later, some interesting details of the operations of the Australian Security Intelligence Organisation (ASIO) were revealed in a High Court case. [105] The Scientologists sought a declaration that ASIO was continuing to unlawfully collect and disseminate information about them, particularly to prospective employers. This was an unwelcome surveillance and intrusion that had apparently been going on for some time.

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[100] '50 Books of Cult Seized', *The Advertiser*, 18 September 1968.
[101] Fred Knight, 'New York Ignores Protest Against "Hitler" in Australia', *The Australian*, 30 Jul 1969.
[102] 'Scientologist says migration barred', *The Sydney Morning Herald*, 25 May 1972.
[103] 'Scientology man not allowed in', *The Australian*, 1 November 1972.
[104] Jack Cannon, 'Australia 'land of intolerance", *The Herald*, 16 November 1972.
[105] *Church of Scientology v Woodward* (1983) 154 CLR 25.

Although the declaration was rejected in the first instance, on appeal it was held that judicial review was available, but that the onus of proof upon the plaintiff would be heavy, including the possibility that much of the evidence would be subject to Crown privilege. Following the death of Aickin J. before he had delivered his judgement, the Court was equally divided on the possibility of the plaintiff having any chance of success if the matter went to trial, and so the appeal was dismissed on the prevailing opinion of the Chief Justice.[106]

[106] Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy* (Australia: The Law Book Company, 1984) 222-26.

II: 6

CAUTION IN NEW SOUTH WALES AND NEW ZEALAND (1964-69)

'the NSW Government preserved a magnificent calm and did nothing whatever'

The governments of three Australian states had taken strong legislative measures against Scientology, with the Commonwealth Government taking co-operative measures. However, a different political response emerged in the most populous state of New South Wales, where the organisation was also active and the subject of some controversy and complaint. In September 1964, during the course of the Anderson inquiry in Victoria, the NSW Labor Government was asked by Country Party Opposition member Mr. W. A. Chaffey whether the Minister for Health would make a statement alerting the public to the activities of the Hubbard Association of Scientologists International. In reply, the Hon. W. F. Sheahan noted that Mr. Hubbard in England had 'enriched himself by playing upon the imagination of people and alleging that scientology would benefit them by increasing their personality'. The Minister further stated the Government's policy of maintaining vigilance and warning the public, that

> The public should be warned not to have anything to do with this body, which deals in psychiatry more than anything else. The prime reason for its existence is to fleece the public. If this organisation is not watched carefully, it might commence its operations in this State. At the moment I know of no law under which it can be prevented from doing so, but I warn the public not to subscribe to it because, generally speaking, it involves people making applications for a course in scientology for which they pay much more than is necessary; further, if they need psychiatric treatment, they can receive much better treatment at one of our psychiatric hospitals or institutions.[1]

[1] NSW Legislative Assembly, *Parliamentary Debates (Hansard)*, Sydney: NSW Parliament 1964. 23 September. 817-8.

In May 1965 the Renshaw Labor government was replaced by the Askin-Cutler Liberal Country Coalition, which remained in power until January 1975.[2] Throughout this period the Askin-Cutler Government maintained an unwillingness to take legislative action against Scientology, a policy direction it regarded as rash. This was despite being of the same political hue as the governments in three Australian states that enacted draconian legislation. In October 1965, following publication of the *Anderson Report* in Victoria, Government backbencher Mr. Healey noted that there were two Scientology establishments in Sydney and asked his government to consider taking action. The Minister for Health, Mr. Jago replied that 'there is cause for concern about the operation of this cult – or group, whatever you may describe it as ... The result of its activities are without exception dangerous and pernicious as far as the community is concerned'. He undertook to 'obtain the report of the inquiry in Victoria and take any steps necessary to prevent scientology having any impact on the community in NSW'.[3] However, no legislation resulted.

In December 1965 journalist Charles Beresford pondered upon the different approaches adopted in Victoria and NSW, which he observed 'seem to have very different ideas of medical, moral and social evils'. He pointed out that while police were raiding the scientology centre in Melbourne and confiscating files, '*the NSW Government preserved a magnificent calm and did nothing whatever*'. Beresford noted that 'government spokesmen ... talk of any proposed legislation against it (Scientology) as being equivalent to using a steam-hammer to break a walnut, or words to that effect'. This was amid claims that Scientology had booming centres at six locations and a mailing list of around 1,700 at its Surry Hills headquarters.[4]

The NSW Government continued to adopt a policy of ignoring the cult as 'comparatively harmless',[5] until Mr. Healey again raised the issue in parliament in 1968. Referring to the

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[2] The Askin government was succeeded by further Liberal-Country Party coalitions until May 1976, having been preceded by the Renshaw Labor government. NSW Parliament, *The New South Wales Parliamentary Record 1824-1988*, vol. IV (Sydney: D West Government Printer, 1988) 240-50.
[3] 'Jago Says He'll Stop the Rot', *Daily Telegraph*, 7 October 1965.
[4] Charles Beresford, 'Tolerance and apathy', *Canberra Times*, 29 December 1965. Emphasis added.
[5] 'Scientology - NSW's Second Thought', *The Bulletin*, 2 November 1968.

Victorian ban and UK action to bar Scientology students from entering the country, he asked whether the matter had been 'fully investigated in this state and whether the Government proposes any action to protect the people of New South Wales?' Mr. Jago replied that the matter had been 'under examination by the Department of Health for some years' but that it was also a responsibility of the Attorney-General. Referring to the British and Victorian situation, he gave an assurance that 'if sufficient evidence can be brought to our notice that similar damage is occurring in New South Wales, prompt action will be taken to do something about it'.[6]

Mr. Healey followed up with a further question in October 1968, referring to legislative action in South Australia and the contemplation of legislation in Western Australia. In response, the Minister noted that the matter had been 'regularly discussed at the annual meetings of State Health Ministers', but that in NSW there was 'little incidence of the more unfavourable features of scientology'. He had recently made an interim report to Cabinet and had received a deputation from 'highly qualified professional psychologists'. His view was that the Government should maintain a watching brief, and therefore stated

> Any proposal to ban any organisation involves a number of problems. In my view the Victorian decision to require registration of psychologists is possibly not the best way to deal with a matter of this nature. Another consideration is whether there may be other organisations in our community engaging in activities that could be harmful to the individual. The Government has this matter under close examination.[7]

It was subsequently reported that 'the NSW Government had decided not to ban Scientology'. A 'senior Government authority' reportedly said that the Government 'was concerned not to act precipitately in laying down restrictions which might intrude on a wide field of freedom of religious belief and personal behaviour'.[8]

However, Mr. Healey was soon to gather further ammunition. Later that month he complained, as a matter of parliamentary privilege, that a private investigator had been

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[6] NSW Legislative Assembly, *Parliamentary Debates* (*Hansard*), Sydney: NSW Parliament 1968. 14 August, 183
[7] Ibid. 2 October 1489-90
[8] 'NSW decides against ban on scientology', *Sydney Morning Herald*, 3 October 1968.

hired by Scientology to gather information on several MPs in New South Wales, including himself. He described this as 'a wicked, deliberate plot to inhibit and intimidate members of Parliament in the execution of their duties'. Healey tabled statutory declarations alleging that a Scientology official had engaged private inquiry agents to investigate a number of politicians in NSW and New Zealand, and a journalist, Anne Deveson. The brief with respect to Healey was 'to bring pressure to bear on him to stop him attacking scientology in Parliament'. The brief with respect to the NZ investigations was to gather information to 'discredit' people, (presumably critics of Scientology), 'or to have them arrested'. Healey indicated that Scientology, 'an organisation which now poses as a church', had engaged in a pattern of investigating critics, which he described as 'a kind of pernicious practice which is bordering on the criminal'. As a contrast, Jews, Catholics and Protestants had been attacked and criticized, yet 'for years churchmen and churches, sincere in their beliefs', had 'had no need to resort to this kind of threat'. He noted that the *Anderson Report* had referred to evidence showing that private inquiry agents had also been engaged by Scientology in Victoria to investigate the Catholic spokesman, Dr Rumble, the Hon J W Galbally and Dr Dickson, all critics of Scientology.[9]

On the basis that no strict illegality had yet been shown, the Speaker ruled that 'at this stage no *prima facie* case of a breach of privilege has been made out'. However, he said it was clear from the material that the Scientology employed private agent had been 'engaged in prying into the public and private lives' of 'ten or twelve' members of parliament. The purpose was to 'get information to discredit them or to have them arrested', something he felt to be 'repugnant and abhorrent to all honourable members'. The nefarious intention was to prevent members 'from freely discharging their duty in the Parliament, particularly by silencing them'.[10]

In question time that day, Mr. Healey asked, 'will the Minister give immediate consideration to setting up a full public inquiry ?' In reply, Mr. Jago advised that he had

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[9] NSW Legislative Assembly, *Hansard 1968,* 22 Oct, 1863-4.
[10] Ibid. 22 Oct, 1864-5.

referred matters raised in the privileges debate to the Attorney-General for legal advice. He also advised that he had made a preliminary report to Cabinet about Scientology and had been asked to submit a review of the situation and present a firm recommendation. Noting that 'a decision on whether an inquiry should be held involves Government policy', he promised that a submission would be made 'to the Government without delay and a decision announced so that everybody will know the situation as soon as possible'.[11] The decision announced two weeks later was reported as a 'change of policy'. The Government instructed the Director of Psychiatric Services to conduct an investigation.[12] Some months later Mr. Healey felt obliged to ask 'whether any progress is being made in consideration of setting up an inquiry into this cult in New South Wales?' Minister Jago responded that 'investigations into this cult in New South Wales are proceeding', which was apparently a reference to the instruction in October 1968 to the Director of Psychiatric Services. The Minister observed that he had received 'excessively abusive' communications from the person described as the chaplain of Scientology, but that he did not believe 'we should be provoked into any precipitate action against a group of exhibitionists'. He also noted that an inquiry had commenced in New Zealand, on a different basis to the Victorian inquiry. Officers in his department believed that inquiry would be of 'considerable importance'. This obviously fell short of the public inquiry demanded by Healey, but the Minister assured the House

> I should not like any member of this House to think that this matter is passing un-noticed, and that the Government is not conscious of its responsibilities. I do not agree that this organisation is a church or that it has any religious connotations at all ... I shall follow up what the honourable gentleman has said and ensure that everything possible is done along the lines he has suggested.[13]

However, nothing along those lines eventuated and the NSW Government was to continue to maintain a low-key policy response to the issues raised concerning Scientology. This approach was somewhat confirmed by the report of the Powles Commission of Inquiry in New Zealand, upon which outcome the NSW Health

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[11] Ibid. 22 Oct, 1868-9.
[12] 'Scientology - NSW's Second Thought'.
[13] NSW Legislative Assembly, *Hansard 1968,* 19 Mar, 4736-7.

Department officers had placed so much store. That Commission of Inquiry is of interest because it examined the issue of 'Fair Game', its findings advised a more conciliatory public policy and because of its subsequent influence.

POWLES COMMISSION OF INQUIRY (NZ) (1969)

In New Zealand a two man Commission of Inquiry was appointed by Order in Council of the Governor-General on 3 February 1969, to inquire into and report upon 'certain activities, methods and practices of the Hubbard Scientology Organisation in New Zealand'.[14] The Commission was required to give particular attention to estrangements in family relationships, the custody or control of children or persons under the age of 21 years and any improper pressures applied to people who had severed their connection with Scientology. In a considered departure from the brief given to the Anderson enquiry, the terms of reference for the New Zealand commission included the caveat 'not to include any inquiry into the philosophy, teachings, or beliefs of Scientology or Scientologists, except in so far as those matters may in the opinion of the Commission be necessary to facilitate its inquiry' into the matters specified. [15]

The New Zealand Government had had the opportunity to observe activities across the Tasman, including the January raids on scientology headquarters in Perth, and was possibly the wiser for the observation. When a petition signed by 715 concerned New Zealanders was presented to Parliament on 28 June, 1968, requesting that a Board of Inquiry be set up to investigate Scientology and seeking 'certain courses of legislative action', the matter was referred to the Select Committee on Social Services for assessment and appropriate recommendation.

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[14] It was noted in the report that 'it was said that that there are about 2,000 adherents in New Zealand, who are mainly in the Auckland and Waikato area', Sir Guy Richardson Powles and E V Dumbleton Esq, *Report of the Commission of Inquiry into the Hubbard Scientology Organisation in New Zealand,* Government of New Zealand 1969. 5, 15.

[15] Ibid. 5-6.

The parliamentary committee heard 'a substantial volume of evidence' and then reported to the Government. In recommending the establishment of a Commission of Inquiry, the politicians noted that 'the committee is reluctant to suggest that any movement be outlawed or that meetings of any groups of people be banned, but sufficient has been heard to indicate some action should be taken in connection with the activities and methods of Scientology'. The committee was 'conscious of the need for being well informed before final decisions are taken', but added that a more detailed inquiry should proceed 'as a matter of urgency'.[16]

The inquiry was a much more modest affair than its predecessor in Victoria. It took just four months to conduct hearings, (with sittings for 8 days), and reported on 30 June 1969, having received 51 letters from interested persons and heard evidence from 27 witnesses. A record of proceedings of approximately 650 pages was taken. All evidence was conducted in public, after those seeking to give in camera evidence were informed that 'the representatives of the organisation and any other interested persons (presumably 'interested' in a legal sense) could not be excluded'.[17] It is not reported how many withdrew as a consequence.

The decision by the Commissioners to adopt an extremely narrow interpretation of its terms of reference led it to conclude that 'happenings overseas, or opinions formed after reading or hearing about them in general, have no relevance to the purposes of this inquiry'.[18] This limitation, achieved by a narrow reading of the Order in Council, avoided the type of wide ranging investigation conducted in Victoria and was at variance with the wishes of the parliamentary committee, which had recommended that 'inquiry should not be restricted or confined to the "Hubbard Association of Scientology in New Zealand", but should be broad enough to include all aspects of the Scientology movement'.[19]

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[16] Ibid. 8.
[17] Ibid. 9-10.
[18] Ibid. 11.
[19] Ibid. 8.

There was some discussion as to whether Scientology was a religion. It was strongly submitted by counsel for the Scientologists that it was a religion, though the Commissioners pointed out the lack of such claim or implication in the tendered document entitled 'Code of a Scientologist'. In any event, the question was irrelevant, as 'within our New Zealand constitutional framework a religion as such or a church has no specific liberty or immunity to indulge in practices or activities which are otherwise improper or contrary to law'.[20] Staying close to the terms of reference, the Commissioners examined claims of: estrangements in family relationships; affects on custody or control of persons under 21; and improper or unreasonable pressures, examining a small number of case studies in some detail.

The Commissioners examined the case of the O'Donnell family, which involved allegations relating to all three areas of inquiry. The O'Donnells, parents of children in their late teens who had become involved in Scientology, had instigated the petition seeking a parliamentary enquiry, had co-operated with an exposé in the New Zealand *Truth* newspaper and at one stage had conducted an 'operation' to try and rescue their children from the organisation. In the newspaper exposé they stated that they were contemplating moving to Victoria, where Scientology was 'outlawed', to protect their other children from the organisation.[21]

The Commissioners found against Scientology on all three counts in the O'Donnell matter, noting that the activities, methods and practices of Scientology contributed to family estrangement, that the influence of Scientology on the children was clearly contra-parental and that the parents had been subjected to unreasonable pressure. [22] This pressure included the issue of disconnecting notices to the parents. These were not available but they were in similar terms 'or stronger' to a notice forwarded to an aunt which was tendered in evidence, and which stated

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[20] Ibid. 18.
[21] The newspaper article referred to on p. 36 was entitled "Cult Clutch on Teens Forces Family Flight," Ibid. 30-43.
[22] Ibid. 42.

I am disconnecting from you from now on. If you try to ring me I will not answer, I will not read any mail you send, and I refuse to have anything to do with you in any way whatsoever. All communication is cut completely.[23]

Following publication of the *Truth* exposé, in which the parents had called the organisation a 'pseudoscientific cult', Scientology had declared the O'Donnells to be suppressive persons, and a Scientology official wrote to them, stating, among other things, that they were 'in a condition of Enemy and Suppressive persons' and labelling them 'criminals'.[24]

In another case, the Queens Arcade Businessmen's Association had received complaints from customers that they were being accosted by people asking them to go to an office on the first floor, (rented by Scientology), to have a personality test. The Association referred the complaints to the police and the traffic department in Auckland. The practice was subsequently stopped, but then 'a printed card was held up in front of people at both entrances to the arcade', with no reference to the organisation being connected to Scientology. The chairman of the Businessmen's Association then went out one evening and held up an opposing card, warning people not to have anything to do with Scientology. The next day he allegedly received a threatening telephone call from a Scientologist.

Following these incidents, Scientologists visited each tenant of the arcade and asked them to take a personality test. Apparently not happy with the response of Mr. Boric, the stamp dealer, they issued him with a circular and stated that he had been disconnected. The circular declared that Mr. Boric was 'in a condition of enemy to and a suppressive person to Scientology' and threatened legal action for any libellous or slanderous statements he might make. Mr. Boric replied by telling his story to the 'Truth' newspaper. Scientologists sent him some 60-70 'disconnecting' letters and he was subjected to a salacious article in a Scientology broadsheet, (the Commissioners noted that these sheets could be described as 'broadsides'), entitled 'Freedom – Scientology No.

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[23] Ibid. 37.
[24] Ibid. 36.

2', which he complained was damaging to his personal integrity and his business and had resulted in a prominent trade supplier indicating that he had doubts about extending further credit to him. Even the Scientologist's star witness, Lady Hort, agreed that the article 'went a little too far'. The Commissioners found that 'the pressures exerted by Scientology (on Boric) were in fact improper and unreasonable'.[25]

Several other cases were examined, involving complaints that Scientology had caused family estrangement, the 'propensity of Scientology to attack, and to attack viciously, those whom it conceives to have attacked it'[26] and the practice of sending voluminous literature to people 'in some cases despite direct requests that it be discontinued'. [27] On the Scientology attitude to critics, the Commissioners quoted from an article written by L. Ron Hubbard in an article entitled 'Critics of Scientology' in which he said 'we are not a law enforcement agency. BUT we will become interested in the crimes of people who seek to stop us. If you oppose Scientology we promptly look up – and will find and expose – your crimes'. This propensity was illuminated by evidence, which was not contradicted, from a private investigator who alleged he had been interviewed by Scientology with a view to checking the backgrounds of a list of people, in an effort to discover 'criminal convictions, whether they had been in debt, or whether they had ever been in trouble of any kind'.[28]

Throughout the inquiry Scientology relied to a great extent on the credibility of Lady Hort as its main witness. The Commissioners noted that although she had been appointed Assistant Guardian of the organisation in November 1968, she had been abroad from November 1967 to July 1968 and there were 'lamentable gaps in her knowledge', concluding that 'she was unable to throw any light ... on the events associated with any of the specific cases'. The Commissioners complained that no evidence was offered on behalf of Scientology 'from any of the persons who were in senior positions in her absence abroad or were in charge of the organisation in Auckland at the relevant and

[25] Ibid. 45-8.
[26] Ibid. 48.
[27] Ibid. 51.
[28] Ibid. 49.

material times', noting that 'it was indeed said that some of these officials were no longer in New Zealand'.[29] Notwithstanding this lack of co-operation on behalf of Scientology and the Commissioners' unequivocal findings against the organisation, it was decided, 'relying on Lady Hort's candour and co-operation (despite the 'lamentable gaps' referred to above) and upon the evidence of the changed outlook of Scientology, to make no recommendations about the necessity or expediency of legislation change at this stage'. [30]

The 'changed outlook' was a reference to an 'executive directive' issued by Hubbard on 1 August 1968, requiring the circulation of a public questionnaire seeking suggestions for reform. This was followed by a 'Code of Reform' which was 'published' by Scientology on 29 November 1968. It purported to cancel the policy of 'disconnection as a relief to those suffering from familial suppression', security checking as a form of confession, the writing down of 'confessional' material and 'declaring' people 'Fair Game', which had permitted 'aggressive behaviour by a Scientologist towards such a person'.[31] Hubbard had also written a letter dated 26 March 1969, in which he said that the Board of Directors of Scientology had no intention of re-introducing the policy of disconnection, and he 'could see no reason why it should ever be introduced, as an extensive survey in the English speaking countries found that this practice was not acceptable'.[32]

The Commissioners felt that the 'question of the apparent change in the outlook and policies of Scientology ... is of considerable importance',[33] admitting that they had been 'markedly influenced by what it believes to be a distinct change not only in the activities, methods, and practices of Scientology but also in the outlook of the organisation'. However, lest this faith be found to be unwarranted, it was warned; 'if at any time it were to appear that this change had been reversed or that some of the old and objectionable practices had been revived, then the Government should, if an important social evil were

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[29] Ibid. 52.
[30] It was noted that the 'commission has in effect found against Scientology on all three heads of reference', Ibid. 58.
[31] Ibid. 26-7.
[32] Ibid. 27.
[33] Ibid. 25.

found to be occurring, take note and consider what steps might be necessary'.[34] The Commissioners listed certain rules of practice which it admonished Scientology to regard as 'indispensable rules of practice' for the future. These included no reintroduction of the practice of disconnection, no issue of Suppressive Person or Declaration of Enemy orders by any member to any other member of a family, no auditing or processing of anyone under 21 without the written consent of both parents (including approval of the fees involved) and a reduction to reasonable dimensions of "promotion" literature sent through the post, with prompt discontinuation when requested. [35]

Scientology had been mildly chastised by the Commissioners, whose avuncular, wait and see approach was an entirely different *modus operandi* to that adopted in three Australian states. One commentator described the NZ approach as 'sensible'.[36] However, hopes that the Scientology organisation might have been chastened and genuinely reformed by the experience seem to have been premature, or naïve. The author has been supplied with a copy[37] of an expulsion notice, with a 1976 date, whereby the recipient, a resident of Auckland, New Zealand, was 'assigned a condition of Treason', being 'forbidden further entrance into or contact with any Scientologist, Scientology Org or activity' and 'labelled a freeloader and billed for all services received while on staff', although there was also a provision for re-establishing contact should the recipient recant. The hapless Scientologist had been subjected to a Committee of Evidence proceedings and had been charged with the 'high crimes', including 'failure to handle or disavow and *disconnect* from a person demonstrably guilty of suppressive acts'.[38]

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[34] The Commission was also impressed by Hubbard's 'policy direction' of 7 March 1969 which stated 'we are going in the direction of mild ethics', Ibid. 56.
[35] Ibid. 58.
[36] Jon Atack, *A Piece of Blue Sky: Scientology, Dianetics and L. Ron Hubbard Exposed* (NY: Carol Publishing Group, 1990) 192.
[37] The original notice was sighted by the author.
[38] From a memorandum also supplied to the author by a former Scientologist. Emphasis added.

II: 7

THE TURNING POINT: FEDERAL RECOGNITION AND RETREAT FROM STATE SUPPRESSION (1970-82)

'Scientology is winning and it's wonderful'

At the end of 1970, a legal milestone occurred in the campaign of Scientologists to gain acceptance as a religion. Acting under federal jurisdiction, a Perth Petty Sessions Magistrate granted an exemption to Scientologist Minister Jonathan Gellie from conscription under the federal National Service Act 1951, finding the Church of the New Faith (Scientology) to be a religion for the purposes of the Act under which s. 29 exempted ministers of religion from rendering national service. The legislation 'prohibiting' the teaching, application or study of Scientology in South Australia and the legislation 'prescribing' its activities in Western Australia was noted. However, it was concluded that 'many of the great religions of today have been banned at some time of their development, not least of which the Christian religion, and I could hardly think that this could be considered grounds that it was not, whilst banned, a religion'. The comment by Latham C. J. in the 1943 Jehovah's Witnesses case was cited; 'what is religion to one is superstition to another'.[1]

COMMONWEALTH MARRIAGE ACT PROCLAMATION (1973)

Another important political milestone was set in place in August 1972 when Senator Lionel Murphy, Labor's Federal Senate Leader and spokesman on legal affairs, announced that a Federal Labor Government would recognize the Church of Scientology under the Marriage Act 1961. Scientology would be authorized to conduct marriages in all Australian states.[2] The announcement caught some of his federal colleagues by

[1] "New Faith' Minister Granted Exemption', *Daily News*, 10 December 1970.
[2] 'Scientology law repeal planned', *The Advertiser*, 25 August 1972.

surprise. A contretemps developed when the Labor Whip in the House of Representatives questioned Murphy's ability to commit the party to a policy initiative without consulting the 'councils of the Labor Party', stating his own view that 'Scientology is not a religion'.[3] Several other Labor MPs reportedly said 'they could not understand why Senator Murphy had agreed to recognize an institution which was widely regarded as harmful'. However, Murphy was able to enlist the support of his state colleagues in South Australia, where the Attorney-General announced helpfully that the anti-Scientology legislation would be repealed.[4] Support was not so forthcoming in Victoria, where state Labor sources reportedly said that here had been no change in policy since Labor supported the Victorian ban on Scientology'.[5] There may have been further tussles behind closed doors. A week after his bombshell announcement Murphy issued a statement that he 'expressed no approval of or endorsement of' Scientology. He was just concerned to ensure that the 'principles of religious freedom be upheld'.[6]

But the Murphy pronouncement was to stand and upon the election of the Whitlam Labor government in December 1972, the die was cast. On 15 February, 1973, a proclamation under s. 26 of the Marriage Act 1961- 1966 was issued in the Commonwealth Gazette listing 'certain religious bodies and religious organisations' as recognized denominations for the purposes of the Act. Included among a number of newly recognized religions was the Church of the New Faith Incorporated.[7] The Attorney-General wrote to the Church's president in Perth, who had made representations concerning the declaration, advising that 'the Church may nominate persons ... for registration as authorized marriage celebrants'. Murphy helpfully advised that 'my Department will be in touch with you about steps that your Church should take in consequence of the declaration'.[8] The proclamation was an executive action not requiring legislation. However, in response to a critical question from Senator Greenwood pointing out the condemnation of

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[3] 'Senator's pledge on cult invalid', *The Age*, 26 August 1972.
[4] 'Scientology makes a comeback', *The Australian*, 25 August 1972.
[5] 'Labor all clear on Scientology', *The Age*, 25 August 1972.
[6] "No Faith' in belief of group', *The Canberra Times*, 28 August 1972.
[7] Commonwealth of Australia, *Commonwealth Gazette*, vol. 20, 15 February (1973) 2. Other groups listed in the schedule included
[8] Lionel Murphy, Letter to The Reverend M T Graham, 7 February 1973.

Scientology in the *Anderson Report* and asking how the Attorney proposed now to protect the public from Scientology, Murphy replied

> section 116 of the Constitution ... in effect, guarantees that there will be no discrimination between religions ... There are religious sects which may earn the disapproval of many sections of the community, but it seems to me that under the Constitution the Australian Government has an obligation not to discriminate against sects ... I think that this is a bad system. I think it is quite wrong that there should be incorporated in an Act of this Parliament some requirement that, in effect, the Government recognizes religious denominations. [9]

The proclamation was also attacked in the NSW parliament. Mr. Healey asked a question in which he noted earlier attempts to blackmail 'members of parliament and other prominent citizens ... to silence criticism of its psychological mumbo jumbo'. He was concerned it would give 'scientology an air of respectability that it does not deserve'. The Minister for Justice, Mr. Maddison, replied that he had been advised that all federal bodies empowered to conduct marriage ceremonies had had their licences revoked and the new proclamation was issued embracing all recognized religions, including the Church of the New Faith Incorporated. The Labor governments in WA and SA were in the process of repealing their banning legislation, 'probably under the persuasive force of the new federal Government'. The policy in NSW was 'that the sham of this organisation is so patent that it is not necessary to legislate against it'. The federal proclamation was an 'error' and a 'gaffe'. The Minister concluded

> The honourable member raises the question of whether or not this declaration is an affront to people belonging to reputable and established religions. I believe it certainly is an affront that such a crackpot organisation as this has been declared a religion by the Commonwealth Government. It opens the door wide for all sorts of people to come along with a lot of hocus pocus and mumbo jumbo, and by pretending that they are engaged in religious pursuits, have their organisation declared a religion although there is no basic faith behind their ritual. I regret that the State Government can do nothing but accept the situation as it finds it. It must act in accordance with the proclamation made

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[9] Australian Senate, *Parliamentary Debates (Hansard)*, Canberra: Commonwealth of Australia 1973. 13 March. 343-4. Senator Murphy also referred to the Incorporation of the Church of the New Faith under SA and NSW laws and the *Gellie* decision made under Federal jurisdiction.

under the Marriage Act and the directions given by the Commonwealth Government in the matter.[10]

Whatever qualifications Murphy might have expressed about his views on the legislative system or the merits of Scientology as a religion, his proclamation was greeted with jubilation in worldwide Scientology quarters. Murphy the politician advised Scientology headquarters of his decision while on a visit to London. He was rewarded with high praise in the organisation's newspaper, entitled *Freedom*, which produced a front page story lionizing him. Scientologist Mrs. Mary Sue Hubbard, the 'controller for the founder,' noted that 'honest politicians do exist and Australia can look forward to an exciting future under the Labor government.'[11] L Ron Hubbard himself was moved to declare; 'there's no reason not to create a wildfire expansion in Australia now. Disseminate more, train more, audit more.'[12]

RETREAT FROM STATE SUPPRESSION

The 1970 *Gellie* decision gave heart to the Scientologists and impetus to their campaign to have state anti-Scientology legislation overturned. So too did election results in South Australia on 30 May 1970, where the Hall Liberal Country League was defeated and replaced by the Dunstan Labor administration, and in Western Australia on 3 March 1971, where the Brand Liberal-Country Coalition was defeated by the Tonkin Labor Party. The new administrations had both vigorously opposed the anti-scientology acts when in opposition and would be expected to reverse them. Even before the decision to list Scientology under section 26 of the Marriage Act had been announced by the Australian Government, Scientologists were proclaiming that the forthcoming recognition would make the Victorian 'ban null and void, because it specifically exempts organisations acknowledged under the Marriages Act'. It was further claimed that

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[10] NSW Legislative Assembly, *Parliamentary Debates (Hansard),* Sydney: NSW Parliament 1973. 8 March. 3410-11.

[11] 'Religion on the march: Scientology's new reverence', *Nation Review*, 28 April 1973. It was also noted that the church was now operating in Melbourne, Perth, Adelaide and Sydney and that 'although 20,000 members have passed through the books, officials agree that 3,000 would be close to the actual number of practising brethren'.

[12] 'Scientology Plans a Big Comeback', *Melbourne Observer*, 15 April 1973.

'recognition would greatly help in the repeal of the ban on Scientology in WA and SA', that 'many Liberal members of Parliament in WA had said that they would never have banned scientology if it had been a religion'.[13]

WESTERN AUSTRALIA: SCIENTOLOGY REPEAL ACT 1973

The new Labor government in Western Australia had already introduced a bill, the Scientology Repeal Bill, on 14 November 1972,[14] to repeal the whole of the Scientology Act 1968, on the basis that it had proved to be unenforceable and in accordance with its previous opposition. A suggestion from the Police Commissioner to transfer control of the use of E-meters to the Public Health Act[15] was rejected, as was strong opposition from the WA Director of Mental Health.[16] Scientology had already been registered in WA as a foreign company in October 1972, under the name Church of New Faith Incorporated.[17]

The strong opposition of the Labor Party in 1968 had not resulted in a rush to repeal the legislation in government. After the election in March 1971, the new Minister for Health, Mr. Davis, issued an undertaking that he would look at the future of Scientology and conducted inquiries over the next 20 months. After an extensive review the Minister concluded that the legislation should be repealed because: it was advisedly ineffective;[18] it was wrong in principle; there had been a pledge to repeal it by the Labor Party;[19] no other country had subsequently sought to impose bans;[20] Scientology had made internal

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[13] 'Religious status for scientology', *The West Australian*, 13 February 1973.
[14] The Bill did not pass though both houses until 16 May 1973.
[15] 'Bill to Legalise Scientology', *The West Australian*, 15 November 1972.
[16] 'Do not lift scientology ban, says Dr. Ellis', *The Western Australian*, 13 November 1972. See also '"New Faith" bid to see Ellis fails', *The West Australian*, 4 November 1972.
[17] 'Scientology Registered as a Company', *The West Australian*, 24 October 1972. It had already been registered in South Australia.
[18] The advice was from the Commissioner of Police who felt that the only offence that could be reasonably prosecuted under the Act was the use of galvanometers under s. 4, 'if there is sufficient evidence'. The Commissioner of Public Health had advised that there was 'no point in retaining s. 4', WA Legislative Assembly, *Parliamentary Debates (Hansard)*, WA Parliament 1972. 14 November. 5104-5, 1645.
[19] WA Legislative Assembly, *Parliamentary Debates (Hansard)*, Perth: WA Parliament 1973. 10 May. 1654.
[20] WA Legislative Assembly, *Hansard 1973*, 14 November. 5106.

reforms;[21] and he had little evidence of public opposition to repeal. He referred to the New Zealand approach with approval[22] and noted the UK *Foster Report* [23] had found the legislation to be 'discriminatory and contrary to all the best traditions of the Anglo-Saxon legal system'.[24] The general rationale was that

action to repeal the Act does not in any way imply the endorsement or otherwise of Scientology ... If we believe that Scientology should be banned we should also ban Motivaction. This question and practice has been raised in the House and from my inquiries it seems to be more reprehensible than scientology ever was. It just goes to show how dangerous it is to ban one cult, and then ban the next one, and the next. Goodness knows what will happen eventually. [25]

The Minister felt that Scientology reform might have been achieved without the need for banning legislation. He said

With proper communication the same effect could have been achieved without legislation and without wasting the time of the Parliament. Evidence on my files indicates, I regret to say, that requests by scientologists to talk to Government members and officers on this matter were not acceded to. Had there been a confrontation and had the Government said, "We believe this is wrong and if you do not do something we will do something", I am sure the organisation would have done something.[26]

In response, Members of the now Opposition Liberal and Country parties voiced differing views on the bill and did not call for a division. Three main views emerged among Opposition members. Some, like Sir Charles Court, Leader of the Opposition, took the view that the legislation had been very effective and should remain, not

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[21] Documents attesting to this had been provided to the Minister by Scientology. The Minister did concede that 'they stand condemned if they are reintroduced', Ibid. 14 November. 5104, 07.
[22] Ibid. 14 November. 5107.
[23] Discussed in Chapter III: 3 herein. Sir John G Foster, *Enquiry into the Practice and Effects of Scientology,* London: UK House of Commons 1971.
[24] WA Legislative Assembly, *Hansard 1973,* 14 November. 5107.
[25] Ibid. 22 November. 5108.
[26] Opposition Leader Sir Charles Court interjected that that the then 'Government members had to stop interviewing these people when the previous Bill was mooted ... because some of the attitudes of the people concerned were unfair, embarrassing, and threatening. Any Government member who wasted his time with them was being completely unrealistic', WA Legislative Assembly, *Hansard 1973,* 10 May. 1646.

accepting as genuine the scientology reforms of 'the four diabolical practices'.[27] Others, such as the Hon. G. C. MacKinnon, who were sceptical about the reforms[28], felt that the 1968 legislation had been effective. However, it had been undercut by federal recognition of scientology as a church for the purposes of baptisms, marriages and burials, leaving the parliament with no option but to repeal.[29] Others, such as the Hon. W. R. Withers, felt that the 1968 legislation had been necessary and effective, but in view of the internal Scientology reforms, which were accepted at face value, was no longer needed. They felt that the 1968 Act had 'helped to bring about the reform of 1969'.[30]

The Hon. G. C. MacKinnon, who was instrumental in introducing the 1968 legislation, had some interesting observations to make about 'the conditions that pertained when the Act was passed'. He described the level of fear that was instilled, saying 'after this length of time it is difficult to comprehend the sort of fear complex that had been engendered'. He referred to the fact that he (and others) had received wreaths, which was a shock to his mother who opened the wrapping, and his fear (along with others) of being investigated and followed. As a consequence he had no love for the organsiation of Scientology, even though he found it hard to dislike some adherents as individuals, 'who are, to all intents and purposes, genuine'.[31] He said he had acted on more evidence than was apparent, because he 'could not divulge the information that had been given ...in confidence by people outside this Chamber who were able to be traced and recognized by virtue of the disclosure of that information'. He would not normally have risked the inevitable accusations of intolerance and harshness against himself by introducing such legislation. However, he had received approaches from the Liberal, Country and Labor parties and that 'when such approaches came from all the parties I have named, and from

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[27] 'I am not impressed with its undertaking not to continue the four diabolical practices ... I hope I have made my position quite clear in opposing this legislation. I believe it should be left on the Statute book. I sincerely hope that if the Bill gets through ... the organisation will keep its word', Ibid. 10 May. 1644.
[28] 'Scientologists claim that all these practices have been cancelled, and I have no reason to doubt that they have not ... been cancelled'. He intimated that the Queensland Government might have moved against Scientology but had been persuaded otherwise by the 1968 Code of Reform and presumably the approach of the NZ Powles inquiry, WA Legislative Council, *Parliamentary Debates (Hansard)*, Perth: WA Parliament 1973. 16 May. 1764.
[29] Ibid. 16 May. 1764-5.
[30] Ibid. 16 May. 1766-7.
[31] Ibid. 16 May. 1765-6.

groups beyond and outside them, I thought the time had come for action and, as a result, action was taken'.[32]

The Hon W R Withers commented on the nature of religion. He felt that

by definition a religion can mean a belief in God or gods, but it can also mean "a matter of conscience". We then ask: what does a religion do ? We find that a religion helps man to answer such basic questions as those concerning the meaning of life and death and the unknown forces of the world around him ... I also believe in the freedom of religion. That could also mean the right of an individual not to worship if he so chooses.[33]

After the repeal of the legislation it was reported that the Perth City Council and the WA Electricity Commission gave permission for Scientology to attach signs on posts at its West Perth headquarters (also the Australian headquarters) carrying the description '"Church of Scientology", as a sort of final stamp of approval'.[34]

SOUTH AUSTRALIA: PSYCHOLOGICAL PRACTICES ACT 1974 AND SCIENTOLOGY (PROHIBITION) ACT 1968 REPEAL ACT 1974

In South Australia, where a Labor government had also been elected nine months prior to the Labor government in Western Australia, moves to repeal the Scientology (Prohibition) Act 1968 proceeded at an even slower pace. Consideration was being given to introducing a Psychological Practices Bill as foreshadowed by the now Premier, Don Dunstan, in his speeches opposing the 1968 legislation, and this needed investigation. Following the election a committee was appointed by the Chief Secretary to examine the question, and according to the Attorney-General, the deliberations of that committee had occupied a much longer time than expected.[35] However, when the second reading of the *Psychological Practices Bill* and its cognate the *Scientology (Prohibition) Act 1968*

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[32] Ibid, pp. 1763 - 1766
[33] WA Legislative Council, *Hansard 1973,* 16 May. 1766.
[34] 'The survivor', *Australian,* 25 February 1974.
[35] SA House of Assembly, *Parliamentary Debates (Hansard),* Adelaide: South Australian Parliament 1972. 22 November. 3393.

Repeal Bill were introduced on 21 November 1972, just a week after the WA repeal bill was introduced, the South Australian parliament had the benefit of the report of the South Australian Committee of Inquiry into the Registration of Psychologists to assist in its deliberations.

In 1971 the newly elected Attorney-General and Minister of Community Welfare, the Hon. Leonard James King QC, had announced to the State Labor Party conference that the anti-scientology legislation would be repealed. This had given rise to praise in the Scientologist's *Freedom* newsletter, where he was described as a responsible public figure who had undertaken to put the matter right.[36] But the Scientology hopes would have been diminished by the realization that the repeal bill could only be assented to upon the passage of the Psychological Practices Bill.[37] This included a clause which would make it an offence for anyone other than a registered psychologist to provide psychological services for fee or reward;[38] and a provision that the use of a galvanometer would be caught as a 'psychological' practice, which would be subject to regulation under the Bill.[39]

Nevertheless, there was a lot of water yet to pass under the bridge, as the Government had decided to refer the matter to a parliamentary committee of six members for further detailed consideration.[40] This move was seen by the Opposition as a neat political sidestep designed to shunt the matter to one side, in the expectation of a forthcoming election,[41] the timing of which was a matter for the Government to announce.

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[36] Ibid. 22 November. 3392. The praise was quoted by the former Attorney-General, Mr. Millhouse.
[37] A proclamation could not be made by the Governor assenting to the Bill until the Psychological Practices Act had been enacted, cl. 2 (2), Ibid. 22 November. 3397. Per Mr. Carnie, who only supported the repeal Bill because of the subclause, 'which will control the operations of the organisation that I consider to be a blot on our community'.
[38] A provision reminiscent of Galbally's Scientology Prohibition Bill.
[39] SA House of Assembly, *Hansard 1972,* 22 November. 3390. (Dr. Tonkin).
[40] Ibid. 22 November. 3394. The Committee consisted of the Hon. L. J. King, Messrs. Eastick, Langley, Ryan and Dr. Tonkin.
[41] Mr. Tonkin complained, 'as members know, Select Committees cannot exist after the session in which they are appointed comes to an end, let alone the Parliament coming to an end', Ibid. 22 November. 3392.

The anticipated election was held on 10 March 1973 and the Dunstan Labor Government was returned. When the bills were re-introduced some ten months later, on 29 August 1973, accompanied by the minutes of evidence thus far of the Select Committee, they were in substantially the same form as when they were introduced in November 1972. They were again referred to a Select Committee,[42] (with Mr. Payne being substituted for Mr. Ryan and the Attorney-General included), to enable further submissions to be made.[43] On 15 November, 1973, a motion was carried extending the time for the bringing up of the report of the new Select Committee on the Bill to be extended to 5 March 1974.[44]

House of Assembly Select Committee report

The report of the Select Committee was tabled on 5 March 1974 by the Attorney-General, who noted that 'the recommendations of the committee involve substantial modifications to the Bill and, indeed, to the principles on which the Bill, as introduced, was based'. He observed that the report was unanimous and paid tribute to the open-minded way in which the committee had approached its task. Upon the motion of the Leader of the Opposition, who thanked members of the Committee and noted that 'some fairly major changes have been effected', debate was adjourned so that Members would have time to digest the report.[45]

The members of the Select Committee had decided that it was desirable to provide for the registration and regulation of psychologists. However, members came to the conclusion that it was 'impracticable to frame a definition of psychological practice' without restricting the practice of 'other recognized professions and callings', including 'a wide variety of people, ranging from ministers of religion and social workers to university

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[42] With Mr. Ryan replaced by Mr. Payne and the Attorney-General included, L J King, *Report of the Select Committee of the House of Assembly on the Psychological Practices Bill 1973,* Adelaide: South Australia Parliament: Proceedings 1973-74 Vol III, PP 139 1974. 8.
[43] SA House of Assembly, *Parliamentary Debates (Hansard),* Adelaide: South Australian Parliament 1973. 29 August. 597.
[44] Ibid. 15 November. 1832.
[45] SA House of Assembly, *Parliamentary Debates (Hansard),* Adelaide: South Australian Parliament 1974. 5 March. 2281.

lecturers and industrial personnel officers'. It was agreed therefore to dispense with any definition of psychological practice and settle for 'an assurance to the public that the person registered is qualified to practice psychology', by prohibiting anyone else from holding out that he is a psychologist. Close consideration was given to the recommendations of the Chief Secretary's *Committee of Enquiry into the Registration of Psychologists,* to prohibit certain conduct by providing for offences. These offences included: undue pressure to undertake assessment or treatment, disclosure of confidential information to third parties, and making unjustified claims for psychological practices undertaken. Committee Members felt that the first might prevent legitimate practitioners from persuading people to undertake treatment for their own good. The second should be dealt with in the general context of privacy legislation. The third was not practical, due to the problem of definition and the 'impossible task of deciding between competing arguments as to the validity of claims made for the particular types of treatment'.[46]

Having neatly sidestepped these issues, the Select Committee turned to the question of certain practices, which the Chief Secretary's Committee recommended should be confined to registered psychologists. These included: the administration and interpretation of individual tests of intelligence, the interpretation of personality tests or inventories, and the practice of hypnotism and hypnotherapy. With respect to the first two, the Select Committee members resolved to pass the buck to the eventual registration Board by recommending that 'there should be power to prescribe such tests by regulation on the recommendation of the Board'. However, with respect to hypnotism, an attempt was made to bite the bullet. The Committee resolved that 'the evils are sufficiently grave to justify the outright prohibition of the practice of hypnosis other than by qualified persons'.[47]

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[46] King, *Report on the Psychological Practices Bill 1973,* 2.
[47] Ibid. 3.

PSYCHOLOGICAL PRACTICES BILL

The parliament considered a watered-down, but arguably more practical version of the Psychological Practices Bill. It was debated in the House of Assembly on 14 March, 1974, supported by the Opposition and passed without division. The Opposition noted that this 'ground breaking' legislation would 'not prevent certain practices taking place in the community which cause us great concern'. However, it was hoped that the 'improved' Bill 'will ensure that certain fringe organisations and "professions" engage in a more practical and possibly less harmful type of undertaking than exists at present'. [48]

There was some mutual back-scratching on the value of the work of the Select Committee, and suggestions that the process should be mandatory. It was noted that the SA Council for Civil Liberties supported the legislation, which 'would meet most civil liberty requirements' and had pressed for the early repeal of the 'obnoxious' Act.[49] The complexity of the subject was noted, and the limitations of action frankly admitted. The Member for Fisher, Mr. Evans, with respect to those practices the Committee would wish to prescribe and which were to be delegated to the proposed Board for regulation, said

> I am not entirely certain that even the board will be able to prescribe it sufficiently, but it may be able to prescribe certain practices in technical language that will sufficiently define them. The Select Committee considered that the best we could do was set out the two broad categories in this definition, leaving it to the board, if it could, to prescribe the precise conduct being prohibited to unqualified persons.[50]

With respect to hypnotism, there was more determined optimism. The Committee Members had felt that hypnosis should be strictly limited to psychologists, medical practitioners and dentists, with allowance for those already in established practices of hypnotherapy. This was to be given effect to in a new clause recommended by the Committee, and moved by Mr. King, who stated optimistically; 'eventually the situation

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[48] SA House of Assembly, *Hansard 1974,* 14 March. 2486. (Dr. Eastick, Leader of the Opposition).
[49] Ibid. (Mr. Evans).
[50] Ibid. 14 March. 2487.

will be that hypnosis can be practiced in the community only by those who know what they are doing and what effect it is having on the person being hypnotized'.[51]

The Leader of the Opposition felt moved to speak briefly to the third reading of the Bill, noting hopefully

> The Bill satisfies a need that has existed in the community for a long time. It certainly breaks new ground. There will be close scrutiny of activities associated with the introduction of the Bill ... obnoxious fringe activities will not be tolerated under the guise of coming within the ambit of psychological practices. They will not be able to be camouflaged as involving psychological practices.

He concluded that Members of the Select Committee 'realize that, as everything that was originally intended to be included in the Bill could not be included, the activities that members do not regard as legitimate will still not be permitted to proceed'.[52] Presumably he was hopeful that the bi-partisan spirit of the Select Committee might be further invoked to give substance to this warning.

In the Legislative Council the Bill[53] was again supported by the Opposition. The Leader of the Opposition, Mr. R. C. DeGaris, made no apology for the Scientology (Prohibition) Act 1968, which he described as a 'short-term measure' which had served its purpose, that 'at that time, the Government recognized that the regulation of psychological practices would be a better way to handle the problem, but we knew at that time that it would be a long process. That opinion has been borne out, because it has been about five years (ring which) a Bill has been produced and is now before the Council'. Similar practices had been developed by other organisations, notably the Cybernetics Training Institute, which he had raised in the House and which had 'refined and amalgamated hypnotic techniques and pyramid selling techniques into a procedure that was doing immeasurable harm to many families and young people'. DeGaris said, 'since that matter was raised in the Council I have heard no further complaints ...but the growth in the

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[51] Ibid. 14 March. 2488.
[52] Ibid. 2488-9.
[53] SA Legislative Council, *Parliamentary Debates (Hansard)*, Adelaide: South Australia Parliament 1974. 19 March. 2502. The Bill was introduced by the Hon. A F Kneebone, Chief Secretary.

exploitation of undesirable techniques demands legislative action'. He also raised concerns that the Bill did not adequately prescribe the regulation of 'instruments and equipment' and did not adequately prescribe hypnosis, in particular its use in public entertainment or stage hypnosis. He also stated

> I wish to question the use of instruments, which is one of the most serious exclusions in the Bill. I would like to see in the Bill power to prescribe the use of certain instruments such as lie detectors. I should like to see provision made in the Bill to give the Government the necessary power by regulation ... or proclamation ... if one combines the power of hypnotic suggestion with the use of this type of equipment then it is easy to see that a particularly vicious form of invasion of a person's privacy, far in excess of any invasion of privacy contemplated in the Privacy Bill, could be perpetrated'.[54]

Although with respect to the question of hypnosis for entertainment, the responsible Upper House Minister, the Hon. A. F. Kneebone, interjected that the Minister would be empowered to say yes or no,[55] both issues were further pursued by amendment. These included (1) striking out the existing definition of hypnosis in the bill and replacing it with the definition that 'hypnosis includes any activity or practice prescribed as being hypnosis for the purposes of the Act' and (2) adding the sub-clause that no person other than a registered psychologist (apart from Ministerial consent) shall 'use or have in his possession any prescribed instrument or prescribed device', which was subject to a five hundred dollar fine. Mischievously, the Citizens Commission on Human Rights, which shared the address of the Church of Scientology, had written to DeGaris supporting the latter amendment, stating 'the commission has had a number of complaints concerning the deleterious use of psychiatric instruments, such as those used in conjunction with ECT and brain surgery. Your amendment will permit the commission to act upon these complaints'. [56]

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[54] Ibid. 20 March. 2578-9.
[55] Ibid. 20 March. 2579.
[56] Ibid. 26 March. 2692-3. (Hon R C DeGaris).

The spirit of co-operation engendered in the Select Committee continued. The Government Leader in the House agreed to the two amendments, which were passed[57] and later ratified in the House of Assembly.[58]

SCIENTOLOGY (PROHIBITION) ACT 1968 REPEAL ACT 1974

Debate on its complement, the *Scientology (Prohibition) Act 1968 Repeal Bill*, which was introduced by the Hon. L J King, Attorney-General, on 29 August 1973,[59] was more grudging. Opposition members were allowed a conscience vote, and several opposed it. In the House of Assembly, the Attorney-General stated the Government's position thus

> What is suggested against scientologists is that they have provided services in the nature of psychological services for reward, that they are unqualified to do this, and that this has been harmful to those who have been involved in the practice of scientology. The Government's view is that psychological services should be provided for fee or reward only by people who are qualified to provide them , and only by people who have registered and are subject to the discipline of a properly constituted tribunal ... if scientologists regulate their activities so that they do no infringe any law applying generally to all people, it is wrong that they should be prohibited from professing their beliefs and carrying on their activities.[60]

The Leader of the Opposition, Dr. Eastick, supported the Bill reluctantly, on the basis that the original legislation was not enforceable. He said he would not hesitate to support further legislation if necessary to control 'reprehensible and obnoxious activities'. He said he had not been 'hoodwinked into believing that many of the undesirable acts of that organisation prior to 1968' had ceased, despite the assurance given by Scientology that it had adopted a code of reform. Indeed, a letter dated 20 March 1974 had been sent to all members in which the organisation referred to the code of reform and pledged

> These practices were cancelled in 1968 and have not been reintroduced since that time, nor will they be reintroduced in the future. All confessional files that contained personal and private information were burned in Adelaide in December, 1968. The church is very

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[57] Ibid. (Hon A F Kneebone).
[58] SA House of Assembly, *Hansard 1974,* 27 March. 2805-6.
[59] SA House of Assembly, *Hansard 1973,* 29 August. 595.
[60] Ibid. 29 August. 596.

proud of its stringent ethical code which ensures that a high standard of behaviour is followed by Scientologists and in particular scientology ministers.

However, he felt that evidence given before the Select Committee by 'persons representing' Scientology had in his view been 'less than truthful' and there were clear indications that 'the type of activity that preceded the introduction of the original legislation in 1968 has been continuing to a degree', although perhaps less pronounced. This might have been a reflection of the realization by some 'exponents of the organisation that ... they must show an ethical approach or give the appearance of one'. In conclusion, he hoped that Scientologists had learnt a lesson and would act responsibly to those within and outside the organisation. He supported the legislation, with the *caveat*

> Whilst I accept that it is impossible adequately to police the provisions of the original Act (and, therefore, it is bad legislation and should be removed from the Statute Book), if there is an upsurge in the type of attitude shown in documents and referred to publicly earlier, I would have no hesitation in trying to bring about the introduction of legislation or in moving a motion to that effect to control what I claim to be reprehensible and obnoxious activities that do nothing to help family unity and an understanding by every man that there should be fair play in the inter-connection or activities that take place.[61][62]

The member for Bragg, Dr. Tonkin, (who had been a member of the Select Committee), made an extraordinary contribution. He supported the Bill with 'reservation' and 'serious misgivings'. He was of the view that Scientology was

> a gigantic pyramid selling organisation ... exploiting psychological dependence at grossly inflated prices and offering opportunities for more and more people to take part in this exploitation of others for a price. If this was just any other pyramid-selling organisation, and not a church by definition, everyone in the community would be up in arms and would hope that this State's consumer protection legislation would apply to it. The community would be demanding that something be done to protect people from themselves.

He described the 'dilemma' that had now arisen, as a result of the federal recognition of Scientology as a religion, which he described as 'probably a mistake', though 'probably

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[61] SA House of Assembly, *Hansard 1974,* 21 March. 2662-3.
[62] Ibid. 21 March. 2662.

something in which the Commonwealth Government had little option'. The consequences of this were that 'suddenly however, this organisation has acquired a cloak of respectability and a mantle of protection of a religion with its associated freedom from attack and political interference, and that has all been brought about by the administrative technique of making this organisation a church ... authority generally is very sensitive to any suggestion that it should interfere with people's religious freedoms. He felt that parliament should not wash its hand of the matter on the basis that it should not 'limit religious activities'. However, apart from expressing his disquiet, he did precisely that. After taking 'advice from many learned members of various churches throughout South Australia', he came to the conclusion

> Inevitably every single member of the church (sic) from whom I inquired concurred in my view: that is, whether we like it or not in this instance we cannot interfere with religious freedom, nor can we act to limit the activities of a recognized religion. These people were adamant and unanimous in this respect. I think we have no option but to repeal the legislation ... perhaps since the Church of Scientology has made the many reforms listed in its letter, it may look at the pyramid selling aspects of its organisation. Perhaps is will be willing to make reforms.[63]

His position was noted by the Opposition member for Gougher, who opposed the bill, saying that he was influenced greatly by Tonkin's speech, but came to a different conclusion. He felt that there was no guarantee that the former practices of Scientology would not be practiced again if the Act was repealed.[64] His colleague, Mr. Wardle, suggested that the Act should be left in place for at least 12 months to assess the efficacy of the Psychological Practices Act 'for the sake of many Scientologists', who he felt were being exploited. Consumer protection measures should be taken to ban counselling fees, which would 'take away the means by which Mr. Hubbard is making a luxurious living'.[65] The Attorney-General admitted he was sceptical that any reforms had occurred within Scientology, even saying that there was some evidence that the 'system of beliefs' had been made a 'vehicle for exploitation'. He concluded that

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[63] Ibid. 21 March. 2663-5.
[64] Ibid. 21 March. 2667.
[65] Ibid. 21 March. 2666.

The whole point is that we have here a body of people who, however misguided and whatever beliefs about them we may have (even about the possibility of the organisation being used as a vehicle for exploitation), hold a set of beliefs. The whole essence of a free society is that, when people hold beliefs, they be entitled to hold them, profess them and practice them.[66]

The repeal Bill was therefore passed in the House of Assembly on 21 March 1974, with 31 Ayes and 11 Noes.[67]

There were only two speakers in the Legislative Council, where the Bill was introduced on 21 March 1974.[68] The Chief Secretary, the Hon. A. F. Kneebone, re-stated the Government view, saying 'if Scientologists regulate their activities so that they do not infringe any law applying generally to all people, it is wrong that they should be prohibited from professing their beliefs and carrying on their activities'. This was couched in more flexible terms than the exposition made by the Attorney-General in the lower house. However, it maintained the principle of refraining from legislation aimed directly at one organisation. The Leader of the Opposition felt that the rapid approach made in 1968 had achieved some good and noted it had taken 'about five years research to reach the point where we have an acceptable Bill to control psychological practices'. He placed his faith in that legislation to control practices where 'the use of certain devices and certain techniques' were a danger to the community and particularly to young people, who were more 'suggestible'. The Bill passed the Legislative Council without further debate and without division.[69]

VICTORIA: PSYCHOLOGICAL PRACTICES (SCIENTOLOGY) ACT 1982

In Victoria, where it had all started, it was to take another decade and a strong rearguard action by authorities before a bill to amend the Psychological Practices Act 1965, so as to

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[66] Ibid. 21 March. 2667.
[67] Ibid. 21 March. 2668.
[68] SA Legislative Council, *Hansard 1974,* 21 March. 2651.
[69] Ibid. 26 March. 2679.

remove those sections relating specifically to Scientology, was introduced.[70] Four years passed before the impact of the 1973 Marriage Act proclamation finally hit home in Victoria when Mrs. Elaine Allen, the leader of the Scientologists in Victoria, was 'registered' under state provisions as a minister of religion. The Acting Minister for Health, Mr. Jona, said that she was the only Scientologist in Victoria, as the only ordained Minister, permitted to use the E-meter. He also affirmed that if other Scientologists were found to be using the device the Government would act, stating 'the spirit of the legislation must be preserved'.[71]

However, the Victorian government had finally bowed to the inevitable, with the State Registrar of Ministers for Religion , Mr. J. M. Ryder, officially registering her under the denomination 'Church of Scientology Incorporated.' The Chief Secretary, Mr. Dickie, while recognizing that the federal Marriage Act 1961 took precedence over the Victorian Psychological Practices Act 1965, after having delayed Mrs. Ryder's registration to obtain legal advice, declared; 'we certainly would not tolerate the practices which were part of their cult before 1964'. He also maintained, 'she is recognized as a minister of religion but whether we recognize scientology as a religion is entirely another thing'.[72] Notwithstanding the Government's attitude, the Scientologists were jubilant. Mrs. Allen said, 'we've been given the green light ... it's been a long time coming and it is a great victory'. Headquarters in England were reportedly in 'raptures,' a spokesman declaring 'its beautiful. We're going to clear the planet earth. Scientology is winning and its wonderful'.[73]

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[70] It was reported that a bill had been introduced into the Legislative Council on 24 June 1982, that there were about 6,000 practising Scientologists in Victoria, despite the ban, and that the Liberal Opposition did not oppose the repeal bill, 'Scientology ban lifted', *The Age*, 25 June 1982.

[71] 'Scientology E-meter back at $20 an Hour', *Age*, 29 May 1977. Jona also admitted that the Government had not been able to prevent a visiting scientology minister from NSW from conducting services in Victoria. Unsourced and undated photocopy of article from National Library of Australia entitled 'Jona: We're Watching'.

[72] 'State says yes to Scientology minister', *Age*, 19 May 1977.

[73] Unsourced and undated (circa June 1977) Photocopy of newspaper report from National Library referred to above entitled, 'Jona: We're watching' and subtitled ' "Raptures" at church's world HQ'. With membership in Victoria claimed to be 5,000, with 50 on staff, 40 ministers in training and about 20 students on courses, things were certainly looking more promising for Scientology, although on those numbers a recruitment victory over planet earth was still a long way off.

However, while the Liberal-Country Party coalition remained in power, there was no indication that there would be any relenting on the 1965 legislation. Sir Henry Bolte, who had remained in office from 7 June, 1955 to 23 August, 1972, was succeeded by Rupert James Hamer, who remained Premier of a Liberal government until 5 June, 1981, when he resigned and was replaced as Premier by Lindsay Thompson. The Thompson Liberal administration was defeated at general elections on 3 April 1982, and a Labor government under John Cain took office. In view of the policy direction pursued by Labor governments in Western Australia and South Australia, it was not surprising that a re-examination or clarification of policy had occurred in Victoria.

Victorian Health Commission Working Party

A complete review of the Psychological Practices Act 1965 had already been undertaken by a working party headed by Dr. J. L. Evans of the Victorian Health Commission. The working party, which was established by the previous government,[74] recommended that 'the use of a galvanometer or E meter was harmless and not particularly useful and that there did not appear to be any particular reason for the retention of the section' in the Act relating to E meters.[75] Indeed, the tide had turned so much for Scientology that in 1980 the *Melbourne Truth*, the newspaper which had been a leading scourge of Scientology in the lead up to and the aftermath of the Anderson inquiry, published a grovelling back-down. The editorial said

> The publishers of the Truth wish to apologise to past and present affiliates of the religion of Scientology if any embarrassment has been caused to them ... Truth has been informed by the church, and now accepts the integrity, and the religious nature of Scientology. The Church of Scientology was first established as a religious fellowship in Arizona as HASI and then as the Church of Scientology of California. These were both incorporated in 1954 and the constitutions show the religious nature of the church. This fact was allegedly ignored by the Melbourne inquiry. Scientology was finally recognised as a religion by the Australian Government in 1973 ... to become a minister of the Church of Scientology requires extensive training and severe vetting by the Ministerial

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[74] Victoria Legislative Assembly, *Parliamentary Debates (Hansard)*, Melbourne: Victoria Parliament 1982. 15 June. 1200. (Mr. Lieberman).
[75] Victoria Legislative Council, *Parliamentary Debates (Hansard)*, Melbourne: Victoria Parliament 1982. 16 June. 1300-1. (Hon. D. R. White).

Board of Review ... the church is well known for its support of social reform groups', such as the Citizen's Commission on Human Rights (CCHR) and the Society for the Protection of the Privacy of the Individual (SPPI) ... 75 per cent of people surveyed said that Scientology has helped further their religious beliefs ... Truth has been informed that the Church of Scientology sees the future of religion as an important part in the future of our society. The church states that it has a role as the watchdog for the rights of man, and it will be making sure it does its part to ensure freedom for the individual. It is with this belief that we have made this statement'.[76]

PSYCHOLOGICAL PRACTICES (SCIENTOLOGY) BILL

Legislation to repeal the specific anti-scientology clauses of the Psychological Practices Act was soon introduced by the Minister of Health, Mr. Roper, on 2 June 1982. [77] The Psychological Practices (Scientology) Bill was not opposed by the Opposition. Although one Member spoke against it, and other expressed misgivings, there were no divisions.

For the Government, Mr. Roper noted that the original 'Draconian' bans, enacted in an 'emotional atmosphere', had been 'completely ineffective in curbing scientology in Victoria and there had been 'little effort to enforce' the legislation. In fact, it was noted that 'membership has flourished in the period of its illegality – a similar experience to that of the Communist Party during the period it was banned'.[78] While the Government pointed out it did not endorse Scientology, it felt it was 'manifestly unfair and unjust' to single out one sect or cult.[79] He summed up by saying

the Government is not endorsing the Church of Scientology, but it is saying that the Parliament should not set itself up as a judge on religion and on what can and cannot be practised. There are other ways of resolving those problems and honourable members should be careful before they allow legislation of the Parliament to make a judgement on what constitutes a religion.[80]

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[76] 'Inquiry was Unfair to Scientologists', *Melbourne Truth*, 9 February 1980.
[77] Victoria Legislative Assembly, *Hansard 1982,* 2 June. 578.
[78] Ibid. 3 June. 219. Indeed, the Hon. B. P. Dunn observed; 'it is claimed that there are about 6,000 members in the Melbourne area and about 25,000 members in Australia', Victoria Legislative Council, *Hansard 1982,* 24 June. 1858.
[79] Victoria Legislative Assembly, *Hansard 1982,* 3 June. 719.
[80] Ibid. 15 June. 1204. At the conclusion of the debate in the Assembly.

For the Opposition, Mr. Lieberman said that the issue of cults would 'haunt the community for many years to come ... Parliamentarians and Victorians' should resolve to be more alert, interested and concerned about how they operate and what they are about'. He looked forward to the release of the report of the working party, so that parliament might consider 'whether any action by legislation or other means will be appropriate'. He referred to a suggestion that 'Parliament should one day consider introducing legislation that will require at least the disclosure of collections of funds by some of these groups' and noted that a question had been raised that day about an 'organisation that collects money and fleeces the community under the guise of helping the disadvantaged, particularly physically and mentally handicapped people'. He thought that the report of the Minister on that matter 'will provide Parliament with another opportunity of considering how some so-called religious organisations are raising money for so-called good works in the community'.[81]

The Bill was opposed by Mr. Williams, a member of the Liberal Party. He felt that Scientology was 'a cynical, money-gathering exercise', which distinguished it from 'established religious institutions', which directed contributions in the main to charitable and teaching works. He felt it was 'specious' of Federal Attorney-General Murphy to proclaim it a religion and noted with approval the decision of Mr. Justice Crockett in the Victorian Supreme Court, in a case where the organisation had sought the religious exemption from pay-roll tax, that Scientology 'did not constitute a religion'.[82]

Mr. Whiting advised the House that the National Party did not oppose the Bill, but was concerned about psychological pressures on adherents or applicants. He informed the House that 'the National Party believes action either of a voluntary nature or by way of legislation will be required at some future time to prevent the stress and distress that these kinds of pressures can cause'. However, after expressing the hope that programming or deprogramming was not intended by any organisation in Victoria, he concluded that

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[81] Ibid. 15 June. 1199-200. Noting also that the *Readers Digest* had written an exposé of Scientology entitled 'Scientology: Anatomy of a Frightening Cult' in 1980 and that high ranking Scientologists had been imprisoned in America 'on charges of conspiring to burgle and infiltrate Government agencies'.
[82] Ibid. 15 June. 1203.

'members who believe freedom of speech and freedom of religion should be available to all persons must support the Bill now before the House'. [83]

In the upper house debate proceeded along similar lines. For the Opposition, the Hon. Haddon Storey noted 'there is a large file in the Attorney-General's Department of complaints about all sorts of sects or pseudo-sects in this State, and about the harm that can be caused to people who allow themselves to be "sucked in" by them, to their detriment. No country that I know of has been successful in finding a formula for dealing with those sorts of problems. The Standing Committee of Attorneys-General has discussed it and was unable to come to any other conclusion but that, provided the law is complied with, these sorts of sects should be allowed to carry on their practices in the interests of speech and association'.[84]

The Hon. J. V. C. Guest, referring to such groups as 'non-traditional religions', suggested that 'the Government ought to consider whether religious bodies should not file accounts like responsible public corporations and companies incorporated under the companies legislation'. In conclusion, the Hon. D. K. Hayward expressed the view that the world had changed since 1965, 'when people were much more suspicious of any different or unusual groups'. He felt that there was more need for tolerance and acceptance in a multicultural society, it being 'particularly important in Australia today because we have to bring together people of many different races, colours and beliefs and try to forge them into a great nation'.[85]

And so legislative provisions that had been prompted initially by a question asked by the Hon. J. M. Walton on 15 October 1963, and which had engendered such controversy, was finally rescinded on 24 June 1982, the day Mr. Walton retired from the House.[86] Although Mr. Walton did not refer to the Scientology episode in his short valedictory speech on that day, he had been granted the honour on 27 April 1982 of moving the

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[83] Ibid. 15 June. 1200-01.
[84] Victoria Legislative Council, *Hansard 1982,* 24 June. 1858.
[85] Ibid. 24 June. 1861.
[86] Ibid. 24 June. 1855. (Hon. Haddon Storey).

adoption of the Address-in-Reply. He noted that this was the first occasion since 1954 that a Labor Member had been afforded the opportunity – it having been out of office for 28 years. Perhaps the most interesting aspect of his speech, particularly in light of the Scientology episode, was his support for the intention of the new government to enact legislation to enshrine a Bill of Rights in the state's Constitution. He noted that 'over a number of years there has been a gradual erosion of the rights of citizens, and the passing of legislation to place these basic human rights in the statutes is worthy of urgent consideration by Parliament.' Among those rights which had been set out in the *Progress Report on the Constitution Act 1975* dealing with a Bill of Rights was 'freedom of religion'. Walton concluded by commending 'the inclusion of a Bill of rights in the statutes of this State'.[87]

[87] Ibid. 27 April, 21.

II: 8

AUSTRALIAN DENOUEMENT: CHURCH OF THE NEW FAITH DECISION (1983)

'a very old form of tax avoidance'

With recognition as a religion under federal laws and the withdrawal of anti-Scientology legislation in Western Australia and South Australia, in 1980 the Scientologists resolved to pursue the issue of payroll tax exemption in Victoria.[1] The exemption under s. 10b of the Pay-roll Tax Act 1971 (Vic.) was for 'pay-roll tax wages paid or payable "by a religious or public benevolent institution, or a public hospital"'.[2] An exemption under similar provisions had already been granted to Scientology in other states.[3] Therefore a challenge against the refusal of the Victorian Commissioner for Pay-roll Tax to grant an exemption might have been expected to have a reasonable prospect of success.

JUDGE CROCKETT FINDS AGAINST SCIENTOLOGY

However, Mr. Justice Crockett of the Victorian Supreme Court was in no doubt that the claims of Scientology to be a religion for the purposes of pay-roll tax exemption were a 'sham'. The organisation was a 'grotesque parody of Christianity' and its practices 'a mockery of religion'.[4] Scientology had appealed the refusal of the Pay-roll Tax Commissioner to grant it tax exemption as a religious institution. Crockett J found that the aims of Scientology were best summed up by its spokesman before the Anderson inquiry; 'to increase the efficiency and well-being of the individual ... and society as a

[1] 'Scientologists seek recognition', *The Age*, 21 November 1980.
[2] *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120. 120.
[3] Scientology had already been exempted from pay-roll tax in WA, SA, NSW and the ACT, Margot Lang, 'Judges: Scientology is a religion', *The West Australian*, 28 October 1983.
[4] Prue Innes and Aileen Berry, 'Scientology religion claim sham, says judge', *The Age*, 19 December 1980.

whole'.[5] He held that the religious trappings of Scientology were a device which was cynically adopted, first in the United States[6] to 'enable such attendant advantages as would thereby accrue', and then in Victoria to avoid 'destruction' under the provisions of the Psychological Practices Act 1965. This legislation had 'driven the organisation underground' or 'into other States' and here was no 'better method to avoid destruction than to simulate' and become accepted as a religion'. [7]

Evidence of this deception was to be found in the literature of the organisation itself, which contained 'unequivocal rejection of the notion that Scientology is a religion' but had later been interpreted afresh and had been supplemented with new works. A Scientology magazine entitled *Testing* contained the statement that 'H.A.S.I. (the Hubbard Association of Scientologists International) is non-religious – it does not demand any belief or faith nor is it in conflict with faith. People of all faiths use Scientology'. The judge noted, 'there can be found in none of Mr. Hubbard's publications written in the 1950s and early 1960s any claim that scientology was religious in content or intent.'[8] Re-interpretation involved dressing up of Hubbard's 'literary output', the vast mass of which meant that they could not be rewritten or destroyed, so that 'prologues were sometimes added and often a gummed page was included as a frontispiece' stressing 'the supposedly religious nature of the intellectual revelations to be found described in the book itself'. [9]

New works, including two new books, *The Scientology Religion, The Church of Scientology* and *The Church of Scientology: Background and Ceremonies*, were not published prior to 1966 in the form they were now to be found, despite claims that they were republications of earlier works. They were 'intended to invest Scientological teachings with a conceptual doctrine that is fundamentally religious and to dress up the

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[5] 'Not religious, Judge rules - Scientologists lose appeal', *The Sydney Morning Herald*, 19 December 1980.
[6] The judge noted that the *Bill of Rights* in the U.S. bestowed a cherished guarantee of religious freedom so that 'the masquerade in that country might be thought to have been beneficially possible', *Church of the New Faith v Commissioner for Pay-roll Tax (Victoria)* (1983) VR 97. 102.
[7] Ibid. 103.
[8] Ibid. 99.
[9] Ibid. 101.

practices and ceremonies in a manner designed to give verisimilitude to such doctrine by the use of symbolism and paraphenalia of a kind which people, at least in Western Countries, have come to associate with participation in religious activity'.[10] The 'cosmetic changes' made by Scientology and the 'new image assiduously cultivated' since the enactment of the Psychological Practices Act had been 'singularly successful'.

Administrative decisions had favoured the organisation, including the proclamation under the Commonwealth's Marriage Act 1961, payroll tax exemptions in other states and the ACT. But these were not relevant to the present determination, as it was not known what material had been put before the officer who made the decision and no reasons were given.[11] The judicial or quasi-judicial decisions made in Australia, including the 1970 *Gellie* conscription case, a decision of the Victorian Town Planning Appeals Tribunal in 1973 and defamation case considered by the Western Australian Supreme Court in 1978 were criticised on the basis that 'in no instance does it appear that the history of the development of the cult was investigated fully or at all'.

In *Gellie*, 'no attempt was undertaken to cast doubt on the bona fides of the organisation's holding itself out as a religion' and a 'liberal' interpretation had been adopted of the term 'religion'. The Victorian Town Planning Appeals Tribunal, which had allowed Scientology a permit to use certain land as 'a place of worship', was overly influenced by the 1973 Proclamation under the Marriage Act 1961 and accepted 'at face value' the claim of the appellant that it was engaged in 'religious' activities. The decision in *Church of Scientology v. Anderson* [12] was criticized for relying on the evidence of two so-called 'expert' witnesses, a Catholic and an Anglican priest, who had relied upon three documents only to decide that Scientology amounted to a religion. Crockett J had already

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[10] Ibid. 101-2.
[11] Ibid. 106.
[12] Brinsden J had ruled that 'matters of evidence established the criteria testified to by experts sufficiently to characterize the beliefs of the plaintiff a religion'. He also said, 'this action is maintainable by the plaintiffs as it has a "religious" reputation which I think it is entitled to protect by a defamation action', *Church of Scientology Inc v Anderson* (1980) WAR 71. 73, 76.

ruled in the present case that 'the matter was not one appropriate for the reception of so-called expert evidence'.[13]

While it was not his role 'to pass any judgement on the correctness or otherwise of the doctrines of Scientology',[14] Crockett J nevertheless concluded that 'Scientology as now practiced, is in reality the antithesis of religion'. The 'adroitness' with which it had so 'cynically adapted' itself served only to 'rob the movement of the sincerity and integrity that must be cardinal features of any religious faith'.[15] Aside from the 'masquerade' by those perpetrating the 'deception', for those genuine believers; 'gullibility cannot convert something from what it is to something it is not'.[16]

VICTORIAN FULL COURT DISMISSES SCIENTOLOGY APPEAL

In February 1981 the Scientologists lodged an appeal to the Full Court, which consisted of three judges. It was dismissed unanimously on 5 May 1982. The Chief Justice noted that the account of Crockett J on the history of the modification of Scientology's ceremonies and practices had not been seriously challenged. It was 'difficult to avoid the conclusion that one of the reasons for writing this way is that it permits an explanation of the functions or purposes of the organisation to be trimmed to whatever advantage is sought or can be obtained'.[17] Therefore 'a point must be reached where the court is able to say that a so-called religion is no more than a mockery', a point reached in the case of *United States v Kuch (1968),*[18] and apparently also by Crockett, J, who did not refer specifically to *Kuch.* Despite acknowledging this route the Chief Justice refrained from endorsing it or otherwise, following his own path to decision.

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[13] *Church of the New Faith (Supreme Court)* 107-8. On appeal he was supported by Young CJ, who noted that 'the question to be answered in the proceedings is a question of the meaning and application of an Act of Parliament and expert evidence is not admissible to assist in that task. Furthermore, nothing in the material shows that there is an organized branch of knowledge which enables a person to say whether a given set of ideas constitutes a religion or not', Ibid, 128.
[14] Ibid. 110.
[15] Ibid. 109.
[16] Ibid. 111.
[17] Ibid. 116.
[18] *United States v Kuch* (1968) 288 F Supp 439. , *Church of the New Faith (Supreme Court)* 119.

This began with the criticism that Crockett J had made his decision on the basis of forming an 'opinion upon the truth of the doctrines propounded or making an assessment of the sincerity' of the 'founder or leaders or adherents of the particular cult in question'. This criticism was levelled even though 'the conclusions may well be right and there is undoubtedly some basis for them in the evidence'. The Chief Justice felt that Crockett J. might have offended the advice of Latham, CJ in *Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth (1943)*[19] where he said, 'it is not for a court, upon some a priori basis, to disqualify certain beliefs as incapable of being religious in character'.[20]

The Chief Justice observed that 'the question is what Parliament meant by the words "religious institution"' in the Victorian Pay-roll Tax Act 1971.[21] Definitional difficulties had led courts to 'eschew the task of defining religion to any extent greater than is necessary for the particular task in hand'.[22] Rather than confining his examination to the legislative intention, he felt that the answer to the specific question depended upon the general question; 'is Scientology a religion?' He examined a number of 'useful indicia' which did not challenge the validity of the beliefs or the genuineness of the proponents but rather provided some sort of guide as to what might constitute a religion. These included three indicia specified in the United States case of *Malnak v. Yogi (1979),*[23] being: the nature of the ideas, the comprehensiveness of the ideas, and the trappings of the organisation. To these he added three further indicia: public acceptance, method of joining, and commercialism. After examining Scientology in the light of each one and then 'drawing together all the indicia', he concluded that Scientology was not a religion.[24]

Justice Kaye determined to adhere to the 'primary rule of construction', to find the 'plain and ordinary meaning' of the words found in the statute. However, he also moved to a

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[19] *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 CLR 116. 124.
[20] *Church of the New Faith (Supreme Court)* 119.
[21] Ibid. 123.
[22] Ibid. 120.
[23] *Malnak v Yogi* (1979) 592 F. 2d 197.
[24] *Church of the New Faith (Supreme Court)* 123-8.

consideration of Latham's observations on the meaning of the word 'religion' in another context and then referred to the decision in *United States v. Seeger (1965),*[25] a military service conscientious objection case, where it was held that 'a belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God' and therefore qualified for the same religious exemption as a 'belief in relation to a Supreme Being'.[26] Kaye J felt that the American definition, which was wider than that adopted by dictionaries for the term 'religion', was not 'understood or used in everyday speech by Australians in that sense'. The British Courts had declined to follow *Seeger*. Distilling the basic elements of religion common to the three dictionary definitions examined, as well as finding some guidance in the British cases, he found that a 'religion' is 'the recognition of the existence of a superior or supernatural being or power with whom an individual has a personal relation and upon whom his own existence depends', which 'may be without name' and 'may not be a single entity'. He added the rider that a person's 'relationship to his own deity is characterized by the belief that his is the true and only deity'.[27]

The constitution and general rules of the Church of New Faith failed to 'disclose acknowledgement of a particular deity by all members ... or a relationship between all members with that deity'. The Scientology literature contained ''repeated statements that Scientology is non-religious and it does not demand any belief or faith'. The 'processing' offered by Scientology to improve 'intellectual performance and emotional well-being without requiring adherence to or acceptance of any religious belief or faiths' were the same methods practiced by Scientology before and after the 'grafting' of 'methods' and 'formula having some semblance to religious dogma' and 'trappings'. Kaye J concluded that Scientology was not a religion.

Mr. Justice Brooking felt no need to decide the question whether Scientology was a religion, although the extant Psychological Practices Act 1965 defined Scientology as 'a system or purported system of the study of knowledge and human behaviour' and clearly

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[25] *United States v Seeger* (1965) 380 US 163; 13 L. ed. 2nd 733.
[26] *Church of the New Faith (Supreme Court)* 131-2.
[27] Ibid. 130.

comprehended that it was 'something other than a religion'.[28] He did not need to decide whether Scientology was a religion or not because it was clearly 'committing a criminal offence by holding itself out as being willing to teach Scientology' in contravention of the Psychological Practices Act. In Victoria Scientology was a 'body formed for an object illegal under the criminal law'.[29] He accordingly found against the appellant as a matter of public policy, stating; 'there is no reason why public policy should not in an appropriate case deprive the taxpayer of the benefit of some exemption or deduction[30] ... general words in a statute which might include cases obnoxious to the principle of public policy must be read down[31]... and the provisions of the statute must bend before it[32]... even though the result may appear to be an extraordinary instance of judge-made[33] law'.[34]

SCIENTOLOGY APPEAL TO THE HIGH COURT OF AUSTRALIA

Despite this setback and the high cost of justice, the Scientologists were determined to take the matter to the highest court in the land. [35] Their case came before three judges of the High Court of Australia on 30 July 1982 and it was ordered that it should be referred to the Full Court with leave to argue as on appeal. On 9 November 1982, the matter came before the Full Court,[36] where the Scientologists argued the reasons for seeking 'special' leave to appeal, submitting that the size of the organisation in Australia, which they claimed to be 150,000, was one reason for the Court to hear the matter. The attention of the Court was warranted because of the widespread legal exemptions afforded to

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[28] Ibid. 139.
[29] Ibid. 140. He noted clear precedents to the effect that no person can obtain or enforce rights 'resulting to him from his own crime' (the quotation came from Sir Samuel Evans P. in *In the Estate of Crippen (1911) P. 108* at p. 112)
[30] Citing *Federal Commissioner of Taxation v Snowden & Willson Pty Ltd* (1958) 99 CLR 431. 437. (Dixon J).
[31] Citing *Cleaver v Mutual Reserve Fund Life Association* (1892) 1 QB 147. 157. (Fry LJ).
[32] Citing *Re Sangal* (1921) VLR 355. 359
[33] Citing *Re Tucker* (1920) 21 SR (NSW) 175. 181
[34] *Church of the New Faith (Supreme Court)* 142
[35] A Scientology spokeswoman was reported as saying that the case had cost $10,000 or $12,000 so far, but that they would 'spend as many thousands again, if we need to, to win', Innes and Berry, 'Scientology religion claim sham, says judge'. Indeed, the amount of the assessment contested was only $897.80, a clear indication that that the motivation to pursue the issue was for the broader benefits of a potential Court recognition of Scientology as a 'religion', *Church of the New Faith (Supreme Court)* 112.
[36] *Church of the New Faith (High Court)* 121-2.

religions under various Australian laws. Certain religions were at risk of losing their tax exempt privilege (which constitutional commentator David Solomon described as 'a very old and pure form of tax avoidance'). Furthermore, it was noted that the High Court had never defined the meaning of the word 'religion', which appeared in the Commonwealth of Australia Constitution Act 1900.[37]

The matter warranted authoritative adjudication, as 'hitherto the concept of religion has received little judicial exegesis in Australia, whether under s. 116 or otherwise' and it was 'undesirable that the clarification of a concept important to the law of Australia should be left to the courts of other countries when there is an appropriate opportunity for the concept to be clarified by this Court.' The importance of the concept of religious freedom was noted, as was the fact that the judgements in the Supreme Court would influence judicial interpretation of s. 116, even though 'this case does not arise under s. 116 of the Constitution or under any part of its fourfold guarantee of religious freedom.'[38]

The Scientologists argued that the concept of 'religion' should be given a broad meaning, following the decisions in the United States. It was submitted that; 'if by God is meant the Supreme Being, Creator and Ruler of universe, with the usual Western connotations of an Ultimate Deity who is personal and with whom man can or should have a relationship, it must be noted that there are a number of religious traditions without a God'. In this respect Scientology drew much from Theravadan Buddhism, which was said to be 'atheistic or non-theistic'.[39] They also argued that a statement 'by an individual or by a group to the effect that the group is not a religion is not a critical admission in litigation'. [40] The respondent argued that 'resort to American cases decided under the influence of the guarantees of the First Amendment is inappropriate', preferring instead the assistance provided by British cases, which provided a narrower approach,

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[37] David Solomon, 'Scientology's status challenged in court', *The Australian Financial Review*, 10 November 1982. Solomon noted that counsel for the Scientologists had referred to the fact that the Commissioner for Pay-roll Tax had also ruled that the Seventh-day Adventists were not a religious organisation.
[38] *Church of the New Faith (High Court)* , 130 per Mason CJ & Brennan J
[39] Ibid. 123-4.
[40] Ibid. 122.

and arguing that it was doubtful that Scientologists postulated 'a Supreme Being or require a belief in a Supreme Being',[41] which was the substance of the British position.

LANDMARK VERDICT FOR SCIENTOLOGY

The verdict of the High Court of Australia was stunning. Delivered on 27 October 1983, the unanimous decision of the Full Court, consisting of five judges, with three separate written judgements, reversed the unanimous decision of the Victorian Supreme Court. A landmark decision and a 'triumph for Scientology', it opened 'the way for many non-mainstream religions to claim the legal status of a church and all the financial and other privileges that go with that status'.[42] Representatives of Ananda Marga, the Bhagwan Shree Rajneesh (Orange People) and the Unification Church (Moonies) welcomed the decision and saw it as a means to 'help them gain recognition'. [43] The financial benefits were significant. Spelled out by Mr. Justice Lionel Murphy, they included exemptions on, 'stamp duty, pay-roll tax, sales tax, local government rates, and the taxes on motor vehicle registration, hire purchase, insurance premiums, purchase and sale of marketable securities and financial transactions' and 'many other State and federal laws which directly or indirectly subsidize or support religion'.[44]

Murphy J was well aware of the implications of the decision, noting that 'the crushing burden of taxation is heavier because of exemptions in favour of religious institutions, many of which have enormous and increasing wealth'. [45] However, his view was clear; 'in the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is "one in, all in"'.[46] Yet in truth

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[41] Ibid. 127.
[42] Carol Simmons, 'Scientology wins status of church in High Court', *The Australian*, 28 October 1983.
[43] Robert Thomson, 'Sects welcome court decision on Scientology', *The Sydney Morning Herald*, 29 October 1983.
[44] *Church of the New Faith (High Court)* , 149. Mr. Justice Murphy quite deliberately included 'cults', saying 'any body which claims to be religious, whose beliefs or practices are a revival of, or resemble, earlier cults, is religious', *Church of the New Faith (High Court)* ,151
[45] *Church of the New Faith (High Court)* 162.
[46] Ibid. 150.

the Court, which agreed that the definition of religion extended beyond the theistic approach of the UK,[47] had just made the 'club' less exclusive.

Three different judgements were delivered. Justice Murphy provided the widest 'definition' of religion, which really consisted of a list of examples of the types of organisations exhibiting sufficient characteristics.[48] He found

> Because so many different beliefs or practices have been generally accepted as religious, any attempt to define religion exhaustively runs into difficulties. There is no single acceptable criterion, no essence of religion ...The better approach is to state what is sufficient, even if not necessary, to bring a body which claims to be religious within the category ... On this approach , any body which claims to be religious, whose beliefs or practices are a revival of , or resemble, earlier cults, is religious. Any body which claims to be religious, and to believe in a supernatural Being or Beings, whether physical and visible, such as the sun or the stars, or a physical invisible God or spirit, or an abstract God or entity, is religious ... Any body which claims to be religious, and offers to find meaning and purpose in life, is religious. The aboriginal religion of Australia and of other countries must be included. The list is not exhaustive; the categories of religion are not closed.[49]

This list could *prima facie* include practically any group of people, whether interested in sporting, social, cultural or even commercial activities. Secular humanism would qualify, if the claim was made for religious status, on the basis of 'meaning and purpose in life'. Perhaps Murphy J's intention was to wreck the 'club',[50] an explanation advanced by at least one scholar, academic theologian Bruce Kaye, who noted

> Murphy J's position ... reveals something of his social strategy ... His definition is so broad that almost any person or group could qualify if they so wished ... The consequence for social policy of the acceptance of such a broad definition would

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[47] Hence *Barralet v Attorney General* (1980) was 'not followed', Ibid. 121.

[48] One commentator states that 'Murphy J did not attempt to define religion, finding at p. 150 that, while Scientology was a "religion", "to determine what religion is ... poses a threat to religious freedom"', and footnoting that he had 'reached a similar conclusion' in *Attorney-General (NSW) v Grant* (1976) 135 CLR 587. 612. George Williams, *Human Rights under the Australian Constitution* (Melbourne, Australia: Oxford University Press, 2002) 114 fn 76.

[49] *Church of the New Faith (High Court)* 151.

[50] Murphy was well known as a religious sceptic, being patron of the NSW Humanist Society, Alan W Black, 'Organised irreligion: The New South Wales Humanist Society', in *Practice and Belief: Studies in the sociology of Australian religion*, ed. Alan W Black and Peter E Glasner, *Studies in Society* (Sydney: George Allen & Unwin, 1983), 159.

eventually be the legislative withdrawal of the taxations privileges. To judge from his opening and closing remarks he would clearly welcome such a development, indeed, his judgement could well be seen as a vehicle in the promotion of that end.[51]

Wilson & Deane JJ also took a wide view of religion, which accorded 'broadly with the newer, more expansive, reading of that term that has been developed in the United States in recent decades'. [52] They found

there is no single characteristic which can be laid down as constituting a formularized legal criterion, whether of inclusion or exclusion, of whether a particular set of ideas and practices constitutes a religion within a particular State of the Commonwealth. The most that can be done is to formulate the more important of the indicia or guidelines by reference to which that question falls to be answered. Those indicia must, in the view we take, be derived by empirical observation of accepted religions. They are liable to vary with changing social conditions and the relative importance of any particular one of them will vary from case to case.[53]

They then listed the most important of these as: belief that reality extends beyond that which is capable of perception by the senses; ideas relating to man's nature and place in the universe and his relation to things supernatural; standards or codes of conduct or practices having supernatural significance; adherents, however loosely knit, constituting an identifiable group; and adherents themselves seeing the collection of ideas and/or practices as constituting a religion. [54]

Mason C J & Brennan J advanced a more restrictive, two-pronged interpretation, albeit one that was much wider than the English requirement for a deity or deities. They held that the definition was: 'first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on grounds of religion'.[55] In addition, they said; 'there can be no acceptable discrimination between institutions which take their character

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[51] Bruce Kaye, 'An Australian Definition of Religion', *UNSW Law Journal* 14, no. 2 (1991): 345.
[52] *Church of the New Faith (High Court)* 174.
[53] Ibid. 173.
[54] Ibid. 173-4.
[55] Ibid. 136.

from religions which the majority of the community recognizes as religions and institutions that take their character from religions which lack that general recognition'.[56]

The members of the Court therefore supported opening membership of the 'religious' fraternity to all manner of cults and sects and new religious movements. Mason ACJ & Brennan J specifically extended this protection (and all the attendant financial advantages) to groups set up by bogus preachers, noting; 'charlatanism is a necessary price of religious freedom, and if a self-proclaimed teacher persuades others to believe in a religion which he propounds, lack of sincerity or integrity on his part is not incompatible with the religious character of the beliefs, practices and observances accepted by his followers.' [57] This apparent judicial invitation to swindlers was endorsed by their brethren Wilson & Deane JJ who said; 'regardless of whether the members of the applicant are gullible or misled or whether the practices of Scientology are harmful or objectionable, the evidence, in our view, established that Scientology must, for relevant purposes, be accepted as "a religion" in Victoria'.[58] This was not a judgement that Scientologists were swindlers, or its practices harmful or objectionable, but an acknowledgement that it would be classed as a religion nevertheless.

Despite these statements, the idea that a 'religion' should be characterized by 'sincerity and integrity', as enunciated by Crockett J, was not entirely discarded by the High Court. Indeed, the apparent sincerity of Scientology disciples seems to have been an essential part of the decision. Mason CJ & Brennan J noted

> No attack was made upon the sincerity of integrity of the witnesses who stated what the general group of adherents believed and accepted. The question to which the evidence was directed was not whether the beliefs, practices and observances of the *persons in ultimate command* of the organisation constituted a religion but whether those of the *general group of adherents* constituted a religion.[59]

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[56] Ibid. 131.
[57] Ibid. 141.
[58] Ibid. 176.
[59] Ibid. 142. Emphases added.

Nevertheless, they also said there was a 'real question as to whether Mr. Hubbard or the Church organisation intends that auditing be practiced for religious or for commercial motives or for a mixture of both motives ... if the case had been fought on the issue whether the corporations' purpose and activities were religious, the question of motivation may have emerged more clearly ... the motivation of the corporation in promoting auditing would have borne examination'. However, the state of the evidence was such that 'the motivation of the corporation in promoting auditing and the other aspects of Scientology' had 'not been litigated'. The observation was made that

> promotion of religion is not always the preserve of the religious and it may be motivated by pursuit of pecuniary or other venal advantage quite unconnected with and unmotivated by any belief in the supernatural. A commercial institution which derives its income from the sale of religious objects, the sale of religious services or the organisation of church finances can hardly be described as a religious institution merely because its commercial activities incidentally conduce to the advancement of religion. [60]

Therefore the judges indicate that the personal pecuniary motivations of the leadership might mitigate against the organisation being characterized as a 'religious institution' if the purpose behind the activities was personal profit.[61] This is not particularly exceptional. Under the law of charity a *prima facie* religious organisation will not achieve charitable status if it is run for private profit. A shop selling religious artefacts for personal profit is not a charity but a business, and should be taxed on this basis, while a shop selling religious artefacts but run by a charity and channelling the proceeds back into the charity (to advance the aims of the charity) is not a business but an ancillary part of the non-profit charity.

If *Church of the New Faith* had been litigated as a matter of charity law, and if there had been evidence that the 'persons in ultimate command' had utilized the organisation for personal profit, this aspect might have been properly aired. Even if the matter was not strictly to be characterized as one of charity law, the judges seem to indicate that the

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[60] Ibid. 147.

[61] Indeed, it was pointed out by one commentator that 'no doubt these factors will be of significance in later cases concerning other institutions', Sally Walker, 'Is Scientology a religion ?' *Law Institute Journal* 58, no. January/February (1984): 63.

accepted characterization of an institution as a business, that is 'for profit', would lead them to decide that the organisation in question was not a 'religious institution'. To gain the benefits of a fiscal exemption it would seem essential that the organisation in question is not-for-profit, part of the third sector rather than the business sector. If the words of a statute clearly spelt out that any financial benefit was to be directed towards private companies or businesses (perhaps in an effort to promote private worship), as well as not-for-profit enterprises, then so be it. However, in the absence of such clear intention it seems reasonable that an interpretation be placed on the words 'religious institution' denoting third sector, not-for-profit enterprises.

The fact that Justice Murphy pointed out that 'commercialism is so characteristic of organized religion that it is absurd to regard it as disqualifying'[62] is beside the point. The question is whether the commercialism is for private profit or for charitable or other non-profit causes. In *New Faith* the matter was not obviously characterized as one of charity law (although pleadings to this effect might have been entertained by the Court). To make the same sort of distinction between for profit and not-for-profit organisations (as made in charity law) and to rule out an organisation run for the private profit of its leadership or oligarchs ('persons in ultimate command'), [63] the judges would have had to employ the device of context, making a distinction between religion *per se* and a 'religious *institution*', which in the context of the legislation and for the purposes of the law was presumably required to be not-for-profit.

With the appropriate characterization of the case as one involving charity law, or a more general third sector equivalent, the 'motivation' rather than the 'sincerity' of those in ultimate command, might have been in question. Even if the oligarchs were completely sincere in a religious sense, an overriding motivation to accrue personal profit from the organisation, to channel profits to the leader, would be sufficient to disqualify the organisation from receiving the financial privilege involved. There was some discussion

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[62] *Church of the New Faith (High Court)* 161.

[63] Indeed, Murphy J said 'most organized religions have been riddled with commercialism, this being an integral part of the drive by their leaders for social authority and power (in conformity with the "iron law of oligarchy")', thereby exhibiting an awareness of Robert Michels' theory on oligarchy in *Political Parties* (1911).

of the types of behaviour of the leadership that might lead to a finding that the religion in question was no more than a sham. Wilson & Deane JJ said

there are cases where what is put forward as being a religion cannot properly be so characterized for the reason that it is, in truth, no more than a parody of religion or a sham: the claimed religion of "Chief Boo Hoo" and the "Boo Hoos" in *United States v Kuch* provides an obvious example of such a parody. Nor is it to deny that there may be cases in which the fraud or hypocrisy of the founder and leader of a particular system of claimed beliefs and practices constitutes the straw that weighs the balance against characterization as a religion.[64]

However, they could not support Crockett J, the trial judge, who held that Scientology was a sham. This was because 'there was no suggestion made in the cross examination of Mrs. Allen and Mr. Cockerill[65] that they were other than sincere in the beliefs they professed' and 'senior counsel for the Commissioner disclaimed any suggestion that Mr. Cockerill or Mrs. Allen was other than sincere'.[66] Apparently, *Kuch* was to be limited to an extreme example,[67] probably involving a very small organisation, where it could be said with certainty that members of the leadership group were involved in a deliberate fraud, revealing their utter insincerity. In any event, the purpose of the organisation was for private advantage only. However, while a small number of true believers might not be enough to prevent the characterization of an organisation as a sham, a large number of true believers might provide an antidote to this characterization, so that Wilson & Deane JJ say

in the present case, where one has an organisation consisting of thousands of Australians who genuinely believe[68] and follow the current writings and practice of Scientology, the question whether Scientology is a religion in Victoria falls to be answered by reference to the content and nature of those writings and practices and to the part Scientology plays in the lives of its adherents in Victoria rather than by reference to matters such as the gullibility of those adherents or the motives of those responsible for the content of current

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[64] *Church of the New Faith (High Court)* 171.
[65] Scientologist witnesses.who were presumably part of the leadership of the organisation.
[66] *Church of the New Faith (High Court)* 170.
[67] Hence Murphy J noted 'some claims to be religious are not serious but merely a hoax (United States v Kuch ... but to reach this conclusion requires an extreme case', Ibid. 151.
[68] 'Nor does the judgement of the learned trial judge contain any finding that any significant number of the more than 5,000 Victorian members of the applicant was other than genuine and sincere', Ibid. 170. (Wilson J & Deane J).

writings and the form of current practices. As we have noted, the approach of counsel for the Commissioner substantially follows this approach to the problem. The thrust of his submission is directed to establishing that those writings and practices viewed in their entirety fall short of constituting a religion.[69]

IMPLICATIONS OF THE DECISION

Scientologists thus achieved formal membership of the religious fraternity. It should be noted that their admission had not been universally opposed by long term members. Indeed, during their campaign they had been able to enlist the support of some representatives of 'mainstream' religions. Apart from the two clerics who had given evidence on their behalf in their successful Western Australia defamation case against journalist Leslie Anderson, [70] they had been supported in Victoria in 1981 when 'ranking' members of three churches, Baptist, Catholic and Methodist, signed a petition entitled 'In the interests of religious freedom', calling upon the Victorian government to 'review the Victorian Psychological Practices Act and remove all prohibitive sections aimed at members of the Church of Scientology'. The petition requested that 'in future no legislation be passed which discriminates against any minority because of its beliefs'. The Rev. Himbury said; 'it is better to tolerate what we think is wrong rather than condemn things out of hand'. The petition concluded with the disclaimer 'we do not necessarily imply agreement with the tenets and practices of the Church of Scientology'.[71]

Nevertheless, the actions of these clergymen reveal, for good or bad, an approach of accepting Scientology into the fold, lest they also suffer discrimination. Whether this approach has played into the hands secularists seeking to lower the social respectability of all religious groups remains a moot point. An additional consequence of allowing Scientology to benefit from laws ostensibly promoting religious freedom also led, in *New*

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[69] Ibid. 171.
[70] '2 clerics back scientology', *The West Australian*, 21 December 1978. The two clerics were 'the Rev. Father William James Uren, the dean of the St. Thomas More (sic) College at the University of WA' and 'the Rev. Richard Graham Borthwick, a senior tutor in philosophy at the university, of Onslow Road, Shenton Park'
[71] Louise Carbines, 'Churchmen urge an end to bans on scientology', *The Age*, 18 April 1981.

Faith, to the organisation of Scientology benefiting from Commonwealth financial privileges hitherto reserved for more mainstream religious groups.

A legal academic noted in 1984 that the *Church of the New Faith* decision 'now makes the task of determining whether religious status should be conferred on a particular organisation easier; however, a more difficult question of a political nature will now arise – to what extent should governments provide special benefits, privileges and exemptions for religious institutions ?'[72] This question became increasingly more significant because of the wide latitude (on any interpretation), allowed by the High Court in defining religion in 1983. However, it was not until the introduction of business number endorsements for charities and the announcement of the Sheppard Inquiry in the year 2000 that an Australian Government took the first tentative steps towards analysis of the sector including tax-exempt religious entities.

On the financial benefits of acceptance into this club, it was noted in 1994 that 'religious organisations receive significant indirect financial support ... through their tax exempt status worth tens of millions of dollars annually which represents subsidies by Australia's governments for religious activities provided to groups which meet the High Court's definition of religion.'[73] The true extent of the value of taxation benefits (let alone other financial benefits under entitlements such as those listed by Murphy J above) gained by cults, sects and new or older religious groups is an unknown quantity. Religious groups (including religious institutions and religious charities) have not been required to lodge taxation returns[74] and as noted above the ATO has only recently begun to establish a systematic method of requiring endorsement after obtaining an Australian Business Number prior to the granting of gift deductible recipient status (which is only available to

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[72] Walker, 'Is Scientology a religion ?' 63.
[73] Andrew Naylor and Chris Sidoti, 'Leap of Faith: Religious Freedom in Australia', in *Australian Law and Legal Thinkers in the 1990's*, ed. A Tay and C Leung (University of Sydney, 1994), 435.
[74] Max Wallace, The Purple Economy - The Tax Exemption for Religion and Religious Wealth in Australia.' (Paper presented at the Sceptics, Adelaide, November 1999), 2., cites the report of the Industry Commission, *Charitable Organisations in Australia,* which made the point that the Commonwealth Treasury has no information on 'revenue foregone from exemption of income tax of charitable organisations as there is no requirement for them to lodge returns' and Wallace notes that 'organisations that advance religion' were not covered by the Industry Commission report, p. 2

a limited number of select causes), or of religious charitable status. Indeed, it seems that religious institutions, as distinct from religious charities, are still not required to register with the Business Names Registry. Neither religious institutions nor religious charities are required to lodge taxation returns, except that religious charities may be required to provide information for an ATO audit.[75]

As a consequence, reliable information about the religious component of the charitable sector is hard to come by, but there are some broad indications of the overall size and financial significance of the sector. For example, the respected journalist and financial author Laura Tingle, reported in April 2002 that

> a requirement that charities receive a new formal exemption from income tax when the new tax system was begun in 2000 revealed just how big a monster the charitable sector has become. There are 40,202 entities registered as tax-exempt charities and about 800 cultural bodies receive donations ... Last years review of the legal definitions of charities ... put the cost of tax breaks for charities on donations and FBT alone at close to $1 billion a year. This doesn't cover the income tax exemption they all get which, since the sector is now worth around $25 billion a year, represents foregone tax – for which there is no official estimate – of about $9 billion a year.[76]

Therefore, if the number of religious charities in Australia approximates the estimated 7.1% of registered charities in England and Wales in 1992,[77] then the worth of tax-exempt status alone to religious charities in Australia would exceed well over half a billion dollars annually.[78] This indicates that the value of tax exempt status for religious charities alone is substantial enough to warrant considerably more scrutiny than hitherto evident.

In *New Faith*, Scientology not only gained invaluable membership of the tax-exempt religious fraternity, but its newly privileged position was entrenched against remedial

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[75] See discussion in Ch VII: 2 below. It has been noted that 'the Tax Commissioner can demand that they open their books to him for inspection on demand. Yet many of those organisations get down-right grumpy if asked to open their books – the churches being notable examples', Laura Tingle, 'Giving to charity', *The Sydney Morning Herald*, 4 April 2002.

[76] Ibid.

[77] A figure noted in Chapter II: 1.

[78] This is likely to be a considerable underestimation because a large number of religious charities were excepted from registration in England and Wales.

legislative action, if for no other reason than because of the authoritative standing of any High Court judgement. The case immediately emerged as a landmark decision and was subsequently referred to by scholars as the 'leading decision'[79] or 'benchmark for the extension of religious toleration'.[80] A broad definition of religion was extracted from the various judgements, although it is still moot whether the Court as a whole had baulked at extending the definition to encompass other, possibly secular belief systems having equivalence to religious beliefs, and the decision has also been criticized for allegedly minimizing the subjective nature of religion.[81] The broad definition distilled from the various High Court judgements, which has been applied legally[82] and adopted administratively, is the proposition that 'a religion must have two characteristics: belief in a supernatural Being, Thing or Principle; and that there is an acceptance of canons of conduct that give effect to that belief by some part of the community'.[83]

Indeed, in 1992 an administrative Ruling was issued by the Australian Taxation Office (ATO) clarifying the meaning of 'religious institution' under relevant taxation legislation. According to the ATO, a body was instituted for religious purposes if; 'its objects and activities reflected its character as a body instituted for the promotion of some religious object' and 'the beliefs and practices of the members constituted a religion'. To constitute a religion, the requisite set of beliefs and practices were; 'belief in a supernatural being, thing or principle' and 'acceptance of canons of conduct that gave effect to the belief, but

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[79] For example, Gino E Dal Pont, *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000) 148.

[80] That this comment was intended ironically seems apparent from the subsequent observations, that 'Scientology was characterised by a very rapid turnover in its flock, and many of those who left did so with the uncomfortable sensation of having been fleeced', and 'in their various rulings, the High Court judges argued that it was necessary to take a tolerant attitude to fraud in religion'. It was also noted that 'in the 1980's it seemed that notions of religion and the church had become almost infinitely elastic', Hilary M Carey, *Believing in Australia: A cultural history of religions*, ed. Heather Radi, *The Australian Experience* (Sydney: Allen & Unwin Pty Ltd, 1996) 181-82 fns 35, 36.

[81] 'The flaw in the judgements, taken as a whole, lies in the minimisation of this subjective factor in the nature of a religion. Quintessentially, a religion consists of, or corresponds to the subjective beliefs or faith of a single individual or group of individuals ... the subjective aspect of religion receives more emphasis in the international domain, where religion is regarded as a human right, with the stress on freedom of belief', The Australian Law Journal, 'The Law and the Definition of Religion', *ALJ* 58 (July) (1984): 366 col. 2.

[82] See for example the application of *Church of the New Faith* in the NZ *Centrepoint Trust* case, examined below.

[83] Hon Ian Sheppard, *Report of the Inquiry into the Definition of Charities and Related Organisations,* Canberra: The Treasury, Commonwealth of Australia: Available online at <http://www.cdi.gov.au/html> 2001.

that did not offend against the ordinary laws', being the principles distilled from the *Church of the New Faith* decision. It was noted by the ATO that 'although other criteria were considered in that case, if those two *main* criteria were satisfied it was likely[84] that a body would have been characterised as a religion'.

In addition, the ATO observed that religious institutions included not just the 'major religions' but also those 'less well known in Australia, such as Taoism'.[85] Although the approach of the ATO is not crystal clear, it seems likely from the above that the ATO has determined that the Mason ACJ & Brennan J two-pronged definition constitutes a practically determinative criterion or at least criterion with higher priority than other potential indicia. A sociology academic, Max Wallace, has criticized a decision by the ATO to apply a supernatural test to one group, the Raelians, on the basis that they believe the colonizers of earth to be material beings from another galaxy. It is surmised that the ATO disqualified the Raelians on the basis that their belief is not supernatural, but entirely natural. Wallace contends that the Raelian belief is comparable to the 'equally bizarre' Scientology belief that 'beings came to earth in spaceships millions of years ago to dispose of their galaxy's surplus population by herding them into volcanoes and blowing them up with nuclear weapons'.[86]

That the succinct, two-pronged definition produced by Mason ACJ & Brennan J is the correct definition to be derived from the case is, however, a moot point. The interpretations of legal commentators leave room for some doubt about the future application of the definition of religion. MacFarlane and Fisher advance the view that 'if one were to search for the *sufficient* as opposed to the *necessary* elements of religion under Australian law; it is probably the case that for the purpose of the law, the criteria of

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[84] This qualification suggests the possibility that the Tax Office might entertain objections to the granting of tax exempt status, despite the fact that there is no established (or advertised) system for the lodgement and consideration of such objections.

[85] Peter Nugent, *Conviction with Compassion: A Report on Freedom of Religion and Belief,* Canberra: Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Sub-Committee: The Parliament of the Commonwealth of Australia 2000. 189.

[86] Wallace, Purple Economy.' 4.

religion are as stated by Mason ACJ and Brennan J in the Scientology case (1983)'.[87] Mortensen argues that 'since their approach is the narrowest; it must be regarded as having majority support and as being the controlling interpretations for other Australian courts'.[88] However, although the two-pronged Mason ACJ & Brennan J definition might be the narrowest view, this does not mean that it is a necessary requirement (*the* sufficient requirement), nor the controlling interpretation (if that is taken to mean it is *the* sufficient or necessary requirement). Taken in conjunction with the other judgements allowing for a broader interpretation, it is arguable that the Mason ACJ & Brennan J test is merely *a* sufficient requirement, not *the* sufficient requirement. On this view, *Church of the New Faith* can only be certain authority for the proposition that establishing a supernatural element and canons of conduct giving effect to such belief (albeit one that is sincerely believed by a certain proportion of followers) will most likely ensure religious classification. Otherwise, as pointed out by Murphy J, 'the categories of religion are not closed'.[89]

Hall points out the similarity of the direction taken by Wilson & Deane JJ and Murphy J, where both judgments tended to an American view of further broadening the concept. He notes of the Wilson & Deane JJ. Indicia that 'no one guideline would inevitably be determinative',[90] that 'while a candidate for classification might exhibit sufficient characteristics, there was no requirement that it must necessarily share any particular characteristic ... nor was any coherent attempt made to prioritise the indicia'. Not that this mattered, because 'if context is determinative, there is presumably no reason why they should be prioritized'.[91] Indeed, if the judgements of Wilson & Deane JJ and Murphy J are taken together, it can be said that the majority in *Church of the New Faith*

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[87] Peter MacFarlane and Simon Fisher, *Churches, Clergy and the Law* (Sydney: The Federation Press, 1996) 28.
[88] Reid Grant Mortensen, 'The Secular Commonwealth: Constitutional Government, Law and Religion' (Doctorate of Philosophy, University of Queensland, 1995) 22.
[89] *Church of the New Faith (High Court)* 151.
[90] A point also noted by Williams who says 'Wilson & Deane JJ set out five indicia ... none of which was necessarily determinative', Ibid. 114. Indeed, as discussed in chapters I: 2 & VIII: 1 herein, if any indicia is determined by a future court to be mandatory, perhaps that requiring an ethical code of conduct, applying internally and externally, might be the best candidate.
[91] Clifford G Hall, "Aggiornamento': Reflections Upon the Contemporary Legal Concept of Religion', *Cambrian Law Review* 28, no. 7 (1997): 19.

envisioned a broader, more flexible approach to the definition than that which is applied administratively.

Whether the succinct ratio advanced by Mason ACJ & Deane J will endure, and how it is interpreted, is moot. It has been applied by the New Zealand High Court in a charity law context in 1985 and the NZ government affirmed in 2001 that 'for the purposes of the law, the criteria of religion are the belief in a supernatural being, thing or principle and the acceptance of certain canons of conduct in order to give effect to that belief'.[92] The ratio was applied by Tomkins J in *Centrepoint Trust*,[93] where a group operating under the precepts of their spiritual leader, Mr. Bert Potter, applied for stamp duties exemption as a 'charitable trust, or ... institution established exclusively for charitable purposes'.

On the first prong of the Mason CJ & Deane J test, Tomkins J held that trust members had a belief in the supernatural. For some this was a conventional belief in a supreme being. For others it was 'a belief in the supernatural in the sense of reality beyond that which can be perceived by the senses', as exemplified by the expression 'that frequently recurs of creative energy'.[94] Here the Court confirmed a definition going well beyond the English requirement for deity and arguably even further than *New Faith*. Unlike *New Faith*, the matter was unambiguously one involving charity law.[95] Tomkins J accepted evidence that Centrepoint adherents adopted an 'ethical code of behaviour' which was equated with the 'canons of conduct' enunciated in *New Faith*, thereby imposing an ethical dimension to canons of conduct beyond mere rituals, which were referred to separately. Tomkins J held that 'the standard and codes of conduct that members expect to be observed involve not only the ceremonies and rites to which I have referred, but also the acceptance of total honesty in their relationships with each other and their commitment to Mr. Potter and his teachings'.[96] This minimum requirement, a dimension internal to the group, was deemed sufficient to confer *prima facie* religious designation

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[92] NZ Government , *Tax and Charities (Discussion Document)*, Policy Advice Division, NZ Inland Revenue Department 2001. 18.
[93] *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* (1985) 1 NZLR 673
[94] Ibid, 698
[95] Ibid. 676
[96] Ibid, 698

upon the trust. Next, the institution was required to show public benefit to satisfy charitable status.

Concerns were raised in cross-examination about alleged harm to Centrepoint children of the acceptance of unconventional sexual practices. However, the Court was 'not prepared to hold, without evidence from qualified persons in support, that it must necessarily be so', thereby taking a liberal line on contemporary sexual mores.[97] Tomkins J accepted that the psycho-therapy services offered by the group and available to outsiders, constituted public benefit sufficient to satisfy the public benefit requirements of charity law. Uncontradicted evidence was accepted that the healing techniques used by the trust were 'well recognized and commonly used by psychologists'.[98] Despite these findings based strictly on the evidence before the Court,[99] Tomkins J was prepared to examine the teachings of Potter to ascertain whether they might be harmful to children and would have entertained evidence to that effect if it had been presented. He also indicated judicial acceptance of a combined purpose/activities test to determine whether the group was charitable[100] and noted that his finding that his finding of charitable status 'might well be otherwise if trust members stood to gain financially from the trust's activities'.[101]

Centrepoint is interesting because Tomkins J required an ethical component relating to the internal dimensions of the trust before he would grant it *prima facie* religious status. In addition, the establishment of public benefit and consequently religious charitable status was supported by evidence of a code of conduct involving 'recognition of the responsibility of man to man'[102] and teachings that involved an external ethic 'beneficial to the community at large as distinct from the followers of the teachings'.[103] From this it seems that an ethical component was seen to be implicit in the canons of conduct

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[97] Ibid, 686
[98] Ibid, 684
[99] 'I have decided the issues in this case solely on the evidence sworn to, the documentary material properly provided, and the submissions made in this Court. I have ignored any other facts or opinions that I may have seen or heard in the news media or otherwise'. Ibid, 701 (Tomkins J)
[100] "The Court can have regard to the manner in which the trust has operated to enable a conclusion to be reached whether its purposes are charitable'. Ibid, 676
[101] Ibid, 700
[102] Ibid, 688 (from the evidence of a Dr. McKenzie)
[103] Ibid, 688-9

criterion of Wilson ACJ & Deane J in *New Faith*, an internal ethic being required for *prima facie* designation and an additional external ethic being required to satisfy charitable status.

New Faith is revisited in chapter V and its implications explored in the application of s. 116 of the Australian Constitution (and the definition of religion contained therein) to the normative proposal for a third sector entitlements/definitions tribunal contained in chapter VIII: 2 conclusions. In the next chapter (chapter III) the history of official responses to Scientology in the United Kingdom is traced, culminating in the 1999 decision by the Charity Commission for England and Wales to refuse Scientology the Holy Grail of admission to the Register of charities. At the conclusion of chapter III comparative observations are made on the efficacy of the policies pursued and instruments used (by the governments considered in the case studies) in response to allegations of harm levelled against Scientology (under the heading 'Issue Identification Oversights and Implementation Failures Revealed in Chapters II & III').

CHAPTER III: THE UNITED KINGDOM

III: 1

PARLIAMENTARY DEMANDS AND EXECUTIVE RESPONSES (1959-69)

'Scientology is socially harmful'

Official investigation of Scientology in the former colony of Victoria did not go unnoticed in the United Kingdom. In 1959 expatriate American L. Ron Hubbard and his family occupied a 'brooding' Georgian mansion at East Grinstead in Sussex known as Saint Hill Manor. By 1961 Hubbard had begun to utilize its spacious facilities for the conduct of Scientology courses.[1] Despite a ' "storm of controversy" in the town' following publication of Hubbard's book, *Have You Lived Before This Life* in 1960,[2] and some problems with the local planning authority in 1961,[3] Scientology had been able to develop relatively unhindered at Saint Hill prior to the publication of the *Anderson Report* (1965)[4] in Victoria. Hubbard sought publicity revealing his eccentric theories on horticulture, which Russell Miller, author of Hubbard's unauthorised biography *Bare-Faced Messiah*, surmised had 'helped divert attention from the real reason he had bought the estate ... that it should become the world-wide headquarters of Scientology'.[5]

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[1] The arrival of the Hubbards is amusingly described in Russell Miller, *Bare-faced Messiah - the true story of L. Ron Hubbard* (London: Michael Joseph, 1987) 233. Miller says that 'in March (1961), Hubbard announced the launch of the "Saint Hill Special Briefing Course" for those auditors who wished to train personally under his auspices', Miller, *Bare-faced Messiah* 242.
[2] Miller, *Bare-faced Messiah* 238.
[3] Ibid. 242-3.
[4] Kevin Victor Anderson, *Report of the Board of Inquiry into Scientology,* Melbourne: State of Victoria 1965.
[5] Miller, *Bare-faced Messiah* 243. Miller cites the local *Courier*, which reported that 'by battering seeds with X-rays, Dr Hubbard can either reduce a plant through its stages of evolution or advance it' and the *Garden News*, reporting that Hubbard, the 'revolutionary scientist', had shown that plants feel pain, which

However, the citizens of East Grinstead would have noticed reports in the British media concerning the *Anderson Report*. In October 1965 *The Times* reported that Anderson had found that 'scientologists used psychological techniques, including "command hypnosis", to produce mental enslavement, and in many cases mental derangement', among other salacious details. Hubbard was quoted and his East Grinstead residency noted,[6] as was his threat to sue the Victorian government for $10 million 'for publishing a defamatory report'.[7]

On 7 February 1966 the Conservative MP for Hertford, Lord Balniel, asked the Labour Secretary of State for Health, Mr. Kenneth Robinson,[8] whether he would 'initiate an inquiry into the scope and practice in this country of so-called scientology, and the practice of psychology for fee or reward by persons who have no medical or psychological qualifications'. The Minister immediately replied 'No, Sir'. Balniel's supplementary asked if the Minister would 'agree that the commercial practice of psychology by unqualified persons could be very dangerous indeed for certain mentally disordered people,' with reference to the 'scathing criticism by an official board of inquiry in Australia'. The Minister replied; 'I am prepared to consider any demand for an inquiry, but I have not had one yet ... extravagant claims are made on behalf of scientology, which are not generally accepted'. Anyone considering a course of this kind should 'go to his doctor first'.

The Labour MP for Staffordshire, Mr. Snow, asked if the Minister was aware that 'there will be some support among some Members on this side of the House for this general proposition ... there are people who attract a large number of clients by almost fraudulent claims to have a medical background'. The Minister responded that 'the law does not

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was 'demonstrated by connecting an E-meter to a geranium with crocodile clips, tearing off its leaves and showing how the needle ... oscillated'. Miller, *Bare-faced Messiah* 234-5.

[6] 'Risks in Practice of Scientology', *The Times*, 6 October 1965. Hubbard's comment was that 'he had been forbidden to appear at the hearing and no testimony of his, or of witnesses on his behalf, was heard'. This was incorrect.

[7] 'Threat to sue for $10 million in Victoria', *The Times*, 27 October 1965.

[8] The Labour government under Prime Minister Harold Wilson remained in office between 16 October 1964 and 19 June 1970, David Butler and Gareth Butler, *Twentieth-Century British Political Facts 1900-2000*, 8th ed. (London: Macmillan, Basingstoke, England, 2000) 29.

prohibit anyone from practising medicine or surgery, with one or two limited exceptions'. However, that there were restrictions on the use of the title 'Doctor' by unregistered persons. The Minister appealed; 'if anybody has evidence that this society – or the members of it – is doing that, I hope that he will communicate it to me'.[9]

Lord Balniel was chairman of the National Association for Mental Health. Two days after his question Hubbard allegedly 'issued an instruction from Saint Hill manor: "Get a detective on that Lord's past to unearth the titbits. They're there"'. This was reportedly followed by the establishment of a 'Public Investigation Section' of Scientology, and instructions to a private investigator to unearth dirt 'on every psychiatrist in Britain'.[10] By 1966, 'Scientology even seemed to be wearing out its welcome in East Grinstead'. The local *Courier* reported that the feeling that Scientology was trying to take over had created 'a lot of resentment and alarm'.[11]

Towards the end of 1966 concerns about Scientology were again raised at Westminster by the Conservative Member for Horsham in West Sussex, Mr. Peter Hordern and Mr. Geoffrey Johnson Smith, the Conservative Member for East Grinstead in East Sussex, where Scientology headquarters was situated. Both Members filed questions asking if the Minister of Health would now initiate an inquiry into Scientology. The Minister's written answer, on 5 December 1966, was once again in the negative, stating 'I do not think any further inquiry is necessary to establish that the activities of this organisation are potentially harmful. I have no doubt that scientology is totally valueless in promoting health and, in particular, that people seeking help with problems of mental health can gain nothing from the attentions of this organisation'.[12]

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[9] UK House of Commons, *Parliamentary Debates (Hansard),* London: UK Parliament 1966. 7 February, 1966

[10] Miller, *Bare-faced Messiah* 254-5. Miller also describes Hubbard's injunction to 'his followers to defend Scientology by attacking its opponents: "If attacked on some vulnerable point by anyone or anything or any organisation, always find or manufacture enough threat against them to cause them to sue for peace ... Don't ever defend, always attack ..."', Miller, *Bare-faced Messiah* 241.

[11] Miller, *Bare-faced Messiah* 261.

[12] UK House of Commons, *Hansard 1966,* 5 December. 183.

On the adjournment debate of 6 March 1967, the Minister for Health was called upon to reconsider his position. Mr. Hordern alleged a considerable body of evidence of harm to warrant an inquiry, to draw 'attention of the public to the activities of that organisation and if found to be harmful to pass legislation to ban it'. He claimed 'that money is extracted from the weak, the credulous and the mentally ill, and the techniques used are potentially, and in many cases, positively harmful to the mental health of the community'. The public had been hampered in its knowledge of Scientology by the propensity of that organisation to silence media criticism 'with a writ of libel'. He hoped the adjournment debate, conducted under parliamentary privilege, would be widely reported 'to allow the nature of this organisation to be understood for what it is'.

He cited the details of a constitutent who had suffered from a mental illness, manic depression, but from which she had apparently completely recovered. Miss Henslow had enrolled as a fee paying evening student at Saint Hill Manor, after which she had sent her mother a letter which said she was 'suppressive to her, evaluates for her, invalidated her and was destroying her, that she did not wish to see her again and that from then onwards she did not exist for her'. Another letter was sent shortly thereafter rescinding the letter but the mother was not reassured. Later, (after one visitation where 'Mrs. Henslow was horrified at her daughter's condition') two Scientologists had 'brought Miss Henslow to her mother's home, dressed only in a nightgown and coat, and in a completely deranged condition'. After the Scientologists had left, Miss Henslow 'flew out of the house and dashed down the road, shouting at the top of her voice'. Although Miss Henslow had subsequently made some progress, she had still not fully recovered. The incontrovertible blame for Miss Henslow's condition was her 'attendance at Saint Hill Manor'. Hordern had forwarded details of another case to the Minister which 'points to the same conclusion'. Much of his speech was devoted to 'the evidence and findings of the Anderson Commission'. Anderson had reported on; 'disgraceful methods' of inducement, the virtual impossibility of breaking away from Scientology, the financial consequences and damage to health suffered, the use of harmful hypnotic procedures, provocation of family discord, the filing away of personal information and the use of inquiry agents to harass opponents, 'including even the member of the Victoria

Legislative Council who raised the subject in that assembly'. There was 'good reason to suppose that these harmful practices are being carried on in this country.'[13]

Johnson Smith said he had 'information which would add substance to the arguments which have been put forward'. Many of his constituents were 'seriously disturbed by the activities and objectives' of Scientology, which was 'still run by the same man from the same place and it still appears to make a lot of money'. He acknowledged the difficulty faced by the Minister because Scientology 'now calls itself a religion ... I am sure that all of us agree that we should tolerate any and all religious beliefs in our democratic society, but to what extent we can tolerate the practices of self-styled religious organisations is quite a different matter'. Others who had 'dared to question' the activities of Scientology were subjected to a 'campaign of vilification'. He wondered if he and the Member for Horsham would 'share the same fate'.[14]

The Health Minister agreed that Scientology was 'potentially harmful' to its followers, it imputed sinister motives to critics, it had 'pretensions to healing' and the evidence suggested it accepted clients known to be mentally ill. It targeted 'the weak, the unbalanced, the immature, the rootless and the mentally or emotionally unstable'. The international nature of the organisation and its central control from Saint Hill Manor suggested that the same practices were carried out in England as in Australia. Giving short shrift to Scientological claims for religious status,[15] he noted; 'recently, in England, they have conjured up a "Church of Scientology", have dubbed at least two of their staff "chaplain" and, I am told, have issued many of their staff with a full clerical outfit'. He had received a large number of written complaints concerning the alleged damaging effect of Scientology on health and in particular mental health. Other Members of Parliament had also received representations complaining about Scientology and were

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[13] UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1967. 6 March. 1216-20.
[14] Ibid. 6 March. 1220-21.
[15] Hubbard, for example, described Scientology as 'a branch of religious philosophy which handles man as a spiritual being in relationship to the universe,' 'Commons to debate "scientology"', *The Times*, 25 February 1967.

concerned 'over the possible damage done by scientology to the mental health of its clients and over what they see as a harmful influence in an even wider context'. Many of the complainants had taken Scientology courses or had friends or relatives who had done so and had complained about 'a deterioration in mental stability and an estrangement between the person concerned and his family and friends'. The Minister had received a representation from the East Grinstead Urban District Council advising him of a resolution passed in December 1966, 'expressing grave concern "at the effects the activities of scientology may be having upon the town and its people"'. There had been 'a number of Press articles describing the harmful practices of scientology and of its splinter groups'.

He and the Home Secretary (the Right Honourable Roy Jenkins, the Labour Member for Birmingham) had 'considered very carefully the proposal that a public inquiry should be set up, and the alternative proposal that action should be taken to terminate their activities here'. Nevertheless, the Minister remained of the view that 'a further inquiry is unnecessary to establish that the activities of this organisation are potentially harmful'. His present view was that prohibition 'would not be the right course to take'. Legislation would be necessary to achieve prohibition. Unless the case was overwhelming there would be a reluctance to contemplate legislation on the Victorian model, which would 'have to range considerably beyond its immediate object if it were to be effective'. Satisfied that Scientology courses had not improved the condition of mentally disturbed people who had taken them, he had not received evidence proving that Scientology was 'directly and exclusively responsible for mental breakdown or physical deterioration in its adherents in this country'. He intended to 'go on watching the position'. He felt; 'the harsh light of publicity can sometimes work almost as effectively'. Steps could be taken to 'alert the public to the facts about scientology, to the potential dangers in which anyone considering taking it up may find himself, and to the utter hollowness of the claims made for the cult', by wide reporting of the debate.[16]

Nevertheless, it seemed that the Government might yet be prepared to go beyond this watching brief in an effort to suppress the development of Scientology in Britain. In June 1968 it was reported that 'six Americans, 'heading for the Hubbard school of Scientology at East Grinstead, Sussex, were refused entry to Britain yesterday.' The report was confusing. The Home Office confirming that two men, a woman with two children and another young woman, had been excluded from Britain under immigration regulations. However, 'there was no question of excluding them because of their connection with scientology'. A spokeswoman for the group said 'we got the impression that we were being stopped because we are scientologists', while East Grinstead HQ washed its hands of the hapless six, issuing the statement that 'these people are nothing at all to do with us, nor were we expecting them'. In the same article it was reported that Scientology had commenced a recruiting drive from its offices in central London by offering free personality tests.[17] The confusion over the immigration status of Scientology visitors continued in July with the apprehension at Heathrow airport and detention in prison for two weeks of two New Zealand Scientologists. Following representations to the Home Office, they were released and admitted for six months to 'continue their planned studies at Saint Hill ..."on condition that they do not take employment"'.[18]

BAN ON WORK AND STUDY VISAS (1968)

The situation was clarified on 25 July 1968, when Mr. Robinson, the Health Minister, in reply to a written question by Mr. Geoffrey Johnson Smith, made a detailed statement in the House of Commons outlining executive action to be taken under the Aliens Order 1953, 'with immediate effect', to 'curb' the growth of Scientology. This action involved: no longer accepting scientology establishments as 'educational establishments for the purpose of Home Office policy on the admission and subsequent control of foreign nationals'; not admitting 'foreign nationals arriving at United Kingdom ports' who intended to 'proceed to scientology establishments ... as students'; not 'granting student status for the purpose of attending a scientology establishment' to foreign nationals

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[16] UK House of Commons, *Hansard 1967,* 6 March. 1221 - 28.
[17] 'US Scientologist's refused entry', *The Times*, 5 June 1968.

already in the UK as visitors or otherwise; not granting study extensions to those foreign nationals already studying at scientology establishments; not granting work permits or employment vouchers to foreign nationals or Commonwealth citizens 'for work at a scientology establishment'; and not extending permits to work at scientology establishments already issued to foreign nationals. The rationale for this action was made clear. Describing Scientology as a 'pseudo-philosophical cult', the Minister said that, based on the evidence of the *Anderson Report* on Scientology in Victoria in 1965, 'coupled with evidence already available' in the UK, he and the Home Secretary had initially taken the view that there was little point in holding another enquiry to establish 'the general undesirability and potential dangers of the cult'. However, despite his previous public warning, the practice of Scientology had continued and indeed expanded, warranting further action. Mr. Robinson stated that

> the Government are satisfied, having reviewed all the evidence, that scientology is socially harmful. It alienates members of families from each other and attributes squalid and disgraceful motives to all who oppose it; its authoritarian principles and practice are a potential menace to the personality and well-being of those so deluded to become its followers; above all, its methods can be a serious danger to the health of those who submit to them.

In addition, he expressed concern that 'there is evidence that children are now being indoctrinated'. The Government concluded that Scientology was 'so objectionable that it would be right to take all steps' within its power to 'curb its growth'. As it appeared that Scientology had 'drawn its adherents largely from overseas', even though it was making intensive efforts to recruit locally, foreign nationals were to be targeted. The Minister advised that the Government would continue to closely watch the situation and was 'ready to consider other measures should they prove necessary'.[19] Scientology response was indignant. Mrs. Jane Kember, Deputy Guardian at East Grinstead HQ, said to the press, 'this is pure suppression, and it is frankly dangerous to suppress a minority group

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[18] 'NZ students released', *The Times*, 8 July 1968.
[19] UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1968. 25 July. 189-91.

... we have at the moment 234 students and about half of them are foreign ... this will mean a loss of money to England and to East Grinstead'.[20]

A few days after the ministerial statement two American students of Scientology were intercepted at Heathrow airport and escorted by guard to another airliner to be returned home. A Home Office official referred journalistic inquirers to the Minister's statement.[21] The same treatment was meted out to another group of seven Americans shortly thereafter and a planned charter flight of Scientology students from New York was cancelled in anticipation of refused entry.[22] The Scientologists were not about to accept these indignities lying down. Complaining about 'religious persecution', a Scientology spokesman threatened that writs would be issued against 'parties who have reported our activities unfairly and grossly inaccurately'. An appeal was planned to the European Council on Human Rights and a promotional campaign started from Bristol in the West Country.[23] Ron Hubbard weighed into the protest, claiming that 'England, once the light and hope of the world, has become a police state, and can no longer be trusted'.[24]

VISA BANS UPHELD BY THE ENGLISH COURTS (1968)

Legal action was subsequently pursued by the Scientologists on many fronts. One action concerned a Dutchman and Scientology minister, Evert Doeve, who had been arrested for overstaying his visa, just an hour before the Ministerial statement to the House of Commons. The Scientologists appealed against a Magistrate's order for Mr. Doeve to leave the country in seven days. The appeal to the Divisional Court resulted in a ruling that the magistrates had acted beyond power.[25] The Scientologists also sought a declaration to the effect that a decision of the Home Secretary not to consider further

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[20] Rita Marshall, 'State acts to curb new cult', *The Times*, 26 July 1968.
[21] 'Two scientologists stopped at airport', *The Times*, 29 July 1968.
[22] 'Scientologists flight off', *The Times*, 30 July 1968, 'Scientology suspects barred', *The Times*, 31 July 1968.
[23] 'Scientology suspects barred'.
[24] 'Cult founder says he has finished', *The Times*, 2 August 1968.

study visa applications was unlawful and void, and that he should treat applications on their merits, in accordance with natural justice. The applicants, Schmidt and another, representing fifty other students, had received letters from the Home Office rejecting their applications for study visa extensions and citing as the reason the Ministerial Statement of 25 July 1968. However, His Lordship Justice Ungoed-Thomas of the Chancery Division, held that the Home Secretary's refusal was 'justifiable if he is satisfied that their stay would be harmful to the country'. As for natural justice, it was held not to apply to a deportation order under the Aliens Order 1953, which was 'not a judicial or quasi-judicial act but an administrative act'.[26]

An appeal to the Court of Appeal was struck out, by a majority of two to one, with the Master of the Rolls, Lord Denning, confirming the right of the Home Secretary to set down a general policy under the Aliens Acts, 1914 and 1919, and the Aliens Order, 1953. These provisions 'gave the Home Secretary power to refuse admission or continue a stay in any case where he thought it undesirable. He had always to consider and would consider the public good, the public interest, and the desirability or not of the alien remaining here'. Lord Denning also noted that 'a foreign alien did not come to this country as of right but entered with leave'. Lord Justice Widgery concurred, noting that an alien's 'desire to land could be rejected for good or bad, or sensible or fanciful reasons or for no reason at all'. Dissenting, Lord Justice Russell felt that striking out the application 'in summary fashion' was not appropriate. However, 'that did not mean that his Lordship considered that any of the points taken for the appellants would succeed at the trial; but he thought it possible that some one or more might'.[27] A further attempt by the Scientologists to seek leave to appeal to the House of Lords was refused by the Judicial Committee.[28]

On other legal fronts, Scientology commenced a plethora of libel and defamation actions against its critics, including politicians, public servants and the press. As he had feared,

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[25] 'Cult man ordered to leave', *The Times*, 6 August 1968, 'Scientologists issue writ', *The Times*, 21 September 1968.
[26] 'Scientologists Fail', *The Times*, 23 October 1968.
[27] 'Action of alien scientologists is struck out', *The Times*, 20 December 1968.

Mr. Geoffrey Johnson Smith MP was served with a writ of defamation arising out of a BBC 1 programme. [29] His colleague, Mr. Peter Hordern MP, was sued for libel[30] and members of the East Grinstead urban council were issued with writs for alleged libel and slander, arising out of their 'resolution calling on the Health Minister to ban scientology from the country'. The Health Minister also came under attack, with a Scientologist declaring he would bring a private summons against the Minister for 'practising religious discrimination'.[31] Another public official targeted by Scientology was the Chief-inspector of the East Grinstead police division, who was the subject of a writ for the alleged unlawful imprisonment of Evert Doeve, the Scientology Minister.[32]

Meanwhile, the Scientologists had plenty to complain about. A reported 800 delegates to an international Scientology congress at Surrey were barred entry. Six East Grinstead general practitioners reportedly refused 'to accept followers of the cult on their National Health Service lists.[33] An Italian Scientologist, attempting to join his wife at East Grinstead by car ferry, was turned back twice in four days.[34] In addition, the son of a prominent Scientology spokesman was denied entry to a preparatory school in East Grinstead, reportedly until the cult had cleared its name.[35]

SCIENTOLOGY PUBLIC RELATIONS EFFORTS

In an effort to do just that, a public relations exercise was organised in which six sealed packages containing 'unused printed questionnaires headed "security check"' were delivered to the Department of Health and Social Security.[36] Scientology spokesman Mr. David Gaiman explained that 'this was a symbolic way of informing the department that

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[28] 'Scientologists refused leave to appeal', *The Times*, 14 February 1969.
[29] 'Cult sues MP', *The Times*, 21 August 1968.
[30] 'Scientologists issue writ'.
[31] Tim Jones, 'Hubbard speaks to scientologists - on tape', *The Times*, 19 August 1968.
[32] 'Scientologists issue writ'.
[33] 'Home Office bars 800 scientologists', *The Times*, 15 August 1968.
[34] 'Scientologist is refused entry', *The Times*, 18 September 1968.
[35] 'School ban on cult boy', *The Times*, 13 August 1968.
[36] The Department of Health was abolished on 1 November 1968 and incorporated into the Department of Health and Social Security under the Secretary of State for Social Services, Butler and Butler, *British Political Facts* 31.

security checks were no longer part of the organisation's policy ... we have made a very honest and expensive attempt to find out what we were doing that was unacceptable by the community, and we have brought out a code of reform. Now we would like to know from the Minister what evidence he has against us'.[37]

In a further effort to show just how user friendly Scientology could become, an 'open house' was organised at Saint Hill Manor described by Mr. Gaiman as 'rather like a vicarage garden party'. Scientology was seeking to show that there is nothing sinister or socially harmful in their activities, as Mr. Robinson, Minister of Health alleged'. The 'open house' included the display of books and pamphlets, a 'hastily put together' exhibition and 'film shows and lectures throughout the day'. Describing actions against Scientology as a 'witch hunt', Mr. Gaiman claimed it had done them more good than harm, increasing the number of students and membership. He reckoned the Government curb on foreigners coming to Britain for scientology courses had been worth 'between £3m and £4m in free publicity'. He claimed the ban was now a 'dead duck', as visitors with 'scientologist' marked on their passports were being freely admitted[38] and in the past week 34 Scientologists had had their permits to stay extended.[39]

On the parliamentary front, the debate was not all one way traffic against Scientology, with some parliamentarians seeking clarification of the moves against it. Two Members, Mr. William Hamilton, The Labour Member for Fife and Mr. Biggs-Davison, the Conservative Member for Essex, placed questions on the notice paper to the Health Minister in October 1968 asking the Minister whether he would publish the evidence 'indicating the social and medical dangers of the cult of scientology' and whether he would make a statement. The Minister replied that 'the detailed evidence illustrating the

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[37] 'Scientologists abandon 'security checks'', *The Times*, 10 January 1969.It was also noted, 'under the security check scientology students had been subjected to a barrage of questions which included if they had ever committed murder, adultery or rape. Other reforms included a prohibition on the writing down of confessional material or recording it in other ways'. In an earlier statement, Gaiman had claimed that the Minister's statement generated interest in Scientology to the extent that 'we are sending between 300 to 500 information packages daily to people who write asking what scientology is all about', 'Scientologists look for new centres', *The Times*, 26 August 1968.

[38] This claim was somewhat misleading as it was only those Scientologists intending to study or work at Scientology establishments in Britain who were banned.

cult's potential danger to health mainly takes the form of individual case-histories which it would be inappropriate to make public'.[40]

Scientology also produced a report to Members of Parliament in an effort to rebut 'parliamentary accusations against Scientology'. The report notes the 'Code of Reform' of 1968 which it claimed was the result of suggestions provided in response to a public survey in which one million questionnaires were mailed out. Policy changes had been effected in 1968 which included: cancellation of disconnection as a relief to those suffering from familial suppression, cancellation of security checking as a form of confession, cancellation of condition known as fair game, and prohibition of any confessional materials being written down or otherwise recorded.[41] The report claimed that the 'Document of Registration of Scientology' (dated 19 May 1954) establishes a 'religious fellowship and association for the research into the spirit and human soul', 'that 'the Ceremonies of the Church of Scientology were first published in 1959'. It is alleged that the organisation had been under investigation by Scotland Yard from as early as March 1968, although 'no evidence of any activity of any kind has been found of any activity by any Scientologist in connection with Scientology organisation which is outside of any law of the land'.[42]

PARLIAMENTARY DEMANDS FOR A WHITE PAPER

With the appointment of the Rt. Honourable Richard Crossman,[43] Labour Member for Coventry East, to the new ministerial position of Secretary of State for the Social Services in November 1968, Mr. Hordern asked the new Minister if he would 'now

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[39] Christopher Warman, 'Saint Hill Manor opens its doors to the public', *The Times*, 2 September 1968.
[40] UK House of Commons, *Hansard 1968,* 15 October. 81.
[41] Church of Scientology, *A Report to members of Parliament on Scientology* (East Grinstead, Sussex, UK: World-Wide Public Relations Bureau, 1969) 2.
[42] Ibid. 8.
[43] Later of the *Crossman Diaries* and subsequent BBC television series partly based on them, *Yes Minister & Yes, Prime Minister,* fame

publish a White Paper[44] on the practice of scientology'. He also requested that the Government 'produce the evidence which they already have to support the action which they have already taken'. The rationale was that 'given the propensity of the scientologists to issue writs', it was 'essential for the Press and for the public to have a full document from which they can quote in freedom', on the basis that accurate reports of parliamentary proceedings carried qualified privilege against defamation actions. A White Paper setting out the Government's position and tabled in parliament would attract this privilege. This was supported by Mr. Arthur Blenkinsop, the Labour Member for South Shields, who commented on the interest on both sides of the House and welcomed the Government's action already taken, but who felt that the facts should be 'given as much publicity as possible'.

In response to another supplementary question by Mr. Norman St. John-Stevas, the Conservative Member for Chelmsford, asking the Minister, in view of his 'noted academic brilliance', to 'say in one brief, concise sentence, exactly what scientology is', the Minister said, 'yes, I think I could: it is a fraud'. This response prompted a probing question from Mr. Alexander W. Lyon, the Labour member for York, who asked whether the Minister would agree that 'unless the evidence is available to the Government to prosecute its sponsors for fraud, the less they meddle in matters which are really for individual judgement the better it would be, and that it would be more helpful to make that information available than to use their draconian powers in order to limit it ?' The Minister concluded that particular debate by noting his own good wisdom in taking time to reflect further, 'before one takes a very important decision' on what is 'a very awkward question'.[45]

On 2 December 1968 the Minister gave his answer, 'for the present', and that was to 'leave things as they are'. This was contested by Mr. Hordern, who declaimed that it was 'as unsatisfactory an answer as could be made by the Government'. When pressed on the

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[44] 'A colloquial term for a government report, statement of policy, or similar document, which is not of sufficient thickness to require the stout blue covers which would transform it into a Blue Book', Norman Wilding and Philip Lourdry, *An Encyclopaedia of Parliament*, 4th ed. (London: Cassell, 1972) 787.
[45] UK House of Commons, *Hansard 1968,* 4 November. 474-5.

need to publish the information on which the Government had acted, presumably in the form of a White Paper, the Minister conceded that he had 'not excluded the possibility of a public inquiry', but he 'would like to reflect further on these matters'. He said, 'I think it would be an abuse of our tradition to publish a White Paper until after the inquiry had taken place'. Several other Members contributed to the debate by way of supplementary questions. Lord Balniel was of the view that it would be 'better to have an impartial objective inquiry rather than taking Executive action based on evidence of which some of us are aware, but of which the public are not aware'. Mr. Arthur Davidson, the Labour Member for Accrington, was of the view that an inquiry would helpfully facilitate the ability of the Press and others to call Scientology a fraud outside the House. Mr. Johnson Smith supported this view. To the contrary, Mr. Lubbock, the Liberal Member for Orpington, warned that taking action against Scientology on the basis of 'socially undesirable activities' might set 'a dangerous precedent ... in the sense that it might be applied to many other religions'.

Responding to the criticisms that the Government's inaction was not helping the position of the press, the Minister argued that the action to date had already resulted in a good deal of investigation by the press and information being made available. He also felt that published information about the Scientologists had resulted in them withdrawing 'one or two of their more contentious claims', and that what he had previously described as 'fraudulent practices, are, to some extent, being curbed'. He concluded by saying that the policy of not prosecuting, but rather 'forbidding foreign nationals to study and practice Scientology here ... seemed a legitimate course of action', and that he 'did not propose to take any further action'.[46]

INQUIRY BY SIR JOHN FOSTER QC MP (1969)

While no further executive action was to be contemplated for the time being, the government finally resolved to undertake an inquiry. On 27 January 1969, the Secretary

[46] Ibid. 2 December. 1017-19.

of State for Social Services, Mr. Crossman, made a statement to the House.[47] The statement announced the establishment of an inquiry 'into the practice and effects of Scientology and to report'. The existing restriction of foreign nationals proposing to study or work at Scientology establishments would continue during the course of the inquiry. Opposition Conservative MP and QC, the learned Member for Northwich, Sir John Foster, had consented to undertake the inquiry, which would be 'semi-privileged', with 'evidence taken privately and not on oath'. In explanation, the Minister said that 'the choice is very limited to the Government. We either have to have a formal inquiry under the Tribunals of Inquiry (Evidence) Act, 1921, or we have to have the sort which I have proposed', which was in fact a departmental inquiry. He felt that the former would be using a 'sledgehammer to crack a nut', and that the latter was the appropriate form for a very special reason, being that 'the kind of evidence we want will be from people of a nervous nature, who will not face cross-examination or any public examination'. However, he assured Mr. Hordern that the terms of reference were wide enough to enable Sir John Foster to study the problem in overseas countries, saying it would be unrealistic to expect him to do otherwise.

The Minister assured questioners that any report would be made public. However, he did not give an unqualified response when questioned by Dr. Hugh Gray, the Labour Member for Yarmouth, whether 'sufficient evidence will be published to justify any conclusion that the Government' reaches', except to say that the report would be published 'whatever the repercussions'. Again, in response to a question by Mr. Gordon Walker, as to whether evidence would be published, he replied 'I must await the reception of the report'. Nevertheless, the Minister claimed that Sir John Foster was 'an absolutely free man in the inquiry, and we shall not try to influence him in any way'. However, he made the interesting statement that 'it is now highly desirable – after six months we have seen some remarkable changes taking place – that we should now have an inquiry and publish its results'. This opinion may have been a reflection of persistent lobbying activities of the Scientologists, a course of conduct revealed in a question by Sir

[47] The statement was made in reply to a Question on Notice from Mr. Hordern, enquiring what further consideration had been given to an inquiry.

Gerald Nabarro, the Conservative Member for South Worcestershire, who received a collective 'Oh' when he referred to having been lobbied extensively by Scientologists.

The Minister was not overly concerned to investigate the campaign conducted against the previous Health Minister and the 'assassinations of the characters of several' MPs. His main concern was with what was happening to 'innocent people with weak minds'.[48] In view of literature being widely distributed by Scientology, where Crossman was vilified as an agent of a 'hidden foreign group', his language seemed well measured. Furthermore, the appointment of Sir John Foster, an Opposition Conservative MP, a reportedly well regarded, [49] respected civil libertarian,[50] and a senior lawyer, would augur well for Scientology being given every opportunity for a fair hearing.

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[48] UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1969. 937-4. (Reponse to question from Mr. Laurence Pavitt, Labour MP for West Willesden).

[49] 'An admirable ... hard-headed, down to earth character', 'A hidden foreign group', *The Times*, 28 January 1969.

[50] Later described as 'a man of pronounced libertarian beliefs' Nigel Lawson, 'A dangerous precedent over scientology ?' *The Times*, 17 November 1971.

III: 2

LEGAL PROCEEDINGS (1970-73)

'critics ... subjected to the most odious form of blackmail'

It was to be over two years before the *Foster Report* was presented to the next administration (the Heath Conservative government)[1] and a further seven months before it was released to the public. Meanwhile, a great deal of legal disputation continued, mostly driven by Scientology. Proceedings concerned efforts to: legitimise the movement and gain financial advantage, silence critics, and defend against actions brought by political opponents. The findings and judicial comment were generally adverse to the organization.

ATTEMPT TO GAIN FINANCIAL ADVANTAGE

An example of the first category involved an attempt by Scientology in 1969 to obtain registration of a Scientology chapel at Saint Hill Manor (as a place of meeting for religious worship) under the Places of Worship Registration Act 1855.[2] The Registrar-General, after making the due inquiry required, which included the examination of two booklets supplied by Scientology entitled *Ceremonies of the Founding Church of Scientology* and *Scientology and the Bible*, decided that the building was not a place of worship. His decision was appealed to the Queen's Bench Division by Michael Segerdal, a Minister of the Church of Scientology and Acting Chaplain at Saint Hill, seeking an order of mandamus requiring the Registrar-general to record the chapel as a place of worship on the register.

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[1] The Conservative Party under Edward Heath PM was in office from 19 June 1970 to 4 March 1974, David Butler and Gareth Butler, *Twentieth-Century British Political Facts 1900-2000*, 8th ed. (London: Macmillan, Basingstoke, England, 2000) 33.

[2] *Regina v. Registrar General, Ex parte Segerdal and Another* (1970) 3 WLR 479.

The appeal before three judges was refused unanimously. Mr. Justice Ashworth delivered the written judgement, stating it was 'a matter of controversy whether Scientology was a religion at all'. He felt that the statement in *Scientology and the Bible*, that 'Scientology is open to all people of all religious beliefs and in no way tries to persuade a person from his religion, but assists him to better understanding that he is a spiritual being', meant only that the Scientology chapel served 'as a meeting point for persons of all religious beliefs', it being difficult to extract anything from that to indicate that Scientology itself was a religion. If people had met there to 'worship according to their own religious beliefs', that might be sufficient to find that the chapel was a place of religious worship. However, 'there was nothing in the service described in the booklet (*Ceremonies of the Founding Church of Scientology*) to indicate that it was a service of religious worship'. Although forms of worship varied enormously, some indication that it was a service of religious worship 'and some opportunity provided for worship, either by spoken words or silent meditation, would be expected'. It 'might probably be described as a service of instruction' but not a 'service of religious worship'. It was difficult to regard any of the other forms of ceremonies held at the chapel, 'such as christening or naming ceremonies, funeral services, and wedding ceremonies after marriage at a register office ... as a religious service'.[3]

The Queen's Bench decision was appealed to the Court of Appeal, where it was upheld. Lord Denning, Master of the Rolls, said 'if ... registered, they (Scientology) will obtain considerable privileges. They will have taken one step towards getting a licence to celebrate marriages there; they will be outside the jurisdiction of the Charity Commissioners; and the building itself may become exempt from paying rates'. The 1855 Act was an extension of the Toleration Act 1688, under which Protestant Dissenters were allowed to 'meet together as a congregation or assembly for religious worship, provided always that their place of meeting was certified to the bishop or to quarter sessions and registered; and provided, also, that the place was not locked, barred or bolted but was kept open'. Later this 'toleration' was extended to Catholics by the Roman Catholic

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[3] 'Scientologists lose chapel appeal', *The Times*, 15 November 1969. Parenthesis added.

Relief Acts of 1791 and 1829, and to Jews by the Religious Disabilities Act 1846. Finally, in 1855, 'it was extended to all denominations'.[4]

Lord Denning held that the words 'religion' and 'worship' should not be taken separately, but combined in the phrase 'place of meeting for religious worship'. This had to be 'a place where people come together as a congregation or assembly to do reverence to God. It need not be the God which the Christians worship. It may be another God, or an unknown God, but it must be reverence to a deity'. For Buddhist temples, 'properly described as places of meeting for religious worship' he was prepared to make an exception to the governing principle intended by the legislators in 1855, that 'it should be a place for the worship of God', While he did not further elaborate on what distinguished Buddhism from Scientology, his opinion on the religious claims of Scientology, having looked at the ceremonies and affidavits was that it was 'more a philosophy of the existence of man or of life ... God does not come into their scheme of things at all'.[5]

Lord Winn was 'not concerned to dwell on the question ... whether Scientology is or is not a religion'. The answer depended 'on the meaning ... in the particular context, to the chameleon word "religion" or "religious"'. While it 'might or might not be right to call that philosophy a religion, the evidence ... did not reveal any form whatever of worship', which meant to, 'humble themselves in reverence or recognition of the dominant power and control of any entity or being outside their own body and life'. Lord Winn compared Egyptian and Buddhist beliefs to Scientology, noting that just as they 'think all the time of the transmigrating souls', Scientologists 'are concerned far more with the transmigration and education and development of thetans than they are with God, in any shape or form, or any concept of a divine, superhuman, all-powerful and controlling entity'. He had 'formed, for what it may be worth, as possibly irrational, possibly ill-founded, but very definite opinion that here the applicants have failed to show that the Divisional Court was in any sense wrong'.[6]

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[4] *Ex parte Segerdal* 482.
[5] Ibid. 485.

Lord Buckley concurred. His definition of 'worship' was 'something which must have some, at least, of the following characteristics: submission to the object worshipped, veneration of that object, praise, thanksgiving, prayer or intercession'. There was nothing in the form of ceremony set out in the Scientologists' publication for marriages, for example, 'which would not be appropriate to a purely civil and non-religious ceremony such as is conducted in a register office'. Not all of the elements of worship were necessary, but that 'when one finds an act which contains none of those elements ... it cannot answer to the description of an act of worship'. What took place in the Scientology chapel was a ceremony of 'instruction' rather than worship.[7] It was later reported that the Scientologists had failed in their attempt before the House of Lords Appeal Committee for leave to appeal to the House.[8]

ATTEMPTS TO SILENCE CRITICS

Fears expressed by Mr. Geoffrey Johnson Smith MP[9] that he would be personally targeted by Scientology were apparently well founded. After a BBC TV interview on the programme *24 Hours* in July 1968, in which he allegedly implied that Scientology was potentially harmful, he was served with a writ of libel. The matter[10] came up for hearing in November 1970. The Scientologists claimed Mr. Johnson Smith said that the Minister of Health had stated in Parliament that scientologists 'direct themselves deliberately towards the weak, the unbalanced, the immature, the rootless and the mentally or emotionally unstable'. Asked by the interviewer whether 'he had come across any alienation within families, Mr. Johnson Smith replied that 'this had been the disturbing trend of correspondence he had, stretching back almost three years' and that Mr. Hordern MP had also 'detected this same theme'. The Scientologists claimed the words meant they were 'a harmful organization, acting in an improper way towards members' and

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[6]Ibid. 486-7.
[7] Ibid. 487-8.
[8] 'Scientologists' plea fails', *The Times*, 20 November 1970.
[9] Member for Holburn and St Pancreas South 1959-64; for East Grinstead 1965-83; for Wealden June 1983 - :Vice-Chairman, Conservative Party 1965-71, *The Vacher Dod House of Commons Companion 1998*, (London: Vacher Dod Publishing Limited, 1998) 339.
[10] *Church of Scientology of California v Johnson-Smith* (1972) 1 QB 522.

were libellous.[11] Mr. Johnson Smith argued that his comments were substantially true, made in good faith and without malice, being fair comment.[12]

The thirty-two day hearing was reportedly 'the longest libel action in recent legal history'. For the defence it involved evidence pointing to the harm allegedly caused or potentially caused by Scientology and the sincerely held public interest motivations of Mr. Johnson Smith. For the plaintiffs, it involved; evidence attesting to the benefits allegedly conferred by the organization, some attempt to malign the motivations of the defendant, and the public exposition of alleged discrimination and religious persecution suffered by Scientology. Mr. Johnson Smith claimed the complaints he had at first received in 1965 about Scientology 'were of general matters and unconventional behaviour not within an MP's responsibility'. He had received a copy of the Victorian *Anderson Report* early in 1966, which 'contained serious allegations about practice and techniques'.[13] By 1968, 'there was concern at both level and national level ... it was non-political' - meaning non-partisan. A former East Grinstead Labour councillor had written to him 'protesting about scientology propaganda sent out to local children'.

In addition, a mother had complained to him that her 24 year old son had left his job as an electronics engineer, to take a Scientology course. Another mother had complained that her daughter had left home and might sever connections with her, due to the influence of Scientology. Otherwise, there had been complaints about propaganda sent to pupils of a private school and personal approaches to staff and pupils at a school for maladjusted children. These complaints had perturbed him, and gave him 'the impression there were people who had various degrees of unhappy experiences as a result of their contact with scientology'.

Mr. Johnson Smith told the Court he felt it was his duty to raise this matter of 'great public importance' even though the Scientology organization had a reputation for 'slapping writs on people who wrote or said anything they thought critical'. With respect

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[11] 'Privilege raised in MP libel case', *The Times*, 6 November 1970.
[12] 'Scientology libel case lost', *The Times*, 22 December 1970.

to his lack of malice,[14] he pointed out his reasonableness in that he had 'never suggested banning scientology in Britain' nor did he 'ever try to have the cult's East Grinstead headquarters closed'.[15] Counsel for Mr. Johnson Smith, Sir Elwyn Jones QC, told the court that his client's comments were 'not only fair but most restrained', in view of the groundless suggestion that 'he was a member of sinister groups who had it in for scientology'. This was 'the kind of smear that the plaintiffs have indulged in all too frequently' when someone had 'the courage to criticize them'.[16]

To the accusation that he had engaged in a witch-hunt against Scientology, Mr. Johnson Smith said he had not gone around his constituency 'trying to stir things up, to drum up a situation involving the sect'. He said he saw no point in visiting Scientology headquarters as that would be equivalent to passing judgement on the Church of England by 'looking at Canterbury Cathedral'. In addition, he felt that letters from Scientologists 'smacked of an inspired lobby', and were therefore 'on a different footing from complaints by people who were genuinely worried about some of the cult's practices'. He felt that the 'uneasiness ... fear and suspicion in many people's minds' could have been cleared up by an inquiry.'[17]

Other criticisms were made of Scientology by counsel for the defence, who alleged that 'critics of the Church ... were subjected to the most odious form of blackmail to frighten them off'. It was alleged that the cult's founder, L. Ron Hubbard, had ordered the hiring of detectives to unearth dirt on Lord Balniel after he had called for an inquiry into Scientology in 1996. A Scientology witness, Mr. Gaiman, said that Lord Balniel was connected with the World Federation for Mental Health, which he alleged was openly hostile to Scientology and connected with which, he made the startling claim, 'we have found murder, rape and violence'.[18]

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[13] 'Freedom of MP on trial, counsel claims', *The Times*, 25 November 1970.
[14] Counsel for the plaintiffs alleged that he acted from malice but was precluded on the grounds of parliamentary privilege from adducing evidence of matters said in parliamentary debate, 'Judge forbids questions on Commons speech', *The Times*, 7 November 1970.
[15] 'Duty to give TV interview about sect, MP says', *The Times*, 7 November 1970.
[16] 'Freedom of MP on trial, counsel claims'.
[17] 'MP denies witch hunt against scientologists', *The Times*, 28 November 1070.
[18] 'Blackmail by cult of its critics, QC says', *The Times*, 11 September 1970.

Sir Elwyn also pointed to the harm that Scientology allegedly inflicted on its own members, saying that penalties imposed on staff at world headquarters for falling below standards were 'horrific'. He read, as evidence to the court, a policy letter authored by Hubbard in 1967, setting out penalties under four headings; liability, treason, doubt and enemy. The condition of 'liability' meant the suspension of pay, the wearing of a dirty grey rag on the left arm and day and night confinement to Scientology premises. 'Treason' meant suspension of pay, deprivation of uniforms and insignia, a black mark on the left cheek and either confinement to Scientology premises or dismissal from post and debarment from premises. 'Doubt' meant debarment from premises, not to be employed, payment of a fine, discontinuation of training or processing and the person under the penalty was not to be communicated with or argued with. The condition of 'enemy' meant the issue of a 'suppressive person' order and the implementation of the 'fair game' policy, which meant that the person 'may be deprived of property or injured by any means by any scientologist without any discipline of the scientologist. May be tricked, sued or lied to or destroyed'. In cross-examination, Scientology witness Mr. Gaiman agreed that this sounded horrific, but that it had been part of the church's 'puritan' period, that had ended by August 1968.[19]

Another claim by Sir Elwyn Jones QC, that children as young as five were indoctrinated into Scientology using hypnosis, was disputed by Mr. Gaiman, although he agreed that during auditing 'children sometimes went into a deep sleep of between eight minutes and eight hours'.[20] Another case of alleged harm was also disputed. The defence raised the case of a young women who had been visited by her parents at Saint Hill and complained to their MP that 'they found her dirty, unkempt, and short of food', apparently being disciplined for falling below the sect's standards. To the contrary, Mr. Gaiman said that the woman had been 'abandoned at the medical and psychological levels'. He explained: 'when she came to us she had been written off. She was catatonic. She just sat. Now

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[19] '"Horrific penalties" by sect, counsel says', *The Times*, 14 November 1970.
[20] 'Leader of sect denies hypnosis of children', *The Times*, 13 November 1970.

she is a happy young woman, who has completed lecture tours and who is still at Saint Hill'.[21]

In his address to the jury, Sir Elwyn said, 'if any freedom is on trial in this court it is the freedom of a duly elected Member of Parliament to express conscientiously and fearlessly his honest opinion about a matter of public concern'.[22] He submitted that Mr. Geoffrey Johnson Smith had merely exercised his (and any other person's) democratic right to comment fairly on a report of parliamentary proceedings. He said, 'if the right to comment fairly on privileged documents and reports did not exist, newspapers and television could not tell the public what is going on in Parliament'.[23]

For the plaintiffs, it was alleged that after the 'Government's attitude towards scientology became public', the approach of people in East Grinstead changed and the situation had started to turn into a 'pogrom'. Mr. David Gaiman, the Scientology witness, outlined examples of alleged discrimination against Scientology in East Grinstead. These included: a local insurance office refusing to grant motor cover to Scientologists; difficulties for Scientologists to get on to a medical list, to get a mortgage or an hotel room; the Ministry of Labour refusing to send prospective employees to Scientology establishments; the refusal of the Post Office to allow advertising facilities and the withdrawal of a scholarship which had been offered to Gaiman's son, aged 10. He complained that 'a lot of things happened which were not British but were perhaps more in keeping with Germany in 1933'. In addition, media interest had become a nuisance, to the extent that reporters could be 'pulled out of the shrubs at any time of the day or evening'.[24]

Some interesting witnesses were called to attest to the benefits of Scientology courses. These included a medical general practitioner, who claimed that 'we now have a technology which for the first time in human history gives a 100 per cent guarantee of

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[21] 'Sect "improved abandoned girl's life" claim', *The Times*, 18 November 1970.
[22] 'Freedom of MP on trial, counsel claims'.
[23] 'QC says scientologists' claim is hollow', *The Times*, 16 December 1970.
[24] 'Cult man says town's attitude changed', *The Times*, 10 November 1970.

success'. Dr. Edward Cleveland Hamlyn, who had taken a course at Scientology HQ in June 1969, testified that he used dianetic techniques on his patients and that he was 'absolutely convinced of their value in dealing with illnesses which are functional rather than organic'. He reportedly said that while there was no cure for a number of illnesses, 'migraine, asthma, lumbago, arthritis and bed-wetting could be treated successfully with dianetics'.[25] Curiously, the Labour Member for Woolwich, Mr. William Hamling, who had previously been Parliamentary Private Secretary to Mr. Kenneth Robinson, testified that he had taken a Scientology course and found it to be 'first-rate'. He also said that the 'scientologists I have met on numerous occasions have been normal, decent, intelligent people'.[26] Another witness, a Mr. Ronald Frost, who had also taken a Scientology course, testified that Scientology had cured his mentally sick daughter, saying their 'treatment is invaluable as far as mental health is concerned', although expressing concern about the current direction of Scientology.[27]

Finally, an American Scientologist was imported to testify about the success of a nationwide programme he had established, with Scientology principles at its heart, for drug addicts and the rehabilitation of criminals. A former prisoner and drug addict with a 19 year habit, who had served 13 years for possession of drugs, Mr. William Benitez claimed that 'since this organization was set up four and a half years ago we have accomplished 85 per cent success in dealing with addicts'.[28]

Summing up to the jury, Browne J. said that the case concerned the question of freedom of speech, 'the freedom to express an honest opinion'. He made adverse comment on the manner in which the case had been conducted for Scientology, that on the question of alienation of families it was 'astonishing' that no witnesses had been called for the plaintiffs. On that point, therefore, the evidence was all one way.[29] He noted that 'the

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[25] 'Technique of sect is supported by doctor', *The Times*, 19 November 1970.
[26] 'MP found sect course was "first-rate"', *The Times*, 21 November 1970. His former boss also appeared as a witness at the trial - but for the defence. 'Man believes sect cured mentally sick daughter', *The Times*, 9 December 1970.
[27] 'Man believes sect cured mentally sick daughter'.
[28] 'Sect's teaching "broke me of addiction"', *The Times*, 20 November 1970.
[29] 'Judge speaks of "one-way evidence" in libel case', *The Times*, 19 December 1970.

sect had not suggested much less proved they had sustained any financial loss as a result of the broadcast'. It was hardly surprising that the jury took only 100 minutes to decide that Mr. Johnson Smith had not defamed Scientology, which was ordered to pay costs, 'unofficially estimated at £70,000.00'.[30] Such vindication might have been of considerable moral comfort to Mr. Geoffrey Smith, but costs awarded to the successful party were determined by the court on a scale of fees that was invariably lower than the actual fees charged by legal representatives. It was estimated that Mr. Johnson Smith might, in victory, have to find around £5,000.00 to cover his legal costs. *The Times* Diary noted; 'in terms of freedom of speech, such sums are sufficient to deter all but the most affluent from speaking their minds'.[31]

In another episode, an acrimonious battle between the National Association for Mental Health and the Scientologists landed in court, after an attempted take-over of the association by Scientologists.[32] In July 1970, *The Times* reported that 'the last of 300-odd' Scientologists who had joined the association in 1969 in an attempt to take it over had been expelled. A resolution had been passed in November 1969, by the association, requesting 181 members to resign. Eight Scientologists had obtained an injunction, forcing an adjournment of the AGM, but the 'validity of the association's resolution was upheld in the High Court action that followed'. Subsequently, all but 6 of the 181 members were expelled at the July 1970 meeting.[33]

In 1971 a concerted effort was made by Scientology to prevent publication of *The Mind Benders*, a book critical of Scientology written by former adherent Cyril Vosper. Scientology obtained a temporary injunction restraining the distribution of the book and restraining Vosper from 'imparting any information the subject of confidence between the plaintiffs and himself'. Before the Court of Appeal, an interlocutory appeal by the author and his publishers was allowed and the restraining injunction set aside, thwarting a

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[30] 'Scientologists lose libel action against Tory MP and decide against an appeal', *The Times*, 22 December 1970.
[31] 'Pyrrhic victory ?' *The Times*, 23 December 1970.
[32] C H Rolph, *Believe what you like; what happened between the Scientologists and the National Association for Mental Health* (1973).
[33] 'Sect appeals rejected', *The Times*, 3 July 1970.

trial of the issue on the grounds that this was 'not a case where at the trial the plaintiffs were likely to succeed'. [34] Scientology argued that Vosper, who had worked at Saint Hill for 14 years, had signed an agreement undertaking not to disclose the contents of a course in which he had participated. With respect to extracts taken from publications authored by L. Ron Hubbard, including *Introduction to Scientology Ethics*, and various 'Policy documents and bulletins', which were quoted in Mr. Vosper's book and subjected to criticism, Scientology argued that this was a breach of Mr. Hubbard's copyright.

Lord Denning, Master of the Rolls, said that s. 6 (2) of the Copyright Act 1956, allowed fair dealing of copyright material, if it was 'for the purposes of criticism and review', and that this was a question of degree. With respect to the use of substantial quotations from Mr. Hubbard's book, these were 'followed by explanations, elaborations, and eventually criticism and condemnation', and that he would call it a fair dealing. With respect to the use of the policy documents and bulletins, these were sufficiently widespread as to constitute a fair dealing.

The Court ruled against Scientology in the public interest. The Scientologist's had argued that Mr. Vosper had used 'information obtained in confidence and should be restrained from doing so ... on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it'. However, Lord Denning cited the *Sunday Times* case,[35] in which he himself had noted, 'there are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret'. He pointed out that Vosper's counsel had referred to evidence indicating, 'medical quackeries of a sort which may be dangerous if practised behind closed doors', being so dangerous that 'it is in the public interest that these goings-on should be made known'. Even though this evidence had not been fully tested, His Honour felt that, 'even on what we have heard so far, there is good ground for thinking that these courses contain such dangerous material that it is in the public interest that it should be made known'. He concluded that 'Mr. Vosper has a

[34] 'Ban on book on scientology is lifted', *The Times*, 20 November 1971.

defence of public interest', and that 'if what he says is true, it is only right that the dangers of this cult should be exposed'.[36]

Concurring, Megaw L J elaborated on comments by Lord Denning, that Cyril Vosper had been declared by Scientology to be a ' "suppressive person" ... considered to be "fair game" ... to be in a "condition of enemy" ... with no right "to self, possessions or position" and that any Scientologist could take any action against him with impunity'.[37] He said, 'here was an organization which had laid down a criminal code of its own and by that criminal code it treated and required its adherents to treat, as outlaws deprived of any protection or sanction so far as the Scientological organization was concerned if they had been guilty of "suppressive acts", and no Scientologist was to be condemned, under the ethical code of Scientology, for any action – I repeat any action – which he might take against such "fair game"'. Even if some of these 'fair game' provisions had been removed, it was apparent to his Lordship that most still remained. It was 'sufficiently clear, whatever explanations may be given, assuming that the words used in relation to "suppressive acts" mean what they on their face appear to mean, counsel for the defendants is more than abundantly justified in his proposition that there is here such evidence that the plaintiffs are or have been protecting their secrets by deplorable means such as is evidenced by this code of ethics; and, that being so, they do not come with clean hands to this court in asking the court to protect those secrets by an equitable remedy of injunction'.[38]

Such judicial admonishments did not deter the Scientologists from taking further action before the courts to silence Vosper and others. In March 1972 Mr. Justice O'Connor of the High Court, strongly rebuked Scientology in dismissing applications by the Church to have Vosper and Keith Whetstone, a newspaper editor, jailed for contempt of court. The application had been made on the basis that *The Mind Benders*, and an editorial critical of Scientology written by Whetstone, 'might prejudice forthcoming libel actions in which

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[35] *Fraser v Evans* (1969) 1 QB 349.
[36] *Hubbard v Vosper* (1972) 2 QB 84. 96.
[37] Ibid. 92.
[38] Ibid. 100-1.

the church was involved'. O'Connor J. said that any suggestion that a jury would be influenced by the publications was 'unreal'. [39] He found; 'I have come to the clearest possible conclusion that these motions are simply steps in a deliberate pattern by the Scientologists to stifle any criticism or inquiry into their affairs and are entirely without merit ... they can properly be described as an abuse of the processes of the court'.[40] Indeed, his Honour was so unimpressed with the actions of the Church, that he awarded costs against it 'on an indemnity basis – the highest possible scale of costs'. He further ruled that Scientology would not be allowed to proceed with 'other actions in which it was involved until it paid £3,000 into accounts opened' by the defendant's solicitors.[41]

LITIGATION AGAINST SCIENTOLOGY

The contempt allegations against Vosper and Whetstone had been raised in relation to an action commenced against Scientology for defamation by Mr. Kenneth Robinson, the former Minister of Health from 1964 to 1968, who had made the Ministerial Statement banning Scientology study and work visas. While Robinson was Minister, Scientology had conducted a virulent campaign against him through various broadsheets, entitled *Freedom Scientology*, *Freedom and Scientology* and *Freedom*, which were distributed to 'about 100,000 persons, including people in pubic life (such as MPs) and editors of newspapers and journals'. These publications alleged that 'Mr. Robinson had instigated or approved of the creation of what were called "death camps", likened to Belsen and Auchwitz, to which persons (including mental patients) could be forcibly abducted and there killed or maimed with impunity'. It was also alleged that he had 'abused his position as a minister in relation to government grants to the National Association of Mental Health', of which he been a vice-president before becoming Health Minister.

Following judicial criticism of its abortive contempt of court action, and perhaps in an effort to forestall even more severe criticism of its litigious tactics, the Church agreed to settle the action against Robinson for an allegedly 'substantial', though unrevealed sum.

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[39] James O'Driscoll, 'Scientologists tried to stifle critics, says judge', *The Daily Telegraph*, 4 March 1972.
[40] Frank Goldsworthy, 'Sect slated by judge', *Daily Express*, 4 March 1972.

Other terms of the settlement that were revealed included an indemnification for costs, an acknowledgement in open court that the allegations were false and an undertaking that they would not be repeated in the future.[42]

[41] 'Sect's "attempts to stifle criticism"', *The Guardian*, 4 March 1972.
[42] 'Church of Scientology to pay libel damages to former Minister', *The Times*, 6 June 1973.

III: 3

THE FOSTER REPORT (1971)

'whether scientology is a religion as a matter of law will of course depend on the particular branch of the law under which the question falls to be determined'

Sir John Foster had been commissioned on 27 January 1969 by the Wilson Labour government to produce a report on Scientology. There was some impatience with its production, with MPs asking when it would be received[1] and whether the visa ban would be lifted pending its receipt.[2] However, as *The Times* noted, Sir John had to fit 'this unpaid task into his normal parliamentary and legal work'. It was surmised he had delayed completion until the libel suit against Geoffrey Johnson Smith was finalised.[3] Finally, a motion to authorize the publication of the *Foster Report* on the 'practice and effects of Scientology, was passed by the House of Commons on 20 December 1971. The report was tabled two days later by Sir Keith Joseph, Secretary of State for Social Services in the Conservative government of Edward Heath. The Minister had received the report from Sir John Foster in April 1971,[4] and there was speculation as to whether its contents might have occasioned the further delay.

Journalist Nigel Lawson thought 'the most likely explanation for the delay must be the Department of Health and Social Security is not at all happy with the report'. Foster, in view of his 'libertarian' credentials, would most likely not have approved of continuing the ban on foreign Scientology 'students'. However, to end the ban would be seen as 'a

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[1] UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1969. 14 July. 17. UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1970. 9 March. 213, 23 March. 86, 24 March. 391, 25 March. 435, 26 March. 93, 20 July. 11, 23 July. 200, 10 December. 180. UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1971. 12 January. 36, 4 May. 301.

[2] UK House of Commons, *Hansard 1969*, 2 December. 268. UK House of Commons, *Hansard 1970*, 26 March. 487, 16 April. 264, 5 November. 1246.

[3] 'Fostered', *The Times*, 31 December 1970.

[4] UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1973. 313, 29 January 1973.

vindication of Scientology – if not of its tenets, at least of its harmlessness – and a repudiation of its critics'. In view of the recent libel action against Johnson Smith MP, where a jury had found the implication that Scientology was a harmful organisation to be substantially true, the government would have to decide how to take some action to control Scientology that might 'offset the impact' of removing the ban. The likely recommendation would be

> an amendment to the medical Acts ... to make it illegal for any medically unqualified person to claim to be able to cure mental illness. There would be precedents for this. Anyone, in English law, provided he does not claim qualifications he does not possess, can put a brass plate up outside his house, call himself a doctor, and claim to cure any disease – with the two exceptions of cancer and VD. In theory, it would be possible to add mental illness to this select list.

Lawson thought a committee of medical men might be established to advise on the 'desirability and practicability of some such legislation'. Movements like Scientology would increasingly flourish as religion moved more to social work. A difference between Scientology and 'conventional religions' was that 'churches, like political parties, are outside the ambit of the Trade Descriptions Act, because they do not take money for the benefits they claim to confer. A commercial organisation like the Church of Scientology enjoys no such immunity'. He questioned the efficacy of the ban, stating 'it has failed in its purpose. Scientology in Britain shows no sign of decline and the world headquarters of the movement remains at East Grinstead ... without the fruits of any government inquiry to justify it, the use of the Home Office's arbitrary powers in this blunt and blanket fashion set a most undesirable precedent'. [5]

There had already been some bi-partisan questioning of the ban.[6] In November 1970 Mr. Peter Archer, Labour Member for Rowley Regis and Tipton, said 'there was a limit to the length of time over which any group may be selected for discriminatory treatment without announcing the reason'. Mr. Evelyn King, the Conservative Member for Dorset South, felt 'there are in this country always a great many eccentric beliefs, faiths and

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[5] Nigel Lawson, 'A dangerous precedent over scientology ?' *The Times*, 17 November 1971.

sects; and that it is usually a great error for them to be isolated by the Home Office for treatment'. The Conservative Minister of State for the Home Office, Mr.Richard Sharples, Member for Sutton and Cheam, noted 'it is the policy of the present Government to adhere to the policy of the previous Government, in that we should await the report of the inquiry'.[7]

SUBSTANTIVE RECOMMENDATIONS

Foster made three principal recommendations. The first was that 'psychotherapy (in the general sense of the treatment, for fee or reward, of illnesses, complaints or problems by psychological means) should be organised as a restricted profession open only to those who undergo an appropriate training and are willing to adhere to a proper code of ethics'. He recommended that 'the necessary legislation should be drafted and presented to Parliament as soon as possible'. Second, 'the fiscal privileges enjoyed by religious bodies should be reviewed' and should contemplate 'restricting their availability to religions which not only satisfy the present criteria but also have a substantial following in the United Kingdom and engage in genuine and overt acts of worship'. Third, 'most of the Government measures of July 1968 were not justified'.[8] An exception was that until his recommendation might be accepted and legislation passed 'for the organisation of psychotherapy as a profession', those foreign or Commonwealth Scientologist coming to Britain 'should be admitted as visitors only, and not as students'. Once a professional body had been established it would be up to Scientology to gain the approval for courses leading to registration of a practitioner, which would then enable the admission of bona fide students from abroad.[9]

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[6] 'Scientology report out tomorrow', *The Times*, 21 December 1971. 'Several MPs who believe that the scientologists are no more harmful than some other sects are asking the Government to lift the ban'.
[7] UK House of Commons, *Hansard 1970,* 5 November. 1246-7. Mr. Sharples later reported to the House that 'since July 1968, 145 aliens have been refused admission because they proposed to study or work at scientology establishments',UK House of Commons, *Hansard 1971,* 29 June. 96-7.
[8] Sir John G Foster, *Enquiry into the Practice and Effects of Scientology,* London: UK House of Commons 1971. v.

Mode of inquiry

Foster had disabled himself 'from passing any adverse or favourable judgement of Scientology, its practitioners or practices'. This was a consequence of the manner in which he conducted the enquiry in private with 'neither witnesses nor advocates,'[10] and which was in the form of a 'Departmental Enquiry' rather than of the type conducted under the Tribunals of Enquiry (Evidence) Act 1921.[11] He explained that the model followed was requested by the Minister but 'proceeds in total independence from that or any other Department' and is 'impartial', having no regard to the Minister, the Department, the policies of the Government or party politics. Unlike 'accusatorial' enquiries, where parties were represented by Counsel, a departmental enquiry had no power to hear evidence on oath, to enforce production, or to sanction for contempt or other powers of coercion. Adverse findings on contested matters would therefore be based on 'unsatisfactory or incomplete evidence'. As Scientology would not have the opportunity to refute any allegations made against them he would therefore not 'find any facts, or express any opinions, condemning Scientology or any of its practitioners'. Foster also dispensed with oral evidence from witnesses, because he felt that such evidence would be of no value unless it led to defined issues and was subject to cross-examination, which was not an available option in an 'inquisitorial', Departmental enquiry.

Despite these apparent handicaps, Foster was of the view that the ends of his enquiry were not defeated due to the 'fortunate circumstance that the Scientology Organisations are highly – some might think excessively – prone to writing about themselves'. He had access to much published material. As Scientology was organised on 'distinctly bureaucratic lines' there was a great deal of internal material available in the nature of 'policy letters, bulletins, directives and the like', although there were gaps in the material

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[9] Ibid. 167.
[10] Ibid. 3.
[11] The type of inquiry chosen suggests that Scientology was not considered a threat to national security. Foster noted that a Tribunal of Enquiry is the form normally adopted when 'there is a public crisis of confidence about the conduct of Ministers or other high functionaries of State, or where the Nation's security may be involved', Ibid. 13.

presented to the enquiry by Scientology. Despite these gaps, Foster was able to gather material from other sources (presumably including former Scientologists) and material gleaned from other enquiries. Material from Australia, New Zealand, Canada, Rhodesia and South Africa was available.[12] Foster placed some weight on the *Anderson Report* because that enquiry proceeded on the basis that 'evidence called ... was open to testing by cross-examination and rebuttal on behalf of the Scientology interests'. Many of the findings of the *Anderson Report* had not been rebutted by the Scientologists, and 'there are a number of findings in it which one would certainly expect to see denied if they were not accepted'.[13] He repudiated an attack on the *Anderson Report* made by Scientology, in which the *Salmon Report*[14] was selectively quoted to allege that the 'Anderson Enquiry was "irregular" and possibly illegal, stating; 'there is nothing in the *Salmon Report* to cast any doubt on the regularity or legality of the appointment or proceedings of the Anderson Board'.[15] He had attempted to present Scientology material 'in a manner which is justly balanced, and which presents a fair outline of the whole'. As to adverse material, he had 'refrained from expressing any views' of his own, but had 'left the documents to speak for themselves. In this way any reader of this Report is free to make up his own mind, relying on my assurance that my selection from the material has been free of bias'.[16]

Conclusions reached

However, Foster makes a number of direct criticisms of Scientology and draws a number of conclusions throughout the report, noting that 'where, as in many of these cases, the facts are not in dispute, I have been able to come to conclusions.'[17] Therefore:

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[12] Foster considered the Victorian *Anderson Report*, the *Report of the South Australian Legislative Council Select Committee on the Scientology (Prohibition) Bill*, the *Report of the New Zealand Powles Commisison of Enquiry into Scientology* and the report of the Canadian Committee of the Healing Arts, as a well as the study it commissioned by Professor John A. Lee. He noted that a Commission of Inquiry into Scientology, under retired judge Mr. G P C Kotze, had commenced in South Africa. He also considered Scientology responses to these reports, Ibid. 15.

[13] Ibid. 17. He earlier noted that the *Anderson Report* had 'proved to be wholly unfavourable to Scientology', Foster, *Enquiry into Scientology*, 5.

[14] The Rt. Hon. Lord Justice Salmon, *Royal Commission on Tribunals of Inquiry (Salmon Report)*, London: Her Majesty's Stationery office 1966.

[15] Foster, *Enquiry into Scientology*, 6.

[16] Ibid. 18.

[17] Ibid. 158.

Scientology was not a science as claimed as it did not use the 'scientific method' in investigations;[18] denials by Scientology that it claims to effect cures were not plausible;[19] the organisation had failed to file company accounts as required by law;[20] the organisation had engaged in 'vindictive' counter-attacks to criticism as a result of Hubbard's hostile personality,[21] (which, reflected in the leadership, explained the 'relationship between Scientology and the rest of society);[22] and claims by Scientology of religious discrimination were not founded [23]

Some claims are debunked by quoting Scientology sources and juxtaposing commentary or evidence from authoritative sources to dismiss the claims. Hence Foster notes that 'the Anderson Board actually had a demonstration of "auditing"' of about thirty minutes duration' where the Board was 'appalled at the realization that it witnessed this unfortunate woman being processed into insanity' whereas 'Mr. Hubbard evidently takes the view that auditing can never do any harm'.[24] He observes that 'the Scientology leadership is highly sensitive of any suggestion that "processing" involves, or even resembles, any form of hypnosis,' yet 'the scientific evidence which the Board heard from several witnesses of the highest repute and possessed of the highest qualifications in their professions of medicine, psychology, and other sciences ... leads to the inescapable conclusion that it is only in name that there is any difference between authoritative hypnosis and most of the techniques of scientology. Many scientology techniques are in fact hypnotic techniques, and Hubbard has not changed their nature by changing their names'.[25] The 'free personality test, called the 'Oxford Capacity Analysis', had 'been investigated by a Working Party of the British Psychological Society, the leading scientific body in this field in the United Kingdom' and found to be ... potentially harmful' especially 'to the nervous introspective people who would be attracted to the leaflet in the first place'. It was designed to 'convince these people of their need for the

[18] Ibid. 47.
[19] Ibid. 174.
[20] Ibid. 38.
[21] Ibid. 127.
[22] Ibid. 134.
[23] Ibid. 158.
[24]Ibid. 103-05.
[25] Ibid. 105-6.

corrective courses run by the Scientology organisations'. While these followers were sincere, 'none of this furnishes evidence of the sincerity of the Scientology leadership, whose financial interests are the exact opposite of those of their followers'.[26]

There are few unqualified conclusions reflecting favourably on the organisation. Foster notes that, 'during the first 4 to 5 weeks after my appointment, I received through the post a total of 1178 written testimonials about Scientology' which 'testified largely to the benefits which their writers had received from undergoing Scientology processing'. However; 'many of these testimonials arrived in one or more batches from the same place ... taken at their highest ... these letters provide evidence in support of the proposition that many people have found Scientology helpful to them, however subjectively. I am unable to judge how sane or balanced the writers were before they took up Scientology; evidently they must have had problems, else they would have experienced no need for help'.[27] Foster also notes that 'the Scientologists tell me that the practice of "disconnection" has been abandoned since October 1968, and although I have evidence of family estrangements persisting, or arising, since then, I have no evidence of any further formal "letters of Disconnection"'.[28]

Helpfully to Scientology, Foster rejected the approach adopted in some Australian states, noting, in words subsequently cited by Scientology to some effect; 'I disagree profoundly with the legislation adopted in both Western and South Australia, in turn based on part of that adopted in Victoria, whereby the teaching and practice of Scientology *as such* is banned. Such legislation appears to me to be discriminatory and contrary to all the best traditions of the Anglo-Saxon legal system'.[29] Of further assistance to Scientology was Foster's conclusion that; 'it seems wrong in principle for the Secretary of State for Home Affairs to use his wide powers of exclusion against those Scientologists who happen to be

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[26] Ibid. 120.
[27] Ibid. 119-20. However, as a counterpoint to this Foster noted he had received 'written evidence from a number of persons who claim either that Scientology has done them, or their friends and relatives, demonstrable harm, or that they have derived no benefit from processing and have felt themselves cheated of their money', Foster, *Enquiry into Scientology,* 120.
[28] Foster, *Enquiry into Scientology,* 126.
[29] Ibid. 181.

foreigners or Commonwealth citizens, when there is no law which prevents their colleagues holding UK citizenship from believing in their theories or carrying on their practices here'. The better approach was to 'encourage rather than restrict the free flow of people and ideas', a 'tradition of friendliness and hospitality' based on 'long-established policies of tolerance and asylum'. Hence; 'foreigners should be free to come and go through our ports of entry as they please, unless there is clear evidence that they are likely to do us some specific harm, such as the commission of crimes, political activity endangering national security, the passing on of contagious diseases, putting our own people out of work, or indigence as the result of which we shall find ourselves forced to support them'.

He had been advised that 'the Home Office policy stems from the statement of 25th July 1968 that scientology is harmful'. However, 'if the practices of Scientology are thought to constitute a danger to our society sufficiently grave to warrant prohibition or control under the law, then it is for Parliament to make such a law and for the Executive to apply it impartially to Britons and foreigners alike within the confines of this country'. Therefore the visa ban, with the exception of Scientology students, should be repealed.[30]

Foster described psychotherapy as 'psychological' medicine, which 'seeks to affect our minds directly and without any material intervention', including particular schools or disciplines such as 'psychoanalysis' or 'analytical psychology'. Psychologists were those 'who study the workings of (largely) our intellect', including 'educational psychologists (who study how we learn), and industrial psychologists (who study us at work).' Psychiatrists were those who 'seek to cure such of our illnesses as are thought to be of (mainly emotional) mental origin' and who 'practise two distinct kinds of therapy', including 'physical' medicine, 'which seeks to affect our minds through our bodies by material interventions such as electric shocks or drugs', and what he describes as 'psychotherapy', where no drugs are used. He found that 'Scientologists practice both psychology (in that they measure intelligence quotients and claim to improve them) and psychotherapy ("auditing" in particular and "processing" in general)'. Foster claimed

that this was common ground, in that Hubbard had described 'Scientology and Dianetics as "that branch of psychology which treats human ability" and as "the first thoroughly validated psychotherapy"'.[31]

Psychotherapy therefore involved Freudian techniques where the 'trained and selfless practitioner is concerned only to convert the deep emotional dependence on him which his patient develops during the treatment'. Described as the transference effect, in responsible hands this leads to 'an ability on the patient's part to wean himself from the therapist, and to achieve the maturity, and the independent ability to make relationships by choice, which are the aim of most of us ... those who feel that they need psychotherapy tend to be the very people who are most easily exploited: the weak, the insecure, the nervous, the lonely, the inadequate, and the depressed, whose desperation is often such that they are willing to do and pay anything for some improvement of their condition'.[32] There were great dangers in the 'abuse, or incompetent use, of a system of therapy which operates by a deliberate intervention in the patterns of people's irrational emotions'.[33] Foster noted that

> it is fatally easy for the unscrupulous therapist, who knows enough to create a dependence in the first place, to exploit it for years on end to his own advantage in the form of a steady income, to say nothing of the opportunities for sexual gratification. While the latter would rapidly spell the end of a medically qualified therapist's practice at the hands of the General Medical Council, that body has no jurisdiction over therapists who do not happen to be doctors.[34]

While in psychology the 'incompetent assessment of someone's intellectual capabilities of his fitness for a particular employment' might be 'regrettable', it was not in a comparable order to the abuse of psychotherapy. Therefore, his recommendation was that the 'practice of psychotherapy *for fee or reward in cash or kind*, paid by or on behalf of the patient', be professionally restricted in similar manner to which 19 separate

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[30] Ibid. 159-67.
[31] Ibid. 176.
[32] Ibid. 176-8.
[33] Ibid. 180.
[34] Ibid. 177-8.

professions were regulated in Britain.[35] Unlike the Victorian model, where a number of categories were exempted from the Psychological Practices Act 1965, but where there was no stipulation as to fee or reward, Foster felt that categories such as 'doctors, dentists, ministers of religion, social workers and marriage guidance counsellors' should not be exempted. They should obtain the necessary training and qualifications, if they wished to charge for practising psychotherapy. His recommendation would therefore avoid the loophole provided under the Victorian model, which had been successfully exploited by Scientology. Foster commented, somewhat sardonically; 'it is the phenomenon of Scientology which has pointed out this need in the existing law ... if it is the leadership's sincere desire to help humanity, they will have cause to congratulate themselves'.[36]

Foster dissembled that he did not wish to come to any conclusions about whether the leader of Scientology 'in fact exploit their followers for their own profit, or whether it is desirable for auditors who may have had only a few weeks' training since they came to Scientology with problems of their own, to be encouraged to practice psychotherapeutic techniques on those who, *ex hypothesi*, are sitting targets for exploitation'. He was of the view that 'the mere fact that such a situation could easily be abused at the present time with impunity demonstrates the need for urgent reform'.[37] He concludes, mischievously;

> I cannot see any reason why Scientologists should not be allowed to practise psychotherapy if they satisfy the proposed professional body that they are qualified to do so, and that their techniques are sound, that their practitioners receive adequate training and operate under a stringent ethical code, and that there is no hint of exploitation. If it is indeed, as they claim, "the first thoroughly validated psychotherapy", the profession will welcome them with open arms. And should its governing body decide, as has been done in many professions, that it is unethical to advertise for patients or to make unqualified claims to cure, I have no doubt that the Scientology leadership, if its sincerity is genuine, will be happy to conform to these standards.[38]

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[35] Ibid. 178. Emphasis added.

[36] Ibid. 179.
[37] Ibid. 179-80.
[38] Ibid. 181.

In his examination of the fiscal privileges of religions, Foster asked rhetorically; 'Is Scientology a religion ?'. He noted that this question is 'diffuse', the great religious traditions being an amalgam of 'theology, metaphysics, cosmology, ethics, law, ritual, history and myth'. Nevertheless, he adopted the theistic view of the 'divine godhead', that the 'main thing which distinguishes a religion from other systems of thought or belief is that the former includes belief in one or more divine beings, while the latter do not'. He tested his hypothesis against some dictionary definitions, and said he was content to adopt the definition adopted also by the Scientologists in *Kangaroo Court.* That definition was the one appearing in *Webster's New 20th Century Dictionary*, which Foster interpreted as including, 'in anything other than a loose sense ... both belief in a divinity, and worship of that divinity, as necessary ingredients'.

However, while the Webster definition does emphasise the worship of 'God', or 'the creator and ruler of the universe', it also specifically includes 'the Buddhist religion' under 3 (a) when it says 'any specific system of belief, worship, conduct, etc. often involving a code of ethics and a philosophy; as a Christian religion; the Buddhist religion'. The implication from this would appear to be that the concept of deity is not absolutely necessary in popular conceptions of religion. Indeed, the Webster definition also says; 'loosely, any system of beliefs, practices, ethical values, etc. resembling, suggestive of, or likened to such a system, as humanism is a religion'. Foster noted earlier that 'almost any system of thought, however speculative, can be called a philosophy without inviting too much disagreement'.[39] From the looser aspects of the above definition, it could also be said that almost any philosophy can be called a religion. He makes the commonsense point that '*whether Scientology is a religion as a matter of law will of course depend on the particular branch of the law under which the question falls to be determined*'.[40] To provide some insight into whether Scientology might be categorised as a religion, he first summarises the evidence, mainly from Scientology documents, and then examines the three extant legal cases involving Scientology and the question of religion. The Scientology evidence included certain statements to the effect

[39] Ibid. 51-3.
[40] Ibid. 58. Emphasis added.

that Dianetics is a science not a religion, that Scientologists do not engage in rites, ceremonies etc, but also statements claiming specifically that it is a religion. In addition, there is a claim by a prominent Scientologist that he is a practising Jew and that 'scientology in no way conflicts with my religious beliefs', it not being a religion.

Foster also notes the clear view of the *Anderson Report*, 'except for the purpose of deceit, Scientology has not been practised in Victoria on the basis that it even remotely resembles a religion'.[41] Again, he notes that Professor Lee 'appears to have come to the same conclusion'. Making a comparison with Christian Science, which 'took on a religious form from its beginning', the Professor notes that Scientology took on a religious form after it suffered severe setbacks as a "science of mental health"'.[42] On the question of deceit, Foster says

> although more than one "Church of Scientology" was incorporated in the United States in the 1950s, it is clear that no serious attempt was made to present Scientology as a religion until after the publication of the *Anderson Report*. In that context, the HCO Policy Letter of 12 March 1966, which appears at paragraph 68 above, may also be instructive, especially its penultimate paragraph;- "Of course anything is a religion that treats the human spirit. And also parliaments don't attack religions ...". Since that time, there has been abundant evidence of a shift in the presentation of Scientology by its leadership towards a religious image.

Foster also notes that 'some people may also find it novel to discover a religion which recruits new members by the methods of salesmanship and a "free personality test" described in paragraphs ... below, (none of which mention that the subject is being recruited into a religion)'.[43]

On the question of law, he examines three cases including the UK Scientology chapel case and two American cases, one involving the seizure of E-meters for alleged contravention of the Food Drug and Cosmetics Act 1964 and the other involving Scientology claims for religious exemption from Federal income tax. With respect to the

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[41] Ibid. 53-4.
[42] Ibid. 58.
[43] Ibid. 57-8.

English case, Foster quotes Lord Denning MR and Buckley LJ on the definition of religious worship, which excluded Scientology, and notes that the Scientologists were refused leave to appeal to the House of Lords.[44] With respect to the E-meter seizure case, Foster notes that the US Court of Appeal found that the Scientologists 'for the purposes of this case, had made out a *prima facie* case that it was a *bona fide* religion on the basis that 'accounts of auditing integrated into the general theory of Scientology are religious doctrines. Since no rebuttal has been offered, we must take the point as proven'.

However, the case was not clear cut, as the Government had not taken the opportunity to challenge the Scientologist's claims. The Court also noted that; 'any prima facie case made out for religious status is subject to contradiction by a showing that the beliefs asserted to be religious are not held in good faith by those asserting them, and that forms of religious organisation were erected for (sic) sole purpose of cloaking a secular enterprise with the legal protections of religion'. Later, clarifying observations were delivered by the majority and what amounted to a virtual invitation was offered to the Government, the majority stating that 'the Government up to this time ... has not challenged the bona fides of (sic) appellants' claim of religion. In the event of any new trial ... it would be open to the Government to make this challenge. If the challenge is made successfully, the First Amendment question would, of course, disappear from this case'.

In the second American case, it was found by the Court of Claims that Scientology had failed to show that earnings had not accrued to the benefit of private individuals. Consequently, the Court found it unnecessary to decide whether Scientology was 'a religious or educational organisation as alleged'. The case was of interest in that it revealed at least some of the income and other benefits derived personally by L Ron Hubbard.[45] It seems that Foster takes the position that Scientology is probably not a religion at law because it is probably more likely to be categorized as something else,

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[44] Ibid. 58-9.

[45] Ibid. 59-62.

namely a business enterprise providing personal profit for the founder. He does not state explicitly that he had Scientology in mind when he makes the claim that the area of religious fiscal privileges is open to abuse. However, he does say; 'as matters stand, it is enough for any small group of people to come together and claim to believe in, and worship, a diety (sic), and this is clearly not good enough in light of the great economic value of the privileges concerned'. While Scientology may not be named here, the inference seems obvious.

Foster concedes that 'it may be thought desirable to continue to confer these privileges on bona fide religions having a substantial following', but is expressly of the view that there needs to be 'precautions which will ensure that there can be no abuse'. He questions the validity of religious privileges in general, saying that the 'privileges themselves are numerous, and occur sporadically and without much logic in a number of areas' and that 'the source of these privileges – some of which are of substantial economic value – is to be found in the remoter parts of our history, and it appears to me to be debatable what correlative benefit our society today derives from their continued existence'.

The list of fiscal privileges he outlines is substantial. He notes that 'advancement of religion' is one of the three main purposes validating a charity in law, the other being the 'advancement of education' and the 'relief of the poor'. Charities enjoyed exemptions from various taxes, including income, capital gains and employment tax, and gifts to them enjoyed certain privileges. In addition, registration as a place of religious worship under the Places of Worship Registration Act 1855 enabled religions to avoid the normal council rates and contributions. His recommendation is to review these substantial privileges 'with the object of at least ensuring that they are restricted to religious movements having a substantial number of adherents, and engaging in genuine acts of worship'. As a caveat he states that this review 'must not detract in any way from the existing tolerance of religious belief, whether it be Christian, Jewish, infidel or heathen'.

RECEPTION OF THE FOSTER REPORT

Foster's inability to adjudicate on the harmfulness or otherwise of Scientology was lamented editorially by *The Times* in December 1971, where it was noted that 'the question that matters to public policy is: is it (Scientology) seriously harmful to a significant number of those who are attracted to it ?' It was also observed that his recommendation for a professional council for psychotherapy, although making preliminary sense, was not supported by evidence and would 'need to be more widely tested and discussed before it were acted on'. The editorial writers agreed with his conclusion that the ban on study and work visas was 'an objectionable use of executive power', but did not comment at all on his major recommendation for a review of the fiscal privileges enjoyed by religious organisations.[46]

The Secretary of State for Social Services, Sir Keith Joseph, provided the Government's initial parliamentary response to the *Foster Report* in a written answer to Mr. John Hall MP. Sir Keith noted that the main recommendations were that the restrictions imposed by the previous Administration should be 'relaxed' and that 'there should be legislation enabling the practice of psychotherapy for reward to be restricted to suitably qualified persons'. He announced that the government would 'initiate ... consultations at once' with the relevant professional associations. He was silent on the recommendation for an inquiry into the fiscal privileges afforded to religious organisations, apart from noting that the 'recommendations contained in the report should be considered as a whole'. He concluded that until consultations were completed the Government did not feel able 'to reach any conclusions on the report'.[47]

Scientological response to the report was to claim it as a victory. Foster's recommendation to end the ban on Scientology working visas was applauded by Ron Hubbard, who commented as though it were a *fait accompli,* stating; 'I feel a blow has been struck for human rights. All the ban did was cost England many millions in foreign

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[46] 'What is Scientology ? What can be done ?' *The Times*, 23 December 1971.

exchange and make unnecessary upsets for people'. He 'heartily agreed' that 'psychiatric practices should be regulated by law'.[48] Scientologists were said to be 'jubilant', with spokesman David Gaiman noting they would 'cooperate with the Government in any advisory body that is to be set up on psychotherapy', saying presumptuously, and inaccurately, that 'we are delighted that the report has recommended what we most wanted: that the ban on foreign scientologists will be removed.[49] In fact the ban was to remain in place for another nine years, and even when it was finally lifted the Government made it 'clear that individuals associated with scientology whose presence was not conducive to the public good would continue to be liable to refusal under ordinary immigration principles'.[50]

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[47] UK House of Commons, *Hansard 1971,* 22 December. 385-6. and also Tim Jones, 'Government to act on controls proposed in scientology report', *The Times*, 23 December 1971.
[48] 'Foster report pleases Mr Hubbard', *The Times*, 24 December 1971.
[49] Jones, 'Government to act on controls proposed in scientology report'.
[50] 'Ban lifted on scientologists entering Britain', *The Times*, 17 July 1980.

III: 4

PUBLIC INTEREST DECISIONS (1974-79)

'real risk of ... harassment ... by threats and blackmail'

Notwithstanding Foster's recommendation, a decision of the European Court, in 1974, confirmed the right of the British government to maintain its visa ban, if it so wished, 'on grounds of public policy, to prevent a national of another member state from taking gainful employment within its territory'. This applied even in a situation where 'no similar restriction is placed upon its own nationals'.

VISA BAN POLICY UPHELD (1974)

The United Kingdom government had refused leave to allow Yvonne van Duyn, a woman of Dutch nationality, entry to the United Kingdom to take up employment as a secretary with the Church of Scientology, a refusal which she had duly litigated. The Chancery Division of the High Court subsequently requested the European Court to determine whether European Economic Community (EEC) provisions were breached by the refusal. The issue arose under Article 48 of the EEC Treaty, which provided for freedom of movement for workers and the elimination of discrimination based on nationality with respect to employment. Exceptions were provided for under paragraph 3 on grounds of public policy, public security or public health. Also to be considered was a directive under Article 3 (1) of the Council Directives No. 64/221, which provided that 'measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned'.

The Court considered to what extent the activities of an organisation, that were deemed by that country to be 'contrary to the public good, but which were not 'prohibited by national law', could be 'used as a justification for derogation from the fundamental

principle of freedom of movement for workers'. The Court held that any such public policy decision 'must be interpreted strictly, so that its scope cannot be determined unilaterally by each member state without being subject to control by the institutions of the community'. Despite this, the Court also noted that 'the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another'.

The Court held that; 'where the competent authorities of a member state have clearly defined their standpoint as regards the activities of a particular organisation and where, considering it to be socially harmful, they have taken administrative measures to counteract these activities, the member state cannot be required, before it can rely on the concept of public policy, to make such activities unlawful, if recourse to such a measure is not thought appropriate in the circumstances'. This was the case even in a situation where 'the member state does not place a similar restriction upon its own nationals'. In this respect it was noted that it is a principle of international law that a state 'is precluded from refusing its own nationals the right of entry or of residence'.

The Court also held that 'a member state, in imposing restrictions justified on grounds of public policy, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organisation the activities of which the member state considers socially harmful but which are not unlawful in that state'. This applied, notwithstanding the fact that 'no restriction is placed upon nationals of that member state who wish to take similar employment with these same bodies or organisations'.[1]

While the *Duyn* case confirmed the legality of executive action taken against Scientology, the European Court also stated the limiting parameters that it considered pertinent to the application of public policy to judicial decision making. The applicability of public policy depended first on government policy being clearly stated, and secondly, on administrative action being taken to implement that policy. It therefore followed that

the public policy argument might be applied adversely to Scientology in other legal cases while the visa ban remained, highlighting the need for Scientology to overcome this executive implementation of stated Government policy.

PUBLIC INTEREST DECISIONS ADVERSE TO SCIENTOLOGY

Although the European Court adopted a narrow approach to the application of government public policy to judicial decisions, the domestic courts in the UK had continued after the V*osper* case to apply wider considerations to questions of public interest, a category of public policy arising under the Common Law. In *Hubbard v Vosper*, counsel for the defence had argued that, 'as a matter of public policy and pursuant to the principles of equity no confidentiality should be enforced by the courts in aid of the so-called secrets of a body carrying on practices in conflict with the public interest'.[2] It will be recalled that this argument was accepted by the Court, the *prima facie* evidence, according to Lord Denning, constituting grounds 'for thinking that these courses contain such dangerous material that it is in the public interest that it should be made known'.[3]

Robert Kaufman and the Church of Scientology (1973)

Hot upon the heels of the *Vosper* case, Scientology, operating as the Church of Scientology of California, sued another budding author and former adherent, Robert Kaufman, who had written the critique, *Inside Scientology – How I joined Scientology and became Superhuman.* Scientology instituted proceedings against Kaufman and Olympia Press Ltd., the publishers of his book, in an attempt to restrain publication, again on grounds of breach of confidence, for using material obtained from Scientology courses.[4]

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[1] 'UK ban on scientology worker allowed by EEC rules', *The Times*, 5 December 1974.
[2] *Hubbard v Vosper* (1972) 2 QB 84.
[3] Ibid. 96.

[4] 'Ban on Scientology book lifted', *The Times*, 15 May 1973.

Mr. Justice Goff dismissed the action. He held: the defendants had proved one case of fraudulent representation and had succeeded with the defence of public interest; the plaintiffs had not come to equity with clean hands; if applicable, damages were sufficient remedy but any alleged injury appeared to be problematical and speculative in the extreme and; it being 'pernicious nonsense', the subject matter of the confidence was not such as the court would protect in any event.[5]

The defendants had proved one of a number of fraudulent claims alleged, namely the Scientology claim that 'there are no tenets in the cult of Scientology which cannot be demonstrated with entirely scientific procedures'. His Honour noted that 'this allegation accords precisely with the passage on page 51 of the *Foster Report* to which the particulars refer'.[6] The passage referred to in the *Foster Report* cites the statement, and sources it to *Freedom Scientology* No. 8, 1969, a magazine produced by Scientology. The reference to the statement appears in the *Foster Report* among a list of Scientology claims to effect cures and eradicate a number of illnesses. It follows Foster's comment that he had 'been unable to discover any evidence which would support Scientology's claim to be a science if these criteria are applied', and the observation that 'the Anderson Board, having heard the evidence of a number of distinguished scientists, found that Scientology was not a science'.[7] After examining the available evidence, Goff J. came to the conclusion that 'the assertion that there is no tenet in Scientology which cannot be demonstrated with entirely scientific procedures must have been reckless as well as wrong',[8] thereby finding fraud.

Goff J. noted that the broad test of public interest, as noted by Lord Denning in *Hubbard v Vosper,* was derived from a 'line of authority from *Garside v Outram* (1856) 26 LJ Ch 113 to the latest case, *Initial Services Ltd v Putterill* (1969) 1 QB 396, where Woods VJ. stated, (presumably in *Garside v Outram*), that 'iniquity' was 'merely an instance of just

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[5] *Church of Scientology of California v Kaufman* (1973) RPC 635. 635.
[6] Ibid. 644.
[7] Sir John G Foster, *Enquiry into the Practice and Effects of Scientology,* London: UK House of Commons 1971. 47-9.

cause or excuse for breaking confidence. There are some things which may be required to be disclosed in the public interest, in which event no confidence can be prayed in aid to keep them secret'. Therefore the more general test was 'just cause or excuse for breaking confidence'.[9] In *Hubbard v Vosper,* Lord Denning had determined that exposing dangerous material was just cause or excuse for breaking confidence in the public interest. Goff J. refers to this test as 'the narrower test', as distinguished from the 'wider proposition from *Fraser v Evans'*,[10] although it might more appropriately be described as one example of 'just cause or excuse', coming under the ambit of the wider test.

Goff J. notes that in *Hubbard v Vosper,* Lord Denning was not able to conclude definitively that Scientology courses contained dangerous material, as the matter before him was an application for interlocutory relief only. That did not prevent Lord Denning from being sufficiently concerned, about the probability that Scientology courses were dangerous, that he allowed Vosper's book to be published. Again, in the motion preceding the present trial, Goff J. had been able to look to 'matters not admissible at the trial even under the agreement between the parties, notably the conclusions of the Public Inquiry in the State of Victoria as contained in the *Anderson Report'*. Now, however, he had to reach a decision on the admissible evidence before him.[11]

The judge considered, first, whether on the narrow basis it had been shown that 'the practices of Scientology are dangerous'. He examined evidence contained in Kaufman's book that he had suffered a breakdown as a result of undertaking Scientology courses. Against this he weighed evidence from medically qualified expert witnesses provided by Scientology. On balance, he felt that the inference that Kaufman's breakdown was due to Scientology was 'irresistible', saying 'of course, I have no evidence whether he was a person of peculiar susceptibilities, more likely than others to be affected, but here is definite evidence of actual harm being done'.

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[8] *Kaufman* 654.
[9] Ibid. 649.
[10] Ibid. 653.
[11] Ibid. 649.

Further to that evidence, he felt, even though it could not be checked, that 'some weight must be given to the statement in the *Foster Report*, page 120, paragraph 170'. In that statement Foster noted that he had received written evidence from a number of persons, who claimed either that Scientology had done them or their friends or relations demonstrable harm, or that they had derived no benefit from processing and had felt themselves cheated out of their money'. Apart from this, his honour found a number of admissions in Scientology books 'that the courses may do harm, and to the physical mind or body and not merely to the thetan or spirit'.[12] Therefore Goff J. found for the defence on the narrower test laid down by Lord Denning.[13] On the wider proposition enunciated in *Hubbard v Vosper*, his Lordship, having read confidential passages from Scientology material, found it to be 'what the first defendant (Kaufman) so aptly described as "a labyrinth of incoherent material"', and what he considered to be 'absolutely nonsensical mumbo-jumbo'. He noted; 'for instruction of that kind which the plaintiffs seek to keep secret large fees are charged. Moreover, as will have been seen, there is evidence of a pecuniary penalty being exacted to patch up any injury done to oneself by violating orders. In my judgement the public interest does indeed require disclosure of the type of things for which they are being asked to pay'.

With respect to the equitable necessity for clean hands, his Lordship held that he must follow Megaw LJ. in *Hubbard v Vosper*, where he had held that Scientology did not come to court with clean hands because it protected its secrets by 'deplorable means'. In addition, Goff J. held that 'the defendant (Kaufman) was at all material times aware of the relevant penal rules and was afraid of the Enemy and Fair Game Law'.[14] However, in addition to the deplorable conduct criticised by Megaw LJ., Goff J. found an additional tactic employed by Scientology upon which to rely, being 'the deplorable means adopted to suppress inquiry or criticism'. In this respect he referred to two Scientology policy statements referred to in the *Foster Report*, being the HCO Policy letter of 15 February 1966 describing how to deal with investigations of Scientology and an executive letter of 5 September 1966 entitled 'How to do a NOISY Investigation'.

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[12] Ibid. 652.
[13] Ibid. 653.

In the former, Scientologists were directed to expose attacks on Scientology 'with lurid publicity' *inter alia*, and in the latter Scientologists were directed to, 'as soon as anyone attacks them ... to make insinuations to his employers, friends, medical advisers and neighbours – "anyone" – that the attacker is engaged in criminal activities'. This was in effect an exhortation to commit criminal libel. Of these directives, Goff J. held that 'surely Megaw LJ's words, "and this is the organisation which is seeking to have its documents treated as confidential by the order of the court", directly apply to such conduct'.[15] On damages, his Lordship noted that Stephenson LJ. in *Hubbard v Vosper* had determined that damages would be an adequate remedy. Of course this would apply only if Scientology could prove that the passages complained about constituted an actionable injury. In the present case, Goff J. felt that 'save insofar as disclosure may prejudice the plaintiffs by exposing the worthless nature of the passages disclosed, any injury appears to me to be problematic and speculative in the extreme' and proceeded to adopt the view of Stephenson LJ.

In addition, his Lordship was of the view that 'the passages sought to be protected are pernicious nonsense' and therefore accepted 'the submission that equity will not lend its aid to prevent disclosure of such matters'. He was aware that in so finding he might be breaking new ground, noting that 'it was argued that there is no case in which an injunction has been refused on that ground'. Nevertheless, he was of the opinion that 'the facts here are unlike those of any other confidence case of which I am aware'. Furthermore, he found support in the judgement of Megarry J in the case of *Coco v A N Clark (Engineers) Ltd.*, at p. 48, where he said 'equity ought not to be invoked merely to protect trivial tittle-tattle however confidential'. Therefore, 'by analogy, ought it to be invoked to protect what I see here, which, even if I am wrong in finding it dangerous, is at best utterly absurd ? ... In my judgement the answer is "No"'.[16]

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[14] Ibid. 654.
[15] Ibid. 656 - 58.
[16] Ibid. 658.

Scientology and the Department of Health (1979)

The additional grounds relied upon by Goff J. in *Kaufman*, the harassment of critics, were invoked in a case heard in January 1979 before three judges of the Court of Appeal, the *Church of Scientology of California v Department of Health and Social Security* (1979).[17] That case arose out of three consolidated actions for libel by Scientology against the Department and two of its senior officers. The actions concerned, 'information released to the press by the Minister of Health and letters written by the officials to health authorities in Sweden and Canada which suggested that the plaintiffs were dangerous charlatans who gave inexpert medical treatment to mentally ill people which made their condition worse rather than better', and that 'they are an undesirable and evil body'.[18]

In the course of legal discovery, the defendants had obtained an order from the Master excusing them from giving inspection to Scientology of medical documents, except to a medical practitioner nominated by Scientology, on his undertaking in writing that he would not reveal the contents to anyone except counsel for Scientology, including indeed the Scientologists who were party to the proceedings. In addition, the production of other documents was subject to an undertaking by the solicitor acting for Scientology that they would be shown only to counsel for Scientology and that Scientology would not use the documents for 'any purpose collateral or ulterior to the conduct of the action'.[19] These orders were made based on 'evidence and material before the court that the plaintiffs (Scientology) had in the past had a policy of harassing critics in order to discourage them from continuing with their criticisms'.[20]

It was against the terms of the Master's order that Scientology appealed to the Court of Appeal, arguing that the Master had no discretion to make the order, or if he did he had no grounds for exercising it. Although the Court felt that the Master's order was too restrictive, and to that extent agreed to substitute other terms, the inherent jurisdiction of

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[17] *Church of Scientology of California v Department of Health and Social Security* (1979) 3 All ER 97.
[18] Ibid. 97-9.
[19] Ibid. 99.

Courts to make such restrictions was upheld, on the basis of the public interest in preventing abuse of process. In addition, in the matter before the Court, it was held that, 'because there was a real risk that an unnecessarily wide circulation of information obtained by the plaintiffs (Scientology) on discovery might lead to harassment of persons who had written to the department by over-zealous supporters ... either in England or abroad, some restriction on inspection of the defendants' documents by the plaintiffs was required'.[21]

Stephenson LJ., noted that the case involved a balance of conflicting interests as described by Lord Denning MR in *Riddick v Thams Board Mills Ltd.*,[22] p. 687, where he 'referred to the public interest in discovering truth so that justice may be done between the parties, and how that had to be put into the scales against the public interest in preserving privacy and protecting confidential information'.[23] He observed that against the general rule of unrestricted discovery, were cases in libel and patent law where discretion was allowed, to protect the anonymity of informers in the public interest in the former, and trade secrets in the latter.[24] In finding that the Court did have 'inherent jurisdiction to prevent the abuse of its own process ... and that that jurisdiction gives it power which was taken by the master and by the judge in this case', he noted that the power included the ability to limit 'inspection by the legal adviser but not by the party himself'.[25] He noted the defendants' concern about

harassment perhaps here but more probably abroad ... where the strong arm of Mr. Ron Hubbard may be suspected as likely to pursue against what are termed "suppressives" the policy of "fair game", some of the provisions of which have already been referred to in this court: see the judgement of Megaw LJ. in *Hubbard v Vosper*.' Having carefully considered the evidence, he said: I am satisfied that *there is a real risk that ... documents ... may be misused ... for harassment of individual patients, informants and renegades named in them, not only by proceedings for defamation against them but by threats and blackmail*, and that they may be distributed to those in other parts of this worldwide organisation who may misuse them in the same way'... I am thinking chiefly of the "fair

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[20] Ibid. 97.
[21] Ibid. 97-8.
[22] *Riddick v Thames Board Mills Ltd* (1977) 3 All ER 677.
[23] *Scientology v DHSS* 101.
[24] Ibid. 103-4.
[25] Ibid. 106.

game law" against suppressive persons expounded in the HCO policy letter of 1st March 1965 ... and the policy letter of 21st October 1968 cancelling publication of the policy in the interests of public relations, but not the policy itself. I am also impressed by the "dead file" system ... what is written about "noisy investigations" in HCO executive letter of 5th September 1966 and the extract in Sir John Foster's report from the HCO policy letter of 15th February 1976.

Further, he noted 'Mr. Hubbard's statement published in the article in the *Toronto Sun* ... which sets out the purpose of bringing actions in Mr. Hubbard's view.'[26] Hubbard's view was reported by the *Toronto Sun* in November 1976, where it was said 'using the courts to the advantage of the Scientology cause has been advocated at length by L. Ron Hubbard, founder of the Church of Scientology. In 1971, for example, a Scientology reprint of the Hubbard statement read: "The purpose of the suit is to harass and discourage rather than win. The law can be used very easily to harass"'.[27] The newspaper reported that it was a victim of such tactics, in an apparent attempt by Scientology to prevent the continuation of an investigative series of articles by Mark Bonokoski, entitled 'The Scientology File'. The follow up to the series noted that, 'judging from internal Scientology documents ... indications are that legal tactics are aimed at intimidation'.[28]

Against all this, his Lordship was mindful of the 'important fact that there is no evidence that the plaintiffs have ever broken the law of this country or disobeyed an order of the courts of this country'. Nevertheless, he felt that he needed evidence, which he did not find before the Court, 'that it is now no longer the policy of this church's founder to act and require subordinates to act and members of his church to act as those documents indicate'.[29] He therefore concluded that 'on the material which we have in this case some sort of restriction ought to be imposed in the exercise of that jurisdiction'.[30] The other judges concurred with this assessment. Brandon LJ. said

there is material ... which shows that it has been the policy of the plaintiffs, in the past at any rate, to treat their critics as enemies and to use various techniques of harassment in

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[26] Ibid. 109.
[27] 'Scientologists go to court in effort to halt Sun series', *The Toronto Sun*, 4 November 1976.
[28] Mark Bonokoski, 'The Scientology File', *The Toronto Sun*, 18 March 1977.
[29] *Scientology v DHSS* 110.
[30] Ibid. 112.

order to discourage them from pursuing their criticisms. In these circumstances I consider that, if the plaintiffs are given an unrestricted right of inspection of such of the defendants' documents as would reveal the identities of persons who have criticised them, and the nature and extent of their criticisms, there is a real risk (I do not put it any higher) that the plaintiffs will use such right for a collateral and harmful purpose in harassing those persons.[31]

Templeman LJ. noted that counsel for Scientology had argued that its 'policy and tactics' had been modified since the time 'during which the plaintiffs were fighting for survival and were using what counsel described as "robust American methods of defence"'. While acknowledging the submission that there was 'no recorded allegation of harassment of witnesses or disobedience of an order of the court', apart from a present allegation before the court which was disputed, (although the judge felt it was 'cause for concern') and making no findings and reaching no conclusion, tentative or otherwise, adverse to the plaintiffs', he nevertheless found the former policies and tactics to be 'disturbing' and present information about persons who now controlled Scientology to be 'not altogether reassuring'. In addition, he felt that Scientology

must inevitably assist individuals who have personality problems and whose zeal might outrun their discretion. The possibility has been raised and persists that an unnecessarily wide circulation of information obtained on discovery might result in some harassment in England or abroad even if the plaintiffs themselves were not responsible and were themselves prejudiced by an excess zeal on the part of some supporter.

Therefore, in the 'interests of prudent administration of justice', reasonable precautions should be taken. While a strong case needed to be made out, he was of the opinion that, 'in the unusual circumstances of this case I am satisfied that the court ought to intervene and that there is jurisdiction for the court to do so'.[32]

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[31] Ibid. 113.
[32] Ibid. 115-6.

III: 5

SCIENTOLOGY LEGAL AND LOBBYING STRATEGIES (1970- 80)

'we are working with MPs and are acceptable'

Judicial comment was made in the *Department of Health* case about the volume and high failure rate of Scientology litigation both in the United Kingdom and abroad. Stephenson LJ. said, 'in addition to the 43 actions brought by the Church of Scientology of California in Toronto ... there are 29 actions brought by the plaintiffs in this country and Mr. Grant (a solicitor in the office of the Treasury Solicitor) has sworn that none of them has been settled on terms really favourable to the plaintiffs and only one has been fought, and that has been lost by the plaintiffs'.[1] In addition to the action against Robinson settled on terms ignominious to Scientology, the organisation paid 'substantial damages in settlement' to Dr. Anthony Ryle, a psychiatrist and director of health services to Sussex University, for attacking his professional competence in a critical Scientology review of his book entitled *Student Casualties*.[2] Other settlements adverse to Scientology seemed to pass without media notice, most probably the desired result of out of court settlements and possibly a reflection of terms of settlement containing secrecy provisions.

The action taken against the Metropolitan Police Commissioner was also not proceeding well for Scientology, with the Court of Appeal, (presided over by Lord Denning MR), in October 1977 affirming an order that preliminary issues should be heard prior to any trial. The substantive issue for the pending trial was whether the Commissioner, through his officers, had libelled Scientology in a 1969 report critical of Scientology. The report was sent to the German police by New Scotland Yard, under a 1961 Interpol agreement

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[1] *Church of Scientology of California v Department of Health and Social Security* (1979) 3 All ER 97. 110. In fact *The Economist* had paid Scientology 'suitable' settlement damages for an incorrect statement that Scientology had 'lost' defamation proceedings, although perhaps the terms were not considered to be 'really favourable', 'Scientologists get damages', *The Times*, 10 February 1970.

between the United Kingdom and West Germany. The issues for preliminary hearing involved questions of international law, where the general rule of 'double actionability', requiring actionability as a tort both in England and the other country, normally applied. There was argument that the complaint was neither actionable in the United Kingdom nor in Germany, and would therefore fail. If the matter failed the preliminary issues hearing, the entire case would come to an end.[3]

Indeed, Scientology was faring so poorly at the hands of the Court of Appeal, that in February 1978 it made application to have matters involving it to be transferred to another court, away from the influence of Lord Denning MR. The application was founded on the alleged basis that 'an unconscious influence was operating adversely to it (Scientology) in his Lordship's previous judgements'. The American authority cited in support of the application was that of *Public Utilities Commission of the District of Columbia v Pollack* (1952), where Mr. Justice Frankfurter, in withdrawing from the case, had stated

> reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgement, or may not unfairly lead others to believe they are operating, judges recuse themselves ... The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.[4]

It was submitted that the Scientologists had such an apprehension and that 'if that belief was not wholly unreasonable that might be a ground for transferring the matter elsewhere'. In addition, the Scientologists were in a different position to the normal litigant who might only come to the court once, in that they had been before the court on eight occasions for interlocutory proceedings. Counsel for Scientology submitted that Scientologists were offended by comments made by Lord Denning in the Metropolitan Police Commissioner's case. The Master of the Rolls had said, 'an organisation which calls itself the Church of Scientology of California ... I am not sure it is right to call it a

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[2] 'Scientologists to pay damages', *The Times*, 22 June 1977.
[3] 'Preliminary issues may end scientologists' libel action', *The Times* 1977. The matter was dropped six years later, 'Writs dropped', *The Times*, 29 July 1983.

"church" at all ... "Scientology" is an invented word to describe their activities'. Counsel for Scientology submitted that his client's maintained their right to call themselves a church. Indeed, Scientology was described in *Webster's Dictionary* as a 'religious movement started by Mr. Hubbard', whereas Lord Denning had 'taken a view that scientology was not a religion and that the church was not entitled to call itself a church'.

Lord Justice Shaw said that the grounds for the application were 'not merely slight but non-existent'. Lord Justice Waller observed that, 'only the persuasive way counsel had put the application gave any substance to the otherwise non-existence of grounds for it'. Nevertheless, Lord Denning was happy to oblige the applicants. He was reported saying; 'if the Church of Scientology felt that its case would be a little disturbed by his sitting on it, that was the last thing he would wish and he would see to it that it came before a court in which his Lordship was not sitting'.[5]

LOBBYING AT WESTMINSTER

Although Lord Denning's voluntary removal from Scientology cases presented the organisation with a gleam of hope, Scientology's litigation strategy had been far from successful in the United Kingdom. As an alternative strategy, the organisation made efforts to secure a political victory by lobbying parliamentarians in an effort to reverse the visa ban. While references from the *Foster Report* had been used in the courts in a manner detrimental to the organisation, Foster's recommendation to remove the ban on work visas was potentially of great significance, as revealed in discussion of the 1974 *van Duyn* case above.

The Scientologists had been lobbying parliamentarians for some time. Indeed, in 1970 it was reported in a gossip column that a function, proposed to be held at the Houses of Parliament at Westminster by Scientology, had been cancelled because the invitation had

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[4] *Public Utilities Commission of the District of Columbia v Pollack* (1952) 343 US Rep 451.
[5] 'Lord Denning elects not to hear appeal concerning scientologists', *The Times* 1978.

breached House rules. The breach occurred when Scientology advised that the function was 'kindly sponsored' by a member of the House. Despite the *faux pas*, the MP involved, Mr. Eric Ogden, the Labour Member for Liverpool West Derby, said that Scientologists had been 'lobbying for more than a year now and seemed reasonable and responsible'. Indeed, it was reported that the sect had been engaged in 'regular and intensive lobbying at the House'.[6]

The Scientology issue was kept alive at Westminster for nearly a decade. From publication of the *Foster Report*, in December 1971, by the Heath Conservative Government, through the terms of the Wilson and Callaghan Labour Governments, from 1974 to 1979,[7] to the announcement of the lifting of the immigration ban, on 16 July 1980,[8] under the Thatcher Conservative Government, not a year went by without questions from parliamentarians. These were generally about the visa ban and were in the main supportive of the Scientology case for it to be lifted. In that period some 61 Oral and Written Answers were provided by the Government in the House of Commons on 72 sitting days,[9] to 32 questioners, most notably Mr. Arthur Lewis, the Labour Member for

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[6] 'Scientologists' common faux pas', *The Times*, 13 March 1970.

[7] Labour held office under Harold Wilson from 4 March 1974 to 5 April 1976 and then under James Callaghan from 5 April 1976 to 4 May 1979. Margaret Thatcher held office from 4 May 1979 to 28 November 1990, David Butler and Gareth Butler, *Twentieth-Century British Political Facts 1900-2000*, 8th ed. (London: Macmillan, Basingstoke, England, 2000) 35 & 38.

[8] UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1980. 16 July. 578-9.

[9] UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1972. 9 November 1174-5, 14 November. 194-5, 243, 17 November. 243, 21 November. 375, 30 November. 207-8, 12 December. 81. UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1973. 29 January. 313, 2 March. 459, 3 April. 51-2, 8 May. 48, 15 June. 12, 19 June. 76-7, 19 July. 185, 16 October. 18-9, 17 October. 245, 12 November. 67. UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1974. 25 January. 387, 25 November. 83. UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1975. 11 February. 77, 13 February. 185, 11 March. 96, 15 December. 443. UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1976. 2 February. 423, 25 February. 258, 1 April. 558, 5 May. 385, 5 August. 939. UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1977. 23 May. 371-2, 30 June. 288, 1 July. 372-3, 14 July. 207, 28 July. 581-2, 26 October. 781, 15 November. 170, 23 November. 745, 28 November. 16. UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1978. 9 January. 615, 26 January. 80-1, 17 February. 419, 24 February. 819, 6 March. 454, 8 March. 664-5, 14 March. 114, 15 March. 97, 16 March. 293-4, 7 April. 18, 3 May. 121, 3 May. 41, 15 May. 55, 18 May. 283, 26 May. 772, 6 July. 255, 8 December. 824. UK House of Commons, *Parliamentary Debates (Hansard)*, London: UK Parliament 1979. 26 January. 275, 26 January. 81-2, 27 March. 120-1, 21 May. 22, 11 June. 4, 11 June. 11, 23 July. 29, 24 July. 12, 24 July. 28, 24 July. 234, 25 July. 46-8, 25 July. 300-01, 26 July. 84-5, 27 July 517, 27 July. 32-3, 27 July. 35-6, 24 October. 175, 13 December. 727. UK House of

Newham North West, who asked questions supportive of the Scientology position on 17 days. Indeed, in March 1977, it was reported that Scientologists had been 'working closely with two Labour MPs, Mr. Thomas Litterick, (the Member for Birmingham) and Mr. Arthur Lewis', who were chairman and president respectively of the All Party Parliamentary Committee for Freedom of Information, in drafting and promoting proposed freedom of information legislation in the form of a private member's Bill. It was noted that parliamentary demands for such legislation had 'coincided with a campaign by the Church of Scientology for access to records held on its members at Scotland Yard, the Home Office and elsewhere, and with an attempt by scientologists to increase their influence and improve their public image'.

Four Scientologists were involved in the freedom of information legislation campaign. These included Mr. Rory Boulding, a lawyer who was said to be a 'principal architect of the Bill', Mrs. Elaine King, parliamentary secretary to Mr. Lewis, (former secretary of the All Party committee), and her husband Mr. Joseph King, the press officer of a liaison committee associated with the proposed Bill. The fourth was Mrs. Pamela Hurwitz, a liaison committee member representing the 'National Society for Crime Reduction and Social Justice, a reform group sponsored by the sect'. Mr. King was reported as saying, 'Scientologists are now getting a reputation for openness whereas there may have been grounds for criticizing us on that score in the earlier days. They were not doing their public relations properly then. Now we are working with MPs and are acceptable'. Mrs. Hurwitz said, 'the MPs are working quite happily with us ... In the past there have been a lot of nasty rumours and I hope we can now dispel some of them'.[10]

Scientology relationship building had certainly been successful with Mr. Lewis. As well as leading the list of parliamentary questioners seeking the lifting of the visa ban, in March 1978 he attended a Scientology conference and proposed that Scientology should challenge every MP, before the forthcoming general elections, to 'declare support for the

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Commons, *Hansard 1980,* 13 March. 649, 1 April. 150-1, 2 April. 222, 11 June. 188, 17 June. 477, 19 June. 605-6, 7 July. 24, 10 July. 264.

[10] Michael Horsnell, 'Drive against government secrecy - Scientologists working with MPs on Bill', *The Times*, 1 March 1977.

lifting of the Home Office ban ... on the rights of a religious group to enter Britain'. It was also reported that Mr. Lewis and other MPs were proposing an all party motion, to 'establish the degree of backbench support for the ending of the ban'.[11]

The election of the Thatcher Government in May 1979 gave further impetus to the moves urging reconsideration of the long term visa ban. This seemed to be based on two grounds, according to *The Times* political reporter, Michael Hatfield. The first was the impracticality of its continuing implementation, it being noted that 'Home Office ministers for some years have seen the ban as an unnecessary nuisance, particularly for hard-pressed immigration officers who have to identify members of the movement'. Secondly, was the 'libertarian philosophy on individual freedom', espoused by Margaret Thatcher, who reportedly wanted the ban lifted. Against this was the view of some government ministers and backbenchers, who in fact wanted the ban retained and extended to the 'moonies'.[12]

Perhaps sensing a new opportunity, Scientology now pressed its tactic of arranging for Europeans with political or social status to challenge the entry ban. In July the newly elected government avoided embarrassment when the Home Secretary allowed entry to a Danish member of the European Parliament, Mr. Ole Govmand,[13]who had declared his intention to study and/or work for Scientology in England. Scientology's main ally in the Commons, Mr. Arthur Lewis MP, seized upon the admission of Mr. Govmand to draw attention to the now inconsistent application of the ban.[14] He further adopted the tactic of directing parliamentary questions to the new Prime Minister, Margaret Thatcher. In view of her reported support for the lifting of the ban, his tactic was perhaps designed to embarrass her into using her powerful position, as a newly successful leader, to push a change in policy through the Conservative Party room.

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[11] John Groser, 'Scientology query for candidates', *The Times*, 8 March 1978. It was later reported that 92 MPs had signed a motion condemning the ban, 'Home Office says ban on overseas Scientologists to stay', *The Times*, 19 June 1980.
[12] Michael Hatfield, 'Proposal to end 11-year ban on Scientologists', *The Times*, 15 November 1979.
[13] *The Daily Telegraph* 17 July 1979, 17c – article referred to in the *Index to The Times* 841, 1979 – 'leading Danish member allowed into Britain'.
[14] UK House of Commons, *Hansard 1979*, 23 July. 29.

In an effort to highlight the lack of rationale for the ban, and the inconsistency in policy application between domestic and foreign Scientologists, Lewis asked the PM, on two consecutive months, whether she would ascertain the number of Scientologists in her department, and 'remove them from office in view of their danger to the security of the state'.[15] Also in July 1979, a Conservative MP, Mr. Peter Ross, tabled an all party motion entitled, 'Justice for Scientologists', which called upon the Secretary of State for Social Services to either publish the evidence for the visa ban or else lift it.[16]

However, despite the admission of Mr. Govmand, in September 1979, in a re-assertion of Home Office policy implementation, another Scientologist, Baroness Edith von Thungen Reichenbach, was refused entry to attend a Sunday service at East Grinstead. The Baronness was sent home to Munich, on the grounds that she was visiting to ' "promote the interests of and attract attention to" the church in the United Kingdom'.[17] Other revelations about the conduct of the Church were also now to emerge which would threaten its campaign to have the visa ban lifted.

PUBLIC RELATIONS REVERSALS

Improved public relations expertise, working harmoniously with some politicians on common causes and obtaining not insignificant parliamentary support for the lifting of the visa ban, had constituted solid progress by Scientology towards social and political legitimacy. This was despite revelations in February 1978 that L. Ron Hubbard had been convicted and sentenced in his absence to a four year prison term for fraud by a Paris Criminal Court. He was also fined 35,000 Francs.[18] However, the organisation was obliged to contend yet again with further extraordinary and sinister revelations of its own making. As debate was developing within the governing Conservative Party about lifting

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[15] Ibid. 24 July. 128, 27 July. 517. The PMs answer was in the negative.
[16] David Beresford, 'Papers reveal sect's "dirty tricks"', *The Guardian*, 7 February 1980. It was also reported that by February 1980, 67 MPs had signed the motion.
[17] David NicholsonLord, 'Scientologist wins plea against entry ban', *The Times*, 17 May 1980.
[18] 'Scientology Boss Gets Jail Term', *East Grinstead Courier*, 22 February 1978.

the visa ban,[19] it was revealed that the United States government was seeking the extradition of two senior Scientologists, living in Britain, who had allegedly masterminded burglaries of government offices in the United States in 1976.[20] These had apparently been authorised from Scientology headquarters in East Grinstead.[21]

The Budlong/Kember extradition and US conviction (1979)

The burglaries had allegedly been planned for the purpose of obtaining information on legal proceedings being conducted against Scientology in the United States by the Internal Revenue Service (IRS) and the Food and Drugs Administration, and in addition to obtain information about 'particular persons who were hostile to the church'. The extradition applications related to just two of eleven Scientologists, 'charged with the theft of US government documents and the bugging of a government meeting'.[22]

Despite an argument that the alleged offences were political, and that the US government was acting in bad faith,[23] the Scientologists involved, Mrs. Jane Kember, a British subject with the title of 'guardian worldwide', who supervised and controlled operations and Mr. Budlong, a US citizen in charge of the Scientology information bureau,[24] lost the argument. They were refused leave by the House of Lords Appeal Committee, to appeal to the House of Lords[25] for a writ of *habeus corpus*. Despite a petition to the Home Secretary, the extradition was arranged.[26]

Subsequently the pair were convicted in the United States and jailed in December 1980, 'for between two and six years', having, according to the prosecution, 'from their

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[19] Hatfield, 'Proposal to end 11-year ban on Scientologists'.
[20] 'Double criminality in extradition law', *The Times*, 7 December 1979.
[21] David Beresford, 'Officials lose extradition plea', *The Guardian*, 8 February 1980.
[22] (London) Reuter, 'Sect leaders accused of ordering infiltration of US tax offices', *The Calgary Herald*, 15 May 1979.
[23] 'Double criminality in extradition law'. It was claimed that false reports about Scientology were being circulated between government departments and that the burglaries were committed to inform the church in order to change government policy towards it.
[24] Reuter, 'Sect leaders accused of ordering infiltration of US tax offices'.
[25] 'Scientologists lose extradition plea', *The Times*, 8 February 1980.
[26] 'Scientology officials to be extradicted', *The Times*, 11 March 1980.

headquarters in East Grinstead, Sussex ... challenged and attempted to undermine the judicial and government structure of the United States'. In addition, the American trial uncovered other unsavoury activities perpetrated by Kember, who had, *inter alia*, 'tried to get a woman who wrote a book about Scientology imprisoned or committed to a mental institution'. Evidence also emerged that both defendants had sent messages to 'church members in the United States arranging for a burglary at a lawyer's office to be covered up'.[27]

The Paulette Cooper frame-up and 'dirty tricks' allegations (1980)

The matter referred to in the Kember trial was that involving journalist[28] Paulette Cooper, who in 1971 had published *The Scandal of Scientology* and was allegedly targeted by the Church with a 'dirty tricks' campaign of vilification. Documents seized by the FBI, in the prosecutions of Kember and others, reportedly included a ten page memorandum dated 1 April 1976, entitled 'Operation Freakout', which set out plans to get Cooper 'incarcerated in a mental institution or gaol, or at least to hit her so hard that she drops her attacks'. The plans outlined in the memorandum included impersonating her and making bomb threats against two Arab consulates in New York.

Other facets of the alleged campaign included: stealing her personal stationery from her apartment to forge a bomb threat to the Church; commencing 14 legal actions against her to harass by litigation; placing her name on pornographic mailing lists; writing her name and address in graffiti in public places; making spurious allegations to the IRS about her father's tax affairs; stealing a document from her lawyer to gain a legal advantage and even sending potential suitors to date and spy on her. The initial success of the alleged dirty tricks campaign was so successful that Miss Cooper was actually indicted before a federal grand jury, on an alleged bomb threat against Scientology which was said to have been manufactured by the Church itself. The state only dropped the charges when

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[27] 'Two Scientologists jailed', *The Times*, 20 December 1980.
[28] She also held a degree in psychology.

Cooper took the unusual step of agreeing to undertake a truth serum test, to prove her innocence. [29]

In another episode, it was reported that Scientology had attempted to frame the Mayor of Clearwater, Florida, Mr. Gabriel Cazares, a critic of Scientology, on a hit and run charge and conducted a smear campaign against him alleging that he was 'promiscuous and a bigamist'. Details of the attempted hit and run frame-up, were provided in a 'Government sentencing memorandum submitted to the Washington court which convicted nine Scientologists to gaol terms for conspiracy to burgle Government offices'. It was also reported that a report of the frame-up operation was made in a letter dated 15 March 1976 to Mo Budlong, at Scientology headquarters in East Grinstead.[30]

These revelations were reported in a series of articles run by *The Guardian,* in February 1980, outlining the alleged dirty tricks campaigns waged against critics of the Church, where 'Scientologists tapped telephones, smeared critics, burgled offices and spied on the private lives of public figures'. *The Guardian* claimed that 'the eminent British QC, Sir John Foster' had been a target of Scientology's 'private "intelligence" operations. The paper noted that; 'in July 1972 the sect's internal intelligence service tried to find out details about "young women" who purportedly stayed at Sir John's apartment in New York', apparently with a view to 'establish a link between him and an attractive New York author and freelance journalist, Miss Paulette Cooper'.

It was also reported that it had now been confirmed that L. Ron Hubbard had issued 'provisional instructions to have a private detective investigate the life of Lord Balniel'. This was after he had 'pressed the Government to set up an inquiry into Scientology'. In addition, the paper claimed that Miss Cooper was 'the victim of the Scientologists' intelligence service ... controlled by the organisation's so-called "Guardian's Office" at East Grinstead, Sussex.'[31]

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[29] David Beresford, 'Sect framed journalist over "bomb threats"', *The Guardian*, 9 February 1980.
[30] David Beresford, 'Bigamy smear used to dent mayor's career', *The Guardian*, 9 February 1980.

BATTLE WON: VISA BAN LIFTED (1980)

It might be expected that such allegations would weigh heavily against any change in government policy. Indeed, after *The Times* reported, in November 1979, that the Thatcher government was contemplating an end to the visa ban, a debate ensued in the letters column, in which the director of the Deo Gloria Trust, a Christian religious organisation, referred to recent Scientology conduct overseas as grounds for maintaining the ban 'in the interests of Government security'. The Trust director, Mr. Frampton, referred in particular to the US prosecutions against 9 leading Scientologists for their role in an alleged 'conspiracy to steal government documents, burgularize (sic) government offices, intercept oral communications and forge government passes'. In addition, he referred to the pending case of 'two others', presumably the Budlong and Kember matters.[32]

The Scientology response, from Tom Minchin, Director of Public Affairs (UK) at Saint Hill, was the claim that the Church in the US was a victim of the COINTELPRO,[33] anti-dissident programme conducted by the FBI, in which false information was circulated about disfavoured groups, including those on President Nixon's 'enemies list'. He claimed that Scientology was on this list because it had campaigned against the allegedly 'unethical psychiatric practices by the CIA in the early 1950s'.

Minchin claimed that this placed a very different picture on the US situation, where the 'proceedings' were 'under appeal on major grounds'. Furthermore, those were matters internal to the US (notwithstanding that operations had been directed from Saint Hill) and in Britain Foster had recommended the lifting of the visa ban as 'unjustified and contrary to Anglo-Saxon tradition'. On another point, he made the interesting claim that Church had waged a largely successful campaign through the courts, to achieve official

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[31] Beresford, 'Papers reveal sect's "dirty tricks"'.
[32] 'Scientology ban', *The Times*, 28 November 1979.
[33] Counter Intelligence Programme. Originally formulated for use against the Communist Party of America in 1956, the programme, applying 'wartime counterintelligence methods', was later extended to other domestic groups in the US – see Richard Gid Powers, *Secrecy & Power - The Life of J. Edgar Hoover*, 2nd ed. (London: Arrow Books, 1989) 339, 74.

recognition in the United States, Canada, Australia, New Zealand, Rhodesia, Germany, Sweden and Denmark.'[34]

An interesting analysis of the dilemma confronting the government was written by the Religious Affairs Correspondent of *The Times,* Clifford Longley, at the end of 1979. He noted that the Home Office was reviewing the efficacy of the visa ban at an awkward time for Scientology in view of the criminal prosecution in Washington. One of the defendants, Sue Hubbard, the wife of L. Ron Hubbard, had been sentenced to five years jail, a story reported by *The Times* on 8 December 1979, although she was currently released on bail pending an appeal. Discussing the Deo Gloria Trust argument in the letters column of *The Times*, Longley observed that the American prosecution, if eventually substantiated, 'does provide, perhaps for the first time since the ban was imposed, a reasonable and publicly explicable basis for it'. He felt

> it is persuasive to argue that people who have broken the law in the United States, and their immediate associates, cannot be trusted to keep to the law in this country, and are therefore undesirable. It would be wrong, obviously, to let such people use Britain as a safe harbour, away from the scrutiny of the United States law enforcement agencies, from which to mount illegal activities in the United States.

Longley gave some weight to Scientology arguments that its lawbreaking in the US was somehow excused by the alleged victimisation of the organisation by the CIA and the FBI, noting that 'those agencies have used similar tactics against Scientology as those now alleged in reverse'. In addition, he noted that some of Scientology's complaints against conventional psychiatry were 'not incredible', in view of the 'well-documented scandals in British mental hospitals'. Furthermore, he felt that 'a ban on entry against a foreign national simply because of his or her religious-psychological beliefs could not be defended'. In conclusion, Longley gave his policy prescription, stating

> it would perhaps be wise, steering the most neutral of all possible courses, to replace the general ban with a ban on those against whom a prima-facie criminal allegation has been upheld, regardless of the particular circumstances, pleas, admissions, or legal tctics (sic)

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[34] 'Christians and cults', *The Times*, 8 February 1980.

in an individual case; and perhaps also, at least while the issue remains so unresolved, to maintain the ban against those who are close associates of such persons'.[35]

On the parliamentary front and spurred to action by the American revelations, early in 1980 the Conservative MP, Mr. John Hunt, a member of the government, tabled a contrary amendment to the Ross all party motion supporting the lifting of the visa ban. The amendment expressed concern about 'the documented evidence from the USA indicating that members of the Church of Scientology have been involved in criminal activities including a conspiracy to infiltrate federal agencies and steal Government documents'. The amendment 'strongly' urged the 'Secretary of State for the Home Department to maintain his ban on the entry of known Scientologists into the UK'. Mr. Hunt felt that if necessary the ban might be extended to other groups 'if any similar evidence was forthcoming'.[36]

Despite this opposition and in spite of the continuing bizarre revelations from America, the campaign to remove the visa ban proceeded apace. By May 1980 it was reported that 'more than 90 MPs' had signed a Commons motion asking that any evidence for the ban be made public'. It was also revealed that Scientology had petitioned the European Commission on Human Rights on the basis of provisions for freedom of religion and expression under the European Convention on Human Rights. In particular, complaint was made under Article 14, which endorsed the right to an effective remedy before a national authority. The fact that the evidence on which the ban was based had never been made public was part of the complaint. A Scientology spokesman stated that 'the scientologists are the only religious group in Britain who are discriminated (sic) in this way'.[37]

In another positive break for Scientology, an immigration appeals adjudicator ruled that the Gatwick Airport immigration officer, who had denied entry to Baroness von Reichenback in September 1979, had read 'more into the visit than was warranted by the

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[35] Clifford Longley, 'Home Office weighs case for lifting Scientology ban', *The Times*, 31 December 1979.
[36] Beresford, 'Papers reveal sect's "dirty tricks"'.
[37] David NicholsonLord, 'Scientology plea to Europe over ban', *The Times*, 30 May 1980.

facts', when he had determined that the primary reason for her entry was to promote and publicise Scientology. The adjudicator also pointed out that the church was not proscribed in the United Kingdom. As the Home Office considered whether to appeal the matter to the Immigration Appeals Tribunal,[38] Scientology maintained pressure by arranging for more Europeans to test the ban. A Dr. Thomas Kroiss, from Austria, slipped through, it being claimed by Scientology that he had been 'cut off mid-sentence' when giving his reasons for entry. Later, when he saw the Inspector of Immigration and explained that he was a Scientologist he was allegedly told it was 'all right'.

To the contrary, a Dr. Otto Peter Kreneg, a doctor of law at Vienna University, and the Reverend Evert Doeve, were detained,[39] with Scientology applying immediately to the High Court for 'a writ of habeas corpus to prevent the two being sent home'. They were temporarily admitted 'pending the outcome of the application'. In the end the Home Office decided not to appeal, [40] having apparently lodged a notice of appeal which was later withdrawn.[41] The next day it was reported that the *habeus corpus* application had been withdrawn,[42] with Kreneg and Doeve being allowed in 'for a one day visit', while another two French Scientologists tried their luck, with only one 'at first allowed in'. The confusion, resulting from an orchestrated Scientology campaign, allowed their spokesman to claim, 'our feeling is that the ban no longer officially exists'.[43] Baroness von Reichenbach had added to the farce by entering, (after being interviewed by immigration officials), to attend a dinner at the House of Commons,[44] and a group of 13 French Scientologists were allowed in, 'for a service and seminar on religious tolerance at the East Grinstead headquarters'. The 13 had initially been detained, an appeal lodged

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[38] NicholsonLord, 'Scientologist wins plea against entry ban'.
[39] Frances Gibb, 'Scientologists put 12-year immigration ban to test', *The Times*, 12 June 1980.
[40] 'Scientologists to challenge entry ban today', *The Times*, 13 June 1980.
[41] Michael Horsnell, 'Scientologists are let in for a day', *The Times*, 16 June 1980.
[42] 'Scientologists withdraw court challenge', *The Times*, 14 June 1980.
[43] Horsnell, 'Scientologists are let in for a day'.
[44] 'Home Office says ban on overseas Scientologists to stay'. The Baroness dined with three MPs,'who took up her case: Mr. Peter Rost, the Conservative member for Derbyshire, South East; Mr. David Stoddart, Labour member for Swindon; and Mr. Ronald Brown, Labour member for Edinburgh, Leith'.

and consultations entered into with Home Office officials, following which 'immigration officials allowed them in for a one-day visit.'[45]

The Home Office was quick to repudiate any suggestion that the ban had ended. It was stated that the Baroness had been allowed in because it was not felt that she was entering for the purpose of studying, working for, promoting or engaging in the business of Scientology, notwithstanding the highly political nature of her visit. Indeed, a press conference was held at the Commons to mark her visit, with a Scientology spokesman explaining that Scientologists wanted to visit East Grinstead headquarters, because it was regarded as 'kind of Mecca'. The Home Office also conceded that the ban was under review.[46] An announcement was soon to come. On 26 June 1980, it was reported that the Home Secretary, Mr. William Whitelaw, had informed his Conservative Party colleagues that he was recommending the lifting of the ban[47] and on 16 July 1980 he informed the Commons that the decision had been taken. His explanation was that the Secretary of State for Social Services was not 'satisfied that there is clear and sufficient current evidence for continuing the existing policy with regard to Scientologists on medical grounds alone'.

However, he stated that 'individuals associated with Scientology whose presence is not conducive to the public good will continue to be liable to refusal under ordinary immigration policy'. In addition, he specifically noted that 'the immigration rules make special provision for the admission of ministers of religion and missionaries outside the work permit scheme but persons connected with the scientology organisation will not qualify under these heads'.[48] With the exception of the demurral on religious recognition, the announcement was pretty much in line with the 'most neutral of all possible courses' policy prescription which had been enunciated by *The Times* religious affairs correspondent. The lifting of the ban, even with the qualifications announced by the Minister, was received with delight by Scientology. Its spokesman, presumably well

[45] Horsnell, 'Scientologists are let in for a day'.
[46] 'Home Office says ban on overseas Scientologists to stay'.
[47] 'Scientologist ban may be lifted', *The Times*, 26 June 1980.

aware of the public relations value of the coup, claimed that religious liberty had been upheld,[49] notwithstanding the government's continued refusal to acknowledge its religious claims.

The decision to lift the ban was received none too well by a number of parliamentarians. Some Members of the House of Lords were moved to complain in Consultations, and raised the option of establishing a Select Committee of the House to look into the Scientologists and the 'Moonies'. The government remained unmoved. Its spokesman Lord Belstead, the Parliamentary Undersecretary of State for the Home Office, while acknowledging the right of the Lords to establish its own Select Committee, maintained the line that for its part the government believed, for the moment, that an inquiry would be inappropriate. He also admitted that 'the Government took into account some recent convictions of scientologists in the United States of America, but did not consider that these were sufficient to justify maintaining the general ban on people coming from overseas to work for or study scientology'.[50] In the Commons the Government confirmed that it had not consulted with US authorities about 'the criminal activities of Scientologists in that country', but had taken into account 'the information available about such matters'.[51]

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[48] UK House of Commons, *Hansard 1980,* 16 July. 578. Curiously, the announcement was made in response to a question from Mr. Geoffrey Johnson Smith MP.
[49] Ian Bradley, 'Ban lifted on scientologists entering Britain', *The Times*, 17 July 1980.
[50] Baroness Gaitskell hoped that the 'Government will think again', Viscount Eccles said 'this decision is very disturbing to a lot of us' and Lord Orr-Ewing noted that 'in all parts of the House and in many parts of the country there is anxiety about these issues'. Only Lord Monson rose to say that many would support the lifting of the ban as it was an 'indiscriminate blanket ban' imposed 'without any satisfactory explanation ever having been given' and therefore 'contrary to the traditions of a free society'. He added that this did not indicate 'any strong feelings about scientology one way or another', UK House of Lords, *Parliamentary Debates (Hansard),* London: UK Parliament 1980. 8 August. 1763-8.
[51] UK House of Commons, *Hansard 1980,* 31 July. 794. (Mr. Raison in reply to Mr. John Hunt's question to the Home Secretary).

III: 6

CONTINUING COMPLAINT, CONTROVERSY AND OFFICIAL CRITICISM (1981-97)

'Scientology ...has as its real objective money and power for Mr. Hubbard, his wife and those close to him at the top'

In September 1981, just over a year after its political victory over the visa ban, Scientology announced some housekeeping measures, described by its spokesman Peter Thompson as a 'coming of age'. The reshuffle of organisation and leadership was lauded as the 'biggest since Mr. L. Ron Hubbard, its founder, left 15 years ago'. Mr. Thompson declared; 'in future the church would be less abrasive and more concerned with maintaining friendly relations with governments and with its original aims of reforms in psychiatry and combating drug addiction'.[1]

A year later it was reported that twelve staff members at British headquarters had been 'excommunicated' for alleged 'misconduct'. Others from the Office of Guardians had been moved to other positions. This was the result of an internal Church investigation following the 'conviction and imprisonment of senior Scientologists in the United States'. The new external affairs director of the Church in the UK, Mrs Edith Buchele, was credited with the expulsions, having found a 'complete mess' after her appointment. Internal charges were laid against the twelve by Scientology. These included the 'misuse of church funds to launch a series of libel actions' and it was said that one senior member of the Office of the Guardians had falsely claimed to be a barrister.

The Office of the Guardians had been closed earlier in the year and international headquarters of the church had been transferred to Los Angeles. Mrs. Buchele claimed that the true policy of the church, as defined by L. Ron Hubbard, was to 'use legal means

only as a last resort but above all "to live in peace with one's environment"'. To mark this commitment a 'new' open policy had been adopted. *The Times* was allowed free access the previous day to any part of the Saint Hill complex[2] and six libel actions against the Metropolitan Police Commissioner had been dropped.[3] That these reforms were window dress rather than genuine house cleaning soon became apparent, with Scientology quickly reverting form. The *Daily Mail* claimed the policy of 'disconnection' was re-introduced in September 1982, with the 'Church' admitting, through its public affairs officer Michael Garside, that it was 'a fact of life'. Garside reportedly said

> if somebody you are associated with directly makes your life a misery, it may be necessary to drop your contacts with them. It is certainly not our policy to split up relationships. But occasionally someone comes into Scientology aged around 20, and where they have been out of touch with their parents for years, may return and tell them they are making a mess of their lives, and recommend Scientology. We say that situation must get "handled", or you don't get any more courses. They sort out the problem – or apply the policy of disconnection.

The *Daily Mail* found 'many sad and bitter victims' of Scientology, including: a boy of 13 who told his father he would never see him again; a woman who claimed her fiance was forced to leave her; and a dentist who had been boycotted by some Scientology patients. According to dentist Ron Lawley, the Church had reluctantly been 'forced to abandon "disconnection"' some fifteen years ago after public outcry, a parliamentary inquiry and Home Office visa bans over a similar policy'; but 'now the old reign of terror' had returned. The *Mail* reported that a Conservative MP, Anthony Beaumont Dark, was to ask the Home Secretary 'to launch an immediate investigation'.[4]

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[1] 'Sect makes top jobs reshuffle', *The Times*, 19 September 1981.
[2] Clifford Longley, 'Scientology officers expelled', *The Times*, 17 August 1983.
[3] 'Writs dropped', *The Times*, 29 July 1983. Lack of any real prospect for success and/or limiting further damaging revelations in court might have been the real reason for dropping this litigation.
[4] Peter Sheridan, "We disconnect you!' - MP seeks top-level inquiry as 'Church' again disrupts families', *Daily Mail*, 11 February 1984.

JUDGE LATEY LASHES SCIENTOLOGY (1984)

Following these revelations an extraordinary judgement was delivered by Latey J in the family division of the High Court, on 23 July 1984.[5] The judge awarded custody of two children to their former Scientologist mother on the basis that the children would be 'gravely at risk' if he were to leave them in the custody of their Scientologist father under the 'baleful influence of the "Church"'. The decision had been made 'decisively'[6] even though: the children had been in the custody of the father for several years; the mother had previously absconded with the children to another country; attachments had been made with other family members, including a step-brother and half-brother; and the mother planned to take the children to live in Australia. Normally it would have been judged 'in the better interests of the children for there to be no upheaval while ensuring very ample access to their mother', but the Scientology factor was sufficient to 'tip the scales the other way'.[7]

Delivered in open court because it raised 'matters of some general public moment',[8] the judgement found: Hubbard had made a number of false claims to 'promote himself and the cult'; auditing and training courses were dangerous to mental health; corrupt, criminal use was made of confessions made to Scientology auditors; 'vicious methods' were used by the Church as a matter of 'deliberate settled policy to discredit' critics and wayward Scientologists; the Church alienated families and friends; the Church 'laundered' sums of money and paid them into 'the pocket of Hubbard'; and Scientology courses were designed to 'indoctrinate' children. Included among the false claims were: Ron Hubbard was a much decorated war hero, he commanded a corvette squadron, he was wounded and awarded the Purple Heart, he was crippled and blinded in the war and cured himself with Dianetics, he was sent by US Naval Intelligence to break up a black magic ring in California, and that he was a graduate of George Washington University. All this was all

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[5] *Re B & G Minors (Custody)* (1984) (Downloaded from http:www.demon.co.uk/castle/audit/latey.html on 19 January 2002, 28 pages)
[6] *Re B & G Minors* 28.
[7] Ibid. 26.
[8] Ibid. 2.

false, the evidence being 'unchallenged'. Hubbard had also claimed to be an atomic physicist whereas he 'failed the one course in nuclear physics in which he enrolled' and his claim that the Purification Rundown course increased 'the body's resistance to radio-activity' was described as 'balderdash' by the psychologist who gave evidence for the Scientologist Respondent (who also agreed that Hubbard's writings about psychiatry and psychologists was 'bunkum').[9] On the question of Hubbard's use of the title 'Doctor', the only title he held was a self-bestowed 'doctorate' in Scientology. Far from breaking up a black magic ring, Hubbard was 'a member of that occult group and practised ritual sexual magic in it'. The evidence was 'clear and conclusive'; Hubbard was a 'charlatan and worse' and had gone into hiding in 1980, presumably to avoid the service of writs in the US.[10]

It was found that 'auditing is a simple, thoroughly designed means, of concentrating the mind to the state of a controlled trance ... to enforce loyalty to and identification with Scientology to the detriment of one's natural awareness of divergent ways of thinking and outside cultural influences. Love and allegiance are more and more given exclusively to Scientology and L. Ron Hubbard'.[11] This was the description of auditing given by expert witness Dr. Clark, whose evidence was 'cross-examined at considerable length' and was 'wholly convincing', being supported by a mass of other evidence (including Scientology documents) and refuted by none except the 'conditioned views' of Scientologists who had given evidence. As to imputations that Dr. Clark was 'obsessed' (having given evidence in a number of Scientology cases), the judge found his evidence to be 'objective, balanced, very careful and fair'. The Court found, 'in blunt language, "auditing" is a process of conditioning, brainwashing and indoctrination'.[12] Training courses (including auditing) could be 'very dangerous to the mental health of the trainee and evidence has been given of instances of mental breakdown during the course of them or as the result of them'.[13] Evidence established that the 'confessions' made to auditors, contrary to Hubbard assertions of confidentiality, were made available to Scientology's

[9] Ibid. 7.
[10] Ibid. 8.
[11] Ibid. 6.
[12] Ibid. 7.

intelligence and enforcement bureaux to extort obedience and to 'pressure into silence' escapees.[14]

Two illustrations demonstrated the vicious methods used by Scientology to attack its critics. The first involved a campaign of persecution conducted by Scientology against Dr. John Gordon Clark, an expert witness in the case,[15] including: sending letters to the Dean of the Harvard Medical School and the Director of the Massachusetts General Hospital seeking to have him gagged; using agents to telephone patients and interview neighbours to gather evidence to use against him; submitting a report critical of him to a committee of the Massachusetts State Senate; using a 'front' organisation (the Citizens Commission on Human Rights), to bring complaints against him on three occasions to the Massachusetts Medical Board of Registration alleging improper professional conduct; declaring him a 'Number One Enemy' in 1980; bringing two law suits against him in 1981 (which were summarily dismissed but which had been costly and worrying); distributing leaflets at the Massachusetts General Hospital offering a $15,000.00 reward to employees for evidence which would lead to his conviction on any charge of criminal activity; stealing his record of employment from another Boston hospital; convening press conferences calculated to ruin his professional reputation; disseminating stories intentionally and falsely accusing him of theft; hiring paid bullies to harass him and his wife day and night for over a month; and threatening his life, assaulting him and hitting him with a car.[16] The second illustration involved harassment of the mother and the step-father in the present case. Scientology threatened them to discontinue proceedings or they would be expelled from the Church for interfering with the 'spiritual progress' of the children. Upon refusal, a Scientologist employee of the step-father's company resigned, (ordered to do so by the Church because the step-father was engaging in 'suppressive acts').

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[13] Ibid. 14-5.
[14] Ibid. 9.
[15] Dr. Clark's qualifications included, 'Dr. of Medicine of Harvard Medical School and a qualified psychiatrist and neurologist'. His 'high appointments' included 'Assistant Clinical Professor of Psychiatry at Harvard Medical School and Consultant in Psychiatry at Massachusetts General Hospital', being a 'practising psychiatrist'. He had made 'a study of various cults and taught and lectured in various countries on the medical-psychiatric aspects of forced conversions and kindred topics', Ibid. 6-7.
[16] Ibid. 18-19.

Latey J cited Scientology documents entitled 'Black Propaganda', concerning the covert destruction of the repute of individuals and groups, and 'Use of the Courts', outlining use of the law to 'harass and discourage rather than to win'. This evidence showed 'out of the cult's own mouth the frightening, disgraceful and illegal lengths to which it is prepared to go and does go'.[17] Latey J debunked claims that the policy of fair game had been cancelled, noting that in the HCO Policy letter of 21 October 1968, headed 'Cancellation of Fair Game', Hubbard had written 'the practice of declaring people FAIR GAME will cease. FAIR GAME may not appear on any Ethics Order. It causes bad public relations. This PL (that is, policy letter) does not cancel any policy on the treatment or handling of an SP". SP referred to a Suppressive Person, being a wayward Scientologist'. Latey J found 'it was suggested, but not pursued, that this did cancel the Fair Game treatment. It did nothing of the kind, as the last sentence shows. It was cosmetic only for public consumption. Deprival of property, injury by any means, trickery, suing, lying or destruction have been pursued throughout and to this day with the fullest possible vigor'.[18]

The Court cited a few instances of 'many illustrations, proved in evidence, of the ruthless and inhuman disciplinary measures' which contributed to family break-ups, noting that 'Scientology must come first before family or friends. Much evidence has been given and not disputed of how it leads to alienation of one spouse from another, of alienation from children and from friends'. Such illustrations included: 'the step-father and his first wife were ordered to leave their little daughter full time with a baby-minder so as to put in maximum hours to "clear the planet" ... for several months they saw their daughter only on weekends'; and another former Scientologist witness 'for a period of months' was 'required to work from 8.30am to 1.00am', being 'allowed only 15 minutes daily to put her (three-year-old) daughter to bed'. Later, after writing an internal complaint about conditions, she was removed from her post and assigned to the "RPF" (Rehabilitation Project Force) where she was 'required to do at least 12 hours physical work a day

[17] Ibid. 19.
[18] Ibid. 18.

(shifting bricks, emptying bins etc.) and to communicate with no-one, except to receive orders). The work aggravated a chronic back condition ... her time with her children was limited to one half hour per day'. Another former Scientologist witness was 'shouted at and abused because she put the care of her child first' when she declined an assignment that would cause her to leave her young daughter for at least 2 months.[19] The practice of disconnection had also come between former lovers and friends. A woman had received a letter from her fiancé advising her to 'live within the church's protection' or he would disconnect from her.[20] The father in the present case had written a letter to a business associate and close friend who had fell from favour with the Church, advising he had 'behaved in a destructive and suppressive way', was 'dealing in lies' and that going against the Church 'is not only very suppressive but also non-survival for you, your family and any group you are associated with'.[21]

Over 15 months the father and step-mother had paid a total of £14,500.00 into Scientology and would be subjected to harsh disciplinary measures if they discontinued auditing and taking courses. The Court noted that 'no recruit or Scientologist can have these services without paying for them. There is not tempering of the wind to a shorn lamb'.[22] The evidence of one witness, Mr. Armstong, who was 'in a better position to know where the money comes from', had shown that much of the money 'goes into the pocket of Hubbard' and had 'described how it is "laundered"'.[23]

Evidence was accepted from Dr. Clark that 'the "technical processes" used by Scientology to educate children are mind-focusing, hypnotic and anaesthetic ... can mask real disease' and favour 'identification with the process rather than with human, parental authorities'. Children brought up in Scientology would not tend to develop capacities to 'deal with strangers and diverse interests'. They would 'look upon the non-"cleared" outside world as a totally alien culture'. The 'processing check for use on children',

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[19] Ibid. 15.
[20] Ibid. 16.
[21] Ibid. 17.
[22] Ibid. 20.
[23] Armstrong was a 'Scientologist for 13 years from 1969. For several of them he worked on Hubbard's personal staff and was privy to what went on in the innermost circles', Ibid. 22, 15.

entitled 'Children's Confessional Ages 6-12', was described by Latey J as a 'very long and vigorous interrogation'. The Court agreed that 'Scientology training is training for slavery' and noted with approval Dr Clark's analysis that

children also become damaged pawns in family conflicts as the result of Scientology policy which teaches people how to manipulate others. One sees the untoward effects of this policy within the family home when the group works to alienate a child from a spouse who has incurred the "church's" disapproval and who must be shunned by any means available.[24]

A number of other findings were made. These included: Hubbard's proclamation that the law of the country must be obeyed and no illegal activities undertaken 'is a cynical lie';[25] examples of extortion of money were 'proved in evidence and not challenged';[26] the E-meter was used 'privately as a means of intimidation', in a manner 'grimly reminiscent of the ranting and bullying of Hitler and his henchmen';[27] the Scientology intelligence branch obtained information by 'falsehood and deception' and trained new agents in this;[28] and Scientology directed agents to use sexual relations or relationships or family relationships to seduce people high in government to its cause.[29] The Court's conclusion about Scientology has been much quoted and was widely reported at the time, namely;

Scientology is both immoral and socially obnoxious ... In my judgement it is corrupt, sinister and dangerous. It is corrupt because it is based on lies and deceit and *has as its real objective money and power for Mr. Hubbard, his wife and those close to him at the top.* It is sinister because it indulges in infamous practices both to its adherents who do not toe the line unquestioningly and to those outside who criticise or oppose it. It is dangerous because it is out to capture people, especially children and impressionable young people, and indoctrinate and brainwash them so that they become the unquestioning captives and tools of the cult, withdrawn from ordinary thought, living and relationships with others.[30]

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[24] Ibid. 23.
[25] Ibid. 10.
[26] Ibid. 20.
[27] Ibid. 20-21.
[28] Ibid. 10.
[29] Ibid. 13.
[30] Ibid. 25. Emphasis added.

In addition, with respect to the public relations efforts of Scientology, Latey J. said, after noted the article of *The Times* religious correspondent of 17 August 1983; 'One wonders whether he was shown the Red Box data or told of its existence or indeed of any other of the material which I have been quoting. I doubt it'. The Red Box data included sensitive material to be removed 'from the premises in the case of a raid'. Such material included: 'proof that a Scientologist is involved in criminal activities ...'; anything illegal that implicates MSH (Mary Sue Hubbard) , LRH (L. Ron Hubbard) ...'; 'operations against any government group or persons'; 'all operations that contain illegal activities' and 'evidence of incriminating activities', *inter alia.* The implication of these comments is that *The Times* correspondent was duped.[31] The Court felt that the lifting of the visa ban in 1968 could not lead to any inference that 'Scientology is not harmful', as submitted by the Respondent. The language used in lifting the ban 'was in very guarded terms'. It was doubtful that the Department of Social Services had access to the 'documents which have been proved in this case'. The Department 'did not consult the views of Dr. Clark and his like-minded colleagues'. As a consequence, the Court did not 'attach any weight to' the lifting of the ban.

It was submitted by the Respondent that Scientology was a religion, presumably, so as to prove its 'rectitude'. Therefore

> Scientology approached a large number of theologians and other savants on the question whether Scientology is a religion. These have been put in evidence. The definitions vary. Some of them would embrace such cults as Satanism or devil-worship. Their purpose was to try to obtain acknowledgement that Scientology was a "religion" within the meaning of certain fiscal enactments and so obtain tax immunity.

Referring to the recent Australian decision recognising Scientology as a religion,[32] it was noted that the judges of the High Court of Australia, in overturning the Victorian Supreme Court's decision against Scientology, 'neither affirmed or dissented' from the Victorian courts[33] description that Scientology was a 'sham'. In addition, the Australian

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[31] Ibid. 14.
[32] *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120.
[33] The trial court's decision adverse to Scientology, and the Victorian Supreme Court confirmation of it.

case turned not upon 'whether Mr. Hubbard and the persons in ultimate command were charlatans, but whether the adherents believed in them and their ideas, observances and practices'. They did so believe, according them 'blind reverence', in the words of the High Court of Australia. Therefore, if the material was put in evidence 'as to the rectitude of Scientology no such suggestion' was warranted. In conclusion, Latey J. said; 'I have searched carefully for anything good, some redeeming feature, in Scientology. I can find nothing, unless it be such participation as there has been in the anti-drug abuse campaign'.[34]

While the media had a field day reciting Judge Latey's verdict as a damnation of Scientology, the Scientology response was simply to describe his comments as 'like Alice in Wonderland'.[35] The Respondent filed an appeal on the basis that Latey J was injudicious in his approach and Scientology had not been given a right of audience. It was determined by two judges of the Court of Appeal, on 19 September 1984. Dunn LJ & and Purchas LJ delivered separate judgements supporting the verdict and with some minor criticisms[36] approving the manner in which he had conducted the case. Leave to appeal to the House of Lords was refused.

In dismissing the appeal, it was held, that even though the Judge had 'expressed strong disapproval of scientology in general, he had carried out the essential balancing exercise ... having regard to those aspects of scientology essentially relevant to the welfare of the children'. The evidence had 'demonstrated that ... mendacity was an integral part of scientology and justified the trial judge's finding that, whilst the father remained totally committed to scientology, he would be powerless against the pressures of the "church"'.

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[34] The anti-drug use campaign was NARCONON, but evidence from one witness, 'who was in a position to know', indicated that 'part of the funds raised for it were syponed (sic) off to Hubbard, *Re B & G Minors* 24-5.

[35] 'Judge brands Scientology 'sinister' as mother is given custody of children', *The Times*, 24 July 1984.

[36] For example, Purchas LJ. said, 'it may not have been strictly necessary for him to have made definitive findings on collateral matters in the way that he did or in the terms that he did'. Dunn LJ. said 'it seems to me, with respect, that it was unnecessary for the judge to have gone into the detail which he did', nevertheless continuing, 'but when one is considering a set of beliefs, it is, I should have thought, relevant to know the sort of person who is the original proponent of those beliefs ... indeed, the notice of appeal contains no challenge to his findings of fact', *Re B & G Minors (Custody) Appeal* (1984) (Downloaded from http://www.demon.co.uk/castle/audit/appeal.html on 19 January 2002, 15 pages) 12, 9.

It was 'in the interests of the children that the judge should hear evidence about scientology and should make definitive findings upon it, otherwise he could not assess the risk to the children. The judge was obliged to make findings of fact on the nature of scientology, even though the "church" of scientology was not a party and did not have an opportunity of being heard'. This was permissible in a case where 'the paramount importance of ensuring the welfare of the children overrides any right of audience or reply even where the parent is concerned, let alone a person or persons outside the immediate context'.[37]

In a later case before the Charity Commission for England and Wales [38] (see chapter III: 7), adverse judicial comment was found to be a potentially relevant factor in determining whether Scientology qualified as a tax exempt charity, as qualification is subject ultimately to a 'public benefit' test. That Scientology was not heard in this case in its own defence[39] might have limited the value of the Court's comments for later application.[40] However, Latey J had pointed out that Scientology retained the same solicitors as the father, had been aware of the details of the allegations and could hardly refute a case based largely on Scientology documents[41] and Lord Justice Dunn noted; 'no application was made to the judge for the "church" to be joined as a party and there has been no appeal against the refusal of the register to allow an application for the "church" to be joined in this court'.[42]

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[37] Ibid. 14.
[38] See discussion of *Charity Commission Decision: Church of Scientology Application for Registration as a Charity* (1999) <http:www.charity-commission.gov.uk/> Accessed 29 November 2001, 49 pages) Charity Commission for England and Wales in Chapter III: 7.
[39] Scientology was later reported as denouncing the 'Latey hearing as a "travesty of justice" in which it was not allowed to defend itself', 'Verdict dashes cult hopes of ending sinister image', *The Daily Telegraph*, 15 March 1995.
[40] Indeed, the Charity Commissioners commented that 'few of the cases considered the nature and activities of Scientology ... and where those matters were considered they may not have been fully argued nor evidence ... made fully available to the court', *Charity Commissioners: Scientology decision 1999* 43.
[41] *Re B & G Minors (Custody) Appeal* 8.
[42] Ibid. 9.

THE RUSSELL MILLER PUBLIC INTEREST CASE (1987)

Three years later further litigation revealed that Scientology had not grown any more tolerant of its critics. In an action described by Justice Vinelott of the Chancery Division as 'mischevious and misconceived', Scientology sought to restrain publication of Russell Miller's unauthorised biography of Hubbard, *Bare-Faced Messiah.* The Church had applied for an interim injunction to restrain Mr. Miller and publishers Penguin Books Ltd., from distributing and publishing in connection with the book two photographs of Hubbard, extracts from his diaries and certain letters written by and to him. Armstrong, a former senior employee of Scientology, had been engaged to 'protect and preserve Mr. Hubbard's personal papers, while Mr. Hubbard was still alive' and had taken a substantial amount of the archival material' with him when he had left. Scientology, 'registered under Californian law as a religious organisation', obtained a sealing order on the documents from the Superior Court of California. Scientology argued: it had copyright on the two photographs; Armstrong had obtained the documents 'in confidence', so they were entitled to protect that confidence; and the documents had been passed on to Mr. Miller in breach of the Court's sealing order.

Ruling against the Scientology, the Court held that while no-one had *carte blanch* to disregard a duty of confidence, the plaintiffs had a difficulty in that the confidence was owed to Mr. Hubbard, who was dead. In addition, the publication of the photographs 'could not possibly harm' Scientology, whereas any delay would harm Miller and the publishers. Even if a duty of confidentiality was somehow conferred upon Scientology, 'the affairs, doctrines and activities of the church were a matter of legitimate public interest and concern'. His Lordship had read the biography, and it was clear to him that 'the public interest far outweighed any duty of confidence that could conceivably be owed to Mr. Hubbard or to the church'. The four reasons given to show 'legitimate public interest', were: an 'investigation' was 'carried out by the late Sir John Foster many years ago, and following his report, entry into the United Kingdom was barred'; the doctrines and activities of the church were also considered in a case where the parents of infants were deprived of their custody because they were members of the church; the church was

active and proselytising, and in its efforts to obtain converts; the personality, qualities, history and character of its founder were matters which the church itself relied upon and the public had an interest in evaluating the image on which the church relied'; and that 'Hubbard was the revered founder of the church, and his appearance on the Earth was treated by church members as an event of cosmic significance. It must follow that his life, his relationship to the church and the circumstances in which the church was founded were clearly matters in which the public had a legitimate public interest'. All this 'clearly also outweighed the order in the Californian proceedings'.

The Court made two other observations. Scientology had timed its application 'at a time, calculated or not, when the greatest possible damage and inconvenience would be caused to Penguin Books. In the absence of any sufficient reasons for the delay, the delay itself would operate as a bar to any claim to interlocutory relief'. The application was oppressive, and was not brought to protect any legitimate interest. It was both 'mischievous and misconceived'. Second, even though Scientology had been registered as a religious organisation in California, it had 'not been registered as a charity, and it should therefore not be assumed that it would be recognized in England as established for the advancement of religion'.[43] An appeal by Scientology against the decision was subsequently lost.[44]

Following this legal victory over Scientology, in July 1990 *The Sunday Times* accused Scientology of paying private detectives more than £100,000.00 to organize a 'dirty tricks' campaign against Miller. The alleged campaign included spying on Miller, harassing his friends and giving false information to police. A Scientology defector revealed that 'two scientology investigators, Doug Jacobson, a Los Angeles based executive of the church, and Lynn Cox, an Australian private detective, were sent to Britain in 1987 to co-ordinate' the 'undercover operation to smear Miller'. They allegedly arranged for as many as three investigators to park in cars outside Miller's home. Another private detective, John Ingram, was employed to collect rubbish sacks

[43] 'Public interest outweighs private duty', *The Times*, 15 October 1987.
[44] The Times, *Index to The Times. January - December* (London: The Times Publishing Company Limited, 1987) 797.'Church's appeal fails; Law Report, 23 October, 44e'

from outside the offices of Miller's British publishers in an effort to find proof pages. Contacts with the police were allegedly used to 'check on whether Miller had a criminal record, and tried to implicate him in unsolved crimes'. Every time Miller traveled abroad, a two-man 'mission' would be waiting at the airport to 'monitor where he goes, who he sees, where he stays'. Miller had spent three years fighting legal challenges by Scientology to prevent publication of his book in the United States. As a consequence he had lost one American publisher, who had 'decided to abandon the project because the cost of litigation' had 'run into several hundred thousand dollars'.[45]

It had earlier been reported that Miller had been the victim of a 'bizarre' plot to link him with the murder of Dean Reed, an American pop singer who had 'defected to the Soviet bloc' and who was found drowned in a lake in East Berlin. Miller arrived in East Berlin to interview Reed for *The Sunday Times* the day after his death. He was later questioned by police, 'as a suspect in the murder after receiving an anonymous tip-off from someone who used an extensive knowledge of Miller's work and private life to try to frame him'. Reed's family had been interviewed by a private detective with 'a mysterious backer with a particular interest in linking Miller to the death'. Peter Comras, an American private investigator claiming to represent the Miller family, had interviewed friends and associates of Miller. When the Miller family disclaimed any knowledge of him, he 'denied that he was working for Scientology' and claimed that he did not know who his client's were.[46] In another sensational revelation, a Bristol private detective, Jarl Cynewulf, 'confessed' to *The Sunday Times*[47] that he had been hired by Scientology to investigate Miller.[48]

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[45] Richard Palmer and Richard Caseby, 'Scientologists in dirty tricks campaign', *The Sunday Times*, 15 July 1990.
[46] Richard Palmer, "Murder' used in plot against cult author', *The Sunday Times*, 25 October 1987.
[47] Palmer and Caseby, 'Scientologists in dirty tricks campaign'.
[48] The Times, *The Times Index* 797.'detective claims was hired by cult to produce evidence that author was CIA agent; says author's phone calls and mail intercepted by cult investigators; shoots at journalists (ST) 8 November, 3a'

THE HAYMAN BANKRUPTCY EXAMINATION (1988)

Scientology again received adverse reviews in a 1988 bankruptcy case involving a man who had borrowed from various creditors in order to 'give more than £71,000.00 in 17 months to the Church of Scientology'. In examination it was revealed that Adrian Thomas Hayman had paid more than £175,000.00 to Scientology over a 14 year period. He claimed the money had been paid for 'counselling and training courses' at East Grinstead. In addition, 'more than £15,000.00 was paid for three leather-bound volumes autographed by the cult founder, Ron Hubbard, and £16,500.00 for an autographed "E-meter" – an electronic device used during "therapy"'. The suggestion that the items were 'valuable religious artifacts' was rejected by the Assistant Official Receiver, Mr. Stephen Harley, who cited *B & G Minors* and stated; 'it seems very difficult for the layman to distinguish between this church and a commercial concern'. Noting that 'there are areas in this case that cause me concern', he concluded, 'we have a situation of an experienced businessman recklessly and cynically exploiting the easy availability of credit to obtain monies which he had no real expectation of paying back, and immediately proceeding to put those out of reach of his creditors by putting them in the coffers of an organisation with a somewhat chequered past that has been severely criticised by the judiciary of this country'.[49]

The circumstances of the Hayman bankruptcy were echoed in 1995, when a soldier was sentenced to 10 months imprisonment for stealing money from the Army to pay for Scientology courses. In his defence, 23-year-old Brett Parker said he was recruited by an attractive girl in the street, in Poole, Dorset. After parting with £100.00, another attractive girl flattered him into signing a cheque for £1,100.00 for more tuition, which 'cleared out his savings'. He was then advised to undertake a 'special package' at a cost of £13,500.00 for which Scientology organised loans. He stole the money after unsuccessfully attempting to 'pull out of the agreement', which with interest would have cost £20,000.00.[50]

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[49] Lin Jenkins, 'Man went bankrupt after 175,000 gifts to Scientologists', *The Daily Telegraph*, 4 May 1988.
[50] Neil Darbyshire, 'Soldier stole "to pay sect"', *The Daily Telegraph*, 14 June 1995.

THE BONNIE WOODS SETTLEMENT (1993)

In 1993, Bonnie Woods, a former Scientology adherent, sued the Church of Scientology Religious Education College Incorporated and three individual Scientologists for libel. Although the matter was settled before going to trial, the terms of settlement are important because they included an admission, an apology and an undertaking from the defendants. The admitted facts were set out in a 'Statement in Open Court'. Mrs. Woods, an American by birth, had become a Scientologist 'during the 1970s and early 1980s, when she was living in the USA'. After completing a number of higher-level Scientology courses, she had decided to leave Scientology in 1985 and moved to England with her husband. After converting to Christianity in 1991, Mrs. Woods and her husband 'began to provide information, operate a call line and offer advice about Scientology to families and friends of members of the Church of Scientology'. She also 'publicly criticised the Church of Scientology and spoke to the media about her experiences as a member of the organisation' and attended vigils on several occasions outside the Scientology bookshop in East Grinstead, where she 'handed out a document which was very critical of the Church'. In response to these activities, the Church of Scientology Religious Education College Incorporated, 'the body responsible for the propagation and practice of Scientology in the United Kingdom', conducted a campaign against her in which untrue allegations were disseminated. The College had 'produced a leaflet showing a photograph of Mrs. Woods above the words "Hate Campaigner Comes to Town"'. Thereafter

> A group of Scientologists put the leaflet through the letter boxes of those living on the Wood's road and handed it out to members of the public on East Grinstead High Street during one of their vigils. The leaflet described Mrs. Woods as a "hate campaigner", that is, someone motivated by hatred and religious intolerance, and as a "deprogrammer" who tried to force people away from their chosen faith. It also cast doubt on the sincerity of her claims to be a born-again Christian.

As admitted to the Court, the 'allegations in the leaflet about Mrs. Woods were untrue'. She did not 'hate any religion and would not take any steps to force people away from

their chosen religion or encourage others to do so'. She and her husband had met with Scientologists and their families, at the request of their families, and had 'discussed the Church with them'. However, they had not put pressure on them 'to prevent them continuing in Scientology'. In addition, it was accepted that Mrs. Woods was 'sincere in her Christian faith' and that the allegations to her friends and neighbours was 'deeply distressing' to her. The defendants agreed to pay to Mrs. Woods 'a substantial amount of money', and to undertake to the Court that they would 'no longer make these untrue accusations against her'. Counsel for the Defendants said in open court, on their behalf, that they agreed with the facts as outlined by counsel for Mrs. Woods, and that 'they regret that when responding to Mrs. Woods' criticisms of the Church of Scientology they went too far in attributing to her conduct and motives which they now accept were not correct'. They apologised to Mrs. Woods and undertook, in the terms of an order before the Court, 'not to make such allegations again'.[51]

The Times described the settlement as 'a rare capitulation'. The settlement sum of £55,000.00 plus costs was disclosed. The matter had been a six-year battle involving 25 court appearances and an estimated £100,000.00 in costs. The case was compared with 'a number of court cases with former members, most of whom have been forced to file for bankruptcy after losing against an organisation that had an income of £5.6 million in 1995 and property assets of £8.1 million'. While Mrs. Woods was 'delighted' that he reputation had been vindicated and 'relieved' that the litigation was over, a spokesman for the Church attempted to gloss over the result, declaring to the press; 'in deciding to settle the action, the Church bore in mind that Bonnie Woods would have been completely unable to pay the enormous costs of trial is the Church had won'.[52] However, whatever spin might be attempted, the damaging admissions in open court indicated that the Church had continued to resort to 'fair game' tactics. It might be surmised that the settlement, despite the public relations damage suffered thereby by the Church, could have limited even greater damage to its reputation if the matter had proceeded to trial. On that interpretation, the settlement might well be seen as an exercise in damage control.

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[51] *Woods v Chaleff (Statement in Open Court)* (1993) W. No. 2079
[52] Susie Steiner, 'Sect pays 55,000 to 'hate' victim', *The Times*, 9 June 1993.

TV ADVERTISING CASE SUCCESS (1996)

In April 1996 Scientology won a battle to overturn a ban imposed in February 1993 by the Independent Television Commission. The Commission had 'imposed the ban after a complaint about an advertisement broadcast on Superchannel. Its decision was based on a clause that prevents advertising by bodies 'whose rights or other forms of collective observance are not normally directly accessible to the general public'. The decision was reversed after a six year legal battle by Scientology, which was successful after Scientology had adduced evidence by a professor of sociology that the organisation held meetings which were indeed open to the public, and the Commission had taken legal advice. A Church spokesman said 'we are pleased this now gives us the same rights as other religions. We considered the ban to be discriminatory'.[53]

OFFICIAL DENIAL OF RELIGIOUS RECOGNITION (1997)

Reports of the decision reflected a view that Scientology had now received official recognition generally in the UK as a religious organisation. This perception was corrected by the Home Office Parliamentary Secretary of State, Timothy Kirkhope, who wrote in January 1997 to the editor of *The Times*, to 'clarify' the official government position. He wrote

Sir. Your correspondents Ruth Gledhill and Mitchael Grove (January 10) reflect earlier reports suggesting that there has been a change of policy with regard to Scientologists who may seek to enter the United Kingdom as ministers of religion, missionaries or members of religious orders. I should like to clarify the position. There has been no change. The Government's position remains as stated by the then Home Secretary in 1980. Scientology is not regarded as a religion for the purposes of the immigration rules. Scientologists will therefore not qualify under those provisions of the immigration rules relating to ministers of religion, missionaries or members of religious orders.[54]

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[53] Emma Wilkins, 'Television lifts ban on Scientologists', *The Times*, 1 May 1996.
[54] Timothy Kirkhope, 'Letter to the Editor', *The Times*, 10 January 1997.

III: 7

SCIENTOLOGY DENIED THE HOLY GRAIL: THE CHARITY COMMISSIONERS' VERDICT (1999)

'not clear that Scientology confers recognisable benefit upon the public'

Despite failure in 1969 to obtain registration for its chapel as a place of worship, Scientology persevered with its strategy of seeking exemption from government taxes and charges. In 1981 it was reported that a Scientology application for 'discretionary rate relief' on its Saint Hill headquarters and various residences, had been 'rejected by Mid Sussex District Council'.[1] However, a bigger setback came in 1999, when the Charity Commission for England and Wales 'barred it from charitable status', the Holy Grail for organisations seeking to avoid taxation, ruling that it 'failed to promote the "moral and spiritual welfare" of the community, it 'did not confer a "public benefit" and it had not been established "for the advancement of religion"'. The application by Scientology to become a registered charity had been under examination by the Commission for over three years'.[2]

SCIENTOLOGY DENIED CHARITABLE STATUS

The decision of the Commissioners, made on 17 November 1999, ran to 49 pages of detailed analysis, including consideration of many of the complex issues involved in English charity law. The Commissioners considered 'the full legal and factual case and supporting documents (including expert evidence),'[3] and even a 'video presentation'[4] provided by Scientology. The Commissioners also took into account the 'principles

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[1] 'Scientologists rebuffed', *The Times*, 28 July 1981.
[2] Ruth Gledhill, 'Church 'fails test' for charity status', *The Times*, 10 December 1999.
[3] *Charity Commission Decision: Church of Scientology Application for Registration as a Charity* (1999) <http:www.charity-commission.gov.uk/> Accessed 29 November 2001, 49 pages) Charity Commission for England and Wales 1
[4] Ibid. 25

embodied in the European Convention on Human Rights (ECHR)',[5] which they noted was 'to be incorporated into English law under the Human Rights Act 1998 (HRA)', which was 'likely to be fully implemented in the United Kingdom on 2 October 2000'.[6]

The importance of these human rights developments was that they would oblige the courts in the UK to incorporate into domestic law those human rights 'provisions making it unlawful to discriminate against individuals on the grounds of their religion or other beliefs'.[7] The Commissioners considered that 'good administrative practice would suggest that applications for registration pre and post HRA should be dealt with consistently'. As a matter of prudence, good practice and indirect legal obligation any discretion which the Commissioners may have in applying the existing law should be exercised in accordance with and not contrary to the principles of the ECHR where those principles might be relevant to the registration of charities'.[8]

The first substantive issue to be considered by the Commissioners was whether Scientology was a religion for the purposes of English charity law. After examining the English authorities, and noting that 'the English courts have resisted defining what it is that makes some belief systems and others not',[9] the Commissioners 'concluded that the definition of a religion in English charity law was characterised by a belief in a supreme being and an expression of the belief through worship'. For the purposes of charity law they noted that 'the cases make clear that there must be an advancement or promotion of the religion'.[10] Three characteristics of religion under charity law in England were identified, being belief in a supreme being, worship and advancement or promotion. The Commissioners observed that 'the English legal authorities are neither clear nor unambiguous ... and at best the cases are or persuasive value ... with the result that a positive and constructive approach and one which conforms to ECHR principles, to identifying what is a religion in charity law could and should be adopted'.

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[5] Ibid. 1
[6] Ibid. 6
[7] Ibid. 2
[8] Ibid. 7, 8
[9] Ibid. 13
[10] Ibid. 14

Because of the unsatisfactory state of the English legal authorities, the Commissioners took into account foreign court decisions, expert opinion and the common perception to the public at large – being the common English meanings of religion and worship. They looked at cases in India, Australia and the United States, which had all taken a 'broad approach' to the concept of a supreme being. The Indian Supreme Court had concluded[11] that 'religion is not *necessarily theistic*, but undoubtedly has as its basis a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being'.[12] This was considered to be a rejection of theism.[13]

In *New Faith*,[14] two of the Australian judges had defined religion as having two essential criteria, being 'belief in a "supernatural being or thing or principle" and conduct giving effect to that belief'.[15] Two other judges had decided that a 'single formula could not determine the question, preferring instead 'various indicia for answering that question as follows: - that the ideas in question reflect the ultimate concerns of human existence; an element of comprehensiveness; forms and ceremonies'. The other judge (Murphy J.) appeared to have taken the view that 'any body which claims to be religious and offers a way to find meaning and purpose in life, is religious'. The Commissioners suggested that 'only two of the judges there adopted what could broadly be described as a "theistic" approach, referring to the criterion of a "supernatural being, thing or principle"'(notwithstanding the possibilities suggested by the word 'principle').[16] The Australian approach was seen as a dilution of the concept of religion '(so as to refer to belief in a "supernatural ... principle"), for example'.[17]

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[11] In *The Commissioner Hindu Religious Endowments Madras v Sri Lakshmindra Thirtha Swamiar Of Sri Shirur Mutt* (1954) SCR 1005.
[12] *Charity Commissioners: Scientology decision 1999* 20
[13] Ibid. 21
[14] *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120.
[15] It should be noted that the second limb is qualified with ' " ... provided that the canons of conduct do not offend against the ordinary laws"', *Charity Commissioners: Scientology decision 1999* 20, 23
[16] Ibid. 20
[17] Ibid. 21

In *Alameda* the California State Court of Appeal held that 'facilities use by humanist groups for weekly meetings qualified as a place of worship for property tax exemption purposes.[18] The Court identified four characteristics of religion, the 'first being "a belief not necessarily referring to supernatural power"'.[19] The broader approach of the foreign cases, which were of 'persuasive' value only, was rejected. The Commissioners said that they 'did not find themselves compelled to reject "theism" altogether (as in the Indian case), nor to dilute the concept to the extent of the Australian case. No conclusion was offered on the even broader American decision.

The Commissioners noted that all three of the experts relied on by Scientology concluded that 'Scientology believes in a supreme being, although the place and nature of that being is not the same as that of God in Christianity or Judaism for example'. They also cited the *Shorter Oxford Dictionary*, which stated that 'religion means "belief in or sensing of some superhuman controlling power or powers entitled to obedience, reverence or worship, or in a system defining a code of living"'. After considering these three additional factors, they held that 'belief in a supreme being remains a necessary characteristic of religion for the purposes of English charity law'. However, they felt that it would not be proper 'to specify the nature of that supreme being or to require it to be analogous to the deity or supreme being of a particular religion'.[20] They found that it 'could be accepted', presumably on the basis of the three expert witness reports before them, that Scientology 'claims to profess belief in a supreme being'.[21]

With respect to worship, the Commissioners again considered foreign authorities, expert opinions, and common definitions, in addition to the English authorities. They examined the English *Segerdal* case, which recognised 'a concept of worship which exhibited defining characteristics of reverence and recognition of a supreme being outside the body

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[18] *Fellowship of Humanity v County of Alameda* (1957) 153 Cal App 2d 673, 315 P. 2d 94.
[19] *Charity Commissioners: Scientology decision 1999* 20 - 21
[20] Ibid. 21
[21] Noting that 'since it is clear that English law does not enquire into the nature, worth or value of religious beliefs, nor concern itself with the truth of the religious beliefs in question, the Commissioners concluded it to be sufficient for the purposes of English charity law that Scientology professes a belief in a supreme being'. It should also be noted that the expert evidence of belief in a supreme being came only from the written reports of experts commissioned by the Church, Ibid. 25, 19, 20

and life of the follower of the religion'. They also looked at *South Place Ethical Society*,[22] where the court had indicated that it did not seem possible to worship an ethical or philosophical ideal "with reverence". The identifying feature of worship in English charity law appeared to be that of reverence for or veneration of a supreme being'.

Endorsing the 'distinction in English charity law between religious and non-religious belief systems', the Commissioners specifically rejected the foreign legal authorities and the experts provided by Scientology. They noted that in *Alameda*, the Court had 'indicated that any lawful means of formally observing the tenets of the cults (defined as a gregarious association openly expressing the beliefs in question) constituted worship'. In *Church of the New Faith*, the Court, 'in adopting a two-fold test to religion chose not to identify "worship" as one of the two characteristics of religion', adopting instead the 'acceptance of canons of conduct in order to give effect to that belief ... provided that the canons of conduct do not offend against the ordinary laws' test, as the second limb.[23] However, to adopt either the *Alameda* or *New Faith* approaches would mean 'redefining the concept of "worship" as a criterion of religion in English charity law, so as to give the term "worship" a meaning different from that suggested by the English legal authorities'. They 'welcomed the fact that the concept of worship so understood, distilled from the decided English cases was reflected in the common English definition of the word "worship"'. [24]

Looking at the Scientology practice of auditing, which they said appeared 'in essence very much akin to counselling', the Commissioners felt that Scientology did not itself 'appear to describe auditing in terms of worship', having described it in a video presentation as 'counselling'. Scientology training appeared to be 'more like an educational activity ... than a religious activity or worship'. Taken separately or together, auditing and training did not constitute the necessary 'reverence and veneration

[22] *Re South Place Ethical Society* (1980) 1 WLR 1565.
[23] They also noted that 'the decision in that case seemed to turn upon whether the group of Scientologists involved were genuine in their belief, rather than upon any objectice criteria identifying an organisation as "religion"', *Charity Commissioners: Scientology decision 1999* 23
[24] Ibid. 24

for a supreme being ... necessary to constitute worship in English charity law'. [25] Therefore Scientology was not a religion under English charity law. It was upon this finding that the case was decided.

Although the question of advancement or promotion was therefore 'hypothetical', the Commissioner's looked at the issue for completeness. They 'accepted that on the basis of the evidence supplied to them by CoS (Church of Scientology), the organisation did promote and advance Scientology as its system of belief, seeking to spread its message ever wider and exhibiting a missionary element in a manner identified by the relevant legal authorities'.[26] In addition, as the 'question of public benefit had been fully argued' the Commissioners 'considered it appropriate to consider those arguments and form a view upon whether' Scientology, 'if otherwise charitable, was established for the public benefit'.[27]

The Commissioners noted that under English charity law, 'once a religion is recognised by the court as a religion, the beneficial nature of a gift for its advancement will *prima facie* be assumed'.[28] However, the trust must not only be for the advancement of religion, it must also be of public benefit. In the absence of evidence to the contrary, public benefit is presumed'.[29] This 'presumption arises because the law assumes it is good for man to have and to practise a religion and because a religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true'.[30] However, the 'presumption may be readily rebutted – and if it is, public benefit must be proved'.[31]

Taking a wide view of the public benefit question, the Commissioners noted that the presumption may be rebutted in a number of circumstances. They noted the words of Romilly MR in Thornton such that doctrines 'adverse to the very foundation of religion

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[25] Ibid. 1
[26] Ibid. 26
[27] *Charity Commissioners: Scientology decision 1999* 37
[28] Ibid. 12
[29] Ibid. 13
[30] Ibid. 40
[31] Ibid. 38

and subversive of all morality' would rebut the presumption. The Commissioners felt that a number of factors could be taken into account on this basis, including 'evidence that the organisations' purposes were adverse to religion, were subversive of morality, failed to confer recognisable charitable benefits, focused too narrowly upon its adherents or extended to too limited a beneficial class'.[32] These factors were not exhaustive. *Gilmour* was cited in support of the proposition that a gift non-beneficial to the public would be enough to rebut the presumption, a view endorsed in *In re Hetherington decd* (1990).[33]

The Commissioners found that in the case before them the presumption 'was in fact rebutted'. They indicated several factors which led them to that conclusion, including: the newness of the religion, which provided little basis on which to form a judgement about public benefit; public concern, which had been expressed through unsolicited objections to registration and adverse press coverage; and judicial concern, expressed in judicial comment, some of which had been unfavourable.[34]

Observing that the presumption of public benefit had arisen historically in the context of established theistic, worshipping religions, the Commissioners noted that Scientology did not fit neatly into the model.[35] While quick to point out that 'the fact that something is new rather than centuries old does not necessarily render a new organisation less beneficial than one derived from antiquity', the Commissioners felt it was difficult to form a judgement whether a new organisation was likely to be beneficial to the community, 'nor to presume that public benefit flows from the purposes and work of the organisation.' Looking at the practices of auditing and training undertaken by Scientology, the Commissioners felt that these were more akin to counselling or therapy and it appeared to be open to question whether such activities conferred a recognisable benefit on a sufficiently broad beneficial class and therefore would need to be satisfied that the core activities of Scientology were beneficial to the public generally. The normal practice of Scientology to require prepayment in the form of requested donations seemed

[32] Ibid. 40
[33] Ibid. 41
[34] Ibid. 41-43
[35] Ibid. 41

to depart from normal religions, suggesting 'a possible marked difference to established religions' which might suggest that public benefit should be demonstrated.

On the question of public concern, the Commissioners noted that they had received a number of unsolicited objections to the Scientology registration application, objecting 'about Scientology generally' and to its registration 'as a charity in particular'. Although the claims made in the letters were not susceptible of proof, they did indicate 'a concern in some sectors of the community about the practices of Scientology'.[36] In addition, a proportion of the press coverage of Scientology had been 'adverse'. While the accuracy of that coverage might be 'questionable', the coverage across a spectrum of newspapers did indicate a general concern, 'indicating at least that it is not clear that Scientology confers recognisable benefit upon the public'.

The Commissioners 'were aware that there had been concern about Scientology expressed judicially', although few of the cases considered the nature and activities of Scientology and where they had they might not have been fully argued nor evidence made fully available to the court. Nevertheless, 'there had been a not insignificant degree of judicial comment upon Scientology, principally abroad but also in this country' and that 'some of this comment had been unfavourable'. The Commissioners could 'not wholly disregard any adverse comment' when considering whether the presumption of public benefit should be concluded in favour of Scientology', concluding that 'the presumption of public benefit would be rebutted such that the Commissioners should consider whether' Scientology 'demonstrated public benefit in fact'.[37]

Relying on *Hetherington*, the Commissioners noted that 'the celebration of a religious rite in public' confers 'sufficient public benefit because of the edifying and improving effect ... on the members of the public who attend' but that private celebration 'does not contain the necessary element of public benefit since any benefit of prayer or example is incapable of proof in the legal sense'. As 'it is the public nature of the religious practice

[36] Ibid. 42
[37] Ibid. 43

which is essential' for charitable designation, the Commissioners held that 'where the practice of the religion is essentially private or is limited to a private class of individuals not extending to the public generally, the element of public benefit will not be established.[38] While Scientology sought to benefit the wider community,[39] the central religious practices of Scientology, being auditing and training, were conducted in private and not in public.[40] Even if a member of the public attended as an observer, auditing (which is akin to counselling) and training are by their very nature private in the they are 'directed to the particular individual receiving them'. It was 'difficult to see how the public could be edified or otherwise benefited by attending and observing at such a session'. In addition, 'any benefit to the public that may flow from auditing and training' was incapable of proof, any edification or improving effect being limited to the private individual engaged in the auditing or training'. Consequently, 'these activities conveyed no legally recognized benefit on the public'. The perception that the activities were of a private rather than public nature was strengthened by the 'apparent dependence of participation ... upon payment of the requested donation'.[41]

The Commissioners also considered the implications of the European Convention on Human Rights, in particular Article 9 (1), with respect to freedom of thought, conscience and religion, including the freedom to manifest it in 'worship, teaching, practice and observance' and Article 14, providing for non-discrimination, on grounds including 'religion'. It was noted that Article 9 (1) was limited by Article 9 (2), which allowed; 'limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights or freedoms of others'. It was also noted that Article 14 was limited by case law,[42] so that an action would not be discriminatory if it was 'made in pursuant (sic) of a legitimate aim; or there is a reasonable relationship of proportionality between the means employed and the aims sought to be realised'.[43] In addition, any

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[38] Ibid. 44
[39] Ibid. 46
[40] Ibid. 47
[41] Ibid. 48
[42] The case cited was *Tsirlis and Kouloumpas v Greece* (1997) 25 EHRR 198. 16.
[43] *Charity Commissioners: Scientology decision 1999* 9

distinction or difference in treatment would be discriminatory, unless it had an ' "objective and reasonable justification"'. Two cases were cited to support this proposition, *Tsirlis* (1997)[44] and *Belgian Linguistic* (1968).[45] Looking at the different application of the public benefit test between the third and fourth heads of English charity law, the Commissioners were of the view that the test was 'prescribed by law', there did not seem to be any ambiguity, and it was 'an entirely flexible rule applied to individual cases to establish the public benefit, which is a requirement of all organisations which profess to be charitable'.[46] In other words, the test was objective and not discriminatory.

The Commissioners also looked at the 'possible' argument that the financial benefits that flow upon charity registration might be 'relevant to an organisation's ability to teach and pass on its beliefs'. A Court (in Europe or England) could therefore conclude; 'that to decline registration of a charity impairs Article 9 freedoms as it limits the organisation's ability to manifest its beliefs through teaching and "evangelising" activities'. However, the Commissioners felt that refusal to register did not 'appear to interfere with the manifestation of a person's belief', or restrict Article 9 'freedoms', and so; 'it seemed to the Commissioners that it could be argued that Article 9 is not breached when for a particular belief system the State declines to confer a privilege'. In any event, 'any limitation of an Article 9 freedom which might arise', could be justified on the basis of Article 9 (2).[47]

RECEPTION OF THE COMMISSIONERS' DECISION

The immediate result of the Commissioners' decision was that Scientology was denied the highly sought after prize of charitable registration. In the course of the decision, the Commissioners had noted that the fiscal element of this included 'tax relief on voluntary and investment income and capital gains; tax relief on the profits of primary purpose trading; relief from non domestic rates for land and buildings used for charitable

[44] *Tsirlis and Kouloumpas v Greece*
[45] *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252.
[46] *Charity Commissioners: Scientology decision 1999* 11
[47] Ibid. 10

purposes; relief available to those who give to charity'.[48] The Commissioners had taken a clear stand in making a distinction between the freedoms that the European Convention on Human Rights sought to uphold, and the privileges that might otherwise be bestowed on religious organisations. However, there appeared every possibility that this view would be tested on appeal.

Scientology officials were reportedly furious with the decision and vowed to go to court to challenge it. They declared that the decision was 'biased and discriminatory ... flying in the face of the *European Convention on Human Rights'*. Graham Wilson, Scientology's public affairs director, said the decision was 'wrong on the law and wrong on the facts'.[49] Indeed, he felt that the decision was 'the equivalent of a medieval Pope saying that the earth is flat and that the sun revolves around it'. John Stoker, Chief Charity Commissioner for England and Wales, exhibited more *sang-froid.* He commented; 'they can certainly go to the courts to appeal ... but, we did spend an awful lot of time and effort on this and we think this decision we have reached is the correct one in law'.[50]

In October 2000 it was reported by the *Spectator* that 'Tom Spring, the American lawyer retained by the Scientologists', had arrived in London to 'challenge the ruling against his peeved clients', believing that it was 'unfair and prejudicial and contrary to the new Human Rights Act'. The Spectator commented; 'who shall say he is mistaken? He has only to look at what the Jehovah's Witnesses have achieved to see how the intellectual fog can be exploited'.[51] Indeed, the article surveyed what it considered to be the 'chaos' and 'shambles' of British charity law and the Charity Commission, describing the Commissioners as being in a 'state of terminal muddle'.

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[48] Ibid. 10
[49] 'Scientology Denied Charitable Status', *The Associated Press*, 9 December 1999.
[50] Gledhill, 'Church 'fails test' for charity status'.
[51] 'Watch out, there's a charity about', *Spectator: Downloaded from http:www.rickross.com/reference/general/general306.html on 12 January 2001 (4 pages)*, 28 October 2000.2

The article revealed that there were 187,200 registered Charities in England and Wales, noting that some are 'of course wonderful and reputable', others being a 'scandalous abuse of public generosity and public subsidy'.[52] As an example, it was reported that the Panacea Society, a small sect established by the 'prophet' Joanna Southcott, was attempting to establish a 'New Jerusalem' in Bedford. However, it was also 'promoting its doctrines of Anti-Semetism, as well as its plans for world domination'. Despite this, it was established in 1926 as a tax exempt charity and remained on the books. Demanding to know 'why we're subsidising these people', the *Spectator* recommended 'legislation to clarify in law just what "charity" is, and whether religious belief without "charitable works" can be deemed charitable in itself'.[53] A news release issued by the Treasury in 1997[54] estimated that the overall benefit to charities of tax-exempt status was £1.75 billion.[55]

ISSUE DEFINITION OVERSIGHTS AND IMPLEMENTATION FAILURES REVEALED IN CHAPTERS II & III

The *Anderson Report* (1965) pinpointed numerous legitimate concerns about the operations of Scientology and the then conduct of the organisation under its founding leadership. Sufficient evidence emerged (despite Hubbard's failure to appear) to warrant a conclusion that the organisation operated for the financial benefit of its founder. However, at the time the potential for Scientology to emerge as a third sector (purportedly non-profit) religious entity was not fully appreciated by Anderson (even though he acknowledged the use of legal religious persona in the United States to obtain government concessions). It seems that in adopting an unconscious Western bias towards conceptions of religion, Anderson failed to appreciate emerging societal changes leading to a multiplicity of religious faiths and a resultant broadening of the definition of religion away from a limited notion based on a Judeo-Christian understanding of the concept.

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[52] Ibid.1, 3
[53] Ibid.5, 4
[54] HM Treasury, 'Charity Taxation Reviewed', *News Release*, 2 July 1997.
[55] Michael Chesterman, 'Foundations of Charity Law in the New Welfare State', *The Modern Law Review* 62, no. 3 (May) (1999): 337.

In categorically dismissing Hubbard's claims for religious status, Anderson failed to appreciate the efficacy of his religious argument (probably because of Hubbard's likely insincerity), while acknowledging the sincerity of many followers. As a consequence he failed to identify an issue raised by the Scientology controversy as calling for an examination of the framework for privileging third sector entities – particularly religious entities. While a framework could apply to Victoria alone, the contemplation of this issue would likely invoke questions of federalism as concessions are to be found at all levels of government and consistency on financial privileges throughout the States and Commonwealth would become an issue. Anderson's recommendations sought to address immediate concerns raised in Victoria and impacting upon perceived victims in Victoria. The major recommendation to register psychologists was sound. It led to a framework for the regulation of psychologists in which concerns about psychological harm could at least be partially addressed.

Again, in implementing Anderson's main recommendation, the Victorian government was blindsided on the religious issue. By providing an exemption from the Psychological Practices Act 1965 for Ministers of religion designated by Commonwealth proclamation, the State government failed (despite warnings) to appreciate the potential for Scientology to achieve religious status at an official level in Australia. Parliamentary debates reveal that Government and Opposition Members in general were incredulous about this possibility, despite warnings from more thoughtful Members. The error was induced by federalism because the Victorian government made the mistake of allowing another government to designate exceptions to its legislation. The Victorian government also failed to appreciate the potential for issue re-identification to occur with a change of government at the Commonwealth level, another factor which ultimately contributed to implementation failure. In addition, the likelihood of a change being effected by a maverick policy entrepreneur in the form of Attorney-General Murphy, who apparently defied intra Caucus opposition to his 1993 Marriage Act proclamation legitimizing Scientology, was not contemplated by the Victorian government back in 1965.

Federalism was not an issue in the United Kingdom and Sir John Foster seemed more attuned to the possible success of Scientology claims for religious status, although he made sardonic criticisms of these claims. While recommendations for the registration of psychologists were made similar to those proposed by Anderson, the *Foster Report* (1971) included a substantive recommendation that 'the fiscal privileges enjoyed by religious bodies should be reviewed ... with the object of at least ensuring that they are restricted to religious movements having a substantial number of adherents, and engaging in genuine acts of worship'. This was a matter clearly capable of being acted upon by the government he was reporting to and it seems quite likely that the recommendation would have been cognizant to departmental reviewers of the Charity Act 1960 and to the Charity Commissioners (who, it will be seen in chapter VI, play a major role in setting the parameters for the financial privileging of third sector entities).

Compared to the flexibility of the Charity Commission for England and Wales (observed in the decision on Scientology's application for charitable status discussed in this chapter), the limitations of court based decisions on definition based financial entitlements were exposed in *New Faith* (chapter II: 8). Deliberations of the High Court judges were restricted to matters placed in evidence in pleadings before them (decisions made by counsel for the competing parties) whereas the Charity Commissioners were able to examine a wider range of evidence based on their conception of what information was relevant and required to inform their decision. The Commissioners were also acting in the context of an indisputable framework of third sector charity entitlements (of which they possessed considerable personal knowledge and had the benefit of access to bureaucratic expertise), whereas the Australian High Court judges were acting under judicial constraints in uncertain terrain; in the view of some inappropriately applying constitutional concepts to what should have been characterized as a charity law case, but in any event attempting to apply a consistent definition across various contexts and jurisdictions. (Of this more will be said in chapter V).

In Western Australia and South Australia, where legislation to suppress Scientology was explicitly opposed by Labor Opposition parties, the potential for government change and

issue re-identification to occur was not sufficient cause for conservative governments to reconsider their draconian approach, even in South Australia where attempts to find consensus through the vehicle of a select committee ended in debacle. Debate on the measures revealed a growing sophistication in understanding the potential implications of the rights movement (including freedom of religion), which had emerged with the Universal Declaration of Human Rights 1948. However, it is interesting that in South Australia the Opposition made it clear that in government they had already refused to register businesses and companies associated with Scientology, had refused to register Scientology as a religion and would provide no facilities for the spread of the cult. Their opposition to the suppressive legislation was based on general concerns for civil rights, including freedom of expression and association, with the in principle view that laws to redress harms should be capable of general application.

In retrospect, it seems that the approaches adopted in New South Wales and New Zealand were sensible. In New South Wales the government opted to do little or nothing, but this was a considered decision. Internal advice was taken and the situation monitored. Public statements left no doubt, in the mind of the general public, of the government's dismissive, critical attitude towards Scientology – and there is little evidence that Scientology membership experienced any particularly significant exponential growth in New South Wales compared to the three states in which the organisation was legislatively suppressed.

In New Zealand, grievances were analysed by a parliamentary committee, bi-partisan consensus obtained and the issues arising referred for more detailed examination and findings by a judicial inquiry. The grievances were ultimately found to have substance. The major criticism of the New Zealand approach is that the ready acceptance of Scientology assurances that it had implemented reforms was probably naïve. Perhaps the government might have facilitated claims for compensation by the aggrieved parties. However, the modus operandi of seeking to modify organisational behaviour, through warnings contained in the *Powles Report*, was a relatively sophisticated attempt to apply notions of social control. The main thing lacking was an on-going ability to monitor the

progress of reforms once the Royal Commission was wound up; a matter left to subsequent governments generally and revealing a lack of due consideration to the concept of implementation and the need to provide specific recommendations on it. The monitoring organisational vacuum left at the conclusion of the NZ Powles Commission of Inquiry is substantially filled in the United Kingdom by the Charity Commission for England and Wales.

Part two of the thesis, which follows (entitled Religious Definition, Legal Context and Comparisons Between Gate-keeping Models), begins with an examination in chapter IV of the common law presumption that trusts for the advancement of religion benefit the public and canvasses the probable policy rationales for this. Also examined are: academic criticism of the presumption, the manner in which religious charities obtained exemptions from welfare state taxation, and the reasons for judicial reluctance to invoke public policy disqualifications against religious organisations. Chapter V re-examines the *New Faith* decision and competing positions on judicial interpretation of s. 116 of the Australian Constitution, which have potential implications for the proposed establishment of a Commonwealth definitions/entitlements tribunal for third sector entities. Chapters VI & VII look at two comparative models, the Charity Commission for England and Wales and the Commonwealth system in Australia, whereby the Australian Taxation Office administers common law and statutory entitlement definitions which are determined by the courts. Comparisons are made between the two systems and observations drawn which support the thesis conclusions outlined in chapter VIII: 1 & 2.

PART TWO: RELIGIOUS DEFINITION, LEGAL CONTEXT AND GATE-KEEPING MODELS

CHAPTER IV: PUBLIC BENEFIT AND RELIGIOUS CHARITIES

IV: 1

THE PRESUMPTION OF PUBLIC BENEFIT FROM RELIGION

'religion is usually charitable... because it is part of the ethic of religion to encourage service and giving'

Prior to their 1999 rejection of the Scientology application for registration as a charity in England and Wales, the Charity Commissioners had denied charitable status to Scientology in 1978.[1] The earlier decision might have reflected the reported expression of 'official concern about the proliferation of novel and/or obscure religious sects'. The incidence of these sects was felt to be 'enhanced by the increasingly cosmopolitan culture of Britain and the increased ease with which religious beliefs developed abroad' could be 'taken up by groups in the country'.[2] This might have aroused prejudices based on racial, ethnic or religious grounds – along with possibly reasonable concerns about the deviant activities of a few. An underlying concern was the financial implication of an expanding base of tax-exempt religious charities, representing a state subsidy to charitable organisations,[3] including religious charities. Commenting on the comparable Australian

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[1] James Walsh, 'Tax Treatment of the Church of Scientology in the United States and the United Kingdom', *Suffolk Transnational Law Review* 19, no. 33 (1995): 341. Walsh cites Sarah Boseley, 'Behind the Babble; Church or Cult ?' *The Guardian*, 21 September 1994.

[2] Michael Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld & Nicolson, 1979) 160 fn 42. The 'official concern' is a reference to comment by the Charity Commissioners in their *Annual Report for 1976*

[3] Gladstone points out that some recipients of tax exempt status reject this view. He says; 'for instance the Independent Schools Joint Committee has trenchantly rejected the view that "fiscal benefits represent a form of subsidy by the State ... the income of individuals and corporate bodies belongs to those to whom it accrues. It is for Parliament to decide how much shall be removed in the form of taxation. Freedom from taxation is not a form of subsidy". However, he notes that the 'opposite standpoint had been strongly put by the Royal Commission on the Taxation of Profits and Income (the Radcliffe Commission) in 1955',

scene, Pannam observed in 1963 that 'churches are exempt from almost all property and income taxes. This is an extremely valuable right. It amounts in fact to a direct monetary grant to the various religions'.[4] The sum of this privilege is compounded by the rise in value of tax-exempt status due to increasing levels of taxation. The tax-exempt privilege of some increases the tax burden of non-exempt citizens and corporations. In an 'age of economic rationalism',[5] there is a preoccupation with justifying government expenditure, and re-justifying continuing outlays of public money. However, the longstanding fiscal privileges of religions seem to represent a blind spot in government auditing and review processes. Religious belief and the community outreach activities of religious organisations have long been deemed to be in the public interest. The assumption of 'edification' is so implicit that there are few policy pronouncements, either contemporaneous or historical, providing justification for it.[6]

The assumption that religious activities benefit the public arose in an earlier historical context when judicial decisions were typically concerned with private bequests benefiting religious organisations. The role of a court then was to determine whether the intention of a testator or donor was clear; that the beneficiary was properly identified and so forth. By contrast, the enormous financial advantage for religious bodies that now flows from charitable tax-exempt status is a relatively modern phenomenon. The value of tax-exempt status only began to accrue with the entrenchment of income tax in the nineteenth century,[7] and received a fillip in the twentieth century with the advent of the welfare state and exponentially increased levels of taxation. Therefore the assumption is now applied in a completely different context. How this hyper-privileged position arose for religious

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which stated; 'accepting the view that all parts of the national income are prima facie subject to a tax on income, the system does amount in effect to a grant of public moneys towards the furtherance of such causes as come within the legal category of charity', Francis Gladstone, *Charity, Law and Social Justice* (London: Bedford Square Press, 1982) 141-2, fns 7, 8.

[4] Clifford L Pannam, 'Travelling Section 116 With a U.S. Road Map', *Melbourne University Law Review* 4, no. 1 (1963): 79.

[5] Michael Chesterman, 'Foundations of Charity Law in the New Welfare State', *The Modern Law Review* 62, no. 3 (May) (1999): 62.

[6] It has not been so readily presumed that religious organisations will handle their financial responsibilities appropriately – hence the need for regulatory regimes for charities, of which the *Charitable Uses Act* 1601 was an early example.

[7] A temporary income tax was first introduced during the Napoleonic wars between 1799 and 1816. It was reintroduced in 1842, Gladstone, *Charity, Law and Social Justice* 57-8.

charities and the rationale for its continued justification, or otherwise, is an important public policy issue, which has received inadequate scrutiny. The genesis of the privilege in common law countries is to be found in the history of English charity law. Therefore a brief excursion of the leading English cases and statutory measures, in their historical context, [8] is necessary to gain an understanding of the privileged position that religious charities enjoy today and the policy rationales for it, difficult to pin down or substantiate with evidence as these may be.

RATIONALES FOR THE PUBLIC BENEFIT PRESUMPTION

Religion has been a recognised component of English charity law for centuries. Contemporary legal decisions in the field, in a number of common law countries, including Australia, are still based on the four charitable categories derived from the Preamble to the Statute of Charitable Uses (1601)[9] and more precisely enunciated by Lord Macnaghten, in *Commissioners of Income Tax v Pemsel* (1981).[10] Two of the four categories, being trusts for the advancement of education and trusts for the advancement of religion, have long enjoyed a presumption of public benefit,[11] while trusts for the relief of poverty are exempt from the public benefit requirement.[12]

Any analysis of English charity law should acknowledge the Judeo-Christian context under which the law was developed, particularly as this provides an insight into the ethical rationale for privileging religious charities and a reason for the development of the

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[8] For a useful survey of the history see the chapter by S Petrow entitled 'The History of Charity law', in Gino E Dal Pont, *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000) 44-82.

[9] Statute of Charitable Uses (the Statute of Elizabeth) 1601 Even though the Preamble hardly mentioned religion, apart from a reference to 'charitable and godlie uses' and 'repair ... of churches'. Even so, 'advancement of religion was the principal area in which the vague general concept of "charitable" went further than the preamble', Chesterman, *Charities, Trusts* 28.

[10] *Commissioners of Income Tax v Pemsel* (1891) AC 531. 583. He said, ' "Charity", in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads'.

[11] *National Anti-Vivisection Society v Inland Revenue Commissioners* (1947) 2 All ER 217 (HL). 220. (Lord Wright).

[12] *Dingle v Turner* (1972) AC 601. 622-25. (Lord Cross)

presumption of public benefit in a predominantly Christian, albeit Protestant society.[13] Hence, it is pointed out that 'the Jewish Bible (Old Testament) abounds with injunctions to give to the poor and to show kindness to all'.[14] The first-century Rabbi Hillel taught that 'what is hateful to you, do not do to your neighbour. This is the whole Torah: the rest is commentary'. It is noted that 'Hillel's version of the golden rule reflects the clear biblical imperative found in Leviticus 19:18, "You shall love your neighbour as yourself"'.[15] Quotations from the New Testament[16] and biblical parables (eg: the Good Samaritan) are cited to show that Christianity continued this tradition, as is the Augustinian assertion, 'it is only charity that distinguishes the children of God from those of the devil'.[17]

While charity law in England developed under a predominantly Christian milieu, it might also be noted that the Koran teaches that 'piety lies in believing in God ... and disbursing your wealth out of love for God', to 'spend in charity for your own good', as 'God knows the worth of good deeds and is clement'.[18] Injunctions to the faithful to observe good neighbourliness through philanthropy form an important component of the teachings of the Judaic, Christian and the Islamic religious traditions. As society in England and Australia has become increasingly multi-cultural, the beneficial teachings of established Eastern religious traditions, so far as they relate to good neighbourliness and associated philanthropy, provide a continuing rationale to extend religious charitable privileges to

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[13] Woodfield points out that the absolute requirement that a trust must 'benefit the community' owed something to the 'Protestant view that religious activities ought to have utilitarian ends', Steve T Woodfield, 'Doing God's Work: Is Religion Always Charitable ?' *Auckland University Law Review* 8, no. 1 (1996): 27.

[14] Robert H Bremner, *Giving: Charity and Philanthropy in History* (New Brunswick, New Jersey, USA & London: Transaction Publishers, 1994) 11.

[15] Charles Kimball, *When Religion Becomes Evil* (San Francisco: HarperCollins, 2002) 131.

[16] 'I say unto you, Love your enemies, bless them that curse you, do good to them that hate you, and pray for them which despitefully use you, and persecute you. 5:43-44' & 'Jesus said unto him, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy mind. This is the first and great commandment. And the second is like unto it, Thou shalt love thy neighbour as thyself. On these two commandments hang all the law and the prophets. 22:37-40', Martin H Manser, *The Wordsworth Dictionary of Bible Quotations*, 2nd ed. (Ware, Hertfordshire, UK: Wordsworth Reference, 1995) 120, 28.

[17] Bremner, *Giving* 14. Citing from F Van Der Meer, *Augustine the Bishop: The Life and Work of a Father of the Church*, Translation by Brian Battershaw & G R Lamb ed. (NY & London: Sneed & Ward, 1961) 138.

them. On the other hand, the absence of such beneficial teachings might provide some reasonable cause for refusing charitable privileges to groups claiming religious status, particularly if serious allegations of harm are raised. Concerns might arise where a new group or sect of an older tradition interpret (or re-interpret) doctrine in a way that promotes intolerance to outsiders, including overt hostility to critics, or unacceptable treatment of insiders, including in particular potentially vulnerable women and children.

Charity law emerged over time as part of an accommodation between the Roman Church and secular authority. When Henry VIII (reign 1509-47) broke with Rome and closed Catholic monasteries, religion in England came under the control of the secular authority. This control was cemented under the reign of Elizabeth I (1558-1603), after the brief reign of Mary I, with the establishment of 'the Anglican Church in its present form, with the Queen as governor of the Church and able to decree rites and ceremonies', and 'religion being controlled by submission to the credal statement known as the 39 Articles'.[19] This one-sided accommodation (which excluded Catholicism and other traditions and subjected the new Anglican Church to State control) has been ameliorated with the passing of time and various toleration Acts.

An authority on Australian charity law, Gino Dal Pont, contends that the legal presumption of public benefit was applied to religion because of two reasons, one mainly practical and the other philosophical. These are; 'the court's reluctance to enter into questions concerning the comparative worth of different religions, and also the view that religion of itself commonly generates benefit to the public'. For the first, practical reason, judicial diffidence has resulted in marginal groups gaining religious classification, adding in general to the growing list of beneficiary organisations. Even with this reluctance to choose between sects, courts in the UK have nevertheless discriminated by definition in favour of those 'religions' defined and confined by reference to a deity,[20] and have

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[18] Bremner, *Giving* 15, 16. Citing from Ahmed Ali, *Al Qur'an: A Contemporary Translation* (Princeton: Princeton University Press, 1984) 32, 489.
[19] Ninian Smart, *The World's Religions: Old Traditions and Modern Transformations*, First Paperback ed. (Cambridge - Melbourne: Cambridge University Press, 1992) 323.
[20] See discussion of this in the analysis of the Charity Commissioners' 1999 Scientology decision in Ch III: 7 above.

reserved public policy exceptions for those 'religions' considered to be beyond the pale. For the latter, philosophical reason, Dal Pont cites a 1989 UK government White Paper [21] which states; 'it is part of the make up of Man to want to give. It is part of the ethics of most religions to encourage that. Trusts for the advancement of religion have contributed much to the spiritual welfare of generations of individuals and to the sound development of our society'.[22] Furthermore, the presumption traditionally accepted by the courts has been that 'any religion is at least likely to be better than none'.[23] Chesterman notes that this 'value-judgement on the part of the law' occurred because 'the phenomenon of religion, in all its manifestations and ramifications, is thought to confer a genuine, tangible benefit in terms of edification, moral uplift, spiritual comfort and so on'.[24] There is also an assumption that the community benefits from the example of the observant, provided that, at least in the UK, the example is paraded in public.[25] A recent Australian exposition of a rationale supporting religious fiscal privileges is to be found in the 2001 *Sheppard Report*, where it was concluded that

> "the advancement of religion" should continue as a head of charity. It is clear that a large proportion of the population have a need for spiritual sustenance. Organisations that have as their dominant purpose the advancement of religion are for the public benefit because they aim to satisfy the spiritual needs of the community. Religious organisations satisfy these needs by providing systems of belief and the means for learning about these beliefs and for putting them into practice.[26]

It seems that benefits presumed to be derived from religion include those flowing to the individual, being solace through 'spiritual' comfort and those benefits flowing to the community, through religiously dictated ethical doctrines such as good neighbourliness (including philanthropy) and other doctrines leading to good citizenship. It is hard to define exactly the word 'spiritual', but providing spiritual comfort or solace might be

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[21] UK Government, *Charities: A Framework for the Future,* London: HMSO 1989. 8.
[22] Dal Pont, *Charity Law in Australia and New Zealand.* 166.
[23] *Neville Estates Ltd v Madden* (1962) 1 Ch 832. 853. per Cross J.
[24] Chesterman, *Charities, Trusts* 160. However, in the UK some limits have been placed on the presumption that this benefit also benefits the public. See discussion below of *Gilmour v Coats* (1949) AC 426.
[25] See discussion of *Gilmour v Coates* (1949) at IV: 2 below.

seen as contributing to the wellbeing, or more specifically the mental and physical health of the individual, leading to some imperative to show such benefits [27] and providing a possible public policy rationale for continuing religious privilege.

On the question of community benefits, it is noted that the application of religious dictates and punishments (in this life or the next) were a useful method of controlling the population as part of a Church and State pact. This pragmatic benefit can be categorized as the promotion of good citizenship (including the observance of ethical doctrines and obedience to secular laws) through the propagation of religious teachings acceptable to and generally supportive of the State. Therefore, it seems that the essential elements of the various rationales supporting the presumption of public benefit from religion boil down to personal solace (including the possibility of better health) and citizenship (including the elements of good neighbourliness and obedience to secular laws).

ACADEMIC CRITICISM OF THE PUBLIC BENEFIT PRESUMPTION

The traditional presumption has occasionally been called into question, particularly in more recent times with the advent of multifarious religious types, some of which, including Scientology, have aroused controversy and concern. Some of the concern expressed has been that some fringe religious organisations, contrary to the expectation of public benefit, actually cause harm to their adherents and others. English charity law expert Hubert Picarda suggested in 1981 that 'the dictum that *any* religion is at least more likely to be better than none ought now to be qualified'. He felt that the presumption should be discarded, stating; 'a new religion ought to be capable of showing, and ought to be called on to show, that it promotes public benefit. At the very least it should show that its teachings *might* result in moral improvement'. He also observed that 'suggestions

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[26] Hon Ian Sheppard, *Report of the Inquiry into the Definition of Charities and Related Organisations,* Canberra: The Treasury, Commonwealth of Australia: Available online at <http://www.cdi.gov.au/html> 2001. 178. See discussion of the report in Chapter VII: 2 herein.

have been made that the law should not presume benefit where evidence points against any discernible benefit'.[28] Therefore, some *prima facie* evidence of harm should be enough to rebut the presumption.[29] While Picarda did not call for what he termed 'conventional' religions to prove their public benefit, confining his expectations of proof to 'new religions', it seems reasonable to suggest that all beneficiaries of public largesse should be required periodically to justify their charitable status. Such a requirement, familiar in the sunset clauses commonly required for modern subordinate legislative review, would deflect the possible argument that new 'religions', or claimants to that status, were being treated differently, and consequently more harshly, than 'conventional' faiths, leading to potential claims of discrimination under Human Rights legislation. [30]

Writing in 1985, A. W. Lockhart, a commentator on the New Zealand *Centrepoint Trust* (1985) case, which applied the Australian *Church of the New Faith* (1983) decision to that country, was even more critical. He not only questioned the easy presumption of public benefit, but the rationale underpinning religious charitable exemptions *per se.* Lockhart noted that social utility was the common denominator of the four categories of charitable purposes, and stated; 'to say that religion carries with it a social utility is difficult because any effect of religion is difficult to both define and measure and also because any effect is usually of a very personal nature'. Lockhart felt that the original monopoly of mainstream religious bodies in the delivery of charity had been reduced by the development of the welfare state and that their political power had also waned, 'to the point where exemption from normal taxation burdens is no longer warranted'. He concluded

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[27] Hence the imperative to show such benefits, Leslie J Francis, 'The Relationship between psychological well-being and Christian faith and practice in an Australian population sample', *Journal for the Scientific Study of Religion* 41 (March), no. 1 (2002).

[28] Hubert Picarda, 'New Religions as Charities', *New Law Journal* 131 (1981): 437.

[29] It is notable that the presumption was readily displaced by the Charity Commissioners in their 1999 deliberations on Scientology. *Charity Commission Decision: Church of Scientology Application for Registration as a Charity* (1999) <http:www.charity-commission.gov.uk/> Accessed 29 November 2001, 49 pages) Charity Commission for England and Wales 41.

[30] This is a potential criticism of the 1999 Charity Commission decision on Scientology, because there the Commissioners conceded that the 'newness' of Scientology meant that there was less material on which to base a decision, Ibid. 41-2.

why should some members of the community bear a heavier burden of taxation merely because the beliefs of others entitle their organisations to exemption from taxation ? By only turning its attention to the definition of religion and ignoring the revenue consequences of such a definition, the New Zealand High Court (in *Centrepoint Trust*) has tacitly agreed that such apportionment of the burden of taxation is acceptable.[31]

Another legal commentator from New Zealand, Kate Tokeley, has suggested that 'judges are so concerned with not weighing up the merits of one religion as against those of another that they are neglecting the fundamental question of fundamental benefit'. Therefore, 'charitable status is given to religious cults ... which are obscure and sometimes dangerous movements. Some of these religious cults have an influence on their adherents which is tantamount to brainwashing.'[32] Tokeley concludes that

the presumption is that any religion is better than none, but at times the law seems to have lost track of why this is so. *The reason religion is usually charitable is because it is part of the ethic of religion to encourage service and giving.* Religion can therefore be a fundamental source of charity and advancement of religion is certainly for the public benefit. The question which should be addressed is not whether a particular organisation is religious but whether it is for the public benefit regardless of whether it is labelled as religious.[33]

Yet another New Zealand commentator has supported the notion that the presumption is outdated. Steve Woodfield submits that despite the historical association of the church and charity in England, the advent of religious diversity means that 'something described as a religion can no longer automatically be expected to benefit the public, and therefore courts should require substantiation of any alleged public benefit'. This view is supported by the observation that the term religion itself has become 'ever-expanding', to

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[31] A W Lockhart, 'Case Comment: Charitable Trusts', *Auckland University Law Review* 5 (1985): 247-8. This criticism of *Centrepoint Trust* might be somewhat harsh, as Tomkins J set aside any presumption and did examine the case against public benefit. The difficulty in that case was the dearth of evidence presented by the Commissioner for Taxation, limiting the possibility of the Court rejecting an application for religious exemption if there was sufficient evidence presented that an organisation was not operating in the public interest

[32] Kate Tokeley, 'A new definition for charity ?' *Victoria University of Wellington Law Review* 21, no. 1 (1991): 46.

[33] Ibid.: 48. Emphasis added.

the extent that 'religion and charity can no longer be regarded as fairly synonymous'.[34] In addition, Woodfield notes that

> while benefits of a religious nature were widely accepted as tangible, proving their existence was problematic if not impossible. Thus, in order for the law to correspond with social conditions, it was obliged to make a "value-judgement" and recognize a benefit it could not perceive. Difficulties of proof continue to subsist, but widespread acceptance of the existence of religious benefits is doubtful.[35]

Another possible rationale for the presumption raised by Woodfield is that promoted by natural law theorist John Finnis, who argued that 'inquiring into the origins of the universe and the character of any supernatural force is a good thing, notwithstanding the impossibility of establishing such a benefit in court'.[36] Woodfield himself advances the interesting view that 'where adherents live in the community, the existence of a public element should depend on the teachings of the religion with respect to the public', thereby necessitating some judicial inquiry into the public worth of certain tenets of particular faiths, where public benefit is questioned. He observes that

> if the members are exhorted to "love your neighbour as yourself" and to promote the benefits of their beliefs, then the public may well participate in any benefit derived from carrying out the objects of the religion. However, if the religion promotes hostility towards, or disregard for, fellow human beings or their freedom of choice, or even if members are discouraged from benefiting others through the religion, then the public element might not be present.[37]

Woodfield cites Hutley JA in *Joyce v Ashfield Municipal Council* [38] to the effect that the Exclusive Brethren go forth into the world to do 'battle according to their religious views to raise the standards of the world by precept and example'.[39] Here it seems the normal assumption was applied that the religious teachings in question benefited the public so long as they could be shown to affect or involve the public. However, Woodfield's suggestion is intriguing. While his argument is advanced in the context of dealing with

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[34] Woodfield, 'Doing God's Work': 31.
[35] Ibid.: 32.
[36] Ibid.: 33.
[37] Ibid.: 29.
[38] *Joyce v Ashfield Municipal Council* (1975) 1 NSWLR 744. 751.

the manner in which a religion might prove the public element of 'public benefit',[40] it also involves a greater awareness of the need to investigate the benefit aspect, even if this merely involves examining religious texts to discover if these include exhortations to the faithful involving beneficial community involvement, or the reverse, overt hostility. The question which then arises is; 'why stop there?' Woodfield comments that 'public benefit was generally assumed *unless harm was evident'*.[41] Evidence of such harm may be disclosed on the face of religious texts or doctrines, but such statements are subject to pragmatic revision or re-interpretation to satisfy any superficial inquiry. If a judicial officer is required to determine whether an organisation is for the public benefit, it seems unreasonable to limit that inquiry to textual material. Common sense calls for sufficient inquiry into *activities* to satisfy the adjudicator. Indeed, further inquiry might vindicate an organisation where textual material alone is misleading or misunderstood.

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[39] Woodfield, 'Doing God's Work': 29.
[40] He says 'with certain religions it may be that the public element is obvious, and the test may be dispensed. However, in doubtful cases the religion should be required to establish that members of the public have a reasonable opportunity to participate in the benefits that emanate from the exercise of the religion', Ibid.
[41] Ibid.: 31. Emphasis added.

IV: 2

POLICY FACTORS AFFECTING RELIGIOUS CLASSIFICATION

'the Court of Chancery makes no distinction between one sort of religion and another'

The presumption in favour of religion has gone hand in hand with an expansion in the definition of religion *per se*. The definition of what constitutes a religious charity has also been treated liberally by the courts. In order to gain an insight into why this may not be satisfactory in modern public policy terms, it is useful to examine the historical approach to the issue in an attempt to ascertain the legal foundations upon which the contemporary privileges of religious organisations rest. In his 1979 authoritative treatise on English charity law, Michael Chesterman[1] describes how political considerations in judicial decision-making might have led to a distortion of the modern meaning of 'charitable' as derived from the Statute of Elizabeth. That 1601 statute was 'intended to be almost wholly confined to purposes which would operate to the benefit of the public as a whole – in particular, the parish ratepayer – by alleviating poverty and thereby reducing the burden of poor-rates'.[2] However, political attempts to stop the breaking up of landed estates through transfers of real estate to religious institutions, arguably led, paradoxically, to an expanded definition of the word charity.

DEFINITIONAL PARADOX: THE STATUTE OF MORTMAIN 1736

This allegedly occurred as a consequence of the enactment, by a legislature dominated by landowners, of the Mortmain and Charitable Uses Act 1736 (Statute of Mortmain). That Act was designed to prohibit testamentary bequests of land to charities and to make it

[1] Now Emeritus Professor of Law, UNSW
[2] Citing 'a distinguished Chancery lawyer of the time, Francis Moore', Michael Chesterman, *Charities, Trusts and Social Welfare* (London: Weidenfeld & Nicolson, 1979) 26.

difficult[3] for landowners to give land *inter vivos* (or money to be used in buying land) to charities, in particular religious institutions, which it was feared would render the remnants commercially unviable.[4] In cases where the disposition was arguably in question, judges were therefore tacitly encouraged by the obvious intention of the legislature to disallow such transfers where possible.[5] The paradox allegedly occurred because in order to rule a disposition out, a court had to bring it under the jurisdiction of the Act, by adopting a broad definition of the word 'charitable', including religious charities. The theory is that this broader definition was ultimately applied by judges in a different context, to widen the field of charities exempt from taxation legislation, in particular religions, when the legislative and public policy imperative would sensibly be to limit where possible the scope of the exemption. The greater scope of benefits afforded to organisations as a consequence of taxations exemptions, also provided greater incentive for groups to press for inclusion by definition as exempt charities.

A LIBERAL DEFINITION OF RELIGION AND ITS ADVANCEMENT

The leading case for the modern English charity law proposition that 'any genuinely theistic sect, no matter how small or obscure or eccentric' will qualify as a religion,[6] is *Thornton v Howe* (1862). [7] It also happened to be a case in which the definitional paradox that allegedly occurred due to the Statute of Mortmain, apparently came home to roost. [8] In the case, Romilly MR held 'charitable a devise of land to promote the publication of what he called the "foolish" works of Johanna Southcote, a self-styled

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[3] The disposition had to be in the form of 'a deed executed before two "credible witnesses" at least twelve months before the donor's death and enrolled in Chancery within the six months following', Ibid. 36-7.
[4] 'Although the immediate stimulus for the enactment is said to have been an outburst of anti-clerical antagonism to the accumulation of lands by the established church, the parliamentary debates also display considerable concern that land should bot be "taken out of commerce"', Ibid. 36.
[5] Chesterman says 'it has been suggested in a number of contexts (for example, that of settlements of land) that the judiciary of the late seventeenth and early eighteenth centuries were particularly responsive to the interests of the great landowners', Ibid. 35.
[6] 'It is often overlooked that this ruling brought the disposition within the clutches of the *Mortmain and Charitable Uses Act* 1736, so that it was held to be invalid and the decision itself was not as tolerant as it appears at first sight', Ibid.
[7] *Thornton v Howe* (1862) 31 Beav 14.

mother of the second Messiah'. The judgement of Romilly MR raises a number of issues relevant to the treatment of religious charities under the Common-law. These include: the application of a wide definition of religion, the latitude of judicial discretion on public policy grounds, the implicit issue of public benefit, the theme of judicial neutrality between religions and sects, and the probable influence of the Statute of Mortmain.

Thornton v Howe is undoubted authority for a wide definition of religion under the Common Law. Romilly MR was happy to examine the evidence contained in the printed works of the founder of the sect to determine whether the bequest was for a charitable purpose. That is, did it advance religion ? He found that it was the intention of the testatrix, Ann Essam, to propagate the works of Johanna Southcote, who he describes as a 'very sincere' but deluded Christian, and whose works, though 'in a great measure incoherent and confused', were 'written obviously with a view to extend the influence of Christianity'.[9] However, the efficacy of the intention hardly seemed to matter. In this respect Romilly MR said, describing analogous situations involving a theoretical testator, that it is not for the Court to vouchsafe 'his opinion' as to the efficacy of a bequest to 'publish and propagate works in support of the Christian religion', or 'works he thinks will produce that result'.[10] These comments reflect a laissez-faire judicial attitude to endorsing (or a reluctance to interfere with) the intentions of a testator.

The Judge did consider the argument advanced on behalf of the heiress-at-law, that the gift was 'void as contrary to public policy' on the basis that Southcote's writings were 'blasphemous and profane'.[11] He said

> it may be, that the tenets of a particular sect inculcate doctrines *adverse to the very foundations of all religion, and that they are subversive of all morality.* In such a case, if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void; *but the character of the bequest, so far as regards the Statute of Mortmain, would not be altered by this circumstance.* The *general immoral tendency* of the bequest

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[8] Chesterman, *Charities, Trusts* 158.
[9] *Thornton v Howe* 20.
[10] Ibid. 20-1.
[11] Ibid. 17, 15.

would make it void, whether it was to be paid out of pure personalty or out of real estate.[12]

It is this passage that seems to have given rise to the proposition under English charity law that an organisation can be characterised as a religion *per se*, even though it inculcates doctrines adverse to religion and is subversive of all morality,[13] but that these same traits can void a benefit on public policy grounds. Romilly MR later re-iterated the view that bequests to religions may be voided on grounds of 'general immoral tendency'. This phrase seems to be a more flexible version of the earlier statement, 'adverse to the very foundations of all religion, and ... subversive of all morality', but the stricter criteria seems to have been adopted as the rule of thumb in later cases.[14]

After considering the evidence, Romilly MR felt that the writings of Johanna Southcote were essentially well-meaning and harmless, even if they were not efficacious. They were certainly not contrary to the advancement of religion. He said; 'there is nothing to be found in them which, in my opinion, is likely to corrupt the morals of her followers or make her readers irreligious'.[15] Even with respect to delusional claims that Southcote was to be made 'the medium of the miraculous birth of a child at an advanced period of her life', thereby occasioning the 'advancement of the Christian religion on earth', the Judge noted; 'her works, as far as I have looked at them, contain but little upon this subject, and nothing which could shake the faith of any sincere Christian'. Therefore, so long as the 'tendency' was not immoral (and the intention was sincere) the Court would not void a bequest just because it 'might consider the opinions sought to be propagated foolish or even devoid of foundation'. [16]

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[12] Ibid. 20. Emphases added.
[13] A position reflected in the later observation by Scientology that the highest courts internationally have taken an 'ethically neutral' approach to the definition of religion *per se*, Church of Scientology International, *Scientology: Theology & Practice of a Contemporary Religion* (Los Angeles: Bridge Publications Inc, 1998) 9. See discussion in chapter I: 2 supra.
[14] So in 1973 Plowman J said, 'the only way of disproving a public benefit is to show, in the words of Sir John Romilly ... that the doctrines inculcated are "adverse to the very foundations of all religion, and that they are subversive of all morality"', *In re Watson* (1973) 1 WLR 1472. 1482-3.
[15] *Thornton v Howe* , 18
[16] Ibid. 20

On the question of public benefit, the case can also be seen as taking a liberal interpretation. Although Romilly MR does not use the words 'public benefit', it seems implicit that he accepted at face value the view that 'advancement of religion' was an end in itself for the purposes of charity law. There was no examination of the question that the object should be to help the poor, or that is should benefit a significant proportion of the public. Whether there was a requirement that it should tangibly benefit anyone at all is questionable, but the possibility that it might confer some sort of benefit, either tangible or intangible, seems to have been assumed.

Perhaps a benefit arose from having the company of other like-minded people, or possibly the dubious comfort that comes from following a charismatic figure and abdicating responsibility for ones own decision making. In this respect the Judge noted that during her life, Southcote had 'many followers, and probably has some now, as every person will have who has attained such a pitch of self-confidence as sincerely to believe himself to be the organ of communication with man kind specially selected for that purpose by the Divine Author of his being',[17] although this is hardly language couched in terms of approval. However, it was enough that the aim of the beneficiary organisation was to 'extend the influence of Christianity'. The fact that it might not have been efficacious did not really matter. Perhaps the 'intention' also made people feel good and was therefore for the public benefit.

So the foolishness of the belief and writings was not a criterion, provided it was not 'likely to make persons who read them either immoral or irreligious'.[18] Therefore the question that was considered explicitly, that of public policy, can perhaps be read as a potential limitation to the very broad concept of public benefit that seems to have been implicitly accepted by the Court. Something that is 'immoral or irreligious' could be seen as not offering public benefit.

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[17] Ibid. ,18 - 19
[18] Ibid. , 21, 19

However, it should also be noted that the presumption of public benefit in the advancement of religion, implicit in the judgement, was easily displaced by the submissions of the heiress-at-law, who was seeking to void the disposition. Romilly MR was quite happy to consider the evidence before him that the 'religion' might be harmful. While the argument that the writings were 'blasphemous[19] and profane'[20] did not convince the Judge that they were either, the important point is that he was willing to entertain the question.

It seems a fine distinction, but relevant, that once it was established that the organisation in question was religious there was no onus requiring proof of public benefit. While the Judge was happy to consider submissions of alleged harm, he did not seem to reverse the onus of proof, leaving it upon the party alleging harm to prove to the Court's satisfaction that a public policy exception should apply. In the 1999 Scientology decision, the Commissioners went that further step and required proof positive from the applicant organisation that it satisfied the public benefit test.

Another judicial pronouncement arising from the case, that has been followed, was the observation by Romilly MR, that in the context of testamentary schemes, that

> *in this respect* I am of opinion, that *the Court of Chancery makes no distinction between one sort of religion and another.* They are equally bequests which are included in the general term of charitable bequests. *Neither does the Court, in this respect, make any distinction between one sect and another.*[21]

While the Judge pointed out explicitly that his comments on religious neutrality applied in the context of testamentary schemes, his words have been interpreted liberally to apply the same sentiment of tolerant neutrality in the context of taxation exemptions. It should also be noted that his comments were made in the mid-eighteenth century, and at that time it might have been that the Judge was thinking of distinctions between different

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[19] Blasphemy being against the laws of England, if the Judge had felt that the writings were blasphemous, he would have had good public policy grounds to void the instrument
[20] *Thornton v Howe* , 15
[21] Ibid. 20-1. Emphasis added.

Christian religions and breakaway Christian sects. Nevertheless, the sentiment that this statement represents has been applied quite liberally to cases involving non-Christian religions or sects and has been applied in contexts other than that of testamentary schemes.

The decision in *Thornton v Howe* might well have been influenced by the Statute of Mortmain. Two considerations seem relevant. The first was that a wide definition of religion would ensure that the bequest was brought under the statute and thereby voided. The Judge did characterise the beneficiary purpose with some disdain and might perhaps have not been unduly concerned to ensure that the intention of the testatrix succeeded. In addition, it seems that he was of the view that he had available to him a certain amount of judicial discretion to disallow a bequest to an organisation characterised as religious *per se*, if he felt it was unworthy. This can be ascertained from his statement that such a bequest might be voided on grounds of 'general immoral tendency'. Therefore, in another context not affected by the Statute of Mortmain, a wide ranging definition of religion would not preclude a judge from voiding a trust for the advancement of religion on discretionary, public policy grounds.

Observations

Romilly MR seemed quite relaxed about allowing a wide definition of religion in *Thornton v Howe*. Two reasons can be advanced for this. The first is that a wide interpretation is arguably what the statute demanded. Secondly, the Judge felt that if the matter was one that did not come under the statute, he had the discretion to void any disposition he found distasteful on other, public policy grounds, which seemed to be fairly broad. Therefore, in the context of that period, adopting a wide definition of religion did not limit judicial discretion in an appropriate case. A century later, however, when the question had acquired greater practical significance, because acquisition of religious classification carried financial benefits rather than the penalty associated with the *Statute of Mortmain*, the avenue of rejection on public policy grounds may have

narrowed,[22] although this is still an open question. For example, public policy was invoked in a 1990 judicial excursion in Canada, whereby a bequest involving a class restriction, which included race and religion, was voided on public policy grounds sourced to anti-discrimination legislation.[23]

In addition, Dal Pont observes that there may be a number of avenues available for denying 'charitable' status on the basis of 'prevailing public policy'. Therefore, he says; 'if an organisation that meets the legal definition of a "religion" engages in conduct that is illegal or otherwise entirely contrary to society's moral code (the involvement of children in sexual acts, brainwashing, and dangerous psychological techniques being prime examples), it can hardly be said that it exists for the public benefit'. With respect to allegations of dangerous psychological techniques, he notes *Kaufman* (1973),[24] where it was 'held that the confidentiality of certain communications relating to Scientology could be disclosed in the public interest because of evidence showing the practices of Scientology to be dangerous'.[25] He also raises the possibility that 'dangerous risk taking' or the 'refusal of medical treatment' might be grounds for a denial of charitable status.[26]

The issue of neutrality between religions or sects should also be viewed in context. Romilly J was merely stating the obvious point that it would be impossible for a Court to choose between competing irrational[27] beliefs. It should therefore not attempt to do so.

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[22] Because public policy grounds have been confined to the phrase, 'adverse to the foundation of all religions, or subversive to all morality', rather than the broader concept of 'general immoral tendencies', which could just as easily have been taken from the judgement of Romilly MR. The tight requirements for judicial invocation of public policy required in the 1974 case of *Yvonne van Duyn and the UK Home Office*, supra, should also be noted

[23] *Canada Trust Co v Ontario Human Rights Commission* (1990) 69 DLR (4th) 321.

[24] See discussion of *Church of Scientology of California v Kaufman* in Chapter III: 4 herein.

[25] Gino E Dal Pont, *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000) 167, fn 74.

[26] He says that a distinction has been made between conduct and belief or doctrine (citing Parsons CJ in *Glover v Baker* (1912) 83 Atl 916. , 932-3), but that it has been observed that a sincere belief 'must manifest itself in behaviour', an inherent part of the Mason ACJ & Brennan J judgement in *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120. , 136, Dal Pont, *Charity Law in Australia and New Zealand* 167.

[27] In the sense used by Pannam when he says that religion 'involves a striving to understand the meaning of life by reference to some irrational cohesive power. Irrational, because man's reason cannot comprehend

If a testator wished to give his money to an organisation promoting an irrational, though harmless belief system, that was his business and should not ordinarily be vouchsafed by the Court.

However, Romilly J made it quite clear that in an appropriate instance he would not hesitate to choose between religions (or sects) on moral, or in other words, ethical grounds. Indeed, he did not even make a distinction between belief and action. His injunction was against inculcating 'doctrines' subversive of all morality (or with immoral tendencies). An organisation promoting harmful doctrines *per se* would be considered immoral, and certainly institutional or institutionally sanctioned action based on these doctrines would be immoral.

Therefore, while the law 'makes no distinction between one sort of religion and another', it is arguable that this concept of neutrality was intended to relate to matters of belief only. Therefore the law does not determine whether the beliefs of any religion are right or wrong. However, the common law makes a distinction between good and bad religion. It can achieve this by either defining bad religion as no religion at all, which may be termed definitional disqualification, which occurred in *Segedal*; or by disqualification on grounds of public policy, a public policy veto, which was endorsed by judicial comments in *Thornton v Howe*.

A BROAD DEFINITION OF CHARITY APPLIED TO TAXATION

A possible tendency to broaden the definition of religion to limit the flow of benefits to religious organisations might well have achieved an appropriate public policy aim in the eighteenth and early nineteenth centuries. However, the advent of income tax regimes, and exemptions to them, introduced quite different public policy imperatives that became permanently relevant in the latter half of the nineteenth century. In 1799 a taxation law

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it', Clifford L Pannam, 'Travelling Section 116 With a U.S. Road Map', *Melbourne University Law Review* 4, no. 1 (1963): 62.

was introduced in England, providing for an exemption for 'charitable purposes'.[28] Although this law was later discontinued, it was re-introduced in 1842 with the same exemption. Famously, William Gladstone sponsored a Bill in 1863 'to abolish the exemption. He attacked it fiercely in a long and vigorous speech, alleging that it represented an undiscriminating public subsidy for a large group of organisations which were not subject to any adequate form of public scrutiny'. Even though 'the exemption survived this onslaught', for a time the tax commissioners 'opted for a more restrictive approach' to that they had hitherto taken, so that '"charitable" ... connoted some element of relief for the poor or deprived'.

This approach was not subjected to judicial review until 1888,[29] when it was upheld in the Scottish case of *Baird's Trustees v Lord Advocate* (1888).[30] However, that decision was overturned in 1891 by the English *Pemsel*[31] case,[32] where it was held by a majority of four to two that the wider, more general definition allegedly derived from the 1601 statute and enunciated in *Morice v Bishop of Durham* (1805),[33] should apply to cases exempting charities from income tax. Chesterman laments that 'the triumph of the latter view' was made complete by its extension in *Pemsel* to the taxation context, where 'it has been applied without being seriously questioned'.[34]

The prevailing wider view is that so long as a purpose falls within the ambit or spirit of the preamble to the Statute of Elizabeth, and 'a sufficiently large group of "the public" stand to benefit', then the purpose will be deemed to be charitable.[35] So with respect to religious charities, post *Pemsel* there is no requirement that the poor should benefit in

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[28] Income Tax Act 1799, s. 5

[29] The reason was that until 1874 there was 'no procedural machinery to bring appeals from the income tax commissioners to the courts', Chesterman, *Charities, Trusts* 59.

[30] *Baird's Trustees v Lord Advocate* (1888) 15 Sess Cas (4th Series) 688.

[31] *Commissioners of Income Tax v Pemsel* (1891) AC 531.

[32] Where the Court held that a trust advancing missionary establishments of the Protestant Episcopal Church amongst heathen nations was entitled to charitable relief on income tax 'even though the only form of poverty or destitution being relieved was spiritual as opposed to material', Chesterman, *Charities, Trusts* 59.

[33] *Morice v Bishop of Durham* (1805) 10 Ves 522.

[34] Chesterman, *Charities, Trusts* 60-1.He says that this 'was a major step because ... both the ranges of taxes from which charities are exempted and the rates at which some of the relevant taxes are levied have increased substantially', Chesterman, *Charities, Trusts* 61.

some way from the charitable purpose of 'advancement of religion'. In addition, under English charity law, the definition of the type of organisation that will qualify as a religion is quite liberal. Furthermore, the law is also liberal 'as to the methods which may be adopted in endeavouring to advance' religion.[36]

A NARROWER BUT RELATIVELY WIDE VIEW OF RELIGIOUS PUBLIC BENEFIT

There is one decision apparently going against the flow of liberality of definitions applied to religious charities in the UK. That is the decision in *Gilmour v Coats* (1949),[37] which Chesterman describes as 'the leading modern decision on the rule that benefit to the public must be "tangible"'. In that case a convent of Roman Catholic, Carmelite nuns were denied the benefit of a trust because they were a cloistered community dedicated to prayer and did not venture forth to provide any public benefit. Argument that people benefited from the prayers were held not susceptible of proof, being intangible, and that edification by example was not enough. The contemplative nuns themselves, who might have benefited in some way, were apparently also not a sufficient section of the public.

The later decision of *Neville Estates Ltd v Madden* (1962)[38] confirmed that some degree of mixing with the public would rectify this problem. In that case it was held that the Catford Synagogue was a religious charity, because members '(being not in themselves a section of the public) went out after their worship at the synagogue and made contact with their fellow citizens'.[39] Therefore, if the Carmelites had adopted the habit of Thursday night shopping, they might have been a charity ![40]

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[35] Chesterman, *Charities, Trusts* 60.
[36] Ibid. 157.
[37] *Gilmour v Coats* (1949) AC 426.
[38] *Neville Estates Ltd v Madden* (1962) 1 Ch 832.
[39] Chesterman, *Charities, Trusts* 162.
[40] Indeed, in 1995, after Inland Revenue had objected to registration, the Charity Commissioners asked an Anglican order of contemplative nuns, the Society of the Precious Blood, to amend their constitution to prove the public benefit of their work (which included counselling and support for those in need, running a retreat house and allowing members of the public to attend religious services within the abbey).

It seems that some element of public contact, even if only by normal exposure to the public, will be enough to advance religion. Because any 'religious' organisation might comply by adopting slight rule changes, despite *Gilmour* the English position is still at least 'relatively wide'. According to Chesterman, 'there is an unresolved clash between' its 'strictness and the liberality of decisions on "fringe sects" such as *Thornton v Howe* (1862) and *Re Watson* (1973), suggesting the possibility it might eventually be overturned or at least severely 'quarantined'. [41] Furthermore, it has been suggested that the *Gilmour* restriction might not apply to the Antipodes, where 'several decisions have recognised that the contemplative life may convey sufficient elements of public benefit to make assistance for its pursuit charitable'.[42] It seems that the test proposed Down Under is 'the enhancement in the life, both religious and otherwise, of those who find comfort and peace of mind in their resort to intercessory prayer'.

Dal Pont also notes that an Australian judge, Reynolds JA, [43] said in 1975, in relation to *Gilmour*, that the 'doctrine that religious activities are subject to proof that they are for the public benefit could give rise to great problems in that it might lead to the scrutiny by the courts of the public benefit of all religious practices'.[44] However, as we have seen in Chapter III: 7 herein, the Charity Commission for England and Wales has been quite prepared to brush aside the presumption and has shown no qualms in examining 'religious practices' in the course of its determinations.

Consequently IR withdrew its objection to registration, Christine R Barker, 'Religion and Charity Law', *Juridical* Part 5 (1999): 306-7.

[41] Chesterman, *Charities, Trusts* 161.

[42] Gobbo J in *Crowther v Brophy* (1992) 2 VR 97. ,100 cited in Dal Pont, *Charity Law in Australia and New Zealand* 171.

[43] *Joyce v Ashfield Municipal Council* (1975) 1 NSWLR 744. , 750

[44] Cited in Dal Pont, *Charity Law in Australia and New Zealand* 171.

IV: 3

JUDICIAL REASONS FOR NOT INVOKING PUBLIC POLICY DISQUALIFICATIONS

'new ideas ... which the government is not justified in supporting or espousing'

The statement by Reynolds JA cited at the conclusion of the last chapter is an example of the traditional judicial reticence to offend religious sensibilities. However, judicial (or quasi-judicial) acknowledgement of allegations of harm, (which might initially lead to the setting aside of any presumption of benefit and then upon further examination result in the refusal of a taxation privilege), is different to requiring *prima facie* positive proof of public benefit in '*all* religious practices'. In adopting the former approach, the Charity Commissioners in the 1999 Scientology determination (Chapter III: 7) might well have encountered some evidentiary 'problems', but the task was obviously not beyond them.

JUDICIAL COMPETENCE TO EXAMINE CLAIMS FOR RELIGIOUS STATUS

On the question of judicial competence to examine claims to religious status, it has been noted that a court in Australia may examine evidence 'that a body adopts philosophies and ethical disciplines that deny a belief in a supernatural being, thing or principle' to determine that 'a body claiming tax immunity is not in fact a religion'.[1] In addition, it seems that the apparent sincerity of Scientology adherents was decisive in the *Church of the New Faith* decision. Legal academic Wojciech Sadurski noted in 1989 that although 'sincerity is notoriously difficult to prove or disprove before a court ... the inquiry into

[1] Peter Nugent, *Conviction with Compassion: A Report on Freedom of Religion and Belief,* Canberra: Joint Standing Committee on Foreign Affairs, Defence and Trade, Human Rights Sub-Committee: The Parliament of the Commonwealth of Australia 2000. 187. The Committee was citing Butterworths, *Halsbury's Laws of Australia* (Butterworths, 1994) 365-10., where it was also noted that 'Australia has generally assessed the claims of religions to be genuine religions "with a light and trusting hand"'.

sincerity of religious beliefs is not qualitatively different from any another judicial scrutiny of the individual state of mind, such as in the examination of criminal mens rea, or of legislative intent for the purpose of statutory interpretation'.[2] On the question of judicial competence to examine matters relating to religion, academic lawyer Clifford Hall has more recently noted

> of course we might say that theology and comparative religion are not things of which judges should be expected to be conversant but surely the issues raised are qualitatively little different from, say, an evidential understanding of hospital practice and diagnostic treatment procedures when determining a case of medical negligence or psychiatric understanding when a defence of diminished responsibility is raised. Both are matters of evidence of which the judge must take notice.[3]

If those sorts of judicial determinations are possible, then so surely is a determination of public benefit or its reverse, harm, with respect to religions, despite judicial reluctance in the past to lift the veil of organizational claimants to religious charitable status. Indeed, some examination of the reasons for this historical judicial reticence is warranted if public policy makers are to determine whether good reason still exists for a judicial *laissez faire* approach, or whether circumstances now call for a more critical examination of the worth of claims for religious charitable status.

RATIONALES FOR JUDICIAL RETICENCE

The definitional paradox and other contextual considerations outlined in Chapter IV: 2 help to explain why the courts developed a liberal attitude to the definition of religion. However, a number of reasons have also been advanced to explain why the courts (as opposed to the Charity Commissioners) have generally been reluctant to invoke public policy discretions to disallow charitable trusts involving religion, even in cases where some practices of donee religions are considered to be immoral, or perhaps more significantly, dangerous.

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[2] Wojciech Sadurski, 'On Legal Definitions of 'Religion'', *ALJ* 63 (1989): 836-7.

In the context of personal dispositions the courts have attempted to give effect to the wishes of the testator, if these can be ascertained and properly administered. Other factors have also been pointed out by a commentator from Harvard Law School, Howard Kellogg. These include

> the fact that charitable trusts may be used for experimental tests of ideas which are thought to be of a very dubious nature is one of their greatest advantages ... It is a matter of common knowledge how often the intolerance of an ignorant majority of the public has retarded the adoption of useful scientific discoveries. The courts have done well to bridle to a greater extent than has the public a like instinct to doubt the truth of generally accepted ideas.[4]

The view is noted that 'a new idea of any sort should not be taken too literally, since the passage of time is apt to temper its more radical aspects ... the courts have long been aware that the trends in public opinion are such that a doctrine frowned upon at the time of the decision may soon be looked on with public approbation'. Finally, it is observed by Kellogg that the courts have taken the view that if particular practices are against public policy, it should be left to the 'legislature to regulate the practice if such restriction is considered desirable'.[5]

These factors were derived from an examination of testamentary bequests involving unpopular religions, in particular Christian Science[6] and New Jerusalem.[7] In the latter case $40,000.00 had been bequeathed to found a University of New Jerusalem to 'teach the religious doctrine laid down in the writings' of Emanuel Swedenborg. Some of these writings justified the taking of mistresses under certain circumstances. The commentator (writing circa 1941) felt that this 'would seem quite clearly to be against public policy', and yet also felt that the decision of the US Supreme Court in upholding the bequest was correct. However, the Court had ducked the issue by holding that 'the trust was not in any of its parts against public policy', because although some of the ideas expressed by

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[3] Clifford G Hall, "Aggiornamento': Reflections Upon the Contemporary Legal Concept of Religion', *Cambrian Law Review* 28, no. 7 (1997): 17 fn 59.
[4] Howard Kellogg, 'Unpopular Charitable Purposes', *University of Toronto Law Journal* IV (1942): 367.
[5] Ibid.: 372.
[6] *Glover v Baker* (1912) 83 Atl 916. The religion is also known as the Church of Christ, Scientist.
[7] *Kramph's Estate* (1910) 77 Atl 814.

Swedenborg were 'obnoxious to certain of our common standards of morality', this part was absent from the doctrines of New Jerusalem.[8] While this case may indicate the transient nature of ideas about sexual morality, the adaptability of religious doctrine and the common sense (or timidity) of the Justices of the US Supreme Court, the earlier case involving Christian Science raised a more pertinent issue concerning public health.

In that case a bequest to propagate Christian Science by its founder Mary Baker Eddy, was questioned. It was

> alleged that the practice of Christian Science had in many cases prevented sick persons from being treated, and it was admitted that resort to a physician was preferable to the "treatment" afforded by Christian Science in many cases. It further appeared that the teachings of the church did not counsel resort to a physician until it had been shown that the patient failed to experience the healing power of Christian Science. Considering how serious such a delay could be, for example, in the case of a burst appendix, the Court had difficulty in finding that Christian Science was lawful ... as inimical to the public health.

Nevertheless, the Court held the bequest valid on the basis that 'any harm done by the practice of Christian Science was due alone to the negligent application of it'. It was also felt that it was 'a matter for the legislature to regulate if it thought fit, but not a matter which the courts should hold not charitable solely on grounds that it resulted in harm on occasion'.[9]

While Kellogg was of the view that the US Supreme Court had in each of the above cases 'tended to circumvent these difficulties (doctrines and practices clearly against public policy), instead of attempting to deal with them directly', he agreed with the outcomes in the context of private bequests. However, he makes a telling distinction between judicial support for private bequests to experimental causes and those causes supported by public funds, noting that 'if private persons are not permitted to devote their property to testing and advancing such causes merely because most people do not believe in them, many developments that may be truly worthwhile, many new ideas that may be of tremendous benefit to the community may never be popularized. *For such causes are just those*

[8] Kellogg, 'Unpopular Charitable Purposes': 369-70.

which the government is not justified in supporting or espousing'.[10] He also notes that 'the results of going too far in upholding borderline purposes as charitable are serious'. With respect to tax immunities, he argues that 'it is ... false reasoning to say that ... there is no harm in being liberal about tax exemptions, for that is in effect being liberal with the tax-rate on all other taxpayers. *Before a court thus affects the public tax-rate it should make sure that it is doing so in a worthwhile cause'*.[11] This sentiment was advocated in 1972 in a famous statement by Lord Cross of Chelsea in *Dingle v Turner*, where his Honour said

> Charities automatically enjoy fiscal privileges which with the increased burden of taxation have become more and more important and in deciding that such and such a trust is a charitable trust the court is endowing it with a substantial annual subsidy at the expense of the taxpayer. Indeed, claims of trust to rank as charities are just as often challenged by the revenue as by those who would take the fund if the trust was invalid. It is, of course, unfortunate that the recognition of any trust as a valid charitable trust should automatically attract fiscal privileges, for *the question whether a trust to further some purpose is so little likely to benefit the public that it ought to be declared invalid and the question whether it is likely to confer such great benefits on the public that it should enjoy fiscal immunity are really two quite different questions*. The logical solution would be to separate them and to say – as the Radcliffe Commission proposed – that only some charities should enjoy fiscal privileges. But, as things are, validity and fiscal immunity march hand in hand ...[12]

Therefore, with the converging dynamics of an expanding definition of religion, a multiplicity of new claimants to religious status, ever increasing financial subsidies and contemporary concerns about intolerant interpretations of religious doctrine, it seems reasonable to question whether the liberal definition of religion and the *laissez faire* public policy rationales discussed above are still acceptable today.

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[9] Ibid.: 370.
[10] Ibid.: 367. Emphasis added.
[11] Ibid.: 366. Emphasis added.
[12] *Dingle v Turner* (1972) AC 601. 624. Emphasis added.

CHAPTER V: A QUESTION OF LEGAL CONTEXT

V: 1

CHURCH OF THE NEW FAITH REVISITED: APPLYING THE APPROPRIATE CONTEXT

'a wider meaning to the word "religion" in the context of a constitutional guarantee ... than in the context of a statutory exemption'

Historically, it seems English courts (and the Charity Commission) have applied the devices of double-headed definitions and context to skirt around the difficult task of defining the single word religion. In *Segerdal* (1970), where the question of advancement of religion and public benefit was not raised (because the context was not one of charity law), the question was whether a Scientology chapel qualified for financial exemptions as a place of 'religious worship'. This two-pronged definition was applied in the 1999 Charity Commission Scientology decision (unequivocally a charity law case), with the additional requirements of advancement of religion and public benefit to qualify as a religious charity. In the New Zealand *Centrepoint* (1985) case, the charity law context was clearly ascertained, so that the question was whether the objector trust qualified as a 'religious charity' and a distinction was arguably made between an internal and external ethic in order to distinguish between a religion and a religious charity. However, the NZ High Court discarded the English definition of religion (requiring the concepts of deity and worship) in favour of the more inclusive line advanced by the Australian High Court.

APPLYING THE CORRECT LEGAL CONTEXT

The context of any dispute before a court is consequential. A court (or administrative tribunal) must first decide whether a matter involving religion (including quasi-religion,

cults and/or new religious movements) is: a matter to be decided under the common law of charities; a matter of statutory intention (free of any constitutional/bill of rights overlay); or a question of determining the scope of a constitutional guarantee or limitation, under free exercise or non-establishment provisions.

It has been argued that in *Church of the New Faith* (1983) the Australian High Court erred in failing to place the case in an appropriate context of charity law. Woodfield contends the Court 'approached the problem of the definition in the context of freedom of religion ... However, the Court *neglected to consider the public benefit roots of the law of charity*, and to justify the granting of taxation privileges to organisations falling within its definition of religion', the Court being 'influenced by the potential effect of the decision on interpretation of the Australian Constitution'.[1] A view that the High Court adopted a religious freedom approach is also advanced by Dal Pont, who observes that 'the principal reason for the breadth of the definition of "religion" (in *Church of the New Faith*) is that it promotes religious liberty, which is enshrined in the Australian Constitution and in the New Zealand Bill of Rights',[2] although he does not state specifically that s. 116 was applied inappropriately to that decision. Naylor and Sidoti note that the language of the Court in *Church of the New Faith* is 'couched in terms of fundamental guarantees', citing McLeish where he says that the emphasis in that case was 'on the rights of the individual, rather than the scope of legislative power'. [3]

The concern of the Mason ACJ & Brennan J to counteract any possible influence of the Victorian Supreme Court decision in *Church of the New Faith* on future interpretations of s. 116 is frankly admitted, but so to is the fact that the case did not arise under their constitutional interpretation jurisdiction. Hence they state; 'although this case does not arise under s. 116 of the Constitution or under any part of its fourfold guarantee of

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[1] Steve T Woodfield, 'Doing God's Work: Is Religion Always Charitable ?' *Auckland University Law Review* 8, no. 1 (1996): 41 & fn. 102.
[2] Gino E Dal Pont, *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000) 149.
[3] Andrew Naylor and Chris Sidoti, 'Leap of Faith: Religious Freedom in Australia', in *Australian Law and Legal Thinkers in the 1990's*, ed. A Tay and C Leung (University of Sydney, 1994), 428, fn 29., cite Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for S 116', *Monash University Law Review* 18, no. 2 (1992): 211.

religious freedom, it is inevitable that the judgements in the Supreme Court, so long as they stand without consideration by this Court, will influence the construction placed upon s. 116 of the Constitution by other Australian courts'.[4] Their desire for a 'universally satisfying ... definition for legal purposes'[5] is explicit, as is their characterization of the 'relevant inquiry' as being 'to ascertain what is meant by religion as an area of legal freedom or immunity,'[6] which applies to groups as well as to individuals[7] and laws which do not discriminate between popular and unpopular religions'.[8] However, even though their reasoning seems to have been influenced by s. 116 considerations, the lack of clear expression of intention by the Victorian legislature allowed considerable latitude for the Court to retrospectively determine that intention.

Contrary to the search for a universal definition, Wilson & Deane JJ admit the possibility of different meanings under different contexts. They record their agreement with Latham CJ in *Jehovah's Witnesses* when he said 'it is not for a court, upon some a priori basis, to disqualify certain beliefs as incapable of being religious in character' but also note his reference to 'the difficulty, if not impossibility, of framing an acceptable definition of religion for the purposes of s. 116 of the Constitution'. Therefore they state that 'notwithstanding that there may be grounds for attributing *a wider meaning to the word "religion" in the context of a constitutional guarantee* against the establishment of a religion *than in the context of a statutory exemption* from a pay-roll tax, we are of the view that the above comment of Latham CJ., with which we respectfully agree, is in point in answering the question whether Scientology is a religion for the purposes of the

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[4] *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120. 130.
[5] Ibid. 131.
[6] Ibid, 133.
[7] Hence they state 'variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individual's or a group's freedom to profess and exercise the religion of his, or their, choice', Ibid, 136.
[8] 'There can be no acceptable discrimination between institutions which take their character from religions which the majority of the community recognizes as religions and institutions that take their character from religions which lack that general recognition. The statutory syncretism which a Parliament adopts in enacting a provision favouring religious institutions is not to be eroded by confining unduly the denotation of the term religion and its derivatives', Ibid, 132.

present case'.[9] In other words, the Victorian legislature did not restrict the meaning of religion so the Court should not do so either.

As Wilson & Deane JJ accepted that different interpretations of the word might be applied in different contexts, perhaps certain elements of their list of optional indicia might be emphasised within different contexts. By foreshadowing a wide definition under the non-establishment component of s. 116, they leave open the possibility that other interpretations might be applied under the free exercise component or under state provisions, depending on the context. For his part, Murphy J also indicated an awareness of the various contexts in which 'tax exemptions and other privileges for religious institutions' occurred, including 'taxes imposed on the public generally', military conscription and special censorship and blasphemy laws',[10] which occur under State and Commonwealth jurisdictions.

OBSERVATIONS

It is apparent that the members of the Court were well aware of the context in which the matter was being litigated and were sensitive to various contexts in which a definition of religion might be applied. Contrary to the claim that the Court overlooked the appropriate context of charity law, which would involve an examination of the public benefit aspects inherent in that field, it is consistent with the decision (as opposed to some of the *obiter dicta*) that the Court recognized an intention of the Victorian state legislature to benefit religious institutions generally rather than just religious charities.

The privileges afforded to religious institutions under the Pay-roll Tax Act 1971 can be seen as an endeavour by the Victorian legislature to promote religious freedom generally through the support of religious institutions, rather than an effort to promote charitable activities specifically. Closed religious communities would benefit from the exemption equally with those concerned with the charitable 'advancement of religion'. If the

[9] Ibid. 173.
[10] Ibid, 149

legislature wished to limit privileges to religious charities only, it should say so, or the charity law context should be readily apparent. Hence Wilson & Deane JJ note that 'Scientology must, for *relevant* purposes, be accepted as "a religion" in Victoria. *That does not, of course, mean either that the practices of the applicant or its rules are beyond the control of the law of the State or that the applicant or its members are beyond its taxing powers*'.[11]

It seems *Church of the New Faith* was not wrongly decided on a misapplication or an inappropriate application of s. 116 constitutional protections. The case was not dealt with in terms of charity law because this was not the appropriate characterization. The Court, in its appellate jurisdiction, merely determined that the Victorian Parliament had resolved to privilege religious institutions generally rather than just religious charities and had allowed an inclusive definition of religion. Indeed, the Pay-roll Tax Act 1971 referred to 'a religious or public benevolent institution' and eschewed the term charitable or the phrase 'advancement of religion', which would have indicated an intention to confine religious beneficiaries to religious charities.

An alternative argument is that the Court recognized the charity law context but due to the lack of any evidence on the question of public benefit merely applied the common law presumption of benefit from religion. Therefore the Court was only required to consider the first step of determining whether the organisation qualified as a religion *per se* as nothing was raised to rebut the presumption in favour of religion. The absence of any direct reference to the law of charity makes it difficult to support this interpretation, but it is arguable that the result depended on the evidence before the Court and the nature of the adversarial system. The parties did not seek to establish a charity law context and the matter to be resolved before the High Court was a question agreed to by the parties. As that question did not point to any charity law context it is a moot point whether the High Court might have entertained an argument that charity law considerations were meant to apply.

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[11] Ibid. 176. Emphases added.

In addition, the Court was dismissive of indirect evidence of legislative intention, partly because of the nature of the pleadings. The Pay-roll Tax Act 1971 was passed by the same Victorian government that had passed the Psychological Practices Act 1965. That Act defined Scientology as something other than a religion and banned most aspects of it, while allowing exemptions from the Act for those it considered to be legitimate religious practitioners, either through Ministerial fiat or under the recognized list proclaimed by the Commonwealth under the Marriage Act 1961.

As the Commonwealth list at the time included only Christian and Jewish groups, and was not comprehensively amended until the Murphy proclamation of 1973, it is reasonable to suppose that it was those faiths, or those types of faiths, being mainstream religious traditions, that the Victorian government had in mind when it inserted the term 'religious institution' into the Pay-roll Tax Act. In view of its draconian action against Scientology under the Psychological Practices Act, it is hard to imagine that the Victorian government's intention at the time of enactment of the Pay-roll Tax Act was to privilege the organisation.[12] This argument, found in the decision by Brooking J in the Victorian Supreme Court that Scientology was 'so far as the State of Victoria is concerned ... a body formed for an object illegal under the criminal law',[13] was summarily dismissed by the High Court[14] because the sections outlawing Scientology had since been repealed and the question of legislative intent was not vigorously pursued by the respondent.

By the time the High Court had ruled in Church of the New Faith in 1983, those aspects of the Psychological Practices Act 1965 directed against Scientology had been repealed by the Psychological Practices (Scientology) Act 1982. The Victorian government did not seek to assert its inherent sovereignty over the definition of the word religion, allowing the universal definition proposed by Mason ACJ & Brennan J to prevail administratively by default.

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[12] Even though it might contrarily be argued that the legislature deliberately left a wide discretion to the Commonwealth under Marriage Act proclamations.
[13] *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) VR 97. 140
[14] An indication perhaps of the intrusion of s. 116 sensitivities.

V: 2

SECTION 116 OF THE AUSTRALIAN CONSTITUTION AND THE DEFINITION OF RELIGION

'no more than a limitation on Commonwealth legislative power'

The potential effect of s. 116 on federal legislation is relevant to any attempt by the Commonwealth Government to apply, through consensus, common definitions involving the word religion to the Australian states. For example, if it is sought to achieve a uniform, Australian wide administration of charities as they are presently defined and constituted, this necessarily involves a common definition of the word religion, as 'advancement of religion' is an integral part of the common law description of charity. One way for the Commonwealth to attempt to avoid any potential impact of s. 116 would be to delete 'religions' from any proposed statutory definition of charity, but the High Court could still apply an independent determination to any point of demarcation..

Unlike the position in the US, where the Bill of Rights First Amendment applies by law to all the state jurisdictions,[1] section 116 does not extend to the states of Australia and was probably intended to restrict the legislative capacity of the Commonwealth *vis-à-vis* the States. In this respect Australian constitutional law professor George Williams points out that the 'primary object of s. 116 was not to protect human rights'.[2] His colleague Hilary Charlesworth notes majority judicial comment in 1981, to the effect that the section was 'not a guarantee of fundamental human rights ... but only a fetter on legislative power of obscure origin. A narrow construction of the provision was necessary because it was not part of a bill of rights and applied to the Commonwealth government

[1] Although the First Amendment did not apply to the States until the passage of the Fourteenth Amendment, Clifford L Pannam, 'Travelling Section 116 With a U.S. Road Map', *Melbourne University Law Review* 4, no. 1 (1963): 42 fn 7.

[2] Indeed, it 'was inserted to ensure that the power to legislative about religious matters remained with the state Parliaments', George Williams, *Human Rights under the Australian Constitution* (Melbourne, Australia: Oxford University Press, 2002) 110.

alone'.[3] Reiterating a point made by Pannam in 1963,[4] the former Australian Human Rights Commissioner, Chris Sidoti, has stated that

Section 116 of the Commonwealth Constitution does not affect the legislative powers of the states. The states therefore are not prevented from establishing a religion or from imposing any religious observance or prohibiting the free exercise of any religion, except Tasmania, which is the only State to provide for religious freedom in its constitution. They may, if they see fit, establish a state church or religion, oppress other religious beliefs and require a religious test as a qualification for any public office.[5]

The limited nature of s. 116 was also referred to by High Court Justice Gaudron J in *Kruger v The Commonwealth* (1997), where her Honour said that

s. 116 does no more than effect a restriction or limitation on the legislative power of the Commonwealth ... It does not bind the States: they are completely free to enact laws imposing religious observances, prohibiting the free exercise of religion or otherwise intruding into the area which s. 116 denies to the Commonwealth. It makes no sense to speak of a constitutional right to religious freedom in a context in which the Constitution clearly postulates that the States may enact laws in derogation of that right. It follows, in my view, that s. 116 must be construed as *no more than a limitation on Commonwealth legislative power.*[6]

QUEST FOR THE TRUE MEANING OF S. 116

The jury is still out on the true intentions of the founding fathers in the drafting of s. 116. The section deals with two overriding and to some extent competing concepts, free exercise and non-establishment. This calls for debate on the interrelationship between the

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[3] Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (Sydney: UNSW Press Ltd, 2002) 28-9., citing *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 321. 652-3. (Wilson J.).

[4] 'In theory the Australian States are free to establish any religion they please and to completely deny all religious freedom. It is inconceivable, but it would not be unconstitutional'. He notes the Tasmanian exception where the Tasmanian Constitution Act 1934 s. 46(1) protects 'freedom of conscience and the free profession and practice of religion ... subject to public order and morality' and s. 46 (2) states 'no person shall be subject to any disability or be required to take an oath on account of his religion or religious beliefs and no religious test shall be imposed in respect of the appointment to or holding of any public office', Pannam, 'Travelling Section 116': 43, 56.

[5] Human Rights Commissioner, *Free to Believe ? The Right to Freedom of Religion and Belief in Australia,* Sydney: Human Rights and Equal Opportunity Commission 1997. 16.

concepts and of the meaning of the word religion. There are, broadly speaking, three competing explanations for the inclusion of s. 116 in the Australian Constitution and therefore three positions arising on the interpretation of the section.

The first, minimalist position, is that the provision is an anomaly and probably only exists because of political horse trading. This explanation leads to a pragmatic reading of both concepts involved in the provision (a narrow view of non-establishment, allowable aid but no insistence on strict equality of aid and a flexible view on free exercise). The second, separation/no aid position, is that s. 116 is a replica of the US First Amendment and should be read in the light of US Supreme Court interpretations. In particular the government should not involve itself in religious matters nor give aid to religion, while protecting the personal free exercise of religion as a basic human right. The third position, proposing non-discriminatory/neutral aid, is that the Constitution allows government support for religion, even if only incidentally, and that where given this support must be non-discriminatory or neutral between religions, in line with the non-establishment provision. (A variation of this position is that s. 116 also calls for active government support for religion generally, in order to facilitate free exercise, while this aid must be as equal as possible). The third position is sometimes referred to as 'religious equality', as state neutrality is sometimes used to refer to strict separation between church and state rather than state neutrality in support for religions.

MINIMALIST POSITION

According to a minimalist view it was deliberately intended that the Commonwealth should have no power to make laws dealing with religion. There is no head of constitutional power authorizing the Commonwealth to make laws with respect to religion and it was felt that this power should remain exclusively a state domain. The inclusion of s. 116 in a section of the Constitution dealing with the States may have reflected the fact that the section was at the heart of a demarcation dispute between the

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[6] *Kruger v The Commonwealth* (1997) 190 CLR 1. 125. Emphasis added. Nevertheless, Gaudron J. felt that constitutional guarantees should be interpreted liberally, 'even limited guarantees of the kind effected

proposed Commonwealth and the States, or else it was put there because it was miscellaneous.

An explanation for the inclusion of s. 116 is that it was placatory, being inserted on the suggestion of a delegate acting at the behest of Seventh Day Adventists, who feared that a another proposal put forward by Protestant denominations, to refer to Almighty God in the preamble (also known as the recognition clauses), might somehow lead to an established religion and/or the imposition of certain denominational observances, which might preclude Adventists from trading on Sundays. However, it was also considered at the time to be superfluous or anomalous, as the Commonwealth was not intended to have power to make such laws, notwithstanding the preamble, which itself was not intended to have any legal effect and which was placed in the Constitution as a political sop to religious interests. This view of the section seems to have found favour generally with the High Court, leading to a very narrow or minimalist interpretation of non-establishment and a minimalist tending view of free exercise.

The High Court's limitations on free exercise

Therefore, in *Krygger v Williams* (1912),[7] the Court characterized a law compelling peacetime military training (to which Krygger objected on religious grounds) as having nothing to do with religion and therefore could not be seen to be an interference with the free exercise of religion. In another leading decision on the free exercise provision, *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943),[8] the Court found that freedom of religion must in practice be limited, particularly where this freedom might impinge upon the security of the state. All members of the Court held that there was no absolute right to religious freedom under s. 116. In his much cited judgement, Latham CJ reasoned that

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by s. 116', 131.
[7] *Krygger v Williams* (1912) 15 CLR 366.
[8] *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 CLR 116.

It may be going too far to say that self-protection is "the sole end" which justifies any governmental action. But I think it must be conceded that the protection of a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective. It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the *maintenance of civil government* and prejudicial to the *continued existence of the community*. The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. This view makes it possible to reconcile religious freedom with ordered government. [9]

It is arguable from this that permissible limits to religious freedom go beyond protection of society in a time of war, but extend to conduct merely inconsistent with the maintenance of civil government. Latham CJ's solution was for a court 'to determine whether the freedom of religion has been *unduly* infringed by some particular legislative provision. This view makes it possible to accord a real measure of practical protection to religion without involving the community in anarchy'.[10] Other members of the Court expressed an even wider view of appropriate but necessary limits to religious freedom. Rich J observed that there was 'no unlimited licence to propagate or disseminate subversive doctrines', that

Society has the right to protect itself by process of law from the dangers of the moment, whatever that right may be ... Freedom of religion is not absolute. It is subject to powers and restrictions of government essential to the *preservation of the community*. Freedom of religion may not be invoked to cloak and dissemble subversive opinions or practices and operations *dangerous to the common weal*.

He felt that the individual free exercise of religion was not affected by suppression of the institution through which the individual exercised that faith, noting; 'I cannot believe that the suppression of the plaintiff corporation prohibits the free exercise of any part of the religious faith ascribed by the case stated to the individual corporators'.[11]

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[9] Ibid. 131-2. Emphases added.
[10] Ibid. 131. Emphasis added.
[11] Ibid. 149-50. Emphases added. This reasoning would mitigate strongly against an argument that depriving an institution of fiscal privileges granted to religions generally or to some only would infringe the religious freedom of the individual adherents, quite apart from any such claims made on behalf of the corporation itself.

Starke J also expressed a wide view of the limits to religious freedom, (or a narrow view of religious freedom), noting that

The liberty and freedom predicted in s. 116 of the Constitution is liberty and freedom in a community organized under the Constitution. The constitutional provision does not protect *unsocial actions* or *actions subversive of the community itself.* Consequently the liberty and freedom of religion guaranteed and protected by the Constitution is subject to limitations which it is the function and the duty of the courts of law to expound. And those limitations are such as are reasonably necessary for the *protection of the community* and *in the interests of social order* ... The critical question is whether the particular law, as in this case, is reasonably necessary for the protection of the community and in the interests of social order.[12]

Similarly, McTiernan J noted that 'the provisions of s. 116 that the Commonwealth shall not make any law for prohibiting the free exercise of any religion must obviously be limited in their legal effect by necessity and accommodated, *at least*, to the powers with which the Constitution arms the Commonwealth to defend itself against invasion'.[13]

The only note of possible dissent on this point, among the five members of the Court, came from Williams J., who in any event felt that the regulations in question did not infringe s. 116. His view was that in a time of war 'the safety of the nation is in jeopardy, so that the right to such free exercise can only survive if the enemy is defeated, laws which become necessary to preserve its existence would not be laws for prohibiting the free exercise of religion'. Hence

the activities of such bodies can be subversive of good government even in peacetime, and in war time can become a serious menace. If the Regulations only conferred such powers as were reasonably required to prevent bodies disseminating principles and doctrines prejudicial to the defence of the Commonwealth during the war, they could not be impeached under s. 116, even if they interfered incidentally with activities that some persons in the community considered to be the free exercise of religion, because in its popular sense such principles and doctrines would not be considered to be religion, but subversive activities carried on under the cloak of religion ... A state of war ... justifies legislation by the Commonwealth Parliament, in the exercise of the defence power, which makes many inroads on personal freedom, and which places many restrictions on the use

[12] Ibid. 155. Emphases added.
[13] Ibid. 157. Emphasis added.

of property of an abnormal and temporary nature which *would not be legitimate in times of peace.*[14]

Despite this view, the majority took such a narrow view of free exercise under s. 116, that it would seem to afford considerable scope for legislation limiting free exercise in times of peace,[15] or indeed in times of quasi war such as the contemporary 'war against terrorism'. Phrases such as 'for the maintenance of civil government' and 'in the interests of social order', provide a strong argument that limitations to religious freedom go well beyond those measures deemed absolutely necessary to preserve the community and it's Constitution.

The High Court's narrow view of non-establishment

With respect to the non-establishment provision, the majority of the Court (five out of seven judges) in *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) (*State Aid Case*)[16] confirmed a very narrow view of the meaning of non-establishment. Wilson J stated; 'I infer a legislative intent to adopt a narrow notion of establishment, namely, that which requires statutory recognition of a religion as a national institution'.[17] Similarly, Gibbs J noted that the non-establishment clause meant that 'the Commonwealth Parliament shall not make any law for conferring on a particular religion or religious body the position of a state (or national) religion or church'.[18] Barwick CJ took the same line, noting that 'in my opinion, as used in an instrument brought into existence at the turn of the century, establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth'.[19] On the other hand, Stephen J noted that

Even if the framers of our Constitution had seen fit to adopt verbatim the terms of the First Amendment, they would have been doing no more than writing into our Constitution what was then believed to be a prohibition against two things, the *setting up*

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[14] Ibid. 160-1. Emphasis added.
[15] On this point and on the suppression of the corporation see Charlesworth, *Writing in Rights* 29.
[16] *State Aid Case*
[17] Ibid. 653. Mason J. agreed, 612, as did Aickin J., 635
[18] Ibid. 604.
[19] Ibid. 582.

of a national church and the favouring of one church over another. They would not have been denying power to grant non-discriminatory financial aid to churches or church schools.[20]

In this extract Stephen J extends the meaning of non-establishment beyond the narrow view of setting up a national church to include a notion of non-discrimination between churches in the granting of aid, while confirming the majority view that the Commonwealth has power to provide aid to religions. (This is relevant to the discussion of the non-discriminatory/neutral aid position examined below). Finally, Murphy J. propounded a completely dissenting view, in which he noted that '"non-preferential" sponsoring of or aiding religion is still "establishing" religion',[21] so that aid of any form to any religion or to all religions would offend the principle of non-establishment. However, his default position (referred to below) was always that if his view of separation did not prevail, any aid flowing to religion should be non-discriminatory.

STRICT SEPARATION, NO AID POSITION

The dissenting view of Murphy J in the *State Aid Case* is a particularly spirited manifesto of the strict separation/no aid school of thought. On this view, s. 116, being a virtual lift of the US First Amendment, was always intended to be imbued with the same spirit of religious liberty (including freedom from religious persecution)[22] that gave rise to that amendment (with respect to the free exercise component), but that the non-establishment component calls for a strict separation of church and state, including no state aid to religion. This proposition was propounded by Thomas Jefferson in his famous 'wall of separation' letter, in light of which the First Amendment has been interpreted by the US courts. Indeed, Murphy J. refers specifically to the letter to a group of Danbury Baptists, in which Jefferson said, 'believing with you that religion is a matter which lies solely between man and his God ... I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law

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[20] Ibid. Emphasis added.
[21] Ibid. 624.
[22] Murphy J. notes that 's. 116 is a guarantee of freedom from religion as well as of religion', Ibid.

respecting an establishment of religion or prohibiting the free exercise thereof", thus building a wall of separation between church and State'.

That this 'wall of separation' was intended to forbid state aid to any religion was confirmed by Jefferson's colleague, co-author of the non-establishment clause and presidential successor James Madison, who vetoed a Congressional Bill that proposed an appropriation of funds 'for the use and support of religious societies', as this was contrary to the US Constitution's non-establishment declaration. In addition, Murphy J. noted that 'this interpretation of the establishment clause was well settled and accepted judicially in the United States prior to the framing of the Australian Constitution ... and has been consistently followed by the United States Supreme Court' to date,[23] such that this interpretation should have been well in the minds of the framers of the Australian version of the non-establishment clause.

This strict separation, no aid view, which essentially confines religious exercise to the private sphere and forbids state aid to religion, has enjoyed some academic support. For example, it has been pursued enthusiastically by academic lawyer Wojciech Sadurski, whose analysis of s. 116 and proposal for a bi-furcated definition of religion is examined below. However, the approach was rejected by a comprehensive majority of the High Court in the *State Aid Case.* It has also been strongly criticized by legal academic Reid Mortensen, who alleges that 'the concept of separation is secularist, unjust and impractical', having been 'proved to be impracticable and impossible to implement consistently even in the country which nurtured it'.[24]

NON-DISCRIMINATORY, NEUTRAL AID POSITION

A further view is that even if s. 116 arose ignominiously, it was always intended to reflect and *entrench* the contemporary Australian view that where government assistance is given to religion (and this might be encouraged to promote free exercise of religion), it

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[23] Ibid. 626-8.

should be done so in an impartial manner and as equally as possible. Indeed, this was the default view of Justice Murphy, who revealed in his former role of Australian Attorney-General, that

> There are many religious sects which may earn the disapproval of many sections of the community, but it seems to me that *under the Constitution the Australian Government has an obligation not to discriminate between sects* ... I think it is quite wrong that there should be incorporated in an Act of this Parliament some requirement that, in effect, the Government recognizes religious denominations. I think that there should be another system. *I do not think, in terms of the constitutional requirements against the establishment of religions, that such a provision should exist on the statute books. But while it is there, I believe that it should be carried out without discrimination between the various bodies which seek to avail themselves of the provision.*[25]

While the non-discrimination position may seem to be inconsistent with the view that the Commonwealth was never intended to legislate at all with respect to religion, there is no doubt that the Commonwealth soon found ways around that limitation and has granted considerable assistance to religion,[26] as well as creating legislation which recognized religious denominations, such as the Marriage Act 1961 referred to by Senator Murphy above. The question arising therefore is whether any existing Commonwealth laws aiding religious organisations *must* be non-discriminatory or neutral between religions.

Substantial backing for the non-discrimination/neutral aid proposition has come from academia. In 1963 Clifford Pannam observed that the Australian version of the US non-establishment clause seemed 'clearly to imply a neutrality between competing religions'. He noted that a Commonwealth scheme to provide financial aid to build church schools in Canberra was 'not discriminatory as it applies to all churches which might build in Canberra'. It was his view that there was no bar to providing Commonwealth aid to religion, but that it must be non-discriminatory. Therefore he stated that

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[24] Reid Grant Mortensen, 'The Secular Commonwealth: Constitutional Government, Law and Religion' (Doctorate of Philosophy, University of Queensland, 1995) 142, 78.

[25] Australian Senate, *Parliamentary Debates (Hansard),* Canberra: Commonwealth of Australia 1973. 343-4. 13 March. Emphases added.

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the establishment clause should not be construed to mean that a government is powerless to extend non-discriminatory assistance which is intended to preserve religious freedom. Such a construction is internally inconsistent with the other clauses of 116. Beyond this however it is suggested that *the establishment clause only prevents governmental discrimination between the various religions.* If the Commonwealth were to decide that all church controlled hospitals, schools and charitable institutions should be financially assisted, section 116 would be no bar. It merely directs that such aid is to be non-discriminatory.[27]

However, writing in 1981, Michael Hogan noted that the Commonwealth 'may fund and give support to various churches. The traditional practice of governments in Australian has been to grant such funding or support in ways which do not favour one Church against others, but s. 116 does nothing to enforce such "non-preferential sponsoring"'.[28] While an Australian-wide pattern of 'adopting a policy ... of equal treatment for the major Christian churches' was established by NSW Governor Bourke in 1833, it was pointed out by Hogan that 'long established traditions or conventions do no have the force of constitutional provisions'. This was notwithstanding his view that 'when such monies are made available to the churches they should be provided according to some formula which is seen as non-discriminatory between one church and the others'.[29]

As noted above, the High Court has been clear that the non-establishment component of s. 116 should be read very narrowly. Hence Sadurski observed in 1990, with respect to the *State Aid* case, that 'a currently binding construction ... is that "law for establishing any religion" must be understood in a very narrow way, as the law which confers upon a particular religion a status of the official or national religion, and furthermore that it must be the express and direct purpose of such a law in order to place it within the meaning of s. 116'. Therefore, 'any other laws, including those which give financial assistance to religious bodies, pass the muster of the Non-Establishment clause'.[30]

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[27] Pannam, 'Travelling Section 116': 81, 83, 85. Emphasis added.
[28] This was despite the strongly dissenting view of Murphy J. in the *State Aid* case, Michael Hogan, 'Separation of church and State: Section 116 of the Australian Constitution', *Australian Quarterly* 53, no. 2 Winter (1981): 223, fn 20.
[29] Ibid.: 218.
[30] Wojciech Sadurski, 'Neutrality of Law Towards Religion', *Sydney Law Review* 12 (1990): 448.

It would seem from the judgements in the *State Aid* case that the majority was of a view that such aid could be discriminatory, in favour of particular religions over others, so long as it did not amount to establishment. This view is derived from the case because the majority, in providing non-establishment with a very narrow meaning, *ipso facto* rejected a view that it might stand for something broader. However, the only explicit statement confirming this view seems to be where Barwick CJ stated that 'what the Constitution prohibits is the making of a law for establishing a religion. This, it seems to me, does not involve a prohibition of any law which may assist the practice of a religion and, in particular, of the Christian religion.[31]

On the other hand, along with the quotation from the judgement of Stephen J above, which clearly indicates his support for a non-discrimination/neutral aid position, Mason J also expressed the view that 'apart from the second and fourth clauses, the form of religious inequality which has been forbidden by s. 116 is that form of religious inequality which is expressed by the critical words "any law for establishing any religion"'.[32] MacFarlane and Fisher claim that the view of Mason J. provides support for the proposition that 'not only does s. 116 preserve religious freedom, there has also been induced from it the related principle of religious equality'. Indeed, they claim that 'the High Court *held* that "establishment" in s. 116 means ... one church cannot be favoured over another or others',[33] although in view of the majority position it is hard to see how the non-discriminatory position can be elevated to the status of a finding of the Court. The point, however, is that despite the narrow view of the majority in *State Aid*, commentators persist in arguing for a non-discriminatory/neutral aid view of s. 11; so much so that some see it as a *fait accompli*.

However, other commentators who argue for a non-discriminatory interpretation acknowledge the contrary view of majority judicial opinion. Stephen McLeish therefore argues that the current legalistic approach to s. 116, which he concedes is 'concerned

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[31] *State Aid Case* 584.
[32] Ibid. 617.

primarily with legislative power rather than civil rights', should be reoriented in favour of an approach based on an 'identification of the conception underlying the section'. This conception is, he argues, 'the preservation of neutrality in the federal government's relations with religion so that full membership of a pluralistic community is not dependent on religious positions and divisions are not created along religious lines'.[34]

Reid Mortensen also proposes a 'religious equality interpretation' of s. 116, arguing that the present legalistic, restrictive approach is 'seriously misconceived and anomalous', that it 'empties section 116 of any meaningful content'.[35] He acknowledges that the approach in *State Aid* was logically extended in the *Lebanese Moslem Association Case*,[36] such that 'provided government has the necessary secular purpose, it can also indirectly and effectively impose any religious observance or prohibit the free exercise of any religion'.[37] Nevertheless, he argues that 'the current approach the High Court is taking to constitutional liberties and limitations on governmental power also makes it unsafe to assume that the Court is going to maintain the formalism applied to section 116 in *State Aid* and the *Lebanese Moslem Association Case*.'[38]

Therefore, while it may seem settled that the non-establishment clause is no bar to discriminatory aid to particular religions at the Commonwealth level, so long as it does not amount in precise terms to the actual establishment of a national church, it remains possible that a future Court, or even the current Court, might reconsider or rework the meaning of the non-establishment clause so that it requires non-discriminatory assistance. It is even conceivable that the Court might read a notion of non-discrimination between denominations into the free exercise component of s. 116. In the 1999 Scientology application the Charity Commission for England and Wales considered a hypothetical

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[33] Peter MacFarlane and Simon Fisher, *Churches, Clergy and the Law* (Sydney: The Federation Press, 1996) 31. Emphasis added. In support of this view of s. 116 they also cite *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525. 544. Per McHugh JA.
[34] Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for S 116', *Monash University Law Review* 18, no. 2 (1992): 208.
[35] Mortensen, 'The Secular Commonwealth' 199.
[36] *Minister for Immigration & Ethnic Affairs v Lebanese Moslem Association* (1987) 71 ALR 578.
[37] Mortensen, 'The Secular Commonwealth' 197.
[38] Ibid. 202.

argument based upon a free exercise argument in relation to the possible impact of the Human Rights Act UK 1998 and the application of the European Convention on Human Rights and Fundamental Freedoms 1950. The argument considered there, and rejected, was that depriving an *organisation* of charitable registration might impinge on the right of an *individual* to exercise religious freedom through worship, teaching, practice and/or observance.[39] It is quite feasible that a similar argument could be mounted with respect to the free exercise component of s. 116.

Even if a narrow view is currently taken of the scope of s. 116, the possibility remains that extant or potential limitations upon Commonwealth laws, imposed by the section, could jeopardize any future Commonwealth/State agreement on charities or on third sector entitlements in general which included religious organisations. In particular, there remains a possibility that s. 116 (either through its non-establishment component or even possibly its free exercise component) may be deemed to require non-discriminatory treatment between religions where aid is extended, and howsoever religion may be defined by a future court.

A FLEXIBLE DEFINITION (OR DEFINITIONS) OF RELIGION UNDER S. 116

Despite the apparent acceptance of a succinct *ratio* from *Church of the New Faith*, and the influence that this has had, there is little guarantee that the Mason ACJ & Brennan J two-pronged definition of religion will remain undisturbed in any event. As discussed in Ch II: 8, there is a very plausible argument that the judgement of Wilson & Deane JJ, combined with that of Murphy J, represent the real ratio of *Church of the New Faith*. The Mason ACJ & Brennan J definition has been questioned by academic commentators on the basis that it is too narrow, culturally biased or discriminatory as against non-religious belief systems. These criticisms may well be avoided by adopting a more flexible

[39] Note that in their discussion of free exercise (or freedom of religion) Mason ACJ & Brennan J. refer to 'the determination of an individual's or a group's freedom to profess and exercise the religion or his, or

approach to the definition of religion in its situational contexts, based on a synthesis of the Wilson & Deane JJ criteria and Murphy J criterion.

It should be recalled that in *Jehovah's Witnesses*, Latham CJ adopted an extremely broad or inclusive definition of religion *per se*, accepting in effect a lowest common denominator criteria before engaging in the process of endorsing public policy limitations (found in the Commonwealth regulations in question) based on public security considerations. Religions included 'unpopular minorities' and those which 'have involved practices which have been regarded by large numbers of people as essentially evil and wicked'.[40] With respect to free exercise it was unpopular minorities that warranted especial protection from the majority of people. On the other hand, Latham CJ had no problem accepting appropriate laws aimed at curbing such evil and wicked practices.

In addition, despite the effort of the High Court in *Church of the New Faith* to achieve a commonly accepted definition of religion, at least one legal academic has suggested an alternative definition or possibly different definitions of the word religion as it appears in s. 116. This approach may have some influence on future approaches of the High Court, particularly if it is acknowledged that *Church of the New Faith* in fact provides extremely flexible criteria to apply to the definition of religion. Sadurski has proposed a bi-furcated definition of religion in the context of s. 116; a broad definition under the free exercise component and a narrow definition under the non-establishment component.[41] On non-establishment, his view is that religion is essentially a private matter for every individual and that the aim of a non-establishment clause is to ensure that 'the government regulated sphere of public life is uncontaminated by religious (or anti-religious) considerations', a view deriving much from the US notion of a strict separation between religion and state. Therefore a definition of religion that does not include non-religious belief systems

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their choice', evidencing a view that the concept of free exercise is not necessarily restricted to the individual, *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120. 136.

[40] *Witnesses Case* 124-5.

[41] He notes, 'there is nothing unusual about postulating a "bi-furcated" definition of religion, contrary to the numerous critics of such an approach', Wojciech Sadurski, 'Last Among Equals: Minorities and Australian Judge-Made Law', *ALJ* 63 (1989): 842.

would be appropriate for application under the non-establishment provision. On the other hand, Sadurski argues for a broad interpretation of religion under the free exercise component so that it would include such apparently non-religious belief systems, on the basis that

> the distinction between a religion (or what is usually considered religion) and other moral beliefs is of no importance, because the wrong committed through illegal State coercion consists in restricting one's moral choice. While religious choices constitute an important sub-class of moral choices, the boundaries between them and non-religious moral choices are irrelevant because all these moral choices have to be respected by the government as long as they are harmless.[42]

A narrower, possibly supernatural test might be applied for non-establishment (although Sadurski does not spell out what the narrower test would be) whereas secular humanism and other philosophies or belief systems would be given protection under the free exercise provision. On this analysis, it seems that under the non-establishment provision the Commonwealth would be precluded from giving aid to religious organisations as currently defined or recognized by administrators such as the Australian Taxation Office, but would be free to give aid to apparently non-religious secular philosophical societies, which would nevertheless be defined as religions for free exercise protections.

Sadurski admits to the possibility that 'some small, unknown or unorthodox religious groups' would benefit under this regime 'by mistake', but that this 'obviously cannot have any significant consequences'. The 'mistake' would be that they would not be recognized as religions, whereas the mainstream traditions would be easily identified. In order to implement his regime, Sadurski notes that 'the public decision-makers must know clearly and precisely what is to count as "religion", and how to demarcate the non-religious concerns in order to screen off the religion-conscious considerations from their considerations. The main evil that the Non-Establishment Principle attacks is a non-neutral merger of secular regulatory concerns and the religious motives'.[43]

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[42] Ibid.: 841.
[43] Ibid.: 840.

However, this seems a tall order in view of the obvious difficulties in defining religion 'clearly and precisely', and when one considers all the areas in which it seems reasonable for the Commonwealth government to render assistance to enable an individual to freely exercise his or her religion. Examples of these were given by Pannam, who noted that Commonwealth assistance was provided to facilitate chaplain visits to prisons or to provide spiritual guidance to troops stationed away from their regular places of worship, in order to preserve religious freedom. Pannam concluded; 'when it is realized that there are situations in which a government needs to concern itself with religion the fallacy of the no-aid rule becomes apparent'.[44]

Another complication is that under the free exercise component Sadurski envisions that religious groups, broadly defined, will be able to claim exemptions from legal burdens. He notes with respect to free exercise that 'the danger of erring on the side of broadness is rather trivial: it is that some groups will successfully make unjustifiable claims for exemptions from legal burdens'. The burdens he has in mind here are not made explicit, but they probably include cases (which he later lists) in which a group might claim an exemption from drug laws or school attendance or saluting the flag or Sunday trading laws, on the basis of religious belief. On the other hand, it seems clear that such burdens would not include exemption from taxation laws under legislation affected by s. 116, as these exemptions would be specifically precluded under his no aid interpretation of non-establishment.

OBSERVATIONS

Despite the High Court's willingness to date to allow the Commonwealth reasonable legislative scope under s. 116, the sovereignty of the Court over Parliament was starkly enunciated by Latham CJ in *Jehovah's Witnesses*, when he said; 'that guarantee is intended to limit the sphere of action of the legislature. The interpretation and application of the guarantee cannot, under our Constitution, be left to Parliament'.[45]

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[44] Pannam, 'Travelling Section 116': 84-5.
[45] *Witnesses Case* 132.

Therefore, as Mortensen has noted, 'it is premature to dismiss either the recognition or religion clauses as a "dead letter" since, if only because they have constitutional status, they remain the central controlling institutions of governmental relations with religion in Australia'.[46] While Mortensen might overstate the importance of s. 116 relative to the states, it is nevertheless this unknown potential for new or variant interpretations of s. 116, and the word religion contained therein, that renders problematic any involvement of the Australian states with Commonwealth legislation involving religious organisations.

At present the Australian states (with the exception of Tasmania) remain free to exercise sovereign legislative power over the area of religion howsoever they should define it, constrained only by political considerations. There remains unfettered potential for state governments to exercise social control over religion to the extent dictated by contemporary issues. Therefore, it might not seem feasible, at present, to propose that this power should be compromised by the States signing on to any Commonwealth scheme to regulate charity law or third sector entitlements involving religious groups, notwithstanding the practical benefits a uniform scheme might bring. On the other hand, the implementation of an adjudicative scheme at the Commonwealth level, as proposed in this thesis, might well facilitate the later entry of the states on a co-operative basis, provided a Commonwealth scheme does not run foul of activist judicial intervention.

Acceptable social control of religion

In addition, a closer examination of the views expressed by Mortensen, in his 1995 thesis, and also of Evans, in the work based on her thesis published in 2001, reveals significant support for the notion of social control of religion, even from those who superficially advance strong support for the notion of religious liberty. Mortensen relies mainly on a philosophy of political justice, advanced by John Rawls, to 'provide the theoretical basis of the idea of a secular commonwealth', which in contrast to 'some of the older liberal and religious theories of secular government ... does not depend on a religious

[46] Mortensen, 'The Secular Commonwealth' 183.

conception of the good'.[47] A model of secular government which enshrines the principle of fair equality of opportunity, in social and economic relations between citizens,[48] as applied to the religious sphere, seems particularly attractive to Mortensen in the context of increasing religious pluralism in 'Australia and other common law countries'.[49] He accepts as 'a basic premise' of his thesis that 'religion and religious pluralism are permanent features of the cultural landscape', thus dismissing secularist theory on the diminishing societal importance of religion.[50]

To the contrary, Mortensen elevates the principle of religious freedom to a position of priority over other 'government programmes'. The basis for this priority is the 'non-negotiable' nature of religion and its observation to the believer, heightened by a belief that the obligation has a supernatural origin. In addition, Mortensen argues that civil and political immunity is necessary to experiment with religion, which is inherent to its free exercise. The existence of religious liberty is a pre-requisite to 'the origin and development of any religious conception'.[51] Mortensen does not overlook the role of non-religionists. He argues that in a country like Australia, where people hold different and often conflicting religious and non-religious conceptions, it is 'important to base principles of government on a theory which is neither religious nor secularist. The challenge is therefore to elaborate a secular theory of secular government, which simultaneously holds the support of the religionist and the secularist'.[52]

Equal religious liberty requires government to act agnostically with respect to religion, which includes parallel beliefs, so that government is not concerned whether a religion is 'culturally and socially dominant, marginal or even deviant'.[53] Indeed, 'in conditions of religious pluralism, government's sponsorship of one religious group's programme constitutes less than equal treatment of others and is therefore, unjust. Even promoting

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[47] Ibid, 5
[48] Ibid, 66
[49] Ibid, 1
[50] Ibid, 31
[51] Ibid, 57-8
[52] Ibid, 35
[53] Ibid, 56

religion generally fails to treat the secularist citizen as an equal, and promoting secularism creates the opposite imbalance'.[54] It seems that Mortensen is inclined to the wider definition of religion adopted by the US Supreme Court, which, influenced by the 'ultimate concern' idea of theologian Paul Tilloch, includes 'a sincere belief which ... fills the same place as a belief in God fills in the life of an orthodox religionist', and includes ethical societies and may include secular humanists'.[55]

Mortensen argues that the principle of equality 'allows the provision of financial assistance to religious schools' and is, 'in contrast to the concept of separation, a more practicable principle in that it allows government to take advantage of a religious group where its secular objectives and the group's religious objectives coincide, and can be pursued cooperatively'.[56] Indeed, he contends that 'if rights to religious liberty are truly to be equal, then governmental benefits and privileges generally available to non-religious groups should not be denied to a group just because it is religious',[57] which is the objective of strict separation of church and state.

On one hand Mortensen elevates 'equal' religious liberty to a government priority, even to the extent that 'there are some preferences to religious groups under existing Commonwealth legislation and administration that might be invalid under an effective and meaningful establishment clause'.[58] On the other hand he accepts there are some legitimate potential limitations on the application of equal religious freedom for the individual and for the group. As liberty in general can be limited in the interests of some other competing basic liberty, religious liberty can be limited for 'the effective enforcement of security rights' which are 'the basis of an organized political society which makes the exercise of other liberties possible.' Therefore 'the principle of equal religious liberty can be limited in the interests of maintaining public peace and order ... it

[54] Ibid, 59
[55] Ibid, 16
[56] Ibid, 242-3
[57] Ibid, 61
[58] Ibid, 243. The opposite corollary to this might be that all other 'religious' groups will become entitled to sudden largesse.

could be possible to deny equal liberty to an intolerant religious group which, contrary to its own practice, could be compelled (even by physical coercion) to respect others' liberties'.[59] On the question of state aid, Mortensen argues that religious groups can be denied privileges granted generally to religious groups (which in his view should be offered also to presumably equivalent secular groups, although he does not make any explicit distinction between non-profit and for-profit groups). These privileges can be denied to groups which fail to comply with secular rules for non-discrimination, say, against gays or women or on racial grounds. These types of examples represent the principle of fair equality of opportunity, which is a principle competing with the principle of equal religious liberty. On this view the group so denied is still free to exercise religious freedom – just without government subsidy. Hence Mortensen says

> One can envisage that government might be prepared to provide financial assistance to religious schools but ... on the condition that the schools comply with equal opportunity policies in employing teachers in the positions and offices that government supports. If, say, the school objects on religious grounds to the employment of unmarried mothers as teachers, it can either accept the assistance and voluntarily compromise the practice of its religion, or reject the assistance. In either case, the principle of equal religious liberty is satisfied.[60]

This can be rationalized on the basis that 'the promotion of fair equality of opportunity by imposing conditions on financial assistance rather than by discrimination laws probably minimizes the burden on religious practice, and is therefore a more proportionate means of realizing the minimum conditions of fair equality of opportunity'.[61] Where there are competing basic liberties, Rawls is cited suggesting 'adjustments ... at the constitutional or parliamentary stage by considering the relative importance of each basic liberty involved in the collision', which to some extent 'depends on how necessary it is to the development of a sense of justice or a conception of the good'. Mortensen admits that 'this criterion is vague'.[62] This problematic balancing of rights is to be determined by the

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[59] Ibid, 64
[60] Ibid, 61-2
[61] Ibid, 408
[62] Ibid, 63-4

unelected courts rather than an elected legislature. Mortensen is suspicious of the utilitarian concept of majority rule through representative legislatures, stating 'there are reasons to suggest that the judicature is better positioned than the other branches of government to enforce religion clauses. It does not, like a parliament or executive government, represent the electoral majority that is the most likely source of, say, unequal treatment of a religious minority'.[63] Therefore the principle of equal religious liberty should be constitutionally entrenched, it being 'best to include the principle of equal religious liberty in the political constitution, where it can effectively limit parliamentary power'.[64]

In *Freedom of Religion Under the European Convention on Human Rights*, which is based on her 1999 doctoral thesis, Carolyn Evans draws upon Joseph Raz's liberal notion of personal autonomy, whereby people should have a great deal of control over their own destiny, and Ronald Dworkin's 'notion of "equal concern and respect"', which she believes 'gives rise to a strong claim for religious freedom'. She says

> Inherent in the idea of equal concern and respect is the notion that individuals are in the best position to determine their own concept of the good life and should, within certain constraints, be free to pursue their ideal without government interference. In so far as freedom of religion is a right in Dworkian terms it "trumps" all but the most serious social reasons for restricting it. Mere convenience, or the dislike of the majority for a certain religious practice, or other utilitarian considerations are insufficient to justify interfering in a person's right to freedom of religion or conscience, though conflicts with the rights of others or with strong social/utilitarian reasons would be sufficient in some circumstances. The State that interferes with someone's religious freedom without strong reason does not show appropriate concern and respect for that person'.[65]

Evans also draws upon Rawls and others who support the concept of the 'importance of religion or belief to the protection of rational choice and autonomy', although '*none of these authors would claim that freedom of religion is an absolute value*'. While Evans

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[63] Ibid, 63
[64] Ibid, 62
[65] Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford, Oxford University Press, 2001) 29-30

admits to complications in practice of the autonomy argument, 'it at the very least reminds those in the State who formulate laws that interfere with freedom of religion that, however bizarre, inappropriate, or irrational they may consider a religion or belief, that religion or belief may be part of the deepest self definition of its adherents and their fullest expression of the commitment to living in compliance with their conception of the good'.[66]

However, despite this emphasis on religious freedom, which is elevated to some priority, Evans (similarly to Mortensen) allows for a number of circumstances in which religious liberty can be restricted, where there is 'serious justification'. One clear example where 'the State should use autonomy arguments to defeat claims of religious freedom' is 'the conflict between one person's religious duty to punish apostasy with death and the right to life of the apostate'.[67] In addition, Evans' provides a number of other circumstances in which 'the free practice of religion or belief should sometimes be limited'. In her view 'good reasons ... often do exist' to 'justify interference with religion or belief'. For example, she notes

> Religions or groups of believers may be involved in stirring up hatred against people who do not share their beliefs and they may actively oppose the notion of religious freedom. Religions have also historically tended to discriminate against women and some religions have been involved in promoting notions of racial inequality or inciting persecution against homosexuals.[68]

The views of strong proponents of religious liberty and of the non-discriminatory aid approach augur well for the establishment of an adjudicative tribunal proposed in this thesis and the maintenance of its ongoing integrity despite future s.116 judicial interpretations. Even those in the philosophical vanguard of the movement to entrench religious liberty as a priority right accept the possibility of disqualifying some religious groups from state aid, provided there is 'strong' public policy justification for doing so.

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[66] Ibid, 32. Emphasis added.
[67] Ibid, 32
[68] Ibid, 206

CHAPTER VI: SOCIAL CONTROL OF RELIGION: THE CHARITY COMMISSION FOR ENGLAND AND WALES

VI: 1

AN ENTICING MODEL FOR SOCIAL CONTROL ?

'through the imposition of sanctions deviant behaviour is counteracted and social stability maintained'

The Charity Commission for England and Wales is a non-Ministerial Department[1] headed by a Chief Charity Commissioner and four other Commissioners,[2] who are charged with the responsibility of regulating charities registered by them in England and Wales.[3] Under the Charities Act 1993, it is the Commissioners who decide the threshold question of whether an institution is a legal charity eligible for admission to the Register, with the consequent enjoyment of a range of fiscal privileges that registered charitable status provides. A former Chief Charity Commissioner for England and Wales, Mr. Richard Fries, described the Commissioners' 'wide range of powers' under the Act as falling under four heads: registration, monitoring, guidance, and investigation.[4] Attention will focus herein on registration and investigation, which provide the teeth by which the Commission is able to exert considerable influence on the charitable sector, although the influence of the monitoring and guidance 'regimes' should not be underestimated.

By 'charities' we mean those institutions in England and Wales representing that part of the third sector 'devoted to public purposes ... voluntary bodies whose purpose is predominantly to benefit the community, not private individuals'. According to Fries,

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[1] Reporting annually to the Secretary of State for the Home Office but administered on a day to day basis by the Commissioners.
[2] In 2002.
[3] Charities in Scotland and Northern Ireland fall under other jurisdiction.

charities have three 'defining' characteristics: public benefit, independent governance and non-profit distribution. He says they arguably possess a fourth characteristic, their non-political nature.[5] The Commissioners' Annual Report for 2001-2002 notes that 'there are 185,948 charities on the Register (of which 161,200 are 'main' charities; the remainder being subsidiaries or branches of other charities).[6] However, due to exempt, excepted and untraced charities, it has been estimated that there may well be over 250,000 main charities. In 1992 the Commission released figures which showed that religions accounted for 7.1% of registered charities.[7]

Laying claim to a long Westminster tradition of public service impartiality, former Chief Commissioner Fries stated: 'we are government servants. We are independent both of the political process and the voluntary sector'. Mitchell reports that the Commissioners themselves see their role as closer to the courts than to the executive[8] and it does seem true that the Commissioners are relatively independent of the voluntary sector. The Commissioners (of whom there are at least three with a maximum number of five)[9] are statutorily independent of the registered charitable sector for which they are the regulators. They are appointed by the Secretary of State for the Home Office[10] (although 'technically' the Commission is a non-Ministerial Department)[11] and answerable to members of Parliament through the tabling of an annual report[12] and the specific oversight of the Committee of Public Accounts (CPA).

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[4] Richard Fries, 'Charity and the Charity Commission', *International Journal of Not-for-Profit Law* 2, no. 1 (1999): 4 of 8.
[5] Ibid.: 2 of 8.
[6] Charity Commission, *Giving Confidence in Charities: Annual Report 2001-2002 (Part 1)*, London: Charity Commission for England and Wales 2002. 2.
[7] Peter Luxton, *The Law of Charities* (London: Oxford University Press, 2001) 13-14. However, due to statutory exemptions and regulatory exceptions, discussed below, a great many religious organisations avoid the full regime of the Charity Commission, in particular registration, and would not be counted in the percentages of registered charities
[8] Charles Mitchell, 'Reviewing the Register', in *Foundations of Charity*, ed. Charles Mitchell & Susan Moody (Oxford: Hart Publishing, 2000), 178.
[9] Charities Act 1993 (c. 10) 1993, s. 1 (1) (5). The two additional appointments must be approved by the Treasury
[10] Ibid. s. 1 (3)
[11] Richard Fries, 'Charity and the Charity Commission', *International Journal of Not-for-Profit Law* 2, no. 1 (1999): 1 of 8.
[12] S. 1 (5) states that an annual report must be made to the Secretary of State and he 'shall lay a copy of the report before each House of Parliament', Charities Act 1993 (c. 10)

The Commissioners are not statutorily answerable to the voluntary sector in that there is no official committee drawn from the sector and the sector has no statutory right of nomination. Nevertheless, representatives of this important interest group would undoubtedly have influence. It seems unlikely that any Government would appoint Commissioners objectionable to mainstream charities and suitably qualified persons might well have professional, financial or denominational ties with particular charities. There is a statutory requirement that at least two of the Commissioners have seven years standing as lawyers in the jurisdiction.[13] Common sense would dictate that these appointments would be likely to have relevant experience in charity law or related fields, and experience in the charitable sector seems a relevant criterion for Commissioners, judging from recent appointments.[14] The present Chief Commissioner, John Stoker, is a senior career public servant who was Director General of the National Lottery before his appointment to the Commission in 1999.[15]

While it seems accurate to assert that the Commissioners are independent of the voluntary sector, the claim that they are independent of the political process is not sustainable. While an individual Commissioner may feel that he or she has sufficient public standing and rope to feel independent, in the end this rope is a leash to the executive branch of Government. When the Charity Commission was constituted in its 'present form'[16] under the Charitable Trusts Act 1853,[17] paid Commissioners were appointed by royal warrant to hold office during 'good behaviour' at 'the pleasure of Her Majesty'.[18] This in fact meant that they were appointed for life, like judges.[19] Indeed, the

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[13] Ibid. Schedule 1. s. 1 (2)

[14] For example, the Commissioners have recently included a lawyer who previously 'acted for the Attorney-General in charity advice and litigation', an accountant with 'considerable experience of the charitable sector' and another with '25 years of experience in the voluntary sector in management and as a trustee', along with the Legal Commissioner and the Chief Charity Commissioner, Charity Commission, *Giving Confidence in Charities: Annual Report 2001-2002 (Part 1),* London: Charity Commission for England and Wales 2002. 39.

[15] Who's Who, *Who's Who 2003: An Annual Biographical Dictionary* (London: A & C Black, 2003) 2073.

[16] Mitchell, 'Reviewing the Register', 176.

[17] The Charitable Trusts Act (16 & 17 Vict. c. 137) (England and Wales) 1853

[18] Thomas Bourchier-Chilcott, *The Law Relating to the Administration of Charities under the Charitable Trusts Acts 1853-1894 and Local Government Act 1894* (London`: Stevens & Haynes, 1898) 8. s. I. Two of

issue of independence was raised in parliamentary debate on the 1853 Bill, which was referred to a Select Committee of the House of Lords, where the Bill had been introduced. In the House of Lords it was revealed that the Government had

> proposed to make the Board a branch of the Government, including in it the Lord President of the Council, and other Members of the Cabinet – one or more of the latter to be Members of the House of Commons – and three Members of the Privy Council, who should appoint two legal gentlemen of high attainments, upon whom of course the more laborious part of the business should devolve, to be inspectors.[20]

However, the Members of the 1853 Select Committee agreed that 'the question of general superintendence and administration of charities should be altogether separated from any political question, and from the interests of any party'. It was therefore recommended that 'there should be persons named by the Crown who should hold their office during good behaviour, and to whom should be intrusted that general administration'.[21] This proposition was accepted by the Government and became part of the 1853 Act. Today, however, the Commissioners are paid 'such salary and allowances as the Secretary of State may with the approval of the Treasury determine', and are employed at pleasure 'in the civil service of the Crown'.[22] They are therefore answerable to the Government of the day and may be dismissed in the same manner as other public servants.[23]

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the Commissioners were required to be 'barristers-at-law of not less than twelve years' standing', with one of them holding the office of Chief Commissioner, 8. s. II

[19] Mitchell, 'Reviewing the Register', 177.

[20] UK House of Lords, *Hansard's Parliamentary Debates,* London: UK Parliament (Cornelius Buck) 1853. 1017. (The Lord Chancellor). The Government felt that the power 'should be in the hands of persons whose conduct would be before the public, and whose motives were not likely to be called in question. It was with that view that, in conferring these high privileges, the Government thought the Government itself should be responsible'. This was in contradiction to the proposal in the 1851 Bill (which was not enacted) that there should be 'two paid Commissions and two unpaid'.

[21] UK House of Commons, *Hansard's Parliamentary Debates,* London: UK Parliament (Cornelius Buck) 1853. 1154. (Lord John Russell).

[22] Charities Act 1993 (c. 10) Schedule 1. ss. 1 (3) (4)

[23] 'Charity Commissioner's are usually appointed on fixed term contracts for three years. They are subject to similar terms and conditions of all employees, so they can in theory be dismissed for inefficiency, conduct (sic), ill-health etc. They are also on employment contracts, very similar to each other, but not exactly the same', Gavin Bell, Email to Stephen Mutch, 15 July 2003. Mr. Bell is the Public Relations Co-ordinator for the Charity Commission.

Despite its emphasis on independent governance for charity trustees, it is argued that the role of the Charity Commission[24] (which is a relatively large bureaucracy)[25] is one of social control, with extraordinary potential to mould a significant proportion of the third sector,[26] including religions, in a manner acceptable to the government. Social control is

> achieved through a combination of compliance, coercion and commitment to social values. For example, Parsons (1951) defined it as the process by which, through the imposition of sanctions, deviant behaviour is counteracted and social stability maintained[27] ... Social control was also important for Foucault, who studied how individuals were disciplined and regulated by means of surveillance, the power of expert knowledge and other regulatory structures.[28]

It is noted that the Charity Commission model is one that aims to achieve multiple political and policy objectives along with an overall brief of social control. The Government exercises obvious power over the Commissioners through their appointment, contracts of employment and potential removal. Politicians, particularly Government members with controlling numbers, can influence the commissioners by reviewing their activities and making recommendations for action. This occurs as a normal part of the general functions of parliament and through the work of parliamentary committees, such as the Committee of Public Accounts.[29] In addition, the Commission is subject to executive oversight through bodies such as the National Audit Office and the requirement to present an annual report.

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[24] Which began in its 'present form' under the Charitable Trusts Act 1853, with its powers being re-defined and reinforced under the Charities Acts of 1960 & 1993, Charles Mitchell, 'Reviewing the Register', in *Foundations of Charity*, ed. Charles Mitchell & Susan Moody (Oxford: Hart Publishing, 2000), 176..

[25] 'In 2000/01 it had a net budget of over £21 million. It employed around 540 staff in London, Taunton and Liverpool', Charity Commission, *Report of the Charity Commissioners for England and Wales for the Year Ending 31 March 2001,* London: 2001. 2.

[26] Also known as the voluntary sector in Britain, characterized by 'an organised form of independent group activity, arising out of informal, unstructured family and neighbourhood activity – good neighbourliness, good citizenship', with charities forming a distinctive part of the sector 'defined by their public purpose' as bodies serving the community, not just private or personal ends', Fries, 'Charity and the Charity Commission': 1&2 of 8.

[27] 'Deviant motivational factors are always operating, and become established so that they are not eliminated from the motivational systems of the relevant actors. In that case the mechanisms of social control account not for their elimination but for the elimination of their consequences, and for preventing their spread to others beyond certain limits', Talcott Parsons, *The Social System* (NY: The Free Press, 1951) 298.

[28] Nicholas Abercrombie, Stephen Hill, and Bryan S. Turner, *The Penguin Dictionary of Sociology*, 4th ed. (London: Penguin Books, 2000) 321.

The Commission also provides an arrangement whereby politicians can seek refuge behind the perceived independence of the commissioners while at the same time exerting some indirect influence over the direction of their decisions. For example, political debate surrounding controversial applications might be expected to have an influence on the registration decisions of the Commissioners.[30] In addition, politicians can be seen to be 'doing the right thing' by making representations on behalf of constituent applicant groups, while the commissioners can make the actual decision for or against inclusion on more objectively relevant grounds. In doing so, the Commissioners are themselves shielded by their judicial-style status.

In addition to these direct and indirect political considerations, the Commissioners can be expected to pursue an overall brief of social control through the regulation of charities. This is manifested as a statutory requirement[31] and is also evident in the succinctly stated but all-encompassing corporate aim of giving 'the public confidence in the integrity of charities' and the short list of three main Commission objectives, which essentially seek to promote best practice and to 'identify and deal with abuse and poor practices.[32]

While there might be criticisms and suggested modifications, it is observed that the present and potential functions of the Charity Commission provide an interesting and possibly enticing model of social control in a modern, complex, multi-cultural society. The role of the Commission is particularly powerful because the Commissioners, in overseeing admission to and removal from the Register, are able to exercise considerable financial clout (albeit indirectly) over groups wishing to achieve and maintain charitable status – due to the financial privileges this status entails.

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[29] Which is customarily chaired by a member of the Opposition

[30] In their 1999 decision to refuse registration to the Church of Scientology, the Commissioners took note of media controversy surrounding the organisation relating to allegations of harm, so they might also note, overtly or informally, political debate in Hansard relating to such concerns.

[31] 'The Commissioners shall ... have the general function of promoting the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses', Charities Act 1993 (c. 10) 1993s. 1 (3).

[32] Charity Commission, *Annual Report 2001 - 2002 (Part 1)*, 2.

VI: 2

GATEKEEPING: REGISTRATION POWERS OF THE COMMISSIONERS

'range of privileges provides the rationale for accountability'

Registration is the main gateway via which 'charities are automatically eligible for a range of tax relief',[1] are more likely to receive Government grants[2] and are conferred with a credibility which increases their ability to attract donations from the public. Fries argues that this 'range of privileges and benefits provides the rationale for accountability'.[3] There remains a fine legal point that registration merely confirms charitable status and does not establish it, while some venerable charities are statutorily exempt from the Register. However, in general it is admission to the Register that leads to 'a conclusive statutory presumption that the institution in question is or was legally charitable at any time while it is or was registered'.[4]

A JUDICIAL-STYLE FUNCTION

The Charity Commissioners are the gatekeepers to the Register. They hold the keys to the kingdom of charitable, tax-exempt privilege. It is in the role of determining whether a particular applicant has charitable status that the Commissioners exercise what they

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[1] Richard Fries, 'Charity and the Charity Commission', *International Journal of Not-for-Profit Law* 2, no. 1 (1999): 3 of 8.
[2] 'A charity registration number may also be helpful or, indeed, a prerequisite, to a body's obtaining grants from some sources', Peter Luxton, *The Law of Charities* (London: Oxford University Press, 2001) 62.
[3] Fries, 'Charity and the Charity Commission': 3 of 8.
[4] Charles Mitchell, 'Reviewing the Register', in *Foundations of Charity*, ed. Charles Mitchell & Susan Moody (Oxford: Hart Publishing, 2000), 182. Who adds that in practice 'a body refused registration as a charity will be hard put to prove, for example, to the Inland Revenue authorities, that it is nevertheless charitable'

have described as a judicial function.[5] Picarda, notes that 'all these powers are in their nature judicial powers: they are the sort of powers which the court exercises'.[6] The Commissioners have used the term 'quasi-judicial',[7] as has Luxton.[8] The term 'pro-judicial'[9] was used in evidence before the Select Committee on Public Accounts during the 1990-91 Session.[10] In 1972 a judge described the then Commission as a 'statutory body exercising what may be considered a 'semi-judicial jurisdiction'.[11] The issue of status is important, not least because the Commissioners' perception of their role influences the way in which they conduct their activities.

While the Commissioners do not advance the law beyond what they might expect of the courts, this leaves them a great deal of scope to mould the definition of charity in any manner they determine to be within their powers, to expand the definition or possibly to narrow it. This scope is exercised when the Commissioners make a decision to register a charity[12] or to remove an organisation from the Register on the basis that it 'no longer appears to the Commissioners to be a charity', [13] because its function is no longer deemed to be charitable. This judicial-style function is subject to statutory appeal to the High Court[14] which is merits based,[15] but it has not been conclusively determined whether 'administrative aspects to their (the Commissioners') handling of applications ... might

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[5] 'Many of the Commission's functions are judicial. But the Commission is much more than "a judge without his wig"', Charity Commission, *Giving Confidence in Charities: Annual Report 2001-2002 (Part 1),* London: Charity Commission for England and Wales 2002. 9.

[6] Hubert Picarda, *The Law and Practice Relating to Charities*, 3rd ed. (London: Butterworths, 1999) 589.

[7] 'When the Commissioners exercise quasi-judicial powers themselves', Charity Commission, *Report of the Charity Commissioners for England and Wales for the Year Ending 31 March 2001,* London: 2001. 8.

[8] Luxton, *The Law of Charities* 26.

[9] Apparently in the sense that a proconsul is one who acts as a substitute or deputy for the consul, Della Thompson, ed., *The Concise Oxford Dictionary of Current English*, 9 ed. (Oxford: Clarendon press, 1995) 1089.

[10] Mitchell, 'Reviewing the Register', 178 fn. 19.

[11] *Jones v Charity Commission of England and Wales* (1972) 1 WLR 784. , 785

[12] Charities Act 1993 (c. 10) 1993s. 3 (1) The Commissioners shall continue to keep a register of charities ... (2) there shall be entered in the register every charity not excepted ...

[13] Ibid. s. 3 (4)

[14] Ibid. s. 4 (3) states that 'an appeal against any decision ... to enter or not to enter an institution in the register of charities, or to remove or not to remove an institution ... may be brought in the High Court by the Attorney General, or by persons who are or claim to be the charity trustees of the institution, or by any person whose objection or application under subsection (2) above is disallowed by the decision'

[15] 'On such an appeal the court does not pay any attention to any view of the Commissioners on the issue: the question is decided by the court', Picarda, *Law and Practice* 608.

... be reviewable'.[16] However, the Commissioners retain a statutory right to reconsider 'afresh' any appeal determined by the High Court if they consider 'there has been a change of circumstances or that the decision is inconsistent with a later judicial decision, whether given on such an appeal or not'.[17] The potential for this reconsideration to be undertaken *ad infinitum*, subject to any judicial constraints on the interpretation of 'change of circumstances', would surely act as a significant deterrent to all but the most persistent litigant,[18] quite apart from the legal costs involved.

In their publication entitled *Recognising New Charitable Purposes*, the Commissioners claim the courts 'have long recognised that what is acceptable as a charitable purpose must change to reflect current social and economic circumstances'.[19] They also reveal that the emphasis of the Commission has been to expand rather than to contract the field of charitable purposes that will be privileged through registration. Referring to the charitable purposes arising from the Preamble to the 1601 Statute of Elizabeth[20] and the statement by Lord Macnaghten in the 1891 *Pemsel* case,[21] the Commissioners argue

a purpose will be charitable not only if it is within the list in the Preamble[22] but also if it is analogous[23] to any purpose either within it or since held to be charitable. Nowadays many charities are set up for purposes that are not mentioned in the Preamble. In this way charitable purposes have been *extended and developed*, by decisions of the courts and the Charity Commissioners, so that the development of the law has reflected changes in social and economic circumstances.[24]

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[16] Mitchell, 'Reviewing the Register', 182 fn. 53.
[17] Charities Act 1993 (c. 10) s. 4 (5)
[18] Scientology has apparently not been deterred from taking the first step. Mitchell notes its reported appeal (*The Times*, 10 December 1999) from the Commissioners' refusal to grant it registered status, Mitchell, 'Reviewing the Register', 183 fn. 54.
[19] Charity Commission, *Recognising New Charitable Purposes,* London: Charity Commission 2001. 2.
[20] Statute of Charitable Uses (the Statute of Elizabeth) 1601
[21] *Commissioners of Income Tax v Pemsel* (1891) AC 531. ' "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceeding heads', 583
[22] Strictly speaking religion did not appear in the Preamble's list, the closest purpose being 'repair of churches', but 'it was not long before the advancement of the established religion was conceded to be within the equity of the Act', Picarda, *Law and Practice* 72.
[23] A test derived from the 'watershed' case of *Morice v Bishop of Durham* (1804) 9 Ves 399 at 405 where Sir William Grant MR said that a charitable purpose included those 'which by analogies are deemed within its (the Preamble's) spirit and intendment', Ibid. 10 fn. 16.
[24] Charity Commission, *Recognising New Charitable Purposes,* 2. Emphasis added.

Nevertheless, the Commissioners acknowledge that they can also play a role in narrowing the scope of purposes deemed to be charitable, noting, 'we have the same powers as the court ... to recognise a purpose as charitable for the first time or to recognise that a purpose has ceased to be charitable'.[25] However, purposes which have ceased to be charitable (as opposed to organisations which have ceased to fulfil a charitable purpose) are difficult to find. According to Luxton, 'the Charity Commissioners consider themselves able to treat the definition of charities as a moving subject, and have declined to register institutions as charities on the ground that the courts would no longer consider their purposes to be charitable'. However, he concludes; 'there does not appear to be any recorded instance of the Charity Commissioners removing a charity from the register on this ground in the absence of a decision of the courts'.[26]

The shifting sands of charity determinations are revealed in the area of philosophical ethical societies. In 1965, upon request from rating authorities, the Commissioners removed the West London Humanist Society and the Ethical Union from the Register. This was on the basis that their purpose was not for the advancement of religion and although educational, was not exclusively charitable.[27] However, in 2001 the Commissioners announced that 'the promotion of ethical standards of conduct and compliance with the law in the public and private sectors' would be considered to be a charitable purpose. This was not because of a direct analogy with purposes in the Preamble, but 'by analogy with purposes previously determined to be charitable by the courts'.[28]

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[25] Ibid. 2.

[26] Luxton, *The Law of Charities* 450. Luxton also notes (fn. 215) that while the Commissioners refused to register two new rifle clubs on the grounds that that once accepted purpose would in their view not now be accepted by the courts, they did not consequently move to de-register other rifle clubs

[27] Charity Commission, *Report of the Charity Commissioners for England and Wales for the year 1965,* London: Charity Commission 1965. Appendix C - 30. Perhaps these are examples of 'recorded instances' sought by Luxton, although it is not made clear whether the two charities were removed because their purpose had ceased to be charitable or because the Commissioners considered that their initial registration had been a mistake

[28] Charity Commission, *Recognising New Charitable Purposes,* 12.

In their own publications, the Commissioners also seem to reveal a readiness to exhibit more flexibility than that hitherto evidenced by the courts. In *Recognizing New Charitable Purposes* they state; 'faced with conflicting approaches by the courts, we take a constructive approach in adapting the concept of charity to meeting the constantly evolving needs of society ... we could also depart from previous contrary legal precedent where there has been a significant change in circumstances from when those court decisions were taken'. Citing a trend of the courts to set out 'the underlying principles when deciding cases on charitable status and providing guidelines for future cases', the Commissioners say they adopt this approach when deciding applications, citing their decision[29] to refuse admission to the Register in the failed 1999 Scientology application as an example.[30]

Further, the Commissioners have evidenced a willingness to engage in overt policy-making in connection with their judicial-style powers. As part of a thoroughgoing review of the register, prompted in part by criticisms of the parliamentary Committee of Public Accounts, the Commissioners have issued a series of publications, some of which outline whether a particular type of generic application will be approved as a new charitable purpose. These are separate to the Commissioners' published decisions on specific applications but appear to be related to types of approved applications received. The broad scope of the new purposes deemed prospectively to be charitable indicates the extent to which the Commissioners are prepared to engage in social engineering. Recent examples include publications on the promotion of: urban and rural regeneration, community capacity building, preservation and/or conservation, healthy recreation, and human rights and religious harmony.[31]

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[29] *Charity Commission Decision: Church of Scientology Application for Registration as a Charity* (1999) <http:www.charity-commission.gov.uk/> Accessed 29 November 2001, 49 pages) Charity Commission for England and Wales

[30] Charity Commission, *Recognising New Charitable Purposes,* 2, 4, 2-3.

[31] Charity Commission, *The Review of the Register of Charities: Review Publications,* London: Charity Commission (<http:www.charity-commission.gov.uk/registeredcharities/rorpubs.asp>) 2003.

PROMOTION OF RELIGIOUS HARMONY

It was announced in a media article authored by a senior Commission lawyer, in August 2002, that the Charity Commission had 'recognised that promoting religious harmony is a charitable purpose for the benefit of the public'. Although 'promoting a particular religion or educating people about it' had 'always been recognised by the commission as a charitable purpose', the public benefit 'of work that actively promotes harmony between different religious groups and reduces religious conflict, intolerance and discrimination', had now been accepted. This was against a 'changing social background' as well as 'current government policy to promote diversity and new legislation being introduced to make discrimination on the grounds of religion unlawful in the workplace'.

It was observed that the Commissioners would have to look at the proposed activities of trustees and determine whether these would in fact achieve the objective for the benefit of the public. The author proposed a list of activities that would not promote religious harmony for the benefit of the public. These included activities 'specifically directed to promoting a religion or a group of religions as being supreme or paramount among religions, activities that are harmful, or indeed any other activities for which public benefit' could not be demonstrated. The author, on behalf of the Commission, welcomed 'applications from organisations promoting this new purpose'.[32]

The Commissioners later published their 'in principle decision', which had been made after applications had been received from organisations with objects generally described as 'promoting religious harmony', or from which this object could be inferred. Guidelines for intending applicants were included, which recommended that applicants set out the means by which they intended to pursue the purpose in the objects of the organisation. It was felt by the Commissioners that promoting religious harmony was 'manifestly

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[32] Alice Holt, 'Religious harmony made charitable aim', *Guardian Unlimited* *(<http://society.guardian.co.uk/charitieslaw/story/0,10460,782443,00.html>)*, 29 August 2002, 1-2 of 2.

beneficial to the public without the need to consider evidential proof'. However, proof was noted. The Human Rights Act 1998 had incorporated parts of the European Convention on Human Rights protecting freedom of religion and the right not to be discriminated against in exercising a substantive right, including religion. Implementation of a European Directive prohibiting religious discrimination in employment was forthcoming and a consultation paper had been issued by the Department of Trade & Industry, setting out the Government's 'plans for implementing' the European Directive.[33]

In view of these legislative trends it was determined that the test of public benefit, to be decided in the light of 'current standards and social and cultural considerations' approved by 'the common understanding of enlightened opinion for the time being',[34] had been fulfilled. The Commissioners noted that the purpose was analogous to existing charitable purposes, including the 'promotion of equality of women with men and the promotion of racial harmony'.[35] It was hoped that the benefits of adding this new purpose 'could result in tangible benefits of reduction in conflict and crime', that 'understanding other's beliefs' might lead 'to more appropriate provision of services both in the public and the private sphere'. An application from 'leading members of the Christian, Islamic and Jewish faiths' aimed at furthering the purpose, namely The Friends of the Three Faiths Forum,[36] had been registered.

REGISTERING CULT-WATCH GROUPS

Apart from recent steps to register charities with the object of fostering good relations between obviously mainstream religions, the Commissioners have also taken some interesting registration decisions in the vexed area of cults, sects and/or new religious movements. Indeed, they have registered at least three 'cult watch' groups, the Cult

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[33] Charity Commission, *Promotion of Religious Harmony for the Benefit of the Public,* London: Charity Commission 2002. 2 of 3.
[34] A test derived from *National Anti-Vivisection Society v Inland Revenue Commissioners* (1947) 2 All ER 217 (HL). 49.
[35] Charity Commission, *Promotion of Religious Harmony,* 1 of 3.
[36] Ibid. 2 of 3. The new charity was registered on 14 June 2002

Information Centre (CIC), the Information Network Focus On Religious Movements (INFORM) and Catalyst, which have quite different emphases and credentials, but which all seek to play an educational and advisory role in this area.

CIC was founded in 1987 by retail sector manager and company communications consultant Ian Haworth, 'who had once briefly been caught up in a "self-improvement" or therapy group in Canada.'[37] Haworth had 'co-founded a charity called "Council on Mind Abuse (COMA)"' in Canada in 1979 and 'ran it until 1987, when he returned to Britain'.[38] CIC claims to be 'the first educational organisation focusing critical concern on the harmful methods of the cults to be granted charitable status in the United Kingdom'. Its Patron is Prebendary Dr. Chad Varah, the founder of the Samaritans. Its Council members include a number of clerics, a psychiatrist, a retired brigadier and Labour politician Alan Meale, the former Secretary of the All-Party Committee on Cults.[39]

INFORM was founded in 1988 by academic Dr. Eileen Barker,[40] who is the Chair of its Board of Governors.[41] INFORM claims to be 'a non-sectarian charity', established to 'help enquirers by providing information about new religious movements that is as objective, balanced, and up-to-date as possible'. It is supported by 'mainstream' religions,[42] with a list of patrons including the Archbishop of Canterbury, the Moderator of the Free Churches' Council, Roman Catholic Bishop C. Henderson, Greek Orthodox Bishop Kallistos of Diokleia, the Lord Dahrendorf and the Lord Desai. Its academic credentials are also boosted by the presence on its Board of Governors of a Professor of

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[37] David V Barrett, *The New Believers: A Survey of Sects, Cults and Alternative Religions* (London: Cassell & Co, 2001) Ch. 9 'Watching the Watchers'. 102

[38] Ian Howarth, "Topic - Cults: Speaker - Ian Howarth: Curriculum Vitae," (Cult Information Centre (INFORM Archives), 1996), 1.

[39] CIC, *Website* (Internet) (Cult Information Centre. <http://www.cultinformation.org.uk/>). 5 May 2003, 1,3,4 of 4

[40] Now a Professor of Sociology at the London School of Economics and Political Sciences

[41] 'After being in operation for a year, a formal link was established with the LSE through its research Committee', Eileen Barker, 'New Religious Movements: Re-Born or Mis-Used ?' *LSE Magazine*, March 1990, 5.

[42] 'The mainstream Churches, which encouraged the foundation of INFORM, have used and helped it in a number of ways', INFORM, *Inform Annual Report 1988,* London: Information Network Focus on New Religious Movements 1988. 3.

Statistics and another Professor of Sociology, who is the nominee of the British Sociological Association Sociology of Religion Study Group.[43]

Catalyst was established in 1993 by 'former university chaplain Graham Baldwin'.[44] It 'specialises in providing professional help for cult victims and their families'. This involves 'providing the victim and the family with an introduction to cults', providing a plan supportive of both the 'victim' and the family and finally 'counselling the victim, if possible, and providing on-going support for the whole family'. Services include 'legal advice and a helpline for worried families' along with plans to appoint a 'schools and colleges worker' to 'lecture on the problems of cults'.[45] In addition, Catalyst is interested in pursuing exit counselling, noting: 'this is not the same as traditional counselling, being more of an information sharing exercise. We are hoping that a professional organisation with membership, codes of ethics and disciplinary structure may possibly be set up and we are exploring this at the present time'.[46] Barrett reports that 'Catalyst has no specific religious position; its trustees and its staff are multi-faith'.[47]

In addition to the registration of at least three quite different cult-watch groups, the Commissioners have registered a number of controversial cults, sects and/or new religions, which have been the subject of strong criticism by some watch groups, and which have themselves been highly critical of some watch groups. Of course, the Commissioners have also refused to register Scientology, which is high on the list of groups attracting the most attention from watch groups.[48] When the Cult Information Centre applied for registration as a charity in 1992, the Commissioners 'received objections to its registration ... from two registered charities (the Holy Spirit Association

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[43] INFORM, *? about INFORM,* London: Information Network Focus on Religious Movements - pamphlet 2002.
[44] Barrett, *The New Believers* Ch. 9. 102
[45] Catalyst, *Website* (Internet) (Catalyst - Counselling, Training, Legal. <http://www.catalyst-uk.freeserve.co.uk/home.htm>). Accessed 18 January 2002. 1, 2 of 2.
[46] Ibid. (Click on 'Counselling' – Accessed 10 May 2003
[47] Barrett, *The New Believers* Ch. 9. 103
[48] For example, the Church of Scientology, with 34 enquiries, was listed second to the International Churches of Christ (53 enquiries) under 'Groups prompting nine or more enquiries during 2000, in INFORM, *Annual Report,* London: Information Network Focus on Religious Movements 2000. 2.

for the Unification of World Christianity,[49] and the National Council of Hindu Temples) and from a body that was not a registered charity (the Church of Scientology)'. However, the Commissioners found that CIC was pursuing legitimate educational activities in seeking to educate the public and in particular students 'about the techniques used to recruit people into cults'. They dismissed the objections, first on their merits, and secondly on the grounds that the objectors' standing to object was doubtful.[50] Haworth notes that charitable status gave his organisation 'more credibility, because it implies there is a need for education on the topic ... the charity commission were aware, when we applied to be accepted as a charity, that we were going to be very critical of cults and take a strong position on the matter'.[51]

Indeed, CIC was not only critical of 'cults' but was quite critical when INFORM received a three year start-up grant of £120,000 from the Home Office. Haworth claimed that INFORM was too soft on some groups. He said, 'we know the Moonies and the Scientologists welcome Inform. I'm suspicious of any organisation welcomed by these two. I think there's every reason to be extremely concerned'.[52] In 1994, amid complaints that Dr. Barker had allegedly accepted 'expenses-paid trips to Moonie seminars',[53] Haworth repeated the line that the Moonies celebrated when INFORM was established and Baldwin was dismissive of Barker's view of cults, saying 'she thinks cults are no worse than a cold. Our experience shows that that is not true'. Dr. Barker and INFORM's then Director Robert Towler, were in turn dismissive of anti-cultist groups. Barker criticized them for using non-professional counsellors, particularly former cult members who 'may still have unresolved problems'. She claimed 'we have to mop up a lot of damage (they cause) and I'm sure they say the same about us'. Towler criticised them for being over-zealous, creating fear and alarm, especially among parents, and

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[49] Known colloquially as 'the Moonies'
[50] Luxton, *The Law of Charities* 446 fn. 186. Luxton's source is the Charity Commissioners' Annual Report for 1993, 1-3
[51] Ian Haworth, Email to Stephen Mutch, 28 November 2001.
[52] Andrew McCallum, 'New cult-watch agency faces baptism by fire', *Glasgow Herald ? (Unclear photocopy obtained from INFORM archive - date also obscured).*
[53] Barker responded, 'we receive nothing from any of the cults and we are not in the pay of the Moonies'

being unreceptive to evidence which might complicate a 'simple division between goodies and baddies'.[54]

Again, when INFORM successfully applied for charitable status, the process 'took 20 months' because 'misinformation' was allegedly fed to the Commissioners. INFORM complained that 'since its inception' there had been 'a number of attacks on INFORM, all of which' were apparently 'orchestrated by a small group of people connected with some of the "cult-watching" groups that have a somewhat different approach'.[55] The Rev. Neil Dawson, Chairman of another non-charitable but 'leading cult watching body', FAIR (Family, Action, Information and Rescue) established in 1976, had welcomed the establishment of INFORM, stating; 'we are a pressure group and we deal with the human problems left behind by cults. We don't have resources for academic study so this development is useful'. However, at the time a former co-chairman of FAIR, Mr. Casey McCann, had reportedly joined the board of INFORM after accusing FAIR of being 'too strident and generating more concern than was necessary'.[56] So some tension between the groups was apparently not far below the surface.

In 1996 the Conservative Home Office Minister, Tom Sackville, a friend of FAIR,[57] announced a new Government line on cults, stating; 'in the past the Home Office has seemed to give the impression it is neutral and I very much regret this. We're anti-cult'. He said that 'the research group INFORM was to lose the Government's financial and moral support', while the language of '"new religious movements" – favoured by INFORM and cults – was to be banned from ministerial jargon'.[58] Later, when funding to INFORM was re-instated by a Labour Government, Sackville complained; 'I cancelled Inform's grant and I think its absurd that it's been brought back ... the Government is

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[54] See Peter Victor, 'Anti-cult groups riven by schism and bitter feuds: Many despise rivals more than sects they monitor', *Independent on Sunday*, 9 October 1994.
[55] INFORM, *Report to the Home Secretary on INFORM's Achievements,* London: Information Network Focus on New Religious Movements 1990. 6, 5.
[56] Walter Schwarz, 'Church supports cults watchdog', *The Guardian*, 23 February 1987.
[57] Indeed, he was elected Chairman of FAIR on 21 October 2000, FAIR, *Homepage* (Internet Website) (Family Action Information Resource. <http://www.fair-cult-concern.co.uk/index.html>). (Click on 'FAIR News' then 'Extracts from Issue 3 – 2000'. Accessed 11 May 2003. 1 of 12.
[58] 'Blitz on the "sex and power" cults', *Mail on Sunday*, 20 October 1996.

taking non-judgemental advice as an excuse for its non-action on cults'. Barker responded curtly: 'we are not cult apologists ... people make a lot of noise without doing serious research – so much so that they can end up sounding as closed to reason as the cults they're attacking. Besides, I imagine FAIR was disappointed not to get our funding'.[59] Indeed, INFORM argues that some other watch groups do more harm than good.

Differences between cult-watch groups, between academics and experience based watchers, the sometimes acrimonious academic divisions[60] on the subject and the hostile interaction between so-called cults and critics make policy prescriptions contentious. These *contretemps* are noted because they are informative of the approach adopted by the Charity Commissioners in granting registered charitable status in this area. The policy seems very much to be one of 'let a hundred flowers blossom, a hundred schools of thought contend', although it is difficult to determine whether the approach in this area has developed in an *ad hoc* manner or has been the result of more considered reflection. However, the outcome is not contradictory. The fostering of cult 'watch' groups through charitable registration is one way of promoting the scrutiny of cults, sects and/or new or even more established religions, while not necessarily accepting that such 'unofficial' criticism of any particular group is wholly accurate or valid for registration purposes.

From a governmental perspective, it seems sensible to retain an ability to collect intelligence on groups of potential concern from a variety of sources. The granting of charitable status to varying types of watch groups helps to maintain a diverse pool of information sources. For example, while INFORM seeks to maintain cordial relations with subject groups, and can sometimes use this approach to advantage in gaining access for academic study purposes, some former 'cult' members might be suspicious of this *modus operandi* and prefer to provide information to other watch groups. Therefore Governments might be well advised to maintain access to all sides of the debate,

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[59] 'Cult advisers in clash over clampdown', *Daily Telegraph*, 31 July 2000.

[60] For an outline of the controversies between scholars and its effect on expert in-court evidence see for example Charlotte Allen, 'Brainwashed ! Scholars of Cults Accuse Each Other of Bad Faith', *Lingua Franca* December (1998).

particularly in view of the possibility of any organisation being exploited or captured by those conforming to one school of thought.

The approach thus far of the Charity Commissioners has helped to foster this pluralism, although there are some indications that the Government itself might be increasingly reliant on advice from the academically credentialed but sociology based INFORM, which is the only registered 'cult watch group' that has some claim to semi-official status, due to its grant from the Home Office. Among its other functions, it plays an advisory role to Government. In 1988 'INFORM dealt with enquiries referred to it by the Home Office which had originated both from MPs and private individuals and from other government departments, such as the DES, and bodies such as the Charity Commissioners'.[61] INFORM claimed to have responded to enquiries from 'local, national and international government agencies, such as the Home Office and Departments of Immigration, Health and Education, the police,[62] the security services and the social services ... Members of the British and European Parliament, and the US House of Representatives and the Senate'. Professor Barker stated:

> while it does not lobby either against or on behalf of any group, this does not mean that INFORM passively waits to answer questions. It does not merely respond to enquiries, it believes that it can and should actively use the information it accumulates both to allay unnecessary fears and to alert over-complacent individuals and official organisations to actual or potential dangers. It has informed the relevant authorities when allegations of serious criminal activity, such as child abuse, have been brought to its attention. Information supplied by INFORM is used in court cases and for judicial education. It has provided information to governments around the world.[63]

In 1999 it was reported that INFORM had a 'network of contacts in cults and has played a key role in helping governments second-guess the actions of violent sects'. It was noted that 'Inform currently works with Scotland Yard', which had set up 'a special

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[61] INFORM, *Inform Annual Report 1988,* 2.

[62] Indeed, the Metropolitan Police and a number of other government related organisations, such as the Independent Television Commission and the Radio Authority 'have paid annual consultancy fees to INFORM', INFORM Website, "Home Page," (<http://www.inform.ac/infintro.html>: Information Network Focus on Religious Movements). Click on 'Funding'. Accessed 20 November 2001, 1 of 1

[63] Eileen Barker, 'INFORM: Bringing the Sociology of Religion to the Public Space', in *Frontier Religions in Public Space*, ed. Pauline Cote (Canada: University of Ottawa Press, 2001), 28, 29-30.

intelligence cell to monitor cults' activities'. The Home Office also had a 'cults desk' to brief ministers on 'worrying trends', which presumably liaised with INFORM. It was reported that 'as well as watching peaceful groups such as the Scientologists', INFORM kept tabs on 'controversial cults such as the Branch Davidians'.[64] Indeed, in 1999 the *Times* Crime Correspondent, reporting that the 'intelligence network' was close to collapse due to lack of funds, claimed that INFORM had been 'credited with protecting Britain from extremist religious groups'. The Very Rev. Colin Slee pronounced it 'had been vital in preventing extremist cult problems in Britain'.[65]

Other watch groups also have some ability to influence government officials and judicial officers, although it would seem to a lesser extent. CIC claimed that its 'main representative', Ian Haworth, 'acted as a consultant to police' and was 'called as an expert witness in cult-related trials'.[66] However, Haworth lamented that due to the advent of INFORM, 'we are now faced with a situation where I can go to court as an expert witness in a cult case and someone recommended by the government sponsored body can give expert testimony to oppose my position'. His concern about INFORM was based on the view that 'the organisation seemed to operate in a more apologetic mode for cults than anything else. It disliked the term "Cult" in favour of "New Religious Movements", refuted the notion of psychological coercion and appeared to say that most of the problems were associated with misinformation from cult critics'.[67] While the other registered cult watch group, Catalyst, did not claim in its website any special advisory role to Government instrumentalities, the non-registered FAIR stated that it 'alerts Government departments, the media and public bodies',[68] and it would be surprising if this was not common practice among all watch groups.

It can therefore be seen that there is a practical rationale (whether deliberate or not) behind the Commissioners' decisions to register a variety of cult-watch groups, being the

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[64] Marie Woolf, 'Cult Watch closed by cash crisis', *Newspaper title unclear - photocopy from INFORM Archives*, 10 January 1999.
[65] Stewart Tendler, 'Church leaders hear SOS from cult watchers', *The Times*, 18 January 1999.
[66] CIC, *Website* (Click on 'About CIC'). Accessed 19 October 2001, 2 of 5.
[67] Haworth to Mutch., 28 November 2001.
[68] FAIR, *Homepage* (Click on 'The Background and Purposes of FAIR'. Accessed 11 May 2003

gathering of information and access to advice, even though advice might be contested. Indeed, due to the controversy, uncertainty and flux surrounding the debate on cults, there might be cause to register further cult watch, or indeed broader 'religion watch' bodies. For example, there might be room for the registration of a secular, academically based educational watch group with no financial connections to any cult, sect, new or mainstream religious group, or for the registration of an academically based educational watch group with a greater leaning to the disciplines of psychiatry and psychology. From a public policy perspective, the importance of fostering intelligence and advisory sources seems obvious. It is also relevant to explore what role these watch/educational/advisory groups, registered or otherwise, might play in the Commissioners' deliberations on the registration applications of contentious cults, sects and/or new religious movements, or in their possible de-registration.

EVIDENCE AND REGISTRATION DECISIONS

Nowhere is the question of the admissibility of evidence more relevant than in contested applications for registration by groups characterised as cults, sects and/or new religious movements. There has been strong criticism of the Commissioners' decision to consider an allegedly wide range of evidence in determining whether the presumption of public benefit would be rebutted in their 1999 Scientology decision (even though the matter was decided on other grounds).[69] Luxton who considers that course to be alarming, says; 'to take into account concerns amongst some sectors of the public about an institution's practices, as evidenced by unsolicited letters sent to them and views expressed in the press, even though, as they admit, the truth or accuracy of such claims may be questionable ... is to be deprecated; it is unacceptable that the assessment of public benefit, and thereby charitable status, should turn on unsubstantiated rumour. The *lettre*

[69] The Commissioners decided that Scientology failed the second limb of the English charity law definition of religion, (even though the English legal authorities were 'neither clear nor unambiguous' as to that definition), which requires 'belief in a supreme being and an expression of that belief through worship', on the basis that the core religious services of Scientology, auditing and training, did not constitute 'the reverence and veneration for a supreme being' considered necessary to 'constitute worship in English charity law', *Charity Commissioners: Scientology decision 1999* 19, 14, 25

de cachet has no place in charity law.[70] On another issue relating to evidence, whether public opinion should be a factor in determining what constitutes public benefit, Picarda had earlier said 'there should be no room for evidence gained through canvassing for opinions, especially where it is gathered by unreliable opinion polls or even from ad hoc caucuses neologistically called "focus groups". Decisions on charitable status must be determined on legally relevant evidence[71] and well established principle and not on unclear criteria or popular soundings'.[72] He also cited from the 1992 judgement of Decary J in a Canadian case where the judge stated

> Charity and public opinion do not always go hand in hand; some forms of charity will always precede public opinion, while others will often offend it. Courts are not well equipped to assess public consensus, which is a fragile and volatile concept ... Courts are asked to decide whether there is an advantage for the public, not whether the public agrees that there is such an advantage.[73]

All this raises the question of what evidence is suitable for consideration by the Commissioners in their registration determinations and the manner in which evidence can or should be brought before the Commissioners to assist them to determine what is 'of advantage to the public', or, in other words, what is 'for the public benefit'. In considering this, it should be noted that the Commissioners themselves commented, in their 1999 Scientology decision, that the very newness of the organisation made it difficult for them to form a positive judgement on the question of public benefit (despite the fact that their deliberations continued for three years). However, the Commissioners felt that there was sufficient evidence to hand adverse to Scientology to enable them to rebut the presumption in favour of advancement of religion, if indeed they had decided that the organisation was a religion. This evidence was found in the form of public concern, expressed in representations and media reporting, and judicial concern, found in law reports. With Scientology possibly appealing the Commissioners' decision to the High Court or European Court of Human Rights, a higher forum might provide some

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[70] Luxton, *The Law of Charities* 443-4 fn. 170.
[71] In his article Hubert Picarda, 'Charity Review is a Review Too Far', *The Lawyer* 9 June (1998).he specifically said that 'Judges act on evidence, usually expert evidence'
[72] Picarda, *Law and Practice* 12. He was responding to views expressed in the Commissioners' 1998 consultation paper, *Review of the Register – Framework for the Review of the Register,* Annex E

guidance for future determinations on the types of evidence the Commissioners are entitled to consider.

The extant evidence gathering capacity of the Commissioners in registration determinations seems to be uncertain and limited in practice. There appears to be no formal procedure whereby objections to applications for registration might be received prior to registration or provision for anything other than a surface inquiry. There might be unexplored scope under the Charities Act 1993 and regulations for the Commissioners to make inquiries in order to satisfy themselves as to the charitable status of an applicant. However, it would appear that in the 1999 Scientology decision, any evidence gathering exercise was limited and perhaps constrained by the Commissioners' perceptions of what powers they have in this area.[74] At present the Commissioners appear to receive letters objecting to a proposed registration by a form of osmosis. There is no public notice of intention to register in order to facilitate objections.[75] All that happens is that an application is received with 'a full narrative description' of proposed activities and supporting documentation, which may include 'promotional literature, independent assessments from experts ... newspaper articles, business plans and so on'. The Commissioners undertake to provide a decision within fifteen working days of receipt. They might require further information, but the onus for providing the information is upon the applicant and the source of the information requested is the applicant.[76] Therefore potential objectors prior to the act of registration must seemingly rely on tip-offs, leaks or guess-work in order to know when to submit their 'unsolicited letters' to the Commissioners.

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[73] *Everywomen's Health Centre Society (1988) v Minister of National Revenue (1991)* (1992) 2 FC 52. 68-9

[74] With respect to the 1999 Scientology decision it is not known to the author whether the media reports were provided with the unsolicited letters or whether the Commissioners undertook their own research. Judicial pronouncements on Scientology might have been gleaned in a normal judicial-style perusal of legal materials, (for example they say 'if the proposed charity is operating in a field which is on the fringes of charity law ... the views of our legal staff may need to be sought', Charity Commission, *Registering as a Charity,* London: Charity Commission <http://www.charity-commission.gov.uk/publications/cc21.asp> HTML Version, August 2002. 22 of 30. , although they too might have been annexed to unsolicited letters

[75] 'The Charities Act 1993 [s. 4 (2)] specifies that provision might be made by regulations as to the way in which any such objection or application should be made, prosecuted or dealt with; but to date no such regulations have been made', Picarda, *Law and Practice* 610.Luxton, *The Law of Charities*, notes that these regulations must be made by the Secretary of State, 'but that no regulations have been promulgated', 445 fn. 180

In the 1999 Scientology decision, evidence was taken from expert witnesses produced by the applicant, but from the published decision it would appear that no other experts were called (or were able to be called). It is hardly likely that an applicant would present with expert witnesses who did not support its case, so the process of receiving expert evidence in registration decision-making might be one-sided or biased towards the applicant, and if so unsatisfactory under present arrangements. Therefore a number of policy questions need to be resolved. It might seem reasonable to allow the Commissioners a wide discretion, so as to enable them to make the most informed decisions possible. However, provision could be made against over-reliance on unsubstantiated evidence, such as media reports, by facilitating the testing of evidence if it is to be relied upon. In addition, apart from the present ability of Commissioners to question the expert witnesses provided by an applicant, it might be appropriate to encourage or if needs be empower the Commissioners to seek out alternative and more impartial expert advice from relevant quarters. They might also obtain evidence from non-expert individuals with personal knowledge of the workings of the applicant organisation.

In addition, in order to test the public benefit claims of an organisation, it seems reasonable that the Commissioners should have available to them statistical information (and more detailed information if required) on applicants for religious charitable status. This would enable them to assess the level and substance of complaints made against an applicant organisation relative to membership levels.[77] To obtain the details of complaints they might need to be provided with additional powers of access to departmental files. The Commissioners might also be supported in their desire to consider as evidence judicial pronouncements, as well as the deliberations and findings of other types of 'official' reports,[78] particularly in instances where evidence had been tested. These would seem to be relevant in a consideration of the public benefit claims of an organisation. Finally, there seems no reason why the Commissioners should not have

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[76] Charity Commission, *Registering as a Charity,* 21-2 of 30.
[77] Which in the case of most religious bodies would be found in the national Census. Other methods of estimation might be required for very new movements.
[78] Including those from other jurisdictions of persuasive authority.

recourse to advice and research undertaken by various academic (and possibly non-academic) research organisations or individuals involved in the area of cults, sects, new or mainstream religious organisations. In this way the Commissioners would be clearly empowered to adopt a more expansive, inquisitorial role, than that normally associated with the deliberations of a Court in an adversarial system. Courts typically rely upon legally admissible evidence presented by opposing parties and are restricted from considering a range of issues that might be appropriate in making the type of public policy decision inherent in charity registration proceedings.[79]

An alternative narrowing or confining of the Commissioners' discretion by the High Court (or European Court) would in effect compel the Commissioners to give the benefit of the doubt to organisations with dubious claims to charitable status. It would signify a retreat to the judicial approach in contested trusts but absent contesting parties normally found in those cases, denying the Commissioners access to a contesting point of view. In this respect it should be observed that those sections of the Charities Act 1993 dealing with the right to object to and appeal registration decisions, after the event, have apparently been construed very narrowly, even by the Commissioners, so that under the present view it might be difficult to find parties qualified to object[80] and to consequently present contrary evidence.

In the light of this discussion, it is interesting to note that in its investigatory function the Commission is able to adopt a somewhat inquisitorial approach to the gathering of evidence. Once gathered, this evidence could theoretically lead to the deletion of a charity from the Register on the basis that it fails the public benefit test. However, in practice this has not occurred, leading to the observation that once an organisation has obtained charitable status it is most likely to retain it. Nevertheless, an examination of the investigatory functions and activities of the Commissioners is appropriate, because these powers have been used quite dramatically in recent times and form a significant

[79] Contrary to this opinion, Luxton says that the development of charity law is 'a function that is properly judicial'. He deplores what he sees as a diminution of 'the influence of lawyers within the Commission' and the consequent use of 'non-legal criteria' in decisions, such as 'consultation exercises and the commissioning of opinion polls', Luxton, *The Law of Charities* 27.

part of the Commissioners' apparatus of social control. It may also be the case that the investigatory powers (with possible legislative amendments) should be used more generally to determine whether registered charities continue to fulfil a public benefit purpose, or whether organisations should be admitted to the Register in the first place.

[80] Ibid. pars. 10.64 – 10.57.

VI: 3

INVESTIGATIVE POWERS OF THE COMMISSIONERS

'misconduct or mismanagement'

Encouraging applicants to register for purposes promoting religious harmony is an example of a government bureaucracy seeking to exercise social control. The Commissioners do this by rewarding commitment to social values either 'manifestly' evident or deduced by them from Government public policy decisions. At the other end of the carrot and stick approach are coercive powers, used to impose sanctions upon those exhibiting deviant behaviour and enforcing compliance with these social values. In this respect the Commissioners have recently shown their preparedness to act decisively against what they perceive to be religious extremism in the case of the Imam of the Finsbury Park Mosque, a charity registered under the name North London Central Mosque Trust.

THE FINSBURY PARK MOSQUE INCIDENT

In that matter the Commissioners instituted an inquiry and suspended the cleric,[1] Oman Abu Hamza, who was an officer of the trust. After further investigations, the Commissioners announced their decision on 16 December 2002 to remove him from the charity for continuing to 'flout charity rules outlawing political activity'. The decision meant that he could no longer teach or preach at the mosque. It was determined that the Imam had made a succession of statements 'as an officer of the charity (that) were of such an extreme and political nature as to conflict with its charitable status'. He had also used the charity's premises to 'facilitate activities organised by a non-charitable political organisation' and had caused severe damage to the reputation of the charity. In addition,

[1] He was 'listed by the charity commission as the Mosque's Khateeb (cleric), Vikram Dodd, 'Controversial cleric vows to defy mosque ban', *Guardian Unlimited*, 18 January 2003, 2 of 3.

while under suspension he had deliberately breached conditions of the suspension order made in April 2002.[2]

Matters of concern to the Charity Commissioners included Hamza staging an event at the mosque to mark the first anniversary of the September 11 Twin Towers attack under the provocative theme, 'a towering day in history'. He had also allowed the mosque to be used by 'non-charitable political groups such as Al-Muhajiroun'.[3] According to a Charity Commission officer, he had also denounced the US and Israel in such an extreme and political way that his statements were 'at odds with the status of a mosque as a charity'. The Charity Commissioners decided that all this had damaged the reputation of the mosque[4] and prevented the trustees from governing it properly. Action to remove Hamza was therefore warranted to 'protect the charity and its future administration'.[5]

The Finsbury Park Mosque incident, which eventually involved a police raid[6] on the mosque, a number of arrests and attempts to deport Hamza, reveals the extraordinary though normally latent powers of the Charity Commissioners. Under s. 8 of the Charities Act 1993 the Commissioners have broad powers to 'institute inquiries with regard to charities or a particular charity or class of charities, either generally or for particular purposes', although no inquiry can extend to any exempt charity. Under s. 9 the Commissioners also have powers to order people to produce documents and to undertake searches of records, *inter alia*.

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[2] Patrick Butler, 'Muslim cleric banned from charity role', *Guardian Unlimited* <*http://society.guardian.co.uk/charitymanagement/story/0,8150,861057,00.html*>, 16 December 2002.
[3] The leader of Al Muhajiroun, lawyer Anjem Choudary, has reportedly declared that 'what took place ... in New York on 9/11 was justifiable' from the point of view of those who had themselves been bombed and attacked and therefore had a legitimate right to retaliate, Cyril Dixon, 'Bomb Britain Urges Mullah', *International Express*, 6-12 May 2003.
[4] Dodd, 'Controversial cleric vows to defy mosque ban'.
[5] 'Radical cleric removed from mosque', *Guardian Unlimited*, 4 February 2003.
[6] The Commission might well have played a role of liaison with the police. It has a published operational guidance on dealing with charities and suspected terrorism, which includes notifying appropriate authorities when matters of concern are encountered, Charity Commission, *Operational Guidance: Charities and Terrorism: OG 96*, <http://www.charity-commission.gov.uk/supportingcharities/orgs/g096.asp> Accessed 19 March 2003: Charity Commission for England and Wales 2003.

Under s. 18, the Commissioners may 'suspend any trustee, charity trustee, officer, agent or employee from the exercise of his office or employment'. They can only do this after they have instituted an inquiry and are satisfied that there has been 'misconduct or mismanagement' in the administration of the charity, or believe it is 'necessary or desirable to act for the purpose of protecting the property of the charity', to ensure its proper application for the purposes of the charity. They may also 'appoint such number of additional charity trustees as they consider necessary for the proper administration of the charity' and 'vest any property held by or in trust for the charity in the official custodian'.[7] If they wish, the Commissioners may go further and 'remove any trustee, charity trustee, officer, agent or employee of the charity who has been responsible for or privy to the misconduct or mismanagement or has by his conduct contributed to it or facilitated it'. They may also 'establish a scheme for the administration of the charity'.[8]

The Commissioners obviously made use of some of these broad powers in their intervention in the affairs of the Finsbury Park Mosque and apparently did so with the support of the trustees, who reportedly raised no objections.[9] Indeed, their intervention might well have been prompted by complaints received from concerned trustees, and could be seen as a part of the Commissioners' role in dispute resolution.[10] However, their intervention, on the basis that the Omam had acted politically so as to constitute misconduct,[11] was subject to some criticism, particularly with respect to the allegation that he had made political statements. For example, the chairman of the Islamic Human Rights Commission, Masssoud Shadjareh, accused the Commissioners of double standards, noting 'when the Archbishop of Canterbury attacks the government about the

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[7] Charities Act 1993 (c. 10) 1993s. 18 (1) (a) (b) (i) (ii) (iii)
[8] Ibid. s. 18 (2) (i) (ii)
[9] Butler, 'Muslim cleric banned from charity role', 2 of 2.
[10] See Charity Commission, *Resolving Charity Disputes - Our Role: CC25,* <http://www.charity-commission.gov.uk/publications/cc25.asp> Accessed 6 March 2003: Charity Commission for England and Wales 2001.
[11] It is an established tenet of English charity law that charities must refrain from political activities, what constitutes political activity being the subject of numerous legal precedents. See Charity Commission, *Political Activities and Campaigning by Local Community Charities,* London: Charity Commission for England and Wales 1997. Also Charity Commission, *Political Activities and Campaigning by Charities,* London: Charity Commission for England and Wales 1999.

Gulf war he is being political but no one is talking of removing the Church of England's charitable status, or that of rabbis who are involved in politics, who support Israel'.[12]

LINKS WITH TERRORISM

Recognition of the purpose of promoting religious harmony, the potential for cult watch groups to alert the Government to cases of extremism and actions taken under the Commissioners' investigatory powers are particularly relevant in view of the events of 11 September 2001. The attack on the New York Twin Towers prompted the Commissioners to issue their policy on charities and their alleged links to terrorism.[13] However, even before 11 September the Commission had opened inquiries into five charities on these grounds and were evaluating whether an inquiry was warranted for another two.[14] They had also 'built up a network of contacts with intelligence, security and law enforcement agencies'.[15]

The policy on terrorism reveals that groups with such links would not have been deemed charitable under charity principles applicable prior to 11 September. The Commissioners note that the use of a charity's assets for support of terrorism would not be a proper use of those assets and that links with terrorism would 'corrode public confidence in the integrity of charity'. The Commissioners would certainly not register any organisation that 'had support of terrorism explicitly or implicitly as an object'.[16]

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[12] Dodd, 'Controversial cleric vows to defy mosque ban', 2 of 3. It is worth noting however that the Church of England is generally exempt from the Commissioners' powers of investigation

[13] Charity Commission, *Charity Commission policy on charities and their alleged links to terrorism,* London: Charity Commission 2002.

[14] Debra Morris, 'Charities and Terrorism: The Charity Commission Response', *The International Journal of Not-for-Profit Law (<www.icnl.org/journal/vol5iss1/ar_morris.htm>)* 5, no. 1 (2002): 1 of 6.

[15] Charity Commission, *Charity Commission policy on charities and their alleged links to terrorism,* 2 of 3.

[16] Ibid. 1 of 3.

VI: 4

RELIGIOUS EXEMPTIONS, EXCEPTIONS AND OTHER PRIVILEGES

'many institutions with a religious connection ... are excepted from registration'

While it is apparent that the Charity Commissioners have extraordinary powers to intervene in the affairs of those religious charities coming within their ambit, the Commissioners' jurisdiction over religious institutions is inconsistent. It is generally noted that there is a three-tiered level of accountability applicable to religious charities: those generally exempt from the jurisdiction of the Commission,[1] those excepted by regulation from registration, and those subject to the full regime of the Commission. In addition, it might be noted that there is a further category consisting of claimants to charitable religious status, such as Scientology, which have been denied that status in England and Wales and are therefore without the jurisdiction of the Commission.

The 'Church Commissioners[2] and any institution which is administered by them' are largely exempt from the jurisdiction of the Commission,[3] along with certain universities and institutions like the Board of Trustees of the Imperial War Museum. Picarda says that 'the basis for exempting them from the supervision of the Charity Commissioners is that they are sufficiently supervised and protected by other statutory provisions'.[4] Other religious institutions are excepted from registration by 'order or regulations' made under the Charities Act 1993. The 'order' referred to is an order of the Charity Commissioners

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[1] Exempt charities do not need to register and are specifically excluded from the Commissioners' 'information' or inquiry powers, Charities Act 1993 (c. 10) 1993 ss. 8 (1) & 18 (16).
[2] Established under the Church Commissioners Measure 1947, the Church Commissioners 'have control of the assets of the Church of England', with assets of £2.645 billion producing an investment income of some £164 million in 1991, Peter Luxton, *The Law of Charities* (London: Oxford University Press, 2001) 273-4, 14-15 fn. 60.
[3] Charities Act 1993 (c. 10) s. 3 (5) (a) Schedule 2 (x)
[4] Hubert Picarda, *The Law and Practice Relating to Charities*, 3rd ed. (London: Butterworths, 1999) 7.

and 'regulations' can be made by the Home Secretary,[5] a duality of authority under which neither can apparently override the other's exceptions[6] and under which either authority may provide permanent[7] or temporary exceptions.[8] In this way 'many institutions with a religious connection such as churches and church halls are excepted from registration'.[9] There are apparently around 25,000 charities connected with the Christian denomination that enjoy this privilege, although it would appear that the Commissioners are attempting to redress this inconsistency for those religious institutions coming within their ambit.

Otherwise religious charities are subject to the full jurisdiction of the Commission. However, it should be noted that small charities, whose income does not exceed £1,000 per annum and who do not have any permanent endowment nor use or occupy land, are also excepted from registration.[10] In addition, all religious charities enjoy access to the general exception to registration required for places of worship registered under s. 9 of the Places of Worship Registration Act 1855.[11] Another general exception was made under regulation 5 of the Charities (Exception from Registration) Regulations 1996 (SI 1996 No. 180) which provides that 'a charity for the advancement of religion is permanently excepted from the duty to be registered if the application of its income in a particular manner is conditional upon a grave, tomb, or personal monument being kept in good order and if the income of the charity does not amount to more than £1,000 a year'.[12]

In their *Annual Report for 1999-2000* the Commissioners sheeted home to Government Ministers the responsibility for an estimated 100,000 charities (including around 25,000 religious charities) being excepted from the Register. They noted that 'Ministers

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[5] Ibid.
[6] Although a regulation made by the Minister is subject to 'annulment by resolution of either House of Parliament', Ibid.
[7] Subject of course to an amending or repealing regulation from the same source.
[8] Luxton, *The Law of Charities* 433. Luxton notes (fn. 108) as an example that the Commissioners excepted 'charities vested in diocesan trustees of the Roman Catholic Church and the Church in Wales (revealed in the Commissioners Annual Report for 1963, 10 (par 24), although it is not made clear whether this is a permanent or temporary exception.
[9] Christine R Barker, 'Religion and Charity Law', *Juridical* Part 5 (1999): 311.
[10] Charities Act 1993 (c. 10) s. 3 (5) (c) (i) (ii)
[11] Ibid. s. 3 (5) (c) & s. 3 (14)

decided' the policy and that 'the original decisions on the policy behind voluntary registration were taken in the early 1960's'. However, with the introduction of monitoring under the Charities Act 1993 the purpose of registration had changed, and 'as matters stand' some 25,000 religious charities would have to register in 2001 when the 'current rules on voluntary registration expire'.[13] This was a matter undergoing consultation with the Home Office.[14] The matter was raised again in the Commissioners' Annual Report for 2000-2001, where the Commissioners noted that 'certain religious charities connected with particular Christian denominations' were still excepted by Regulations or Orders made under the Act. This meant that they continued to remain outside the monitoring programme of the Commission (unless they registered voluntarily) and only had to send in accounts if specifically requested by the Commission. Referring to consultations held with the Home Office during 2000/01 on 'whether, and on what basis, charities should be excepted from compulsory registration in the future', the Commisisoners noted

there was widespread agreement on the purposes of registration but a range of different views on the way forward. There was some support for the proposition that exception would be justified if the purposes of registration were being met by other means. There was also concern that information should be publicly available about all charities, whether or not they were registered.

However, in the end the matter was again deferred. The Commission continued to work with the Home Office to 'develop proposals for the future'. In the meantime the Home Office had extended the exception to 30 September 2002[15] for 'a number of charities

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[12] Luxton, *The Law of Charities* 433 fn. 112.
[13] The Charities (Exception from Registration) Regulation 1996 (SI 1996 No 180) 'temporarily' excepted a number of Christian denominations until 1 March 2001, replacing SI 1963 No 2074 and SI 1964 No 825 (sic), Picarda, *Law and Practice* 1114. The 1964 statutory instrument is presumably The Charities (Exceptions from Registration and Accounts) Regulation 1964 No 1825 referred to in the Commissioners Annual Report for 1964, Appendix D, 57
[14] Charity Commission, *Report of the Charity Commissioners for England and Wales for the Year Ending 31 March 2000,* London: 2000. 6.
[15] Regulation 4 of the Charities (Exception from Registration) Regulations 1996 (SI 1996 No. 180) was amended by regulation 2 of the Charities (Exception from Registration) (Amendment) Regulation 2001 (SI 2001 No. 260), Luxton, *The Law of Charities* 433 fn. 112.

which were affected by existing regulations due to expire on 1 March 2001'.[16] The last two published Annual Reports have not noted any progress in consultations with the Home Office on this matter. This 'anomalous' situation, whereby a large number of religious charities are excepted from registration, with 'some "traditional" churches enjoying historically bases legal privileges of exemption', has led one commentator to suggest that '"religion", however defined', should be 'separately regulated, as in some respects it already is' and replaced with a system which provides 'fiscal or other benefits based on an organisation's religious merit rather than its charitable purposes'.[17] Otherwise, the Government would be well advised to bring excepted religions under the full regime of the Commission, lest those not excepted complain of discriminatory treatment. [18] In this respect the Human Rights Act 1998 might provide some legal imperative.

[16] Charity Commission, *Report of the Charity Commissioners for England and Wales for the Year Ending 31 March 2001,* London: 2001. 10-11.
[17] Barker, 'Religion and Charity Law': 313-14.
[18] The situation of exempt religion might also warrant re-examination.

VI: 5

A STATUTORY DEFINITION OF CHARITY AND THE HUMAN RIGHTS ACT 1998

'a more objective test for religiosity that is free of cultural bias'

There has been some concern about the financial consequences of an ever expanding Register. This was referred to in the Commissioners' Annual Report for 2001-2002, where it was reported that there was 'a view held in some quarters that there are too many charities ... some people ... believe there are too many charities competing for too few funds and that a significant amount of charitable resource could be saved if more charities pooled their resources and worked together'. However, the Commissioners stressed that they were 'in no position to compel charities to join together', nor could they 'refuse to register an organisation with clearly charitable objectives simply on the basis that another similar charity already exists'. [1] In addition, it has been seen that the propensity of the Commissioners is to expand rather than to contract the list of purposes deemed to be charitable.

It is therefore unsurprising that in September 2002 the UK Cabinet Office's Strategy Unit released a report on the voluntary sector which called for, among 61 recommendations, the introduction of legislation 'redefining charitable purpose based on the principle of public benefit', the rationalization of charitable categories arising under the fourth head of 'other purposes beneficial to the community' and the facilitation of charity mergers, 'possibly by the creation of a dedicated advisory unit in the Charity Commission'.[2] While the UK Government is acting upon this advice and will enact legislation providing for a statutory definition of charity, it is uncertain whether this will result in a significant

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[1] Charity Commission, *Giving Confidence in Charities: Annual Report 2001-2002 (Part 1)*, London: Charity Commission for England and Wales 2002. 21.

contraction of the Register or what effect a new definition might have on 'religious' charities.

If the UK government were to seriously challenge historical charitable purposes, including 'advancement of religion' it could ultimately expand the concept of religion to bring the UK definition more into line with the broader definition in Australia (as currently applied)[3] or the even broader view in the United States.[4] Quint and Spring have suggested that the UK definition, 'faith in a god and worship of that god (i.e. a monotheistic concept),'[5] a 'view (obiter)' expressed by Dillon J in Re South Place Ethical Society (1980) is untenable in view of the advent of the Human Rights Act 1998. They say

while the Charity Commissioners have on occasion denied registration on theistic grounds, in practice, in most cases, the Charity Commissioners have taken a broader approach, and registered religious charities regardless of whether the religion in question is theistic or non-theistic. Hinduism, Sikhism, the Ravidassian religion and Buddhism have been expressly or impliedly accepted as charitable by both the courts and the Commissioners. Charities for the promotion of less traditional religions such as Unitarianism, Spiritualism, the Exclusive Brethren, the Unification Church (Moonies),

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[2] Editorial Board, 'Country Reports Western Europe: United Kingdom', *The International Journal of Not-for-Profit Law (<www.icnl.org/journal/vol5iss1/cr_weurope.htm>)* 5, no. 1 (2002): 1 of 10.

[3] To determine whether a 'particular set of beliefs and practices constitute a religion' for taxation purposes, the Australian Tax Office has ruled that the test, 'belief in a supernatural Being, Thing or Principle; and acceptance of canons of conduct which give effect to that belief, but which do not offend against the ordinary laws', derived from the High Court's 1983 Church of New Faith (Scientology) decision, will apply, noting that 'although other relevant criteria were discussed by members of the Court in that case, if those two main criteria are satisfied it is likely that the body will be characterized as religious', Australian Tax Office, *Australian Income Tax Ruling 92/17: Income Tax and Fringe Benefits Tax: 'Exemptions for Religious Institutions'* (<http://ww3.cch.com.au8080/dynaweb/atg/atgrule/@Generic_BookTextView/231660;pt=2190>). 3 of 7

[4] In their 1999 Scientology decision the Commissioners considered the US case of *Fellowship of Humanity v. County of Alameda* 153 Cal. App. 2d 673, 315 P. 2d 394 (1957), where the California State Court of Appeal in a property tax exemption case held that the religion consisted of four characteristics, a belief not necessarily referring to supernatural power, a cult involving a gregarious association openly expressing the belief, a system of moral practice resulting from adherence to the belief and an organisation within the cult designed to observe the tenets of the belief, *Charity Commission Decision: Church of Scientology Application for Registration as a Charity* (1999) <http:www.charity-commission.gov.uk/> Accessed 29 November 2001, 49 pages) Charity Commission for England and Wales 20-1 fn. 53

[5] Reiterated by the Charity Commissioners as 'a religion has to: be founded on a belief in a supreme being or beings; and involve expression of that belief through worship', Charity Commission, *Registering as a Charity,* London: Charity Commission <http://www.charity-commission.gov.uk/publications/cc21.asp> HTML Version, August 2002. 8 of 30.

Jainism, Baha'I and (recently) the Seventh Day Adventists, besides many small and local sects, have also been registered by the Commissioners.[6]

Quint and Spring suggest that the test of Mason ACJ and Brennan J in Church of the New Faith (1983)[7], 'which requires two basic factors: a belief in some transcendental reality or supernatural "being, thing or principle" and a system of conduct or practice giving effect to the belief', is a more appropriate test. Their argument is that the Human Rights Act 1998 'is likely to engender a more objective test for religiosity that is free of cultural bias' (although it would be hard to accuse the Commissioners of cultural bias in view of the disparate list of religions they have registered). The Australian test apparently fits the bill because 'it is broad enough to include non-theistic religions such as Buddhism and Jainism, and it excludes purely secular belief systems such as ethics, philosophy and politics'. In addition, Quint and Spring argue that the Australian test

is simply articulated, does not involve an extensive probe into beliefs, and it requires a basic organisation of conduct into some form that expresses those beliefs. It is also an approach which appears to be entirely consistent with existing charity law, and with the additional requirements of the Human Rights Act.[8]

However, the possible implications of the meaning of 'belief' as associated with 'religion' in Article 9 (1)[9] of the European Convention on Human Rights 1950 (ECHR), should also be considered in any examination of the potential effects of the Human Rights Act 1998, which makes it 'unlawful for the Commissioners, as a public authority, to act in a way incompatible with ECHR rights',[10] including discriminating 'against individuals on the grounds of their religion or other beliefs'.[11]

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[6] Francesca Quint and Thomas Spring, 'Religion, Charity Law and Human Rights', *The Charity Law and Practice Review* 5, no. 3 (1999): 162.
[7] *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120.
[8] Quint and Spring, 'Religion, Charity Law and Human Rights': 186.
[9] 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom either alone or in community with other and in public or in private to manifest his religion or belief, in worship, teaching, practice and observance', cited in *Charity Commissioners: Scientology decision 1999* 8
[10] *(Summary Document) Decision of the Charity Commissioners re Church of Scientology* (1999) Charity Commission for England and Wales 1
[11] *Charity Commissioners: Scientology decision 1999* 2

It might be possible to argue, as anticipated by the Commissioners, that 'a court could conclude that to decline registration of a charity based on a religion or system of belief impairs Article 9 freedoms as it limits the organisation's ability to manifest its beliefs through teaching and "evangelizing" activities'. This would arguably impact on the right of an individual to 'manifest one's religion or belief "in worship, teaching, practice and observance"'.

While the Commissioners felt confident that that conclusion would not be drawn in a case where 'for a particular belief system the State declines to confer a privilege',[12] (relying on Article 9 (2) exceptions and the 'margin of appreciation' doctrine)[13] it might become more relevant if religions were to be transferred to another jurisdiction and to the enjoyment of different, possibly greater privileges, as has been seriously suggested. In that case a collective of non-religionists adhering to a set of beliefs might well be able to claim discrimination if they are not admitted, or at least given the opportunity to apply under the same conditions as 'religions',

Luxton observes that 'it is not yet settled in Strasbourg jurisprudence whether the meaning of "religion" in Articles 9 and 14[14] is wide enough to include the promotion of non-theistic ethical or philosophical beliefs'.[15] If Strasbourg were to go further than the extant Australian test for 'religion', and acknowledge that the addition of the word 'belief' calls for a recognition of secular belief systems on the same or similar footing, then the Quint and Spring prescription would not prevail. The ultimate determination of the definition of 'religion' in English charity law (and in other areas) might yet encompass the broader American view and accommodate equivalent secular belief systems.

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[12] Ibid. 10
[13] Ibid. 10 - 11
[14] 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The Commissioners also note that it is 'arguable that the registration of charities which advance religion, and the exclusion of other beliefs for example, is potentially within the ambit of Article 9', Ibid. 9
[15] Peter Luxton, *The Law of Charities* (London: Oxford University Press, 2001) 48.

Contemplation of the fact that the legal definition of religion for tax privileges includes ethical[16] non-sectarian belief systems in the United States, and might conceivably do so in Europe, underscores the view that 'advancement of religion' is privileged as a charity in England precisely because it is presumed to foster ethical belief systems leading to good citizenship – a benefit to the community.[17] While the courts, and indeed the Charity Commissioners, have long refrained from making determinations based on whether a religion is right or wrong doctrinally, it should be acknowledged that for the purposes of charity law they are required to make decisions on whether a particular religion or sect promotes religion in a manner which is to the advantage of the community, not whether a group conforms to the definition of religion *per se*.

[16] Note that *Alamada* (1957) required 'a system of moral practice resulting from adherence to the belief'.
[17] For an exposition of this argument see, H R Sorensen and A K Thompson, The Advancement of Religion is Still a Valid Charitable Object in 2001.' (Paper presented at the Charity Law in the Pacific Rim, Brisbane, (Centre of Philanthropy and Nonprofit Studies, QUT) August 2002).

VI: 6

PUBLIC POLICY DISCRETIONS

'limitations as are prescribed by law and are necessary in a democratic society'

If religious organisations are not to be set apart from the general administration of charities[1] or abolished altogether as a charitable purpose, as has been suggested with respect to the purpose 'advancement of religion',[2] a pertinent issue is whether the UK Government will attempt to support or extend, legislatively, extant public policy limitations on the taxation and other privileges afforded to an expanding class of 'religious' charities. Indeed, it might be timely for the Government to take the opportunity to extend or at least facilitate the application of public policy limitations, as the adoption of human rights legislation in the UK might lead to an expanded definition of religion and an even greater clamour at the gate.

Apart from the obvious implication that Quint and Spring seem to accept possible 'discrimination' against secular beliefs by placing religious beliefs on a higher plane, their argument that the Australian test of 'religion' would be 'relatively easy to administer' raises some questions, particularly in the context of English charity law. First, it would expand the number of organisations eligible to apply for taxation privileges under the religious category (although organisations not conforming to the theistic test have already been admitted, indicating an existing de facto recognition of the Australian test). Second, while the problem of finding a deity or deities would be avoided, determining what constitutes 'supernatural belief' in the context of 'a system or conduct giving effect to the belief' is not necessarily an easy exercise, particularly in an age of multiculturalism, where all manner of activities, for example yoga, meditation and

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[1] It has been suggested that 'any future definition should consider removing churches from charity legislation', Christine R Barker, 'Religion and Charity Law', *Juridical* Part 5 (1999): 313

[2] Peter Edge, 'Charitable Status for the Advancement of Religion: An Abolitionist's View', *The Charity Law and Practice Review* 3, no. 1 (1995).

tai-chi, can take on a spiritual and hence possibly religious dimension.[3] Third, and perhaps most importantly, the Australian test (in the manner that it has been abbreviated by commentators and the Australian Tax Office), possibly tends to downplay [4] the other public policy considerations still relevant in English charity law, at least so far as the Charity Commissioners are concerned. Those public policy considerations have been clearly stated by the Commissioners, who say

> *in some cases the advancement of religion is not charitable*. This is where public benefit is clearly lacking. Examples of this include: organisations where the benefit is wholly private (such as an entirely enclosed religious order where the activities consist only of private prayer);[5] and where an organisation is set up to promote the beliefs of a particular religion which undermine the accepted foundations of religion and morality, or are otherwise contrary to the public interest.[6]

It is only if these important public policy questions are overlooked [7] or rendered impotent that the adoption of the Australian definition would possibly simplify the administration of charity law, albeit at the cost of an ever expanding Register and the probable admission of more dubious applicants.

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[3] In this respect the Charity Commissioners have noted that 'the Indian Courts have concluded that religion is not *necessarily theistic*, but undoubtedly has as its basis a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being', *Charity Commission Decision: Church of Scientology Application for Registration as a Charity* (1999) <http:www.charity-commission.gov.uk/> Accessed 29 November 2001, 49 pages) Charity Commission for England and Wales 20 fn 52. The Indian case referred to is *The Commissioner Hindu Religious Endowments Madras v Sri Lakshmindra Thirtha Swamiar Of Sri Shirur Mutt* (1954) SCR 1005.

[4] Application of the test may have underestimated the possibility, (at least in cases involving fiscal privileges for religious institutions), that there is an implicit requirement in the second limb of the Australian test ('the system of conduct or practice giving effect to the belief') that the system of conduct or practice is based on an ethical code which fosters ethical behaviour according to commonly accepted community standards free of cultural bias.

[5] Which Quint and Spring say are likely to be affected by the Human Rights Act 1998 in that 'treating a religious group differently just because it happens to be "enclosed" rather than "open" will pass muster only if the Commissioners can show "very weighty reasons" for doing so', Francesca Quint and Thomas Spring, 'Religion, Charity Law and Human Rights', *The Charity Law and Practice Review* 5, no. 3 (1999): 186.

[6] Charity Commission, *Registering as a Charity,* London: Charity Commission <http://www.charity-commission.gov.uk/publications/cc21.asp> HTML Version, August 2002. 8 of 30. Emphasis added.

[7] Quint and Spring themselves mention public policy considerations only in passing, saying 'the courts have tended to look favourably on any religion regardless of its doctrines or theological merits (another area which is not susceptible to judgement by a court) so long as they are not harmful to mankind'. On the other hand, they concede that the presumption that a religious purpose benefits the public 'can be displaced by evidence to the contrary', which opens the gate to public policy considerations, Quint and Spring, 'Religion, Charity Law and Human Rights': 161.

On the question of public policy it should be noted that such considerations have retained an important place in the law of public trusts in Scotland, where the validity of a trust depends on it benefiting a section of the public and that it is lawful and useful.[8] Ford submits that 'the "lawful" can perhaps be taken as a reference to the general principle that a trust, public or private, may be illegal, contra bones mores (against good morals) or otherwise contrary to public policy'.[9] In such cases the courts retain the option of a public policy veto, which has developed in the context of 'public trust status', where 'no fiscal consequences attach' and where there is therefore less pressure to ensure that a bequest is more widely acceptable to the public, as in cases 'where taxpayers' money is at stake'.[10]

Even though 'the veto is invoked only with reluctance and in circumstances which cry out for it', the public policy veto has been interpreted and applied liberally in Scotland to exclude 'purposes which are manifestly harmful or useless',[11] according to the courts. Trusts have been rejected on the basis that they were 'irrational', 'a sheer waste of money', 'an absurd whim', 'unnatural, contrary to custom, and unreasonable', 'so grotesque, so extravagant, so wasteful ... so mad', and 'irrational, futile and self destructive',[12] the general principle being that a trust should 'not result in a large measure of useless waste'. In such cases, 'without being illegal in the sense of being contrary to any express rule of the common law or contrary to any statute, the principle of public policy' will apply.[13]

On the other hand, the Scottish courts have taken a benign attitude in general to the definition of charity,[14] presuming benefit in a manner 'similar to the presumption of

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[8] Patrick J Ford, 'Public Benefit Versus Charity: A Scottish Perspective', in *Foundations of Charity*, ed. Charles Mitchell and Susan R Moody (Oxford and Portland, Oregon: Hart Publishing, 2000), 217.
[9] Ibid., 222-3.Or 'immoral or contrary to public order', Lord Sands in *Aitken's Trustees v Aitken* (1927) SC 374, 380 – Ford, 226
[10] Ibid., 234.
[11] Ibid., 228.
[12] Ibid., 224 -6.
[13] Lord Guthrie in *McCaig's Trustees v Kirk Session of the United Free Church of Lismore* (1915) SC 426, 438, Ibid., 225 fn. 126.
[14] For example, memorials to the dead have been allowed 'in terms of moral benefit to the living arising from pious feelings', Ibid., 226 fn. 130.

public benefit in English law under the first three heads of charity'. If this presumption is challenged, the test then becomes whether a 'certain section of opinion' regards the purpose to be for the public benefit.[15] Overall, the Scottish judges have allowed themselves a wide discretion either way, in the context of trusts where financial concerns are not paramount. If the more lenient Scottish definition of charity were to be applied in England it 'would considerably widen the existing scope of charity',[16] so that English reformers wishing to apply a brake to the ever expanding list of charities might be well advised to look favourably on the veto powers and steer clear of the definition.

CONCLUSION

The Charity Commission has at present extraordinary powers and much latent potential. However, the true extent of its powers continues to be determined, leaving English charity law in a state of flux. In the case of registration decisions, the result of the Scientology appeal might yet prove chastening, particularly with the uncertain ramifications of the Human Rights Act 1998 coming into play.[17] With respect to the Commissioners' investigation powers, these might yet be pruned by an appeal to the High Court, although the legal cost of appeals seems to work in favour of the Commission[18] and the Court of Appeal has taken a relaxed view of investigation procedures in a case involving a religion.[19]

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[15] Ibid., 231.
[16] Ibid., 229 fn. 147.
[17] Luxton says that a possible effect of the Act will be to admit as charitable 'religious groups (such as the Church of Scientology) which are presently denied such status' on the basis that 'their faith does not involve reverence or worship'. He does not refer to the alternative, public policy grounds upon which Scientology would have been denied admission if it had 'passed' the religious definition test, Peter Luxton, *The Law of Charities* (London: Oxford University Press, 2001) 49.
[18] For example, Hamza, the cleric ousted by the Commissioners in the Finsbury Park Mosque case, might well have appealed the decision, (and might yet do so), but his solicitor said he lacked the money (Vikram Dodd, 'Radical cleric barred from mosque', *Guardian Unlimited*, 5 February 2003.) and he also faced deportation, Alan Travis, 'Move to deport Hamza 'in weeks'', *Guardian Unlimited*, 25 February 2003.
[19] In the case of an application by some Exclusive Brethren for declaratory relief against a Commission investigation the Court held, *inter alia*, that 'the investigator is the master of his own procedure and is entitled to obtain information in any way he thinks fit'. The Court concluded that it might not (and did not) make any declaration where the applicant had a statutory avenue of appeal where 'findings of fact could be challenged', Luxton, *The Law of Charities* 472-3. Citing Rule v. Charity Commissioners (High Court, 10 December 1979) (Fox J) referred to in the Charity Commission *Annual Report 1979*, 12-16 (paras 24-36)

The Charity Commission for England and Wales is an enticing model for social control of religion. The Commissioners play a useful role in promoting religious harmony, fostering various watch groups, acting as watchdogs against financial and other support for terrorism (which all too often springs from religion) and moving decisively to curb religious extremism manifested as charity malpractice. These are all useful functions, even if the Commissioners cannot be expected to get it right on all occasions.

However, if the Commissioners are to continue to fulfil their mandate effectively over religions and possibly equivalent belief systems, the UK Government might well be advised to support statutorily (or by regulation) the public policy discretions the Commissioners believe they have, in particular the discretion to refuse registration on the basis that to register an organisation would be 'contrary to the public interest'. This would help to ensure protection, under Article 9 (2) of the European Convention, for the Commissioners' determinations. Article 9 (2) provides that; 'freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights or freedoms of others'.[20] Although the powers of the Commissioners are undoubtedly 'prescribed by law', in that they have a statutory duty to preside over admission to the Register,[21] at present the extent of the availability of public policy discretion is uncertain, it being dependent on a body of case law. Codification would therefore ensure that this important public policy flexibility is not eroded or lost.

The next chapter deals with the Australian scene. Changes from the prevailing system (where the Australian Taxation Office is the relevant gatekeeper and common law definitions apply) to a charity commission model and codification have been recommended. Thus far the former has been rejected by the government and the latter, although attempted, was stillborn. Chapter VII concludes with detailed comparisons of the two models. Suggestions for changes to the Australian system are canvassed in the thesis conclusions contained in chapter VIII.

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[20] *Charity Commissioners: Scientology decision 1999* . 9.
[21] Ibid. 10 fn. 11.

CHAPTER VII: FROM COMMON LAW TO CODIFICATION ? RELIGION AND CHARITY LAW REFORM IN AUSTRALIA

VII: 1

ADMINISTRATIVE COMMISSION OR DEFINITIONS TRIBUNAL OPTIONS

'administration would be better served by a single, independent common point of view of decision making on definitions'

There has been no shortage of calls in Australia to establish an 'independent administrative body' modeled on the Charity Commission for England and Wales. The Committee of the Sheppard inquiry, which was established at the request of the Australian Democrats[1] to look into the definition of charities[2] ('as part of a political deal to give the value added tax passage through Australia's Upper House of Parliament'),[3] reported in June 2001 that a large number of the 374 submissions received [4] 'expressed

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[1] 'In May 2000, as a result of consideration of the FBT exemptions for charities, the Government agreed to a long standing Democrat request to establish an independent inquiry into the legal dedition (sic) of charities. The Inquiry comprised three lawyers, former Federal Court Judge Ian Shepherd (sic), former ACOSS (Australian Council of Social Service) President Robert Fitzgerald and head of the Prime Ministers Community Business Partnership initiative David Gonski', John Cherry, *Speech to the South Australian CPAs Not for Profit Committee on 20 March* (Australian Democrats Senator. <http://www.democrats.org.au/speeches/index.htm?speech_id=893&display=1>).

[2] The Democrats' role was confirmed in the text of the PM's Media Release of 18 September 2000, which stated, 'in establishing the Inquiry, the Government is honouring the commitment it gave to the Australian Democrats earlier this year to examine such matters', Hon Ian Sheppard, *Issues Paper: Inquiry Into the Definition of Charities and Related Organisations,* Canberra: The Treasury, Commonwealth of Australia 2000. 17.

[3] Myles McGregor-Lowndes, 'Australian Charity Law Reform Proposals', *The International Journal of Not-for-Profit Law* 5, no. 1 (2002): 5 of 13.

[4] Appendix A of the report lists written 'Submissions Received', including 23 confidential submissions, Hon Ian Sheppard, *Report of the Inquiry into the Definition of Charities and Related Organisations,* Canberra: The Treasury, Commonwealth of Australia: Available online at <http://www.cdi.gov.au/html> 2001. 297-309. Electronic copies of submissions cited herein were generally accessed from the Inquiry

support for the establishment of an independent body'. Many nominated the Charity Commission as an appropriate model.[5] The Committee members concurred with this view. They recommended that 'the Government seek the agreement of all State and Territory Governments to establish an independent administrative body for charities and related entities, and to the legislative changes necessary for its establishment'.[6] The body they envision is based largely on the Charity Commission for England and Wales.

ADMINISTRATIVE CHARITY/NON-PROFIT COMMISSION

The Australian Taxation Office (ATO), at present the main gatekeeper for federal tax exempt and gift deductible status[7] for charities and some other[8] third sector[9] organisations, noted that '*administration would be better served by a single, independent common point of view of decision making on definitions* leading to conclusions about whether organisations are charitable or non-profit, such as occurs with the Charities Commission in the UK for example'.[10] It was observed that 'if there was to be a separation of decision making about the status of an organisation from decision making specific to a particular concession', there would likely 'be more scope for decision

website at <http://www.cdi.gov.au/html/public_submissions.htm>. The Defence of Government Schools (DOGS) submission was also published online by the organisation

[5] Ibid. 281.

[6] Ibid. 18, Recommendation 25.

[7] Other decision makers 'with appropriate expertise' for 'various gift deductible categories ... include Departments for the environment, foreign affairs, the arts, health and education, and the CSIRO', where status decisions under categories such as 'approved research institute' are determined, Australian Taxation Office, *Inquiry into Charities and Related Organisations: Submission by the Australian Taxation Office,* Canberra: ATO 2001. 18 of 26 par 89 fn 83.

[8] Not all groups receiving tax-exempt status would qualify as charities. An example given by the ATO is; 'a group of thirteen families formed an association 80 years ago. It solely owns and runs a shrine. Use of the shrine is limited to the members of the families'. This group would not qualify as a charity as it would fail the public benefit test, but qualifies as an exempt religious institution, Australian Taxation Office, *Clubpack* (Commonwealth of Australia, 2000) 46. Religious institutions are exempted under s 23 (e) Income Tax Assessment Act 1936 and s. 57 Fringe Benefits Tax Assessment Act 1986, Australian Tax Office, *Australian Income Tax Ruling 92/17: Income Tax and Fringe Benefits Tax: 'Exemptions for Religious Institutions'*
(<http://ww3.cch.com.au8080/dynaweb/atg/atgrule/@Generic_BookTextView/231660;pt=2190>).

[9] Broadly speaking, 'the third sector encompasses all those organisations that are not part of the public or business sectors', Mark Lyons, *Third Sector. The contribution of nonprofit and cooperative enterprises in Australia* (Sydney: Allen & Unwin, 2001) 5.

[10] Australian Taxation Office, *Submission to Sheppard Inquiry,* 2-3 of 26 par 9. The statement was repeated in the letter covering the submission, dated 19 January 2001 and signed by Michael D'Ascenzo, Second Commissioner

making by non-ATO bodies, if they had the necessary expertise'. The Charity Commission was seen to be a body with the necessary expertise,[11] although the ATO was not explicit on whether it preferred the full blown Charity Commission option or some more narrowly focused body dealing with definitional, gate keeping issues. The major *caveat* to an administrative body and/or gatekeeper independent of the revenue authority, would be compliance costs, which 'would have to be commensurate with the policy objectives. There would also be on-going compliance aspects for which it might need appropriate powers. Cooperation and working relations between the ATO and the other body would need to be assured'.[12]

The Committee members noted one submission from a religious organisation,[13] Anglicare Australia, which supported the commission administrative model on the basis that it 'could help protect the public reputation of honest charities from unscrupulous people and organisations'.[14] Another, from the Catholic Church in Australia, 'argued against the need for an independent Charity Commission'.[15] Anglicare supported the 'establishment of a Charities Commission along the lines of the Charity Commission for England and Wales as a means for promoting charitable activity in Australia, registering and regulating charitable organisations and ensuring public accountability and transparency'. Acknowledging the privileged status of tax exempt bodies, Anglicare noted that 'the Australian public donates millions of dollars each year to charitable organisations and there should be a body to monitor charitable organisations and protect the public interest'. There is no hint here of any concern that the establishment of an administrative commission based on the English model might intrude inappropriately on the independence of religion. However, it is noted that accountability through a commission 'should be done from the perspective of maximizing public participation and support rather than from the perspective of protecting government revenue'.[16]

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[11] Ibid. 18 of 26 par 88 fn 82.
[12] Ibid. 19 of 26 par 90.
[13] There were around (based on the list published in Appendix A) 38 submissions from religious entities (including intra-denominational groups) and claimants to that status
[14] Sheppard, *Inquiry into the Definition of Charities,* 281.
[15] Ibid. 283.
[16] Anglicare Australia, *Inquiry into the Definition of Charities and Related Organisations: Submission by Anglicare Australia,* Melbourne: Anglicare Australia 2001. 17.

The Tax Working Party of the Australian Catholic Church felt that 'the current approach to identifying charitable organisations (as opposed to defining them) through the application of the common law *Pemsel* test has served the community very well', although there was 'scope for broadening the interpretation of what constitutes 'other purposes beneficial to the community'.[17] To achieve this it suggested that the Commonwealth Government should 'direct' the ATO 'to adopt a broader interpretation of this purpose'.[18] Alternatively, the Government might establish a specialist advisory body within the Government similar to the Charities Consultative Committee, 'that draws upon experts from the community to make recommendations about charitable status'.[19] Overall, the advice of the Working Party was to leave well enough alone. This was on the basis that the common law categories were quite adequate, and flexible in allowing 'broad principle to be applied to the manifold expressions of human generosity and creativity'. It was also noted that the 'courts have often indicated that "it is probably impossible to define what is a charitable (trust), and it is certainly not advisable to attempt to do so'.[20] The Working Party did not expound further on reasons for opposing the commission concept,[21] although it might reasonably be inferred from the submission that it was satisfied with present arrangements, including the role of the ATO.

A number of other religious organisations specifically supported the model of the Charity Commission for England and Wales or of some approximate system of accountability through registration. The Uniting Church in Australia argued that 'the administration of laws governing charities must achieve accountable and transparent use of public funds'. The Church proposed that 'the government explore the establishment of a mechanism

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[17] Catholic Church, *Submission to Inquiry into the Definition of Charities and Related Organisations,* Australia: Australian Catholic Church Tax Working Party 2001. 21.

[18] Presumably through legislative amendment, unless the Treasurer has the necessary powers under regulation to so direct the ATO. Any administrative decision to admit entities under new categories would presumably be subject to appeal to the Administrative Appeals Tribunal, but the question that arises is who would have standing, who would have the interest and (under the present arrangements), who would be aware that the application had been made? .

[19] Catholic Church, *Submission to Inquiry into the Definition of Charities and Related Organisations,* 29.

[20] Ibid. 1.

[21] Although the submission did reveal some sensitivity to the role of the state and a concern to maintain independence, noting 'it is important that charities not be turned into arms of the state', Ibid. 4.

similar to the Charities Commission for England and Wales, yet independent of government, as a means of promoting charitable activity in Australia, registering and regulating charitable organisations and ensuring public accountability and transparency'.[22] JewishCare submitted that 'there is a need for a comprehensive system of registration and that this should be combined with a process of formal accreditation and continuing monitoring'.[23] The Lutheran Church, in suggesting a definition of 'Charities and Related Organisations' with reference to its own activities, included the words 'the organisation may be evaluated by its service to the community for continuation of Government registration'.[24]

DEFINITIONS TRIBUNAL OPTION

As an alternative to the full blown administrative option, Missions Interlink submitted that 'the ATO should NOT be the final arbiter, but that an independent Charity/Not-for Profit Appeals Tribunal be established to determine the status of aggrieved organisations. Depending on the range of tensions perceived, this Tribunal could be limited to tax related issues or have a wider scope'.[25] With respect to the Charity Commission model, Missions Interlink submitted

> we do not see the need for another regulatory body to be established to register charities and scrutinize their activities, unless there were VERY significant benefits for the charity sector. It would be quite onerous and counter productive for charities and Not-for-Profits to have to cope with all the time, effort and cost of reporting to and complying with another layer of regulation.[26]

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[22] Uniting Church, *The Uniting Church in Australia Submission to Inquiry into the Definition of Charities and Related Organisations,* Australia: Uniting Church in Australia 2001. 1.7.
[23] JewishCare, *Submission to the Inquiry into the Definition of Charities and Related Organisations,* Bondi Junction, Sydney: Steve Denenberg: Chief Executive Officer 2000. 8 of 9.
[24] Lutheran Church, *Inquiry into the Definition of Charities and Related Organisations: Submission on Behalf of Lutheran Church of Australia,* North Adelaide: Lutheran Church in Australia 2000. 3 of 4.
[25] This was on the basis that 'we understand that in Australia, the ATO has the power to determine the Not-for Profit and/or charitable status of any organisation and that this has created some tensions, although we have no evidence of it amongst our members', Missions Interlink, *Submission from the Missions Commission of the Australian Evangelical Alliance Inc: Inquiry into the Definition of Charities and Related Organisations,* Mitcham, Victoria: Missions Commission: Australian Evangelical Alliance 2001. 2.
[26] Ibid. 3.

PERCEIVED ATO CONFLICT OF INTEREST

A 'strong theme among submissions' for removing the role of gatekeeper from the ATO (or other government agencies), to an independent body, was that of perceived conflict of interest. It was argued that 'the agencies' concern for their primary responsibility (to protect the revenue) would tend to outweigh their interest in granting an organisation charitable status, and therefore eligibility for taxation concessions'.[27] While not confronting the alleged conflict issue directly, the ATO itself seemed uncomfortable in its present role as gatekeeper, noting that community expectations did not match concessions available. Under such circumstances, 'decision makers appear hard and uncaring and there is continued pressure for exceptional cases to be considered'.[28]

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[27] Sheppard, *Inquiry into the Definition of Charities,* 280-1.

[28] Australian Taxation Office, *Submission to Sheppard Inquiry,* 14 of 26. Note however the ATO statement that 'a leveling of concessions would ease pressure considerably', resulting in the Hobson's choice of 'either significant revenue costs to the community (if organisations were "promoted"), or a reduction in the level of concessions now available to some organisations ("demotion")', Ibid, 4 of 26.

VII: 2

FINDINGS AND RECOMMENDATIONS OF THE SHEPPARD CHARITIES DEFINITIONS INQUIRY

'a large proportion of the population have a need for spiritual sustenance'

The Sheppard Committee recommended the establishment of an independent administrative body based on the Charity Commission model. It was felt that it was not necessary for the ATO to 'retain its role in determining charitable status'. As 'a matter of principle ... charitable status ... should stand independently of the taxation concessions that may attach to that status'. The Committee favoured 'the establishment of an independent body to be responsible for determining the charitable status of entities'. This would be 'a significant undertaking'. As 'a minimum' it 'would be responsible for determining the status of all charitable and related entities in Australia, for listing them on a public register, and for regularly reviewing the status of registered entities. Decisions on charitable status by this body would be binding on the ATO and State agencies'.

The Committee saw no need for any new appeal mechanism to be created as 'decisions taken by the new body should be appellable, initially by internal review, but there would also be a statutory right to appeal that decision to an appropriate higher authority' which would continue to be the Administrative Appeals Tribunal (AAT). [1] Despite the explicit role of the proposed independent administrative body in '*determining* the charitable status of entities', the Committee did *not* consider there to be 'a need in Australia for a separate body to have a quasi-judicial role similar to that of the Charity Commission'.

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[1] Hon Ian Sheppard, *Report of the Inquiry into the Definition of Charities and Related Organisations,* Canberra: The Treasury, Commonwealth of Australia: Available online at <http://www.cdi.gov.au/html> 2001. 290-1. Emphasis added. To justify the 'considerable' resource commitment, the Committee's logic was that it should be enlarged even further to include 'monitoring the accountability of charities ... advice and support for the charitable and related sector' and 'an information resource for and about the sector', Sheppard, *Inquiry into the Definition of Charities,* 292-3.

The proposed body would have 'a more limited role than that exercised by the Charity Commission for England and Wales, which has similar authority to the courts to make judgements about charitable purposes'. According to the Committee 'it should be left to Parliament to make changes to definitions, and it should be left to the courts to interpret the law if there are disputes about its meaning'.

The position taken here by the Committee is curious.[2] The role of 'determination of charitable status' foreshadowed for the proposed independent body is in essence the same role played by the Charity Commission for England and Wales, whether it is characterised as a 'quasi-judicial' function or otherwise. The Charity Commission determines whether an entity qualifies according to a set of common law categories while the proposed body would have to determine whether an entity qualified under a set of legislatively defined 'principles' (which merely re-state the categories with some elaboration). The task is essentially the same, even if the Committee felt codified principles could be more precise than the common law, with both allowing appeal to the courts.[3] Nevertheless, having placed its faith in codification, the Committee recommended that 'the principles enabling charitable purposes to be identified be set out in legislation'[4] and recommended its preferred option for doing this.

CODIFICATION PREFERENCE

The preferred option lists (as purpose headings for legislative enactment) three of the four extant common law categories, being advancement of education, religion and other purposes beneficial to the community. It incorporates as well as expands the terms of the other common law category, relief of poverty, as a sub-category (the prevention and relief of poverty, distress or disadvantage of individuals and families) under an ostensibly

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[2] Particularly as the Committee had previously noted, 'in a sector which is heterogeneous and constantly evolving, we do not consider it appropriate to apply a test in a mechanical way, or to use a "check list" approach, which would enable entities to be defined into a category on the basis of satisfying a few simple indicators. The processes for administering the definitions will therefore continue to be a significant factor in determining the overall effectiveness of the recommended definitions', Sheppard, *Inquiry into the Definition of Charities,* 287.

[3] Although the basis of grounds for appeal in England is still unclear.

[4] Ibid. 15. Recommendation 12

new category, 'the advancement of social and community welfare'. Other categories[5] are stipulated, including 'the advancement of health ... the advancement of culture' and 'the advancement of the natural environment'. Some of the categories proposed for legislative enactment are supplemented with explanatory comments to ensure the inclusion of certain activities. For example, under 'other purposes beneficial to the community' are listed, 'without limitation', 'the promotion and protection of civil and human rights; and the prevention and relief of suffering of animals'. It is also noted that 'advancement', an integral part of the existing common law definition, 'is taken to include protection, maintenance, support, research, improvement or enhancement'.[6]

PUBLIC BENEFIT AND CONTEMPLATIVE ORDERS

The Committee supported the retention of the public benefit test 'as currently applied under the common law'.[7] In considering public benefit, the Committee considered the Carmelite nun case.[8] They cited Dal Pont's view that *Gilmour v Coats* [9] 'is unlikely to find favour in modern Australian and New Zealand courts' and the view of Reynolds JA (also cited by Dal Pont),[10] that requiring religious organisations to prove public benefit 'could give rise to great problems in that it might lead to the scrutiny by the courts of the public benefit of religious practices'. [11] A solution is proposed by the Committee members, who note 'it is possible to distinguish closed or contemplative orders that have a public interface from those that undertake meditation or contemplation on their own behalf. Those orders with a public interface offer prayerful intervention to any members of the faith community who seek it'. The fact that 'there is no restriction imposed on the general public's opportunity to ask the members of the order to pray on their behalf is

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[5] These might be viewed as extensions of the existing common law categories, the sorts of purposes that might be privileged anyway through judicial lawmaking.
[6] Sheppard, *Inquiry into the Definition of Charities,* 15-16. Recommendation 13
[7] Ibid. 14. Recommendation 6. The Committee notes here that 'to be of public benefit a purpose must be aimed at achieving a universal or common good; have practical utility; and be directed to the benefit of the general community as a "sufficient section of the community"'
[8] Ibid. 119.
[9] *Gilmour v Coats* (1949) AC 426.
[10] Gino E Dal Pont, *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000) 171.
[11] In *Joyce v Ashfield Municipal Council* (1975) 1 NSWLR 744. 750.

sufficient to meet the public benefit test'. On the basis of this reasoning the Committee recommend that 'where closed or contemplative religious orders regularly undertake prayerful intervention at the request of the public, their purposes be held to have met the public benefit test'.[12]

The problem with this reasoning is that *Gilmour* failed on the 'benefit' aspect rather than just the 'public' aspect of 'public benefit'. The Court held that 'the benefit of intercessory prayer to the public is not susceptible of legal proof and the court can only act on such proof. Further, the element of edification by example is too vague and intangible to satisfy the test of public benefit'.[13] As it has been held in *AG (NSW) v Donnelly* (1957)[14] that following *Gilmour* 'the convents of contemplative orders fall outside the legal conception of charity',[15] it seems that legislation would be the only safe way to ensure charitable privileges for strictly contemplative orders.[16]

ALTRUSIM OVERLAY

The Committee introduced a wildcard proposal by proposing that the concept of 'altruism' be introduced into the legal concept of charity, in an apparent attempt to 'clarify' the meaning of public benefit. This proposal could well lead to unintended consequences. The Committee proposed the introduction of a new category of 'altruistic community organisations' which are 'not-for-profit and have a main purpose that is altruistic', but which 'can have secondary purposes that are not altruistic, and that do not further, or are not in aid of, or are not incidental or ancillary to, their main altruistic purpose'.[17] In addition, the Committee recommended that the public benefit test *for all charities* 'be strengthened by requiring that the dominant purpose of a charitable entity

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[12] Sheppard, *Inquiry into the Definition of Charities,* 127-8. Recommendation 9. It is not stated whether this should appear in legislation or be implemented by Ministerial suggestion or fiat – presuming such power exists, although the general view of the Committee would seem to support the legislative option
[13] *Gilmour* 427.
[14] *AG (NSW) v Donnelly* (1957) 98 CLR 538.
[15] Hubert Picarda, *The Law and Practice Relating to Charities*, 3rd ed. (London: Butterworths, 1999) 108.
[16] An option subsequently taken by the government.
[17] Sheppard, *Inquiry into the Definition of Charities,* 17. Recommendation 23

must be altruistic'.[18] The ramifications of this would appear to be quite uncertain, adding an unnecessary complication to charity law. In an effort to explain the advantages of the altruism concept, the Committee presented the example of closed or contemplative religious orders and attempted to show that altruism explained the difference between groups meditating or contemplating on their own behalf and those with a public interface. However, the difference seems to be satisfactorily understood under the extant common law rule relating to public benefit, without the aid of 'altruism'.[19]

PUBLIC POLICY AND PURPOSE/ACTIVITIES TESTS

In any determination of what constitutes public benefit, the Committee also supported existing public policy considerations in two of its recommendations, although these also contain a considerable relaxation of the current rule against charities engaging in political activities, to prohibit a narrow definition of partisan activity only. The recommendations in question are that an entity be denied charitable status if it has purposes that are: illegal, *contrary to public policy*, or promote a political party or a candidate for political office. Activities of a charity must further, or be in aid of, its charitable purpose or purposes. Activities must not be illegal, *contrary to public policy*, or promote a political party or a candidate for political office.[20]

The Committee saw fit in these recommendations to specifically recommend the retention of public policy limitations in addition to illegality. So far as the gatekeepers are concerned, these issues come into play primarily in the initial assessment of claims for charitable status, where most initial inquiries relate to a consideration of the dominant purpose of an organisation, which is a *prima facie* common law requirement.[21] The Committee examined what type of inquiry (or possibly even investigation) might be undertaken by gatekeepers. It was concluded that the approach of the ATO 'would

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[18] Ibid. 14. Recommendation 7. The author's emphasis

[19] The Committee also cited self-help groups as an area in which the concept of altruism would 'clarify the determination of charitable purpose'. However, it then stated that 'in the Committee's view, the existing common law requirement is a satisfactory test', Ibid. 126-7.

[20] Ibid. 13. Recommendations 4 and 5. Emphasis added.

[21] If the dominant purpose of an organisation is contrary to public policy, it follows that it is not charitable

appear to be in line with the current thinking of the Charity Commission for England and Wales'.[22] Both of these gatekeepers have departed from the 'orthodox' legal view that the dominant purpose can be readily ascertained if an organisation's 'stated purposes' are clearly charitable, and will further inquire into the activities of an organisation, so that 'both the objects and activities are looked at when considering whether the purposes of an organisation are charitable'.[23] The Committee cited the position taken by the ATO, that

> Finding an institution's sole or dominant purpose involves an objective weighing of all its features. They include its constitutive or governing documents, its activities, policies and plans, administration, finances, history and control, and any legislation governing its operation. As these features can change over time, so can an institution's purpose. An institution's purpose at the time it was established is a relevant but not necessarily determinative factor. Accordingly, *it is possible for an institution that was not charitable when founded to become a charitable institution, and vice versa*.[24]

This approach was warmly commended by the Committee, which noted 'it may be that the ATO's approach is justified on the basis that the ATO has a duty to protect the revenue and ought not be hamstrung in its assessment of a particular case simply because of a clear statement of purpose or object in an entity's constituent document. In any case the ATO's approach seems to have an element of practicality and thus common sense about it, not just for revenue cases but for all cases'.[25]

Indeed, the Committee felt that while 'an over-enthusiastic administration can be a burden if no purpose is served by it being undertaken', it was 'difficult to perceive why a short investigation of the nature of the activities of an organisation may not be beneficial'. Even for 'newly formed entities', where 'the exercise may be more difficult and less reassuring', there would be in existence statements of intention by those responsible. Evidence would exist in the form of 'minutes, notes, memoranda and perhaps some correspondence which should be readily available'. If not, the non-existence of such evidence would raise 'a serious question about the entity's entitlement

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[22] Sheppard, *Inquiry into the Definition of Charities,* 109.
[23] Ibid. 101.
[24] Ibid. 102-3 fn 13. Emphasis added
[25] Ibid. 109.

to charitable status'.[26] The rationale in support of undertaking such inquiry (or 'investigation') involved providing greater certainty for the applicant and reassurance for the public. The Committee felt that

> If the nature of the activities are in accordance with the formal purposes or objects found in an organisation's constituent documents, there is greater assurance that the purposes are indeed charitable. Thus not only is it likely that the revenue will be protected, but those members of the public who for various reasons have dealing with the organisation will have greater confidence in doing so.[27]

Churches and religiously affiliated organisations accounted for some 38 or around 10% of the 374 submissions to the Sheppard inquiry. The Committee noted that 'submissions to the Inquiry have argued overwhelmingly that an organisation's purpose should be the prime determinant of its charitable status'. This sentiment was keenly supported by the faith community[28] (or religious lobby), although the sentiment from some quarters appeared to be that an organisations purpose should be taken at face value rather than involve any closer examination of activities undertaken, while at least one other submission cautioned a careful approach in that greater scrutiny of stated purpose or activities may jeopardize the status of genuine charities.[29]

RELIGIOUS CHARITIES AND RELIGIOUS INSTITUTIONS

At present under Australian Commonwealth law, religious entities qualify for taxation privileges under two overlapping categories, 'charity' and 'religious institution', because both concepts are used in different statutory instruments and on occasion in the same instrument. All entities that qualify as a religious 'charity' under the common law

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[26] Ibid. 109-10.
[27] Ibid. 110.
[28] The terminology preferred by the Sheppard committee. See for example Ibid. 127.
[29] The Catholic Church noted that 'there may exist other organisations whose *stated* purpose is charitable and whose activities also *appear* charitable, but which in fact are set up to exploit this appearance and whose *real* intention is to provide profit for those involved in the organisations activities. The law must be careful in how it handles these bodies, as in attempting to restrict the ability of non-charitable organisations to exploit the appearance of being charitable there is a danger that genuine charitable organisations may be penalized indirectly or unfairly,' Catholic Church, *Submission to Inquiry into the Definition of Charities and Related Organisations,* Australia: Australian Catholic Church Tax Working Party 2001. 15 fn 19.

category 'advancement of religion' also qualify as a 'religious institution'. However, the Sheppard Committee notes that 'there is no requirement for religious institutions to be for the public benefit so some religious institutions may not be charities'.[30] In *Clubpack*, the ATO provides an example of a 'spiritual college' which was 'established for descendants of Northern Ireland Protestants who had settled in New South Wales before 1880'. In that case the ATO says that 'the college would not be a charity *because it was not established for the public benefit.* Those to benefit were selected on the basis of relationship to particular persons'.[31] Nevertheless, the 'spiritual college' would qualify for tax exempt status as a religious institution.

The ATO defines an entity as a 'religious institution' for income tax exemption purposes if 'its objects and activities reflect its character as a body instituted for the promotion of some religious object, and the beliefs and practices of the members constitute a religion'.[32] It is noted that 'the expression is not confined to major religions such as Christianity, Islam, Judaism, but also extends to Buddhism, Taoism, Jehovah Witnesses, the Free Deist Communion of Australia and Scientology'. Echoing Murphy J in *Church of the New Faith* it is noted that 'the categories of religion are not closed'. Religion is defined as 'belief in a supernatural Being, Thing or Principle, and acceptance of canons of conduct which give effect to that belief, but which do not offend against the ordinary laws',[33] being the shorthand definition derived by the ATO from the Mason ACJ & Brennan J judgement in *Church of the New Faith* (1983).

However, in addition, in order to qualify as an exempt religious institution, the ATO stipulates that a religious institution must meet at least one of four other conditions, although it seems that this boils down to complying with one of two conditions. The first condition is to comply with one of three tests,[34] either having a physical presence in

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[30] Sheppard, *Inquiry into the Definition of Charities,* 260.
[31] Australian Taxation Office, *Clubpack* (Commonwealth of Australia, 2000) 46. Emphasis added
[32] It is explained that 'an institution may have the legal structure of an unincorporated association or a corporation. However, incorporation is not enough, on its own, for an organisation to be an institution. Its activities, size, permanence and recognition will be relevant. An organisation that is established, controlled and operated by family members and friends would not normally be an institution'
[33] Australian Taxation Office, *Clubpack* 45.
[34] Ibid. 45-6.

Australia, being a deductible gift recipient or being prescribed under income tax Regulations as being located outside Australia but being exempt from income tax in your country of residence.[35] The alternative condition is for a religious institution to be 'listed by name in the income tax regulations for these purposes, and have a physical presence in Australia but pursue its objectives and incur its expenditure principally outside Australia'.

The effect of the ATO's interpretation of the meaning of 'religious institution' is that religious 'charities' qualify for the full range of benefits available under various statutes, including income tax exemption, refund of imputation credits, fringe benefits tax (FBT) rebate, goods and services tax (GST) charity/gift deductible entity concessions and GST religious organisations concessions. However, those organisations that qualify only as a 'religious institution' are limited to income tax exemption, the FBT rebate and GST religious organisation concessions.[36] The ATO lists Scientology as an example of an organisation that would qualify for 'religious institution' status. In it submission to the Sheppard Inquiry, the Church of Scientology claims it 'is an Australian religious institution which has a physical presence in Australia and which incurs expenditure and pursues objectives principally in Australia. As a consequence all the income derived by the Church is exempt from Australian income tax'.[37]

NOTIFICATION AND ENDORSEMENT

It is observed by the ATO that 'being exempt from income tax' on the basis of qualifying as a religious institution 'gives you important income tax entitlements'. These are that 'you do not have to lodge an income tax return, unless specifically requested, and you do not need to notify the ATO of your exemption', although 'you may still be liable for other taxes'. [38] The exemption from notification and hence endorsement seems to be one apparent 'advantage' enjoyed by religious institutions that do not qualify or do not

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[35] Ibid. 6.
[36] See Sheppard, *Inquiry into the Definition of Charities,* 311. Appendix B for a list of 'taxation concessions available to charitable and related entities'.
[37] Church of Scientology Asia Pacific Region, *Submission to Sheppard Inquiry,* Office of Special Affairs: Church of Scientology 2001. 1 of 2.
[38] Australian Taxation Office, *Clubpack* 46.

choose to access exemptions available to religious charities, as 'a charity must be *endorsed* as an income tax exempt charity to be entitled to income tax exemption'.[39] The endorsement process (applicable from 1 July 2000) also applies to deductible gift recipients and must be complied with by charities in order to gain or 'retain Commonwealth income tax concessions',[40] although it does not apply to 'religious institutions'. The Sheppard Committee noted that 'the endorsement process introduced for charities was an explicit attempt to distinguish administratively between charities and other income tax exempt entities ... Only those entities that are eligible for an income tax exemption as a charity are required to seek endorsement as income tax exempt charities'.[41]

The overlap between 'charitable' and 'religious institution' (and indeed between 'charitable' and 'scientific or public educational institutions') was found by the Sheppard Committee to cause 'ambiguity and confusion'.[42] With the advent of a formal endorsement process there is now an inconsistency between the treatment of religious entities. This occurs because some must be endorsed while others, those non-charitable religions with arguably the more tenuous entitlement to tax exempt status[43] (or those who choose not to apply for charitable status but opt instead for religious institution status) are exempted from this process, even though the endorsement process as applied may not be onerous. Professor Mark Lyons observes that 'once an organisation has been accepted as tax exempt, they are told that they need never file a tax return, so there is no way of the taxation authorities knowing, except by accident, whether the organisation is still committed to the purposes that originally won its tax exempt status'. [44] The Sheppard Committee note

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[39] Sheppard, *Inquiry into the Definition of Charities,* 311. Emphasis added
[40] Robert Fitzgerald, 'A Defining Moment: The Inquiry and its Outcomes', *Third Sector Review Special Issue: Charity Law in the Pacific Rim* 8, no. 1 (2002): 268.
[41] Sheppard, *Inquiry into the Definition of Charities,* 262.
[42] Ibid. 263.
[43] On the basis that they do not have to comply with a public benefit test
[44] Mark Lyons, The Legal and Regulatory Environment of the Third Sector.' (Paper presented at the The Legal Environment and the Third Sector in India, University of Mysore, 2003), 10.

there is a legal obligation on endorsed entities to advise the ATO if there is any change in their circumstances which would mean they cease to be entitled to endorsement, but there is no accountability requirement for them to provide the ATO with financial statements or other reports on a regular basis. Endorsed ITECs (Income Tax Exempt Charities) and DGRs (Deductible Gift Recipients) may nevertheless be subject to audit as part of the ATO's compliance strategies.[45]

The Committee also note that 'once endorsed, they receive official advice from the ATO which indicates under which particular provision in the legislation they have been approved'.[46] It was also observed that the endorsement process for charities was inconsistent in that it did not apply to all concessions available, therefore 'an entity can access the GST concessions available to charities by self-assessing its charitable status, but be required to seek endorsement by the ATO to claim an income tax exemption'.[47] To address these anomalies, improve consistency and presumably to tighten up accountability if an 'independent' administrative body is not established, the Committee recommended that 'the endorsement processes currently undertaken by the Australian Taxation Office be extended to include the endorsement of charities and related entities in order to access *all* the taxation concessions to which they are variously eligible'.[48] Under the framework recommended by the Committee it would not be necessary to extend the endorsement process to religious and other institutions, as they would be abolished as separate categories.

EXCLUDE 'RELIGIOUS INSTITUTIONS'

The Sheppard Committee 'was unable to find any clear statement of the public policy intention of separately listing religious, scientific and public educational institutions as well as charitable institutions'. It surmised that when the term 'public charitable institution' was originally inserted in the Income Tax Assessment Act 1927 it might have

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[45] Sheppard, *Inquiry into the Definition of Charities,* 276. Words in brackets added

[46] The Committee note that the endorsement process for ITEC and DGR status was introduced under the A New Tax System (Administration) Act 1999. Prior to that 'charities were allowed to self-assess their income tax status and did not need to apply to the Australian Income Tax Office (ATO) for income tax exemption', Ibid. 275 fn 1.

[47] Ibid. 289.

[48] Ibid. 289, 94. Recommendation 26

been intended to have a narrow meaning of 'relief of poverty and distress'. However, there could be no doubt that in the Income Tax Assessment Act 1936 the wider legal meaning of charity was meant to apply and that the inclusion of the terms 'religious, scientific and public institutions' may have been 'a safety measure, a way of ensuring that certain entities, such as religious institutions, would clearly remain income tax exempt regardless of possible changes to the common law relating to charities'.[49]

It is reported that 'the Committee sought the views of a number of religious entities' on whether the overlapping categories of charitable and religious institutions should be merged under the charitable category of 'advancement of religion'. The responses 'argued strongly for the maintenance of a separate category of religious entity'. However, although the paragraph in the *Sheppard Report* is hard to follow, the Committee seems to suggest that concerns about a merger were based on misapprehension. In answer to a response from the Catholic Church in Australia, the Committee noted that 'all parts of the Church that advance religion and that are altruistic and for the public benefit, such as a diocese or a religious congregation, would fall under the head of charity of "the advancement of religion". A separate category of religious institution is not necessary to provide special status to such purposes'.[50]

Despite the unnecessary complication introduced by the introduction of the word 'altruistic', the Committee found that the examples cited by the ATO in its *Clubpack* publication, of those religious entities that would not qualify as charities, because in the words of the Committee 'they are not altruistic and for the public benefit', should fall outside the framework of tax exempt entities recommended by the Committee, it then being 'a matter for the legislature to determine whether to provide favourable taxation treatment to non-altruistic bodies'. The Committee therefore recommended 'the framework recommended in this Report should not include the terms "religious institution", "scientific institution" and "public educational institution", as altruistic

[49] Ibid. 261.

[50] The reference here to 'altruism' is perhaps unfortunate. It seems to add nothing to the common law concept of charity except confusion. Otherwise the comment would make perfect sense without the phrase 'that are altruistic'.

entities with religious, scientific or public educational purposes and *that are for the public benefit* are covered by the categories in the recommended framework (proposed by the Committee)'.[51] In light of the plausible view of Sorensen and Thompson[52] that religious organisations have been privileged precisely because they are for the benefit of the public and are therefore charitable, it seems that the privileging of religious or other institutional entities that do not satisfy the public benefit test is runs counter to this rationale, unless it can be specifically determined that the clear intention was to benefit an entity because of some benefit internal to the group. Therefore, in principle the Committee's recommendation seems sensible

RATIONALE FOR RELIGIOUS CHARITABLE STATUS

Despite its recommendation with respect to religious institutions, the Sheppard Committee members were in no doubt that 'advancement of religion' should remain a head of charity. They found '*it is clear that a large proportion of the population have a need for spiritual sustenance* ... Religious organisations satisfy these needs by providing *systems of beliefs and the means for learning about these beliefs and for putting them into practice*'. In addition, the Committee saw no reason to depart from what it characterized as the 'decision made by the High Court in the *Scientology case*', citing the two-pronged 'definition' commonly derived from that case and noting that 'no submission suggested a different definition of religion'.[53] However, despite the *prima facie* disparity in political influence,[54] it seems a curious omission that the Committee did not canvass a number of

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[51] Ibid. 262-3. Recommendation 22. Emphasis & parenthesis added.

[52] See generally H R Sorensen and A K Thompson, The Advancement of Religion is Still a Valid Charitable Object in 2001.' (Paper presented at the Charity Law in the Pacific Rim, Brisbane, (Centre of Philanthropy and Nonprofit Studies, QUT) August 2002).

[53] Sheppard, *Inquiry into the Definition of Charities,* 178. Emphasis added.

[54] For example, the Catholic Church submission claims that it 'represents a quarter of Australia's population', with '3,290 priests, 7,359 religious sisters and 1,189 religious brothers working in the Church who together with lay personnel, make the Church the largest "employer" in Australia', Catholic Church, *Submission to Inquiry into the Definition of Charities and Related Organisations,* 32. This can be compared with the submission by the Humanist Society of Victoria which reveals that active membership of all Humanist societies in Australia is less than 1,000, Humanist Society of Victoria Inc, *Inquiry into the Definition of Charities and Related Organisations: Submission from the Humanist Society of Victoria (HSV),* Melbourne: HSV 2001. 3.

submissions opposed in principle[55] to the granting of taxation privileges to religious entities. The statement that 'no submission suggested a different definition of religion' should be critically examined in the light of those submissions from opponents of religious privilege, which were identified in Appendix A of the *Sheppard Report.*

The Humanist Society of Queensland submitted that 'religious organisations be struck out of the list of charitable organisations'[56] and proposed that 'if religion is included as a charitable purpose then all other belief systems should also be included. Thus the phrase "religion" should be replaced by "religion or belief", or even better simply by "belief" as all religions are nothing more than belief systems'.[57] It was also submitted that the use of the phrase 'religion or belief' was 'current international usage'.[58]

The rationale behind the submission was explained thus: 'the Humanist Society of Queensland (HSQ) has been concerned with the use of public funds and Government laws and regulations to maintain private bodies who have ideological positions which are not within the purview of the secular state to support. These bodies often hide under the pretext that they are providing a public service, and may to some extent be providing a public service. However, it is often the case that this activity is coupled with a hidden agenda to propagate their own ideology'.[59]

In this respect it was noted that many charities maintain large bureaucracies that can be used for 'other purposes', and that 'the recruitment of recipients of charity to the ideology or religion of the provider ... could ultimately deliver them actual monetary benefits'.[60] Religions were therefore castigated for the harm that they do: 'Religion is not a public

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[55] Including three from Humanist societies, one from Purple Economy Watch and one from the Australian Council for the Defence of Government Schools. Another submission, from the Rationalist Association of NSW Inc, which may form part of this grouping, was listed in Appendix A of the *Sheppard Report* 305, but was not found on the inquiry website – it may have been a confidential submission

[56] Humanist Society of Queensland, *Submission to the Inquiry into the Definition of Charities and Related Organisations by the Humanist Society of Queensland,* Queensland: HSQ 2001. 7 section 5.

[57] Ibid. 5 section 3 (i).

[58] Ibid. 8 section 5.

[59] Ibid. 4 section 1.

[60] In this respect, it was noted that 'the recruitment of recipients of charity to the ideology or religion of the provider ... could ultimately deliver them actual monetary benefits', Ibid. 5 section 4.

benefit and would be a dis-benefit (sic). As is known many religions are diametrically opposed to each other and the perpetuation of these contradictory and often intolerant ideologies can be a cause of considerable disquiet'.[61]

The Humanist Society of South Australia specifically recommended that 'where the word "religion" occurs the words "religion and other belief systems" be substituted' and that 'the requirement to believe in a "supernatural being" be eliminated.' Therefore charities would be defined as 'organisations whose aims, capacities and history offer constructive, cooperative help according to need (including physical, emotional, educational or social incapacities) irrespective of recipients' sectarian or partisan commitment, gender or ethic origin, and in accordance with the universal declaration of human rights'.[62]

Interestingly, the Society had applied for charitable status as an educational entity but had been refused. The rationale advanced for their proposal to amend the definition of religion was: 'the principal that all religions, and Humanism, Rationalism, Atheism and others concerned with ethics and morals should be treated on the same basis. In this modern scientific world the Australian government should realize that a large percentage of its citizens do not believe in any kind of supernaturalism'. It was pointed out that in 'in Holland and Norway the tax laws allow that a percentage of one's tax is sent to the religion of your choice. Similar systems are developing in Belgium and partly in Germany. Humanism is included in their definitions hence Humanist hospitals, Senior citizens homes, counselling services, Universities and more are now available for all, but particularly for those who do not wish to pay lip-service to a God'.[63]

The Humanist Society of Victoria noted that Humanist objectives are to 'help create a society in which all persons can fulfil their potential free from supernatural influence' and to 'foster a scientific approach to solving human problems'.[64] Therefore, 'humanists are people who believe that it is possible to lead an ethical and morally responsible life

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[61] Ibid. 5 section 3 (i).
[62] Humanist Society of South Australia Incorporated, *Submission to the Inquiry into the definition of charities and related organisations,* Elizabeth South: HSSA 2001. 2.
[63] Ibid. 1.
[64] Humanist Society of Victoria Inc, *Humanist Society - Victoria: Submission to Sheppard Inquiry,*

relying only on human knowledge and experience. We believe that human existence is the best possible result of natural processes, unaffected by supernatural influences'.

The Society submitted that 'charities should be defined as organisations whose aims offer constructive, cooperative help according to need, irrespective of recipients' sectarian or partisan commitment, gender or ethnic origin, and in accordance with the Universal Declaration of Human Rights'.[65] With respect to the terms 'charity' and 'religion', it was submitted that these did not 'adequately allow for the growing secular nature of Australian society' and that they focused on 'social divisions', including the 'upstairs/downstairs societies of the past' and religious sects which were 'often inimical to each other'.

It was also felt that current definitions hindered secular humanist groups, in that 'while the United Nations documents on freedom of religion or belief note this broad understanding of life beliefs, (ie; Secular Humanism), in most legal and official dealings only religious beliefs are recognised'. It was noted that active membership of Humanist organisations in Australia was below 1,000. This was compared with membership in Norway, where membership was over 60,000 due to the receipt of a proportion of tax-raised money.[66]

The Australian Council for the Defence of Government Schools (DOGS), sought to 'question the current extension of "charitable" status to private sectarian religious organisations and private church schools'. It 'suggested that this contravenes Section 116 of the Australian Constitution and the Separation of Church and State'.[67] It noted that 'the *Pemsel* case definition of charities has opened a Pandora's box through which wealthy, commercial religions and their enterprises receive substantial Taxation

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[65] Ibid. 2.
[66] Ibid. 3.
[67] Australian Council for the Defence of Government Schools, *DOGS Submission to the Enquiry into the Definition of Charity,* Melbourne: <http://members.ozemail.com.au/adogs/pr30.htm> Accessed 5 March 2002, 20 pages 2001. 6 of 20.

advantages with little or no accountability. In the process, the commonsense meaning of "charity" for "the relief of poverty" has often been turned on its head'.[68]

DOGS felt that 'the subsidization of religions' contravened the establishment, (in effect the anti-establishment), clause of s. 116, and noted that 'if public funding of church schools was intended to encourage religious diversity and sectarianism, it has succeeded'. In this respect the 'mushrooming of religious schools from 1964 to 1999' was noted, it being observed that a number of new schools had been established in that period by denominations listed, such as 21 Moslem, 1 Hare Krishna, 9 Brethren, 22 Pentecostal and 4 Scientology schools, with the Seventh Day Adventists increasing their number of schools from 44 to 60.[69]

Purple Economy Watch (PEW), a 'lobby group which monitors the wealth of religion in Australia',[70] submitted that 'legislation should be introduced which defines "charity" (assuming that term is retained) as NOT to include churches; theological colleges'.[71] In a confidential paper attached to the submission,[72] it is argued that the 'exclusion of religious organisations from all forms of taxation except some sales tax is both discriminatory, unconscionable and may be unconstitutional'.[73] The rationale advanced against taxation concessions for religious entities is that 'we are all the poorer for the non taxation of religion. Monies raised ... could be going to genuinely charitable activity rather than to empire building of greater amounts of church wealth, generous salaries and benefits for church employees and so on, that flow from the historical exemption and which are completely unaccountable'.[74]

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[68] Ibid. 4 of 20.
[69] Ibid. 16 of 20.
[70] Sean Murphy, *Businesses question Church's tax break* (TV) (7.30 Report. <http://www.abc.net.au/7.30/s4219.htm>).
[71] Purple Economy Watch, *Submission to Inquiry into the Definition of Charities and Related Organisations,* Canberra: PEW 2001. 1.
[72] Obtained from the author, who is the Public Officer of PEW, Max Wallace, The Purple Economy - The Tax Exemption for Religion and Religious Wealth in Australia.' (Paper presented at the Skeptics, Adelaide, November 1999).
[73] Ibid., 2.
[74] Ibid., 11.

Raising the examples of a number of groups that might be categorized as cults, sects and/or new religious movements, it is noted that 'tax exemptions also apply of course to organisations such as the Unification Church and the Church of Scientology. These organisations have been and are the subject of serious civil and criminal actions overseas yet they too continue to be subsidized by the Australian taxpayer'.[75] This is seen to be unconscionable.

On the issue of discrimination, it is noted that the ATO refused the Australian Raelian Movement tax exempt status on the basis that the Raelian belief, that 'the Elohim (a word for God) referred to in the Bible are in fact material beings in another galaxy that once colonized Earth', is not supernatural and therefore not religious. It is submitted that 'the Scientology and Raelian beliefs are equally bizarre. But the Scientology beliefs are exempt while the Raelian beliefs are not. This is clearly discriminatory. Either they should both pay tax or neither should pay tax'. On another note, it is submitted that it is 'paradoxical that the Church of Scientology, an organisation that to my knowledge undertakes no "good works" in Australia that are not linked, either directly or indirectly, to their recruitment activity, is a charitable[76] organisation for taxation purposes'.[77]

It is further noted by Purple Economy Watch that church attendance is going down, with only 17% of Australians attending weekly and 35% refraining altogether.[78] A comment by journalist P. P. McGuiness,[79] that 'the whole problem of the tax treatment of religion may have to be reopened and this can only be hastened by the enthusiasm with which some of the get-rich-quick imports from California, such as Scientology, exploit the exemptions available', is quoted with approval. It is therefore concluded that

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[75] Ibid., 21.
[76] This may be incorrect. It seems that Scientology is a tax exempt 'religious institution' but it may not have been granted or applied for charitable status. As noted under the above heading entitled 'Religious Charities and Religious Institutions', the Church of Scientology claims to have 'religious institution' status, and there is no reason to doubt this claim.
[77] Wallace, Purple Economy.' 4.
[78] These figures are from 'the Australian National University's International Social Science Survey' quoted in Michelle Grattan, 'When it comes to religion we often bow out', *Canberra Times*, 13 March 1995.
[79] In P P McGuinness, 'Religions and the Taxman', *Sydney Morning Herald*, 11 March 1995.

what are now minority organisations should be made accountable like the rest of us and deductions only given on truly charitable works. If for-profit religious organisations do not undertake charitable work, they should not be entitled to tax exemption. The state should not subsidise the recruitment and conversion of efforts of religious organisations big or small in an unqualified way.[80]

Contrary to these sceptical views, some members of the faith community, or religious lobby, used the opportunity of submissions to the Sheppard inquiry to expound on the public policy rationale for providing taxation privileges to religious entities. Indeed, in some cases evidence was advanced to support the argument of private and public benefit. The Catholic Church was concerned that the preliminary *Issues Paper,*[81] issued by the Sheppard Committee, seemed to support 'the view of some that there should be a distinction between religious and charitable activity'. Therefore it provided 'additional argument on the value of religion'. The fundamental rationale advanced is that 'religion provides a basic motivation for acting virtuously and in the interests of the common good ...the promotion of religious faith through word and deed is a vitally important charitable purpose for the benefit of individuals and society. It serves an important educative function in society by *positing a basis for moral actio*n'. As a consequence of this 'it is appropriate that the state give special recognition and support to organisations that promote religion'. Indeed, it was submitted by the Catholic Church that 'the state ... should not be neutral about religion but should regard religion favourably'.[82]

Anglicare summed up the value of religious charities in stating

Religious charitable organisations have made and continue to make a unique contribution to Australian society. Many of the values and institutions within our society trace their origins to Christianity and Church agencies. The concept of charity has its roots in Judeo-Christian teachings. Today, in rural Australia the Church and its agencies are one of the few remaining social institutions able to provide assistance and pastoral help to people suffering grief and loss, for both loved ones and for the services and opportunities that have been withdrawn from rural areas. Church agencies have a strong orientation to assist the poorest in society and capacity to provide support and service to the community

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[80] Wallace, Purple Economy.' 26.
[81] Hon Ian Sheppard, *Issues Paper: Inquiry Into the Definition of Charities and Related Organisations,* Canberra: The Treasury, Commonwealth of Australia 2000.
[82] Catholic Church, *Submission to Inquiry into the Definition of Charities and Related Organisations,* 8-9. Emphasis added.

and are grounded in local communities with effective mechanisms for accountability through the local parish church.[83]

In a submission separate to that of Anglicare, the Anglican Diocese of Newcastle expressed 'concern that in an increasingly secular society a purely religious organisation may not be perceived as having a public benefit. While there is no suggestion in the Issues Paper of any such intent, there is an invitation to discuss the purpose and nature of an organisation'. The Diocese representative added that 'a religious organisation has a public benefit which can be seen: In its teaching (eg. love your neighbour) and the behaviour of its membership' and 'through the freedom of religion which is in itself a public benefit promoting greater tolerance in society'.[84] The Diocese also noted 'the considerable financial privileges enjoyed by charities. A direct privilege is seen in the fiscal benefits accorded to any body with charitable status. This amounts to a substantial public subsidy **at the expense of government revenue'**.[85]

The Synod of the Anglican Sydney Diocese noted that 'an examination of terms and their definitions is a pointless exercise without first addressing the underlying principle issues'.[86] It submitted that 'there are considerable, if intangible, benefits for a society resulting from the promotion of religious belief and practice, not least arising from the social integration and belonging that such practice provides'. Arguing that 'there are inherent and fundamental benefits in a society of encouraging the human response to someone else's need', it was noted that the Australian Prime Minister had acknowledged the existence of a '"social coalition" in the community'. This was a 'public acknowledgement of the value of people responding to a need and doing something to address that need – and others being encouraged to join in and contribute to addressing

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[83] Anglicare Australia, *Inquiry into the Definition of Charities and Related Organisations: Submission by Anglicare Australia,* Melbourne: Anglicare Australia 2001. 8-9 par 15.
[84] Anglican Diocese of Newcastle, *Submission to Sheppard Inquiry,* Newcastle: Peter W Mitchell, Registrar 2001. 2 of 3.
[85] Ibid. 1 of 3. Emphasis in original.
[86] Anglican Diocese of Sydney, *Submission by the Standing Committee of the Synod of the Anglican Church Diocese of Sydney to the Inquiry into the Definition of Charities and Related Organisations,* Sydney: Anglican Church 2001. 8 of 21 par 23.

the need. This dynamic goes to the heart of Christian charity, and goes to the heart of community, and is critically important in a cohesive, compassionate and just society'.[87]

The Jehovah's Witnesses submitted

If the church's primary purpose is to uplift the morals of individuals comprising a community; if it teaches and promotes higher standards; if it assists couples to improve marital relationships; if it helps youths and others to have a purpose in life; to act responsibly, to pay their debts, to live morally, to avoid drugs, to resist smoking, to stop stealing, to avoid lying; and if it teaches people to peaceable, then surely these charitable purposes and actions directed at preventing the problem rather than at the results of the problem are of great benefit to the community.[88]

Furthermore, the Witnesses submitted evidence of these benefits, noting that 'a survey of 126,966 people, conducted in Germany, found that 80 percent of those surveyed felt that their family life had improved because of applying the Bible-based teachings found in the publications of Jehovah's Witnesses. In addition, an independent survey conducted in France in 1998 found "98 percent of Jehovah's Witnesses consider that their faith has led them to a rather harmonious life and to the respect of laws"'.[89]

The Christian Scientists submitted that 'helping one's fellow man to find salvation, through Christian teaching, as well as bringing healing from poor health, poverty, relationship problems, sin, etc. are certainly traditional charitable activities and actually define the teachings and work of this church'. The benefits of the church are brought to the public through 'regular worship services for the community as well as public lectures', as well as through reading rooms at all churches where 'the public can come to find authentic information about the teachings of the church' and 'can read, purchase or borrow these items or just spend time in quiet prayer and inspiration'.[90]

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[87] Ibid. 16 of 21 par 59.
[88] Jehovah's Witnesses, *A Submission by the Watchtower Bible and Tract Society of Australia on Behalf of Jehovah's Witnesses in Australia: Inquiry into the Defintion of Charities and Related Organisations,* Australia: Watchtower Bible and Tract Society 2001. 6.
[89] Ibid. 7. The reference cited for the German survey was *The Watchtower* 1 July 1998. 4 and for the French survey , 'SOFRES ref MHI-MNV 98-204 October 1998. 9'
[90] Christian Science, *Submission to Inquiry into the Definition of Charities and Related Organisations,* Sydney: Margaret Clark: Federal Representative for Australia: Committee on Publication 2001. 2-3.

As evidence for the benefits of Christian Science it is noted that 'more than 125 years ago a scientific spiritual system of healing was discovered and taught in Boston New England by the Founder of this church, Mary Baker Eddy. She wrote a book describing her healing method, Science and Health with Key to the Scriptures, that remains a best seller after more than 125 years and *thousands testify today to its healing effect*'.[91] In addition, it is observed that 'people in many parts of the world are deeply searching for spiritual nourishment ... The media reports this spiritual search is growing stronger daily. Increasing evidence of interest in these spiritual things is found in major growth in religious Internet sites as well as in many alternative healing practices. Bookstores have not just shelves but whole sections covering self-help and alternative healing books'.[92] Christian Science is presented as a way of fulfilling this spiritual craving.

Harkening back to 'primitive Christianity and its lost element of healing', Christian Science practitioners who have completed an 'educational programme established by the Church Manual ... represent themselves as available to pray with any member of the public seeking their assistance for any difficulty, including illness or injury'. Christian Science nurses 'provide non-medical nursing care for those who choose to rely exclusively on the teachings of Christian Science for healing'. Both practitioners and nurses usually charge fees for their services.[93]

The Mormons submitted that tax concessions for religious charities 'grew out of social history from antiquitous (sic) days when the church and the state were effectively one institution' in an environment where 'organisations which selflessly aspired and worked to provide for the needy were well regarded by legislatures and the judiciary'. In this context of 'an English combined church/state environment ... it was inconceivable that the church should be taxed'. Therefore 'the purposes of the church and what it did (though it is conceded that corrupt bishops and priests did abuse the system from time to time) provided complete justification for the attitude of exemption, which was never

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[91] Ibid. 6. Emphasis added
[92] Ibid. 5.
[93] Ibid. 9.

questioned'. The Mormons noted that the church 'taught good citizenship, it provided for the poor and needy and no one was supposed to take any personal pecuniary benefit from its activities'.[94]

The Uniting Church submitted that 'it has always been an essential part of the Christian understanding of God that God calls us to recognize our independence on one another, and to care for one another in an altruistic, not self-serving way. Many contemporary psychologists argue that for human beings to flourish, a healthy sense of their own identity and value is not enough. To achieve self-actualisation, to achieve one's full potential, a human being needs to be able to function as an *ethical* being who can, in appropriate circumstances, subordinate one's own needs to the needs of others'.[95]

The crucial role of Christianity in the development of the concept of charity in Europe is noted, but beyond the purely Christian perspective, it is argued that churches provide an 'important contribution to democracy through their advocacy role', whereby people are encouraged 'to reflect on the issues facing the nation and to exercise their *citizenship* in a responsible way, thinking of the common good rather than their own self-interest'. In addition, 'at a practical level, churches also provide property, facilities and activities that are widely used by members of the wider community'.

International Human Rights instruments, including 'Article 18 of the International Convention on Civil and Political Rights and the United Nationals Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief', are cited in support of the contention that 'religion is a worthwhile and charitable end in itself', it is basic to human life'. Article 18 is further cited as

evidence that religion is understood throughout the world as something which is so basic to human dignity and human flourishing that it requires special recognition and

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[94] Mormons, *Inquiry into the Definition of Charities and Related Organisations: Submission by the Church of Jesus Christ of Latter-Day Saints,* Carlingford, Sydney: A Keith Thompson, International Legal Counsel, Church of Jesus Christ of Latter-Day Saints 2001. 2-3.
[95] Uniting Church, *The Uniting Church in Australia Submission to Inquiry into the Definition of Charities and Related Organisations,* Australia: Uniting Church in Australia 2001. 5.1. Emphasis added.

protection. Like education and family, religion is a fundamental aspect of human life, culture and society. Human life cannot be reduced to the material and the tangible. Human beings may express their religion in different ways, and some may eschew religion altogether, but religion is a recognizable and significant part of human life. Freedom of religion is not freedom from religion. Society must make space for religion if the members of society are to flourish'. [96] In addition, it is noted that in two recent reviews in Canada[97] and the UK,[98] 'there was no question that the advancement of religion continued to constitute a valid charitable purpose.[99]

SECULAR ETHICAL SOCIETIES

While the Sheppard Committee seemed impervious to submissions which opposed the granting of taxation privileges to religious entities, the issue of the potential recognition of organisations with secular belief systems was canvassed. The Committee referred to the 1907 Australian *Freethinkers* case,[100] the 1917 English *Secular Society* case[101] and a 1938 American case, *Old Colony Trust Co. v Welch.*[102] The Committee noted that in the first two cases 'the organisations were considered not to have religious purposes because they worked against already established religions[103] or against the idea of religion'. In addition, it was observed that it was held in the English case that 'an association established with the object of subverting Christianity'[104] would be pursuing 'political objects'.[105] With respect to the American case, it was merely noted that the Freethinkers 'were also held not to be a religion'.[106]

Apart from this cursory examination, little consideration appears to have been given to the possibility of exempting, under 'advancement of religion' those secular ethical

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[96] Ibid. 5.0. Emphasis added
[97] Ontario Law Reform Commission, *Report on the Law of Charities,* Canada: Ontario Law Reform Commission 1996.
[98] Deakin Commission, *Commission on the Future of the Voluntary Sector: Meeting the Challenge of Change - Voluntary Action in the 21st Century,* London: NCVO 1996.
[99] Uniting Church, *Uniting Church: Submission to Sheppard Inquiry,* 4.3.2. Emphasis added.
[100] *In re Jones* (1907) SALR 190. (Incorporated Body of Freethinkers of Australia)
[101] *Bowman v Secular Society Ltd* (1917) AC 406.
[102] *Old Colony Trust Co v Welch* (1938) 25 F Supp 45.
[103] The sometimes violent propensity of some religious groups to oppose others on the grounds of heresy does not seem to have been a consideration in the judgements.
[104] Sheppard, *Inquiry into the Definition of Charities,* 177-8.
[105] Here the Committee, 178, cites Picarda, *Law and Practice,* 83, citing Lord Parker in *Bowman,* 406
[106] Sheppard, *Inquiry into the Definition of Charities,* 177.

societies which propose codes of behaviour equivalent to those advanced by religious charities. There is no discussion of the alternative possibility of exempting such societies under the category 'advancement of education'.

POLITICAL ACTIVITIES

The most publicly controversial recommendation thus far of the Sheppard Committee is a proposed change to the present rule that 'political purposes are not charitable', which includes 'supporting or opposing a change to the law or government policy'. While 'political purposes will not deny an entity charitable status provided they are ancillary or incidental to the charitable purpose',[107] the Committee felt that advocacy on behalf of those people represented by charities 'should not deny them charitable status even if it involves advocating for a change in law or policy'.

However, in order to maintain the independent status of charities from 'political parties or candidates for political office', the Committee recommended that the present rule be relaxed so that 'charities be permitted neither to have purposes that promote a political party or a candidate for political office, not to undertake activities that promote a political party or a candidate for political office'.[108] The rule would therefore oblige charities to be non-partisan rather than non-political.

So far as religious charities are concerned this recommendation would preserve the distinction between religious charities and politically ideological movements such as communism, even if the general legal definition of religion was extended to include philosophical or spiritual groups. However, an extended definition of religion might complicate the presently applied definition of 'religious institution', providing an additional incentive to abolish the distinction between 'religious charity' and 'religious institution' in fiscal privileging legislation.[109]

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[107] Ibid. 209-10.
[108] Ibid. 217-18.
[109] The distinction might be maintained in other areas, such a marriage solemnization ceremonies

ROLE OF THE AUSTRALIAN STATES

It was the view of the Asthma Foundation of Queensland that the States 'would be unlikely to cede their existing authority to the Commonwealth so as to enable a new Commission to bring uniformity to the sector'. The Sheppard Committee was more optimistic. It recommended that 'the Government seek the agreement of all State and Territory Governments to the adoption nationally of the definitional framework for charities and related entities recommended in this Report' and in addition that 'the Government seek the agreement of all State and Territory Governments to establish an independent administrative body for charities and related entities, and to the legislative changes necessary for its establishment'.[110]

Acknowledging that this would be a 'significant undertaking', the Committee felt that

> as a minimum ... the independent body would be responsible for determining the status of all charitable and related entities in Australia, for listing them on a public register, and for regularly reviewing the status of registered entities. Decisions on charitable status by this body would be binding on the ATO and State agencies.[111]

The concerns underpinning the recommendations to establish a common, nationwide approach to definitions and administration were obvious. The Committee noted that 'many submissions expressed concerns about the lack of uniformity in interpretation, and the overlaps in administration, between the Commonwealth and the States. This was seen as confusing to the sector, as well as imposing unwarranted complexity and cost on organisations'.[112]

In addition, while all state governments had associations incorporation acts for those organisations wishing to adopt that legal structure, the various state jurisdictions had different reporting and auditing standards. Furthermore, many older organisations were incorporated 'under State Acts of Parliament relating to churches', with some others,

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[110] Sheppard, *Inquiry into the Definition of Charities,* 291, 94. Recommendations 24 & 25.
[111] Ibid. 291.
[112] Ibid. 279.

(including religious organisations), being 'incorporated under their own Acts', while reporting requirements for organisations varied widely.[113] The fact that lack of uniformity is an acknowledged problem was evidenced by the establishment of a 'national working party of all relevant State regulatory agencies', which was 'currently looking at the development of a uniform approach to the regulation of charitable fundraising appeals'.[114]

The nexus between a consistent framework of accountability and public confidence in the integrity of charities was also noted by the Committee. One Committee member later wrote that 'clear and consistent accountability framework would help to maintain and enhance public confidence in the integrity of charity and provide scope to develop a common framework of reporting requirements to meet the needs of all relevant government agencies'.[115] The case for greater uniformity and consistency, throughout Australian jurisdictions, both in definitions and administration, thus seemed compelling to the members of the Sheppard Committee.

[113] Ibid. 278. Examples of these older charities were cited from Industry Commission, *Charitable Organisations in Australia,* Melbourne: AGPS 1995. 204, C25.
[114] Sheppard, *Inquiry into the Definition of Charities,* 278.
[115] Fitzgerald, 'A Defining Moment': 280.

VII: 3

OFFICIAL RESPONSE TO THE SHEPPARD REPORT

'follow the definition ... determined by over four centuries of common law'

The *Sheppard Report* was released by the Australian Treasurer in August 2001 and the Government's initial response was published a year later. The Treasurer announced via press release that the 'Government has decided to enact a legislative definition of charity for the purpose of the administration of Commonwealth laws and to adopt a majority of the Inquiry's recommendations for the definition', providing an attachment, (*Attachment A*), setting out 'elements of the definition of charity'.[1] However, a leading academic commentator observed that 'the draft legislative provisions provided by the Treasurer significantly depart from those recommended by the review', in that 'the proposed draft adopts the broad categories of purposes suggested by the review, but fails to take up many of the purposes listed under the categories. It may be argued that some of (sic) purposes are already permitted. It is unfortunate that this opportunity has not been taken to clarify and modernize the definition'. Of further concern was the 'proposed definition of what constitutes public benefit', whereby the Government had precluded any organisation with the dominant purpose of 'attempting to change the law or government policy', which was a rejection of the Sheppard Committee's recommendation to move away from a non-political requirement to a non-partisan requirement.[2]

Another 'major issue that the Government failed to address in the review was that of the administration of the definition'. Although the review had recommended an 'independent administrative body be established to determine the status of charities and related entities', which would be binding on the ATO and 'would be the central point in

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[1] 'Proposed Statutory Definition of Charity – The Commonwealth Treasurer – Press Release – Government Response to Charities Definition Inquiry', 29 August 2003, Appendix in Myles McGregor-Lowndes, 'Australian Charity Law Reform Proposals', *The International Journal of Not-for-Profit Law* 5, no. 1 (2002): 10-13 of 13.
[2] Ibid.: 8 of 13.

ensuring the accountability of charities to the public',[3] the Government had impliedly 'rejected the ... recommendations to accompany any alteration in the definition with new administrative arrangements such as an independent administrative body or establishment of a permanent advisory panel'. This was seen as a potentially 'fatal flaw ... as the courts currently receive little opportunity to make new law on the definition because of various factors such as the expense of litigation and reluctance of donation seeking bodies to be exposed to adverse publicity through the judicial process'.[4]

The Government's proposed legislative definition of charity was very much in line with the common law status quo, providing that a charitable entity must be 'not-for-profit', with a charitable dominant purpose, (allowing ancillary purposes which further the dominant purpose), and being for the public benefit. In accordance with the Treasurer's aim 'to closely follow the definition that has been determined by over four centuries of common law', the proposed definition of 'charitable purposes' included 'the advancement of religion',[5] with 'advancement' including 'protection, maintenance, support, research, improvement or enhancement'. In addition, it is noted in the Treasurer's *Attachment A*, that 'in determining whether an entity has the purpose of the advancement of religion, regard is to be had to the principles established by the High Court in *Church of (sic) New Faith*'.[6]

In attempting to codify the existing common law on the concept of public benefit, it was proposed that 'to be for the public benefit, a purpose must: be *aimed at achieving a universal or common good*; and have *practical utility*; and be directed to the benefit of the general community or a sufficient section of the community'. While the last head seems a fair statement of the existing common law position, the first two heads of this proposal might prove to be problematic, potentially introducing new concepts of public

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[3] Ibid.: 7 of 13.
[4] Ibid.: 9 of 13.
[5] Other purposes included the advancement of health, education, social and community welfare (including without limitation the care, support and protection of children and young people, including the provision of child care services), culture, the natural environment and other purposes beneficial to the community, Ibid.: 12 of 13. The historic category of 'relief of poverty' would be covered under social and community welfare, as recommended by the Sheppard Committee
[6] Ibid.

benefit and potentially affecting the existing status of all charities. The position would be particularly uncertain for religious charities, as there is no attempt in the definition of public benefit to retain the existing presumption, or to retain any extant differences in onus between the heads of charity. It seems that applicants for religious charitable status would therefore have to show 'practical utility',[7] *inter alia*, which might prove to be a concept quite different to that of 'tangible benefit', which seems to be the high water mark of proof required (once the presumption has been displaced) for religious organisations under *Gilmour*. In this apparent elimination of the presumption and differential onuses, the Government seemed to be receptive to the view held by the Charity Law Reform Advisory Group of the National Council of Voluntary Organisations (NCVO) in the UK, cited by the Sheppard Committee, that

> the "public benefit" test should be applied more strongly across all four heads of charity. The Group considered that the general presumption of public benefit under the first three heads of charity (ie for the relief of poverty, the advancement of education and the advancement of religion) should no longer apply, and that organisations or purposes falling under these three heads should be exposed to the same degree of scrutiny on their merits as already applies to purposes under the fourth head of charity, for "other purposes beneficial to the community".[8]

On the other hand, despite the clear recommendations of the Sheppard Committee to retain public policy safeguards,[9] the Government omitted at this stage any mention of 'public policy' in its 'elements of the definition of charity' in *Attachment A*. Including instead was the watered down requirement that 'the entity must not have purposes, or engage in activities, that are illegal'.[10] Therefore, unless the courts were prepared to read into the above 'proofs' of public benefit, (in particular 'aimed at achieving a universal or common *good*'), a requirement that a purpose must not be contrary to public policy, there remained a very real danger that this common sense safeguard would be lost. In this respect, if the proposed definition was to remain unaltered, it could be argued that as the

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[7] On the general basis under the adversarial system that 'he or she who asserts must prove', Gino E Dal Pont, *Charity Law in Australia and New Zealand* (Melbourne: Oxford University Press, 2000) 14.
[8] Hon Ian Sheppard, *Report of the Inquiry into the Definition of Charities and Related Organisations,* Canberra: The Treasury, Commonwealth of Australia: Available online at <http://www.cdi.gov.au/html> 2001. 118.
[9] Recommendations 4 & 5
[10] McGregor-Lowndes, 'Australian Charity Law Reform Proposals': 12 of 13.

Government saw fit to omit the words 'contrary to public policy' from its proposal, it was intended that they should not apply. This matter therefore remained in need of clarification following the publication of *Attachment A*.

In addition, two exceptions to the general rule of public benefit were announced, 'that do not have to have a dominant purpose or purposes that are for the public benefit'. These included 'open and non-discriminatory self-help groups that have open and non-discriminatory membership', and 'closed or contemplative religious orders that regularly undertake prayerful intervention *at the request of the public*'.[11]

With respect to notification and endorsement, the Treasurer announced that while the Government agreed that 'commercial purposes should not deny charitable status' so long as they were 'incidental or ancillary to the dominant charitable purposes', it was also concerned to ensure that 'the taxation concessions provided to charities are not abused'. Therefore, it had been decided to extend the notification and endorsement regime, so that from 1 July 2004, charities, public benevolent institutions and health promotion charities would be 'required to be endorsed by the Australian Taxation Office in order to access *all* relevant taxation concessions'. In addition, any organisation endorsed to access these taxation concessions would 'have its status attached to its Australian Business Number and be able to be publicly accessed through the Australian Business Register'. The Treasurer noted that this would 'allow greater scrutiny of the use of taxation concessions by charities and improve public confidence in the provision of taxation support to the charitable sector'.[12]

Pursuant to the recommendations of the Sheppard Committee to pursue jurisdictional uniformity in definitions, the Treasurer announced that he would be 'writing to each of the State and Territory Treasurers to gauge their interest in achieving harmonization of

[11] Ibid.: 13 of 13.
[12] Ibid.: 11 of 13. Attached Treasurer's Press Release No. 049, 29 August 2002. Emphasis added.

laws defining charity'.[13] However, with the Government's rejection of the independent commission proposal, it seemed that the scope of the Commonwealth's ambition would be restricted to definitional rather than more comprehensive administrative proposals.

CHARITIES LEGISLATION EXPOSURE DRAFT

As foreshadowed in his initial response to the Sheppard Report in August 2002, in July 2003 the Treasurer released an exposure draft of the Government's proposed legislation, entitled 'Charities Bill 2003' and subtitled 'A Bill for an Act to define charities and charitable purpose, and for related purposes'. The Treasurer's press release noted that the 'exposure draft of legislation defining a charity' was to apply 'for the purposes of all Commonwealth legislation' and the Board of Taxation was provided with a reference to 'consult on the workability of the legislative definition of a charity proposed in the exposure draft Charities Bill 2003'. In addition, the Board was specifically requested to consult[14] on the recommendation of the Sheppard Committee that the 'dominant purpose of a charitable entity ... be altruistic'.[15]

The exposure draft contained a more expansive definition of religion than that proposed under the Government's initial response to the *Sheppard Report*, which had confined the term to the two-pronged test propounded by Mason CJ & Brennan J in *Church of the New Faith* (1983). Now it was proposed that the definition should incorporate both the Mason/Brennan test and the list of indicia propounded by Wilson & Deane JJ in the same case. Therefore, the exposure draft proposed that in determining whether 'particular ideas, practices and observances constitute a religion', for the purpose of determining whether an organisation qualifies as a charity on the basis of 'advancement of religion', regard is to be had to

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[13] Ibid.: 10.
[14] The Board was directed to 'consult primarily with organisations intended to fall within the new definition of charity'
[15] Peter Costello, *Release of Charities Definition Exposure Draft* (Treasurer's Website - Press Release 22 July) (<http://www.treasurer.gov.au/tsr/content/pressreleases/2003/059.asp>).

(a) whether the ideas and practices involve belief in the supernatural; and (b) whether the ideas relate to people's nature and place in the universe and their relation to things supernatural; and (c) whether the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance; and (d) whether, however loosely knit and varying in beliefs and practices adherents may be, they constitute one or more identifiable group; and (e) whether adherents see the collection of ideas and/or practices as constituting a religion.

In addition, the exposure draft added; 'this section does not limit the matters to which regard may be had in determining whether particular ideas, practices and observances constitute a religion'.[16]

The rationale (provided in explanatory material) for the continued inclusion of religious entities as tax-exempt charities was succinct. It was because 'the advancement of religion has been considered a charitable purpose throughout the history of charity law'.[17] The explanation provided for the proposed codification of the definition of religion based on an amalgamation of the Mason/Brennan & Wilson/Deane tests was also concise. The Treasurer explained that 'the current interpretation demonstrates the current broad understanding of what constitutes a religion. As this understanding of religion continues to develop, so will the meaning of the charitable purpose of the advancement of religion. The courts will continue to be the best guide as to the current meaning'.[18]

This overt acknowledgement that the parameters of religion are not settled might give some heart to spiritual groups claiming inclusion, like Siddha Yoga.[19] However, claims by overtly secular ethical societies for religious status would seem to be precluded, according to the Treasurer's understanding of present law, on the additional basis that

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[16] Charities Bill (Exposure Draft) 2003 Proposed Part 3 – Charitable Purpose s. 12 Religion (1) (a) (b) (c) (d) (e) (2)

[17] Peter Costello, *Explanatory Material: Charities Bill 2003 Exposure Draft* (The Treasurer, 2003) 15, par 1.68.

[18] Ibid. 16, par 1.72.

[19] In its submission to the Sheppard Inquiry, Siddha Yoga claimed to be a 'religious not-for-profit organisation', stating that 'Siddha Yoga meditation is a spiritual path founded on the ancient traditions of yoga, recognizing the divine Self in all', Siddha Yoga, *Submission to: Inquiry into charitable and related organisations,* Fitzroy, Victoria / Canberra: Margaret Conley, Chair of the Board: Siddha Yoga Foundation of Australia 2001.

'the courts have also found that organisations working against religions or the idea of religion cannot in itself be a religion'.[20] Nevertheless, the addition of the words 'regard is to be had to' in all of the proposed s 12 definition of religion, would seem to leave the question with respect to all categories open to debate. A court might 'have regard' to whether the concept of supernatural is involved and come to the conclusion that in a particular case it is not a pre-requisite requirement in order to confer religious status. This argument is reinforced by the reiteration in proposed s. 12 (2) that there is no limitation on the matters 'to which regard may be had'. On this basis, none of the criteria listed would seem to be a pre-requisite to a court's determination of the meaning of the word religion in a charity law context. It seems therefore that the Government is leaving the courts with a potentially very wide discretion indeed, whether this is intended or not.

It might therefore remain open for the courts to apply a 'horses for courses'[21] approach, depending on the context. If a contextual approach is adopted by the courts, this would leave open the possibility of elevating one or one part of one of the criteria listed, such as 'whether the ideas accepted by adherents as requiring or encouraging them to observe particular standards or codes or conduct',[22] to that of a core requirement in a particular context, such as charity law. Furthermore, the contexts, including that of charity law, might be divided into sub-contexts, such as charity trust law and charity tax-exempt status law, where again different criteria might apply.[23]

The explanatory material issued by the Treasurer made some attempt to explain what was meant by the phrases 'aimed at a universal or common good' and 'practical utility', which were preserved intact in the Charities Bill 2003 (Exposure Draft) as determinants of public benefit.[24] Therefore, the Treasurer noted that 'a purpose is aimed at achieving a

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[20] Costello, *Explanatory Material* 15 par. 1.71. The case cited was *Bowman v Secular Society* (1917)
[21] See use of this phrase in Gino E Dal Pont, 'Why Define "Charity" ? Is the Search For Meaning Worth the Effort ?' *Third Sector Review Special Issue: Charity Law in the Pacific Rim* 8, no. 1 (2002): 24.
[22] Proposed s 12 (c), Charities Bill (Exposure Draft)
[23] It has even been suggested that sub-categories of sub-categories might be treated differently, so that 'no affront could be taken to the view that the policy issues at stake in cases concerning the validity of purpose gifts, taxation and rating concessions, and regulation of fundraising, differ from one another', Dal Pont, 'Why Define "Charity" ?' 25.
[24] Proposed s 7 Public Benefit (a) (b) Charities Bill (Exposure Draft)

universal or common good where it is beneficial. A purpose that is harmful cannot, therefore, be aimed at achieving a universal or common good'.[25] This explanation goes some way to preserving common law public policy safeguards. The administrative process of determining whether a purpose is harmful is also aided somewhat by the clarification in the explanatory material that 'in determining the dominant purpose of an entity, items that may be considered include, but are not limited to: the constituent documents of the entity, if the entity has such documents; and the activities of the entity'.[26]

In addition, it is explained that 'a benefit must have a practical utility. Benefits are not restricted to material benefits, but include social, mental and *spiritual* benefits'.[27] While at first blush it would seem that the words 'practical utility' are more restrictive than the common law concept of 'tangible', the 'explanation' provided artificially expands the concept to the vague notion of 'spiritual'. It is hard to see how a spiritual benefit is of practical utility in the ordinary meaning of those words, especially as it was the argument of spiritual benefit that was rejected in *Gilmour* in favour of the requirement that a benefit be tangible. It is difficult to understand why the word spiritual was included by the Treasurer, as the case of closed and contemplative orders, (at least where prayerful intervention is undertaken at the request of members of the public) are covered by special exemption.[28]

One explanation might lie in the pronouncement by the Sheppard Committee, cited earlier, in which they said that religious charities were for the public benefit because they satisfied the spiritual needs of the community, by providing 'systems of beliefs and the means for learning about these beliefs and for putting them into practice'. On this view spiritual needs are met in tangible form. The systems of belief and learning provide guidance for good citizenship. The spiritual need seems to be a common yearning for guidance or instruction in these matters. However, the term spiritual introduces another

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[25] Costello, *Explanatory Material* 9 par 1.35.
[26] Ibid. 8 par 1.32.
[27] Ibid. 9 par 1.36. Emphasis added
[28] Proposed Part 2 s 4 (2) (b)Charities Bill (Exposure Draft)

joker into a pack of cards already riddled with difficult definitions. In its submission to the Sheppard Inquiry, the Catholic Church pointed out the difficulty in defining spiritual well-being. The Church cited William Stringfellow, who noted that

> "spirituality" may indicate stoic attitudes, occult phenomena, the practice of so-called mind-control, yoga discipline, escapist fantasies, interior journeys, an appreciation of Eastern religions, multifarious piestic (sic) exercises, superstitious imaginations, intensive journals, dynamic muscle tension, assorted dietary regimens, meditation, jogging cults, monastic rigors, mortification of the flesh, wilderness sojourns, political resistance, contemplation, abstinence, hospitality, a vocation of poverty, non-violence, silence, the efforts of prayer, or, I suppose, among these and many other things, squatting on top of a pillar.[29]

Even though the concern of the Church was with the replacement of 'the promotion of religion', (presumably meaning 'advancement'), with 'the "promotion of spiritual well-being" as a head for the identification of charitable purposes',[30] the use of the term as a descriptive of what constitutes public benefit would be no less problematic. It is also conceivable, if the view is taken that the Wilson & Deane JJ indicia referring to supernatural is not core to the definition of religion, that the use of the term spiritual as a public benefit might provide substance to an argument for inclusion of groups such as Siddha Yoga.

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[29] William Springfellow, *The politics of spirituality* (Philadelphia: Westminster Press, 1984) 19.
[30] Catholic Church, *Submission to Inquiry into the Definition of Charities and Related Organisations,* Australia: Australian Catholic Church Tax Working Party 2001. 9-10.

VII: 4

COMPARISONS BETWEEN GATEKEEPING MODELS

'the combination of internal trust and external tolerance ... produces benefits for the wider society'

With few relevant cases reaching superior courts for judicial determination, it is the Australian Treasurer who bears responsibility for charity law reform. In June 2003 the Treasurer addressed an Anglicare lunch and made some interesting observations on the charitable role and current standing of churches. He noted the pioneering role of churches, which 'led the way in establishing agencies and hospitals'. While there were some expectations that the advent of the Welfare State would cause charities to 'wither and die', the Treasurer felt there were still 'a number of reasons to reaffirm the role of the charity in addressing human needs'.

These included: the ability of charities to respond 'immediately and individually to need' (something beyond the capacity of 'entitlement programs which are entrenched in law'); fighting poverty effectively (income support from government 'insulated against poverty', it did not treat the cause of poverty); the fact that 'voluntary associations and charities bring an extra dimension to their work to the extent they are staffed by people of strong religious or moral conviction'; and the beneficial consequence that 'giving to the voluntary association or charity enriches the giver as well as the receiver'. Despite this reaffirmation of faith in the work of charities, the Treasurer had some words of chastisement for religious charities in particular. On the theme of trust, Morgan Poll surveys were damning, revealing since 1996 that

> Ministers of Religion have shown the largest decline in rating for ethics and honesty from 59 per cent to 48 per cent ... I suspect recent events will have detracted from that further. Less than half the population rates clergymen highly for ethics and honesty ... recent events have created the suspicion that no matter how clearly the church imagines it can see the moral dimension of actions by others it did not seem to get too worked up about

the moral failure of some of its own priests inside the church. And these were people who really had engaged in moral failure and in some cases criminal activity. This suspicion that the institution of the Church may have been easier on itself than it was on others is corrosive of trust.

The Treasurer then went on to make some observations on the imperative for transparency, accountability and evidence of good works. On the moral failures of the Church in relation to sexual abuse cases, he said 'in an information society very little can now be hidden ... To a degree every institution in society is under media suspicion ... you can rely on the fact that if there is real cause for the attack it will be very destructive. It can be very destructive even when there are no grounds for it'.[1] The public had also lost confidence in big government because of inefficient collecting and handling of money so that 'too little of it arrives with the genuinely needy ... there have been recent concerns in Australia that some charities are suffering from the same problem. Charities are going to have to do better if they want to keep the public trust. Inefficiency is corrosive of trust. And trust is the currency of the charitable sector'. On the question of evidence of public benefit, the Treasurer referred to problems underlying the issues of poverty, drug and alcohol abuse and marriage breakdown, noting that Government's found it difficult to treat the causes of the problems. He said

To the extent that the people involved in helping others can help those others to deal with these problems they will make a very big difference. If the churches can point to lives that have been changed it will make a big difference; more than anything else it would demonstrate that faith is not a lost cause. The public would take a whole lot of notice. The churches and their agencies would recover trust.[2]

This statement seems to be a recognition that whatever intangible benefits might flow from the advancement of religion, it is the tangible benefits that are recognized and provide a basis for public support. From this it might be observed that the Treasurer is fully cognizant of the fact that public policy decision-makers need tangible evidence of public benefit to underpin their decisions.

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[1] Peter Costello, *Is Faith a Lost Cause ? Address to Anglicare Lunch, Sydney, 27 June* (Australian Treasurer. <http://www.treasurer.gov.au/tsr/content/speeches/2003/007.asp>).
[2] Ibid. (Emphasis added

DEALING WITH DEVIANT GROUPS

In another speech in July 2003, the Treasurer noted that 'not all social groupings are positive ones'. He pointed to the Mafia, paramilitary organisations in Northern Ireland and urban gangs, being examples of social networks which 'inspire enormous trust between insiders on the grounds of a common intolerance to outsiders ... These organisations develop social capital amongst themselves which they then direct in destructive ways against others. *It is the combination of internal trust and external tolerance that produces positive benefits for the wider society'*.[3] While recognizing the problem of deviant groups, the Treasurer did not elaborate on how he felt the Government should deal with deviant, intolerant groups in the context of charity law reform. However, he did derive some policy prescriptions from 'the importance of the non-government sector and the positive values arising from it'.

The first was to respond cautiously, to 'do no harm'. The second was, 'if Government has a choice between delivering services in a way that enhances engagement and one that does not, then, all other things being equal it should prefer the former'. The third prescription was that 'the Government should be alert to deal with any threats that arise to the voluntary sector'. The concept of mutual obligation was referred to as an example of the second prescription, whereby, as an example, work for the dole was seen as a way of providing to the unemployed all the social benefits of 'the social activity of work' and the esteem that comes from 'self-reliance'. An example of the third prescription was the response to the public liability threat to the activities of voluntary activities. This threatened to undermine 'an important dimension of our society', its social capital. Therefore it was necessary for Government to 'limit pay-outs and heighten the protection against liability for the voluntary sector'.[4]

While the Treasurer did not specifically refer to any public policy prescription he had in mind for dealing with deviant 'religious' groups, it is obvious from his remarks about the

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[3] Peter Costello, 'Building Social Capital'. Address to the Sydney Institute (Sydney, 16 July 2003. <http://www.treasurer.gov.au/tsr/content/speeches/2003/008.asp>)4 of 5

[4] Ibid, 4-5 of 5

Mafia, paramilitary groups and urban gangs that he is conscious of the problem of groups that do harm, even if his examples were restricted to those groups that clearly breach criminal laws. From a public policy perspective, the question that arises is whether the Government will adequately address the issue of deviant religious groups that are demonstrably or potentially harmful, or the collective or individual misconduct of members of leadership groups (oligarchs) responsible for the running of religions.

As an example of dealing with the misconduct of oligarchs, it is interesting to note the way in which the question of sexual abuse and other misconduct, which goes well beyond financial fraud or mismanagement, is handled by the Charity Commission for England and Wales. In Chapter VI we have seen how the Commission has powers to investigate misconduct within registered charities and can suspend or remove individual office bearers, and replace them. Beyond this sanction, the Commission has the power to de-register a charity if it is no longer deemed to be operating charitably. Grounds for disqualification can potentially be established if an organisation causes harm such that it violates public policy. It is not inconceivable that a charity in England and Wales could be removed from the Register if a pattern of cover-up of sexual abuse was found to be the policy of a charity, or if abuse occurred as a result of the negligence of the charity, rather than as an isolated case of individual misconduct. In at least two cases, involving a school[5] and a children's trust,[6] where decisions have been published by the Charity Commission, sexual abuse and its effect on the proper functioning of the charities was one of the issues considered in enquiries under s. 8 of the Charities Act 1993.

On the question of gate-keeping, the default finding of the Charity Commissioners in the Church of Scientology application for registration (because of *prima facie* indications of harmful conduct they would have reversed the onus such that Scientology would have to prove public benefit), is a clear indication of their policy on groups where there might be sufficient evidence of harmful or potentially harmful activities. The Commissioners

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[5] Charity Commission, *Section 8 Inquiry into Kinloss School,* London: Charity Commission for England and Wales <http://www.charity-commission.gov.uk/common/results.asp> 2002.
[6] Charity Commission, *Section 8 Inquiry into the Mark McManus and Alexina Kelbie Children's Trust,* London: Charity Commission for England and Wales <http://www.charity-commission.gov.uk/common/results.asp> 2003.

made it clear their policy is to exclude such groups from registration, to deny them the financial and reputation[7] benefits that registration provides. This does not mean that registration will be denied indefinitely, because an organisation might be able to point to reform and achieve registration at a later date. However, it is an indication that the Commissioners prefer to keep allegedly deviant organisations outside the tent rather than bringing them inside prematurely (in an attempt to reform them by bringing them under ongoing supervision). This is perhaps recognition of the harm that might be done to the reputation of other charities if deviant groups are allowed registration. It might also reflect concern that the reputation benefit of registration can entrench the position of unsatisfactory oligarchs and provide deviant organisations with a greater capacity to engage in harmful conduct pending reform.

The Australian Treasurer's mindfulness of deviant groups is not a public policy response in itself. If deviant groups are to be denied the financial privileges and reputation advantages that charitable status provides, an administrative system needs to be in place where legitimate concerns can be raised prior to the granting of privileges and complaints made subsequent to registration may also be acted upon if necessary. Despite the absence of a formal system requiring the advertisement of applicants for registration and receipt of objections, as well as some inadequacies in the evidence gathering procedures of the Charity Commission, the process of registration for charitable status in England and Wales provides more scope for the receipt and consideration of objections than the system presided over by the Australian Taxation office. There are a number of operational variations between the jurisdictions which help to explain the difference.

A crucial systemic difference between the Charity Commission model and the Australian model is the difference between transparency and secrecy. A substantial number of Charity Commission registration decisions are published and made accessible on the Commission's website. The full list and details of registered charities are available to the public online. Detailed educative guidance on the charity registration system is available

[7] 'The title of charity can also bring with it a degree of public credibility', Robert Fitzgerald, 'A Defining Moment: The Inquiry and its Outcomes', *Third Sector Review Special Issue: Charity Law in the Pacific Rim* 8, no. 1 (2002): 266.

to the public online and through freely available publications. Members of the public are aware that the Charity Commission is in general a one-stop shop within its regional jurisdiction. The privileges afforded to registered charities are uniform and the definition of charity either covers or excludes[8] from entitlements other third sector groups which in Australia have some equivalent financial privileges, such as religious institutions. Privileges afforded to charities at a state or local government level in Australia are determined in England and Wales by registration with the Charity Commission,[9] whereas in Australia federalism dictates a number of gatekeepers at different levels of government. There are also many gatekeepers at the Commonwealth level (as noted by the ATO which advocates a 'single, independent common point of view of decision making on definitions' – see chapter VII: 1 footnote 7). While the ATO can publish generic examples of types of groups that might or might not qualify, can issue rulings and can refer to published Court decisions, it cannot disclose taxpayers' financial details due to secrecy provisions.

Greater transparency is important because it leads to greater accountability of privileged groups and of the gatekeeper. Because the public in the United Kingdom, including cult watch groups, are better educated about the process and are aware from published Charity Commission decisions and other extensive publications on the criteria for registration, they are aware of potentially disqualifying factors. They also know that any complaints about the conduct of charities, or those seeking charitable status, should be forwarded to the Charity Commission as the relevant decision-maker. Because there seems to be a far greater level of awareness and debate about deviant religious groups in the United Kingdom and certainly a greater array of dedicated watch groups, there is a far greater chance that complaints about possible applicants for charitable registration will be received by the Commission.

The ATO attempts to administer definitions determined by the Australian Courts. As we have seen in chapter VI, the Charity Commission has been far more creative in its quasi-

[8] Apart from the anomalous position of the Church of England.
[9] An exception being registrations under the Places of Worship Registration Act 1855 (although registered charities are exempted from registration under that Act).

judicial role, to the extent that it has recognized new charitable categories (on the basis that these would or should be recognized by the Courts). There is potential for both the Charity Commission and the ATO to enhance their respective information receiving capacities by issuing advance public notification of applications (for registration or endorsement) and providing for the receipt of written objections (or perhaps even anonymous information),[10] a course of action not available to the courts. Linders & Peters note that

> While offering the highest degree of procedural protection and relatively greater flexibility with their case-by-case approach, the courts remain less accountable to the general public than many regulatory agencies. The courts are not required to offer a period for 'notice and comment' by the public prior to making decisions, and do not have their decision-making as closely monitored by other political institutions.[11]

While the ATO is less flexible than the courts in allowing variations on common law definitions, it is more immediately accountable to its political masters. The Charity Commission model provides the flexibility of the courts along with greater political accountability. It offers perceived independence from day to day political considerations (providing it with a cachet of quasi-judicial authority which gives its determinations legitimacy), but at the same time is accountable to parliamentary committees and can be reigned in by the executive government through regulation or by termination of appointment.

One criticism of a full-blown Charity Commission model is that it might 'become a Trojan horse for the sector within government. Its interest would be in protecting the interests of the sector within government ... not the tax revenue'.[12] The impressive size of the Charity Commission bureaucracy (see chapter VI: 1 fn 25) and the proliferation of charitable purposes sponsored by the Commission, does provide some cause for caution. On the other hand the adjudicative functions of the Commission provide a much cheaper

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[10] Hood categorises anonymous information as the 'ear trumpet' tactic in his chapter entitled 'Tools for Detection'. Christopher C Hood, *The Tools of Government* (New Jersey, Chatham House Publishers Inc, 1983) 93-4

[11] Stephen H Linder & B Guy Peters, 'The Logic of Public Policy Design: Linking Policy Actors and Plausible Instruments', in *Knowledge & Policy* (Spring/Summer vol 4 issue 1 / 2 1991) circa 131

[12] Institute of Public Affairs, *Submission to the Board of Taxation: Draft Charities Bill 2003*, 7

avenue for applicant bodies than the ordinary courts. Hence the normative model proposed in this thesis focuses on the gate-keeping, adjudicative functions of the Commission, leaving other functions, such as misconduct investigations and financial reporting, to other government departments. The results of investigations of misconduct or mismanagement would be conveyed to the proposed tribunal to determine entitlement issues. Additionally, it is proposed that the normative tribunal model would benefit from the expert advice of a streamlined bureaucracy (perhaps with statutory advisory groups – such as an inter-faith group suggested in I: 1). Access to this type of advice is not so readily available to the ordinary courts, which in Australia depend on expert witnesses presented by the parties. Furthermore, judges are not chosen for their expert knowledge of the third sector in particular. Tribunal members would be chosen precisely because of exhibited expertise and would not be restricted to lawyers – following the Charity Commission model (see chapter VIII: 2).

RELIGIOUS INSTITUTIONS

The potentially disqualifying factors that are given some statutory force in the UK are more obscure in Australia. While the ATO might conceivably disqualify organisations from charitable status on the basis of public policy considerations, the potential application of public policy considerations to religious institutions is even less clear. As the ATO discloses in its publications that religious institutions do not need to satisfy the public benefit test of charities, it seems that they might also be exempt from the other common law criteria established for charities. As they do not need to lodge returns or notify the ATO of their status, there is no information available about the number of groups that avail themselves of tax exempt status on this basis. In the Australian Government's response to the *Sheppard Report* thus far, there seems to be no reference to Recommendation 22, that the categories of religious, scientific and public educational institution be deleted from the proposed framework for charities. Therefore it might seem that controversial groups will continue to access what is arguably a loophole, gaining access to tax exempt status while avoiding the accountability that is inherent in achieving charitable status, where public benefit must be apparent.

While the Government has moved to extend the endorsement regime, there is no indication that endorsement is to be extended to include the category of religious and other institutions. This would seem to be inconsistent with its policy direction, which has already seen endorsement applied to religious and other charities. A reasonable inference is that the Government ultimately intends to implement recommendation 22 of the Sheppard Committee, but for political reasons has deferred the announcement. This conclusion is perhaps supported by the fact that a life raft has been provided for contemplative orders in special exemption legislation. Therefore groups such as Scientology might be at risk of losing their present tax-exempt status as religious institutions, and would have to run the gauntlet of establishing public benefit, should they apply for charitable status.

If the category of religious institution is to continue and privileges otherwise flow to groups that qualify as religions *per se* and do not promote an external ethic (as in the public benefit requirement for religious charities), it is arguable that a minimum internal ethical standard should be required before access is granted to financial privileges. The approach which seems to have been adopted by the New Zealand High Court (examined in chapter II: 8) might be applied in Australia by the ATO and perhaps gain judicial endorsement. The ATO might adopt a less liberal standard on contemporary mores than Tomkins J in *Centrepoint*. However, in view of the likelihood that the High Court will confirm an ethically neutral, widely inclusive definition of religion for prima facie classification purposes, the Court would have to imply a public policy intention to impose an internal ethic as a condition subsequent to prima facie classification, or the Commonwealth would have to clearly state this intention in legislation.

ROLE OF THE STATES

In attempting to codify the meaning of religion, the Australian Treasurer found himself on the horns of a dilemma. It has been noted in chapter V: 2 that s. 116 of the Australian Constitution does not apply to the states. However, it certainly applies to any legislation

of the Commonwealth parliament. Section 116 is an overriding provision of the Australian Constitution and entrenched against legislative amendment. In his Charities Bill Exposure Draft the Treasurer attempted to describe accurately what he believed to be the prevailing attitude of the High Court.[13] If wrong, his definition and any administrative decisions flowing from it could be nullified by the High Court. Even if the codification was reasonably correct, a future Court might change the goalposts. Therefore, state governments properly advised would be reluctant to enter this realm of uncertainty by ceding their certain power to define religion to a Commonwealth tribunal or commission subject to the vicissitudes of s. 116 and judicial whim.

The proposals outlined in chapter VIII: 2 for legislation accompanying the establishment of a third sector entitlements tribunal are designed to provide a regime under which the proposed tribunal could operate with reasonable flexibility. After a period of time in which the tribunal could be seen to operate well (and establish clear criteria for the acceptance or disqualification of entities from entitlements, and where the High Court has expressly endorsed or refrained from violating the regime), State governments might feel sufficiently comfortable to transfer definitions adjudications presently falling within their jurisdiction to a Commonwealth tribunal capable of establishing common definitions throughout Australia. Hence the tribunal itself would become a heuristic device.

[13] He could merely have noted that the definition of religion is 'as defined by the High Court'.

CHAPTER VIII: CONCLUSIONS

VIII: 1

RELIGION, EQUIVALENT BELIEFS AND ETHICS

'too great a benefit upon organisations which it is assumed, without proof, confer a public benefit'

There has been strong criticism of the continuation of charitable status for religious organisations with scarce public policy justification. Dal Pont says 'the privileges enjoyed by religious bodies are seen as violating the semblance of separation of church and state, and may be seen as bestowing *too great a benefit upon organisations which it is assumed, without proof, confer a public benefit*'. He notes that 'in modern secular society religious bodies are no longer the principal source of charity and points out that concern is magnified given the very broad definition of "religion" propounded by the courts.[1] In a submission to the Sheppard Inquiry, the Institute of Public Affairs (IPA) was critical of religious privileges, noting that contemporary trends in religious observance have resulted in a 'religious free-for-all'. Noting the difficulty in 'placing meaningful limits on access to the defined category' and the 'increasing secularization of Australian society', the IPA queried whether there was sufficient public support for continuation of the privileged status.[2]

In a spirited counter to this scepticism, two legal scholars have argued that there are still valid reasons for treating advancement of religion as a charitable object. Sorensen & Thompson contend that '"advancement of religion" is the promotion of spiritual teaching in a wide sense, and the maintenance of the doctrines on which it rests, and the

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[1] Gino E Dal Pont, 'Why Define "Charity" ? Is the Search For Meaning Worth the Effort ?' *Third Sector Review Special Issue: Charity Law in the Pacific Rim* 8, no. 1 (2002): 28-9. Emphasis added. Earlier academic criticism of the presumption of public benefit from religion is outlined in Ch. IV. 3 above.
[2] J A Hoggett, *Submission by the Institute of Public Affairs: Inquiry into the Definition of Charities and Related Organisations* (Melbourne, IPA, 2001) 10-11

observances that serve to promote and manifest it ... *such teaching and doctrines are identifiable as the genesis or fundamental motivation*[3] *of all conduct expressive of an object or purpose that is charitable*, even in the strict legal sense.[4] They underpin their argument with an 'insight'[5] provided by the Chief Justice of the High Court of Australia, Justice Murray Gleeson, in a Christmas address to lawyers when he said that 'having an individual and personal conviction is not the only thing that is important. *It is the general acceptance of values that sustains the law, and social behaviour; not private conscience.* Whether the idea is expressed in terms of teaching, or communication, there has to be a method of getting from the level of individual belief to the level of community values. Religion is one method of bridging that gap'.[6]

Sorensen and Thompson advance the premise that 'it is the very essence of *any* religion's mission, that citizenship and society be improved through selflessness'.[7] They note that 'there does not appear to be any reported decision in England or other Commonwealth jurisdiction which discusses the rationale for treating the advancement of religion as a charitable purpose'. They conclude that 'arguably the rationale for treating advancement of religion as charitable is to a large extent indicated by its public benefit character',[8] stating 'it is clear that religion continues to have relevance in bridging the gap between "private conscience" and the general acceptance of values that sustain the law and social behaviour'. This proposition is supported by the 'abundant evidence that churches are actively involved in the social issues of today ... church involvement in large-scale humanitarian projects and relief is legend'.[9]

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[3] The authors footnote here that the fundamental motivation is 'an imperative (whether conscious or subconscious) system of values', H R Sorensen and A K Thompson, The Advancement of Religion is Still a Valid Charitable Object in 2001.' (Paper presented at the Charity Law in the Pacific Rim, Brisbane, (Centre of Philanthropy and Nonprofit Studies, QUT) August 2002), 5 fn 34.
[4] Ibid., 5. Emphasis added.
[5] Ibid., 3.
[6] The quotation is from an 'Occasional Address on the occasion of the Christmas Service for Lawyers, St James Church, Sydney, 29 November 2000 – published in (2001) 75 ALJ 93, Ibid., 1 fn 1. Emphasis added.
[7] Ibid., 1. Emphasis added.
[8] Ibid., 10.
[9] As examples, it is footnoted that 'religious institutions are prominently involved in promoting heroin injecting rooms, government subcontracting of state unemployment relief schemes to religious agencies, soup kitchens, and more traditional welfare assistance (clothes, food and money)', Ibid., 12 fn 97.

These pro-religionist scholars advance a theory to explain why they believe that religious belief is more efficacious than non-religious belief systems in promoting good citizenship. It boils down to a belief in afterlife or end of life accountability for earthly actions, that 'moving from belief to action consistent with that belief, is a product of the religious teachings about faith in a supernatural/divine being, coupled with their instruction about individual accountability and responsibility at a day of judgement and/or an afterlife – these introduce a "big picture" perspective for all believers, something that society otherwise struggles to provide'. The provocative claim is advanced that because of this perspective, a greater proportion of religious believers than non-believers are able to delay gratification, making them in general more disciplined[10] and more mature than non-believers. The scholars argue

> people who believe in and follow religious teachings are willing to delay gratification, even enduring severe hardship and deprivation as they do so, but without losing confidence or hope and happiness in the present. This is not to say that other people in Australian society without religious faith are irresponsible or unaccountable, or that they cannot delay gratification for necessarily extended periods. But *religious teachings have proven durable in providing more of the people with this capability and maturity than human beings without religious teachings seem able generally to find.*

Proof of this theory might provide a public policy rationale for discriminating between religion and secular belief systems in financial privileging laws, but no evidence is presented for the claim of more abundant maturity among religionists. The authors seem to support their argument on the basis that it is one of those 'fundamental truisms'.[11] It should also be noted that the Chief Justice stated that religion is but 'one method' of bridging the gap between individual belief and community values and it might be argued that religions have been particularly efficacious in promoting their beliefs because they have received substantial financial privileges to enable them to do so. Furthermore, the dark side of the equation might be raised. All too often harmfully deviant interpretations

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[10] It is footnoted (fn 103) that ' "delaying gratification" is one of the four simple tools of *discipline* by which all human beings "can solve all problems", it is "a process of scheduling the pain and pleasure in life in such a way as to enhance the pleasure by meeting and experiencing the pain first and getting it over with. It is the only decent way to live"', citing M Scott Peck, *The Road Less Travelled* (New York: Simon & Schuster, 1978) 15-20. Emphasis added

[11] Sorensen and Thompson, 'A Valid Charitable Object.' 13. Emphasis added

of religious guidance are advanced to the detriment of the public.[12] On this argument, it is a propensity to believe in superstition that leaves people susceptible to dangerous charlatans.

EQUIVALENT BELIEF SYSTEMS

Sorensen and Thompson essentially argue that religious organisations should be provided with financial privileges because they promote ethical belief systems that lead to good citizenship. It is this ethical component that underpins religious charitable status.[13] However, this is also a rationale that might be used to support the privileging of equivalent belief systems such as secular ethical societies and spiritual groups that may fall without the prevailing definition of religion. This might be so despite the view of the authors, who see non-religious secularism in negative terms, alleging 'there is a strengthening argument that the majoritarian tyranny we should fear in Australian society is to be found in its disavowal of a religious source for its moral values in favour of an overtly secular and even atheistic paradigm that would persecute any religious perspective out of existence'.[14] However, there is no real reason to suggest that secular ethical charities should not co-exist with religious charities and be accorded the same tax exempt privileges. Secular ethical societies are not necessarily anti-religion; they just derive their principles from non-religious sources. In any event, the argument that avowedly atheistic ethical societies are sceptical of religious belief (a justification for refusing charitable status in the past, in the context of a Christian paradigm) should not be fatal. The courts have been willing to accommodate possibly more vehement contradictions in belief between religious charities.

While the initial inclination may be to privilege only secular ethical societies that promote positive values and refrain from criticism of religion, the example provided in chapter VI: 2, whereby the Charity Commission for England and Wales registered both

[12] A point acknowledged by the authors, who write 'it may be conceded that religious practice viewed generally certainly has its share of excesses', noting for example 'the spaceman cult or the Jonestown suicides', Ibid., 2.
[13] A view supported by this empirical study
[14] Sorensen and Thompson, A Valid Charitable Object.' 11.

controversial new religions and cult watch groups dedicated to exposing their excesses, should be noted. It is not difference or criticism that should be feared, but harm based on intolerance. Criticism in an environment of mutual toleration is something that public policy makers might well wish to encourage. Furthermore, in the same manner in which the courts have shifted ground to accommodate eastern style religious beliefs under a multicultural society, the not insignificant proportion of non-believers in society may also need to be accommodated. While no proof has been offered to differentiate between the efficacy of religious and non-religious belief systems in the promotion of good citizenship, some efforts are being made to provide scientific evidence for the value of religion in promoting personal well-being,[15] and perhaps as a consequence, good citizenship. However, there is nothing to suggest that surveys conducted among non-religious social groups that offer similar support structures would not produce similar results. Efforts are also being made to determine scientifically whether there are any positive benefits in the practice of meditation, a practice associated with many religious faiths, but also with non-religious groups.[16] If this research proves a benefit to the health and well-being of practitioners, then it might provide some genuine public policy justification for privileging some secular or spiritual yoga groups conducted on a non-profit basis.

Once the underlying rationale for privileging certain groups is understood, policy makers have a better chance of determining criteria for inclusion or disqualification. Therefore, if it is accepted that the historical reason for privileging religious groups related to the issues of personal well-being and good citizenship, then these underlying criteria, rather than any superficial label, should be the determining factor or factors in providing government support. Sadurski notes that 'the specific purpose of any given rule is best captured by describing the special problem that the rule is intended to attack: if a refinement of an accepted meaning of a particular word or phrase will help us tailor the

[15] It was been reported that a new study by PhDs Thomas Willis, Alison Yaeger and James Sandy at Yeshiva University, New York, (to be published in the journal of the American Psychological Association), found, *inter alia*, that 'students who placed a high value on religion were half as likely to turn to drugs when confronted with serious problems such as unemployment in the family', Christine Jackman, 'Teens who get high on God cope better', *The Australian*, 31 March 2003.

[16] Kim Zetter, 'Can meditation heal whatever ails you ? The mounting scientific evidence for the power of "om"', *goodweekend: The Sydney Morning Herald Magazine*, 30 August 2003.

rule better to attack this evil, then this refined meaning should be adopted'.[17] On this basis, not-for-profit ethical philosophical societies, spiritual societies and even quasi-sporting societies such as yoga and martial arts clubs (which often provide philosophically based codes of conduct), might be eligible for consideration of government aid along with religious groups. Some of these groups might be defined 'religious'. It is arguable that all these groups are just as deserving of protections and privileges as more conventional religious groups, and non-religion is protected under the free exercise component of s. 116. The expansive judgements of Wilson & Deane JJ and Murphy J in *Church of the New Faith* give some support for the prediction that a future Court might treat the word religion as encompassing 'religion and equivalent belief'.

The understanding of the need for equivalency between religious and other belief systems might be the basis for the inclusion of the word 'belief', along with 'religion', in the European Convention on Human Rights and Fundamental Freedoms 1950. This is despite the fact, as observed by legal academic Carolyn Evans, that 'the Commission has ... tended to look at the word "belief" in a rather abstract way and has not recognized that it is part of the phrase "religion or belief" in Article 9', which 'leads to questions over the inclusion as a "belief" of things such as political membership or broad ethical positions'. Evans' solution is to restrict the meaning of belief to

> playing essentially the same role in the life of the individual as religion. The particular formulation that could be used to define this role need not be a simple definition, such as "the ultimate concern" used at times by the United States Supreme Court, but could look at a range of factors ... As many of the more sophisticated approaches to this issue note, religion is not merely a set of intellectual propositions but may have a moral, ethical, supernatural, communal, or symbolic role in people's lives.

On this view 'political orientation or philosophical positions in human affairs' are not overlooked, but are adequately protected elsewhere in the Convention. They are simply separated out so that the phrase 'religion and belief' is not given a meaning 'so open-

[17] Wojciech Sadurski, 'On Legal Definitions of 'Religion'', *ALJ* 63 (1989): 842-3.

ended that it is rendered essentially meaningless'.[18] This approach would also be suitable for the interpretation of the word religion in s. 116 of the Australian Constitution (so that it would be generally understood to mean 'religious and equivalent belief systems'), so long as the expression and pursuit of political and other ideological beliefs are otherwise adequately protected by judicially implied rights. On the other hand, if s. 116 were to be deleted, religions and equivalent belief systems would presumably benefit from any judicially imposed implied guarantees protecting political and ideological beliefs. Either way, religious bodies would be sheltered from the strict separation view advanced by Sadurski, which would preclude religious groups from receiving government aid but allow aid to avowedly non-religious groups.

AN ETHICALLY NEUTRAL, EXPANDING DYNAMIC

If a single definition is retained, the Australian High Court might therefore confirm an even more expansive view of the word religion for the purposes of s. 116 to encompasses groups qualifying as 'religions or equivalent belief systems'. This would likely be accompanied by the confirmation of an inclusive view with respect to unpopular groups, so that the definition of religion will confirm an ethically neutral (lowest common denominator) approach to the definition *per se*, particularly as this approach would facilitate the application of legal frameworks designed to oversee broad categories of non-profit organisations including religious groups (in the absence of a strict separation approach). An ethically neutral approach is reminiscent of the inclusive approach adopted by the Court of Chancery (see chapter IV: 2) to bring religious entities within the 'clutches' of the Statute of Mortmain 1736, in order to defeat testamentary bequests to religious charities. However, a widely inclusive *prima facie* approach to the s. 116 definition of religion, devoid of ethical considerations, would be accompanied by a realization that choices have to be made between groups on the basis of public policy criteria (again reminiscent of the charity law approach), either spelt out in legislation and endorsed by the High Court or implied by the Court.

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[18] Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford: Oxford University Press, 2001) 65-6.

Alternatively, it is possible that the Court will decide to mandate an acceptable internal and/or external ethic[19] as a precondition to applying religious designation to any particular group, and hence elevate the 'code of conduct' indicia of Wilson & Deane JJ to threshold status (a form of definitional disqualification observed in *Segerdal* and a revival of the basic 'sincerity' that Judge Crockett in *New Faith* felt was a necessary prerequisite for any religion). However, it seems more likely that this type of qualification will be applied as a secondary disqualification for non-conforming (or deviant) groups with a *prima facie* religious designation. An ethically neutral approach allows the Court greater flexibility in s. 116 cases involving an individual's reliance on a religious exemption, which may reasonably be applicable to an individual even where the group has been disqualified from receiving financial privileges. Therefore a widely inclusive, ethically neutral approach, which was arguably adopted in *New Faith*, is likely to be confirmed as the judicial approach to a single definition of religion, in which the legislative intention of the Commonwealth, provided it is properly expressed, should prevail in the matter of subsequent disqualifications (unless the Court is of a mind that the matter is clearly one calling for the protection of an individual's religious freedom or to defeat the establishment of a national church).

As a further alternative, it is possible (though improbable) that the High Court might accept a dual or multiple definitions approach. There is a strong understanding that the term religion is fraught with definitional difficulty. Wilson & Deane JJ in *Church of the New Faith* referred with approval to the observation of Latham CJ in *Jehovah's Witnesses* that 'satisfactorily defining religion for the purposes of s. 116 is a difficult, if not impossible task' (chapter V: 1). This understanding might support the view that 'religion' could be defined for state aid purposes (in contexts other than adjudication of s. 116 protections, where it is up to the High Court to determine what it means),[20] in the manner intended by the Commonwealth. While the Court seems to have found in *New*

[19] It is interesting that Latham CJ. observed; 'religious belief and practice cannot be absolutely separated either from politics or from ethics', *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (1943) 67 CLR 116. 125-6.

[20] And where the Court would have to make careful judgements to determine how far groups must be protected (if not privileged), to uphold the principle of individual religious freedom.

Faith that the same definition applied to the word under the Victorian state legislation as it did to s. 116 (a matter of convenient coincidence?), it is possible that the Court might in future determine that a particular Commonwealth statute, incorporating the word religion, does not attract the attention of s. 116 protections and proceed to interpret the word as intended by the statute. This scenario is unlikely given the determination of the Court in *New Faith* to provide a single definition for application to s. 116 and state usage as well.

The confirmation of an ethically neutral *prima facie* definition and endorsement of subsequent public policy criteria might be compromised by an interpretation of s. 116 requiring equal or non-discriminatory treatment of religion to government aid. An uncompromising interpretation of equal aid would prove challenging to existing Commonwealth legislation providing aid to particular denominations.[21] However, as discussed in chapter V: 2, High Court imposition of a requirement for strictly equal treatment of religious groups (based on either non-establishment or free exercise provisions) seems unlikely and even if the Court were to impose equal rights of application, that would be amenable to a system of disqualification based on sound public policy criteria. It also seems unlikely that a strict separation interpretation will be endorsed.

It therefore seems most probable that the High Court will maintain a single, widely inclusive definition of religion (possibly with an expanding dynamic to incorporate equivalent belief systems – whether ethical or not) and rely upon the Commonwealth to incorporate ethical considerations into statutory instruments. This would support the contention that the Court has already settled on an ethically neutral approach for classification purposes. From the pragmatic position thus far taken to s. 116 (and from analysis in chapter V: 2 which concludes that the s. 116 interpretations most likely to challenge the constitutional validity of the proposed tribunal would not prevail) it is

[21] For example, the provision of Deductible Gift Recipient status to the St. Patrick's Cathedral Parramatta Rebuilding Fund might give rise to constitutionally supportable demands under s. 116 for equal consideration for other denominations, or in lieu thereof a nullification of the aid (unless it is construed that the grant is 'heritage' rather than 'religious'. This indicates the potential nuisance value of a non-discrimination interpretation of s. 116 – which is unlikely however to carry the day. Australian Taxation Office, *GiftPack: A taxation guide for deductible gift recipients and donors* (Commonwealth of Australia, 2000) 35.

probable that the Court will be receptive to legislative attempts to disqualify unethical religious groups (in either internal or external dimensions) from receiving privileges afforded to religious groups generally and howsoever defined.

Based on the likely receptiveness of the High Court to the application of public policy criteria to the definition of religion (either incorporating internal and/or external ethics or more likely where an ethically neutral definition is followed by public policy modifications), in chapter VIII: 2 a normative framework for third sector entities (including religious groups) is proposed. The prescription incorporates public policy principles borrowed from the European Convention on Human Rights and Fundamental Freedoms 1950, the misconduct and mismanagement provisions of the UK Charities Act 1993 and principles of corporate as well as individual accountability. An adjudicative tribunal model, based on some functions of the Charity Commission for England and Wales, is the primary authoritative instrument proposed at the centre of the framework to determine questions of definition, entitlement and disqualification.

VIII: 2

ADJUDICATING ON ENTITLEMENTS FOR RELIGIONS

'illegal activities ... had been carried out at the direction of senior Scientology officials'

It is concluded that the basis in the past for granting state aid to religion has been based on two benefits believed to be conferred by religion; personal well-being and good citizenship. In granting aid to promote these benefits, policy makers, including notably the judiciary, have reserved public policy exceptions or definitional disqualification as methods of disqualifying deviant groups from receiving state aid, while avoiding adjudication on matters of doctrine or theological belief. But while the courts do not distinguish between religions on the basis of doctrinal beliefs (on whether these are right or wrong), they have distinguished between groups on the basis of morality or ethics; in other words, whether they are good or bad.

Under the common law of charity, public policy disqualifications can relate to both the internal and external ethics of any given religion. If the internal ethic of a religious group is shown to be harmful (or potentially harmful) to individuals, the group might be disqualified from receiving state aid. If the external ethic of a group is shown to be intolerant and aggressive to outsiders, then this might be grounds for disqualification. In addition, state aid is only provided to those non-profit groups who confer a public benefit rather than a benefit (personal well-being) confined to the group. Hence contemplative orders have been precluded. On the basis that they provide no discernable benefit for the public, ethically neutral or amoral groups would not qualify for assistance. This would preclude amoral groups such as those described by Sadurski, who noted the existence of 'Greco-Oriental mystery cults' which 'prescribed no moral principles to their adherents, and yet the experience they provided was arguably religious'.[1]

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[1] Wojciech Sadurski, 'On Legal Definitions of 'Religion'', *ALJ* 63 (1989): 838.

At present it seems that a much more liberal (and values neutral) definitional standard is applied to areas other than charity law, such as the privileging of religious institutions. If it were acknowledged that the public policy rationale behind assistance to religious institutions (as opposed to religious charities) is to promote the well-being of participants, amoral groups should not qualify for privileges granted to this category either. While it is possible that well-being might be implied if the rituals involved are comforting, where no discernible benefit is ascertained there would be sufficient grounds to refuse assistance to an amoral group. In cases where actual (or even potential) damage might be caused to participants, an organisation *prima facie* qualifying as a religious institution should be disqualified from receiving state aid on legitimate grounds of public policy. In areas other than charity law there is a greater propensity for judges to seek guidance from explicit public policy pronouncements made by government.[2] If judges are to be encouraged to exercise discretion in the application of public policy disqualifications they should be empowered to do so by legislation, or at least encouraged with clear ministerial statements.

PROPOSED ADJUDICATIVE FRAMEWORK

To facilitate adjudication on definitions providing entitlements for non-profit third sector groups, an appropriate framework needs to be in place for the collation of information on entities accessing government aid. It is concluded that Australia would benefit from a more effective framework for the oversight of third sector bodies including religious charities and the extant category of religious institutions. These bodies receive substantial privileges in the form of financial exemptions and government funding. Heightened concerns about religious terrorism and ongoing concerns about abuses within and by religious groups should provide the Commonwealth with sufficient incentive to establish an Australian Third Sector Entitlements Tribunal (ATSET). This tribunal, modelled partly on the Charity Commission for England and Wales and established by Commonwealth legislation, would act in concert with the Australian Taxation Office

[2] As observed in the *Duyn* case referred to in chapter III: 4.

(ATO) to oversee the charitable sector and other third sector categories referred to it by the Commonwealth.

The specific functions of the tribunal would be: to rule on third sector definitions; serve as the gatekeeper for admitting recipients of third sector entitlements; adjudicate on complaints of misconduct levelled against third sector officers and entities; and advise the government generally on definitional matters affecting the third sector and the jurisdiction of the tribunal. Legislative provisions would be required to empower the tribunal to deal with matters of misconduct, involving both individual officials and of the entities themselves, and of mismanagement. Further provisions should be enacted to ensure the maintenance and strengthening of public policy grounds for the suspension or disqualification of entities from receiving entitlements.

State participation

It is agreed with the Sheppard Committee that any Commonwealth regime for the oversight of 'charitable and related entities' should if possible be extended to the Australian states. This thesis has explored constitutional impediments to the extension of the jurisdiction of a Commonwealth tribunal (dealing *inter alia* with religious groups) to the states. The main hazard is found in constitutional limitations on Commonwealth power to make laws with respect to religion under s. 116 of the Commonwealth of Australia Constitution Act 1900. The definition of religion in s. 116 is a matter ultimately reserved to the judiciary and not the legislature. As s. 116 does not apply to the Australian states (which retain unfettered power to deal with matters relating to religion), the continued existence of the section provides a disincentive for the states to co-operate in any Commonwealth, Australia-wide scheme for third sector oversight. Alternative means of overcoming this impediment would be to seek the removal by referendum of s. 116 from the Australian Constitution, or to excise religious groups from any co-operative administrative scheme.

The former might be achievable but would likely encounter serious political obstacles. The problem with the latter is that it might be thwarted by judicial designation, as religious, groups which might not *prima facie* be thought to be so. The removal of religious bodies, which comprise a substantial component of the sector, would compromise the efficacy of any co-operative scheme and would most likely be opposed by religious groups fearing a 'thin edge of the wedge' political attack on their current entitlements. In the absence of any political move to excise s. 116 it is concluded that any invitation to extend the operations of the proposed tribunal to the Australian states would meet with strong reservations from them. However, in the long term the successful operation of the proposed tribunal, particularly if its decisions and proposed enabling legislation are fully endorsed by the High Court in any subsequent challenges, might ultimately provide the environment in which the States could join the framework.

Differential treatment of religious entities

Even under a purely Commonwealth third sector administrative regime, religious bodies, however defined, would have to be treated differentially. This is because religious bodies have idiosyncratic differences from other third sector entities, even apart from the major difference that religious bodies have a privileged legal status (both under charity and constitutional law) not always afforded to other third sector groups. Notably, religious bodies do not uniformly conform to the expectation that third sector entities should be run along democratic lines.[3] Some religious dictates do not conform with contemporary trends in public policy and to date have been dealt with by exceptions to laws otherwise having general application. An example of this is the religious exemption from anti-discrimination and vilification laws pertaining to gay men and women.[4]

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[3] 'Almost all third sector organisations have members and are controlled by their members on the democratic principle of one member, one vote ... The exceptions are some churches and charitable trusts and a few public-serving organisations that are owned by other third sector organisations', Mark Lyons, *Third Sector. The contribution of nonprofit and cooperative enterprises in Australia* (Sydney: Allen & Unwin, 2001) 7.

[4] Hence the apprehension expressed by some religious leaders to further social control of religion by secular government.

Despite these difficulties, it is concluded that it is practically feasible under Australian law to establish an administrative regime whereby harmful or deviant groups, which might achieve legal religious classification,[5] can be disqualified on reasonable grounds from receiving financial privileges provided by the Commonwealth government to religions generally. For the reasons examined in chapter V: 2 dealing with the judicial approach thus far, it is unlikely that notions of religious freedom (or non-establishment), entrenched under s. 116, would be invoked by the High Court to strike down determinations made for sound public policy reasons to disqualify deviant religious groups from government provided privileges.

Codification of public policy disqualifications

While still subject to potential judicial intervention, the Commonwealth would be wise to codify grounds for public policy disqualifications. Legislation for the establishment of a third sector entitlements tribunal could include specific provisions, similar to the 'misconduct and mismanagement' provisions of s. 18 of the UK Charities Act 1993, to be applied not only to individual charity officers but to the entity itself. The Church of Scientology of Toronto, as an entity, was convicted in 1992 in Canada for 'criminal breaches of trust involving espionage activities' within government offices. The Church was fined $250,000.00 and individual participants were fined a total of $9,000.00. Justice Southey of the Ontario Court's General Division found that *'illegal activities ... had been carried out at the direction of senior Scientology officials'*, even though the Church had attempted to place the blame on individuals.[6] The same sorts of determination might be made with respect to disqualification decisions under a third sector entitlements tribunal as proposed. Indeed, issues beyond strict illegality might form the basis for non-entitlement or disqualification, including the continuation of

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[5] Particularly under the wide and flexible definitions provided by the High Court in the landmark case of *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120.

[6] Thomas Claridge, 'Church of Scientology fined $250,000 for breaches of trust', *Globe and Mail*, 12 September 1992. Emphasis added. In NSW a man who had attended Scientology meetings was convicted of obtaining by fraud a confidential state government file on Scientology from the Permier's Department. Victor Ronald Kirby was fined $200.00 but 'denied any affiliation with Scientology', 'Man took secret file by fraud', *Sydney Morning Herald*, 11 April 1975.

unacceptable practices such as Fair Game by Scientology, if proven to the satisfaction of the tribunal.

In addition, a clear statement setting out the public policy grounds upon which disqualification of an entity might be based should be incorporated into any legislation and clearly enunciated in the Minister's second reading speech establishing a third sector tribunal. These might include grounds of public safety, the protection of public order, the protection of health or morals and the protection of the rights and freedoms of others. All these community protections have found authoritative exposition in Article 9 (2) of the European Convention on Human Rights and Fundamental Freedoms 1950, as legitimate exceptions to the 'freedom to manifest one's religion or belief'. A special provision might also be included to allow disqualification of organisations that encourage the abuse of children, such as those which encourage excessive corporal punishment. It should be clearly stated that public policy disqualifications are to be exercised in the discretion of tribunal members and might relate to issues of concern not necessarily proscribed by statute.

Tribunal functions

While this would provide tribunal members with a wide, judicial-style discretion, it is envisioned that tribunal members would be primarily appointed from the judiciary (but might also include senior academics and public servants). The high quality and specialist expertise of appointments to the Charity Commission for England and Wales should be emulated and the day-to-day independence of appointments guaranteed. Appeals would lie in the normal fashion to the AAT (Administrative Appeals Tribunal) and ultimately the High Court. With this safeguard, rules of evidence for hearings before the tribunal should accord with natural justice but need not be unduly restrictive. The onus of proof should be on the applicant for registration, but thereafter might lie with any objector, while the standard of proof might be in accordance with the balance of probabilities. As observed in chapter VI, the process for the lodgement of objections to registration and the continuation of charitable status conferred by the Charity Commission for England and

Wales is in need of some refinement. Clarification is also required on the evidence gathering powers and capabilities of the Commissioners, along with the standing of objectors and complainants. However, the Charity Commission model provides a good basis on which to frame legislative or regulatory rules for the processing of objections to entity entitlements.

There would need to be some form of public registration or endorsement under which entities become entitled to beneficial status and public notification of initial applications. This function could be administered by the ATO. One approach might be to facilitate the receipt of written complaints by the ATO, which could then institute further inquiries or investigations if necessary and take the results of any inquiry to the tribunal for independent determination of the status of the third sector entity (thereby separating the functions of investigation and adjudication). This might occur before or after an entity has initially qualified for entitlements. The standing of objectors would need to be clarified, although access should be allowed to third sector entities with a genuine interest in the sector and the orderly receipt and collation of complaints from leavers (or apostates) should be facilitated. (Here a right of objection on behalf of complainants might be exercised by the Attorney-General or the Treasurer – reflecting a distinction between objections founded on misconduct and those founded on mismanagement or maladministration). Otherwise such complainants might be given standing through representative third sector watch groups). As the basis upon which third sector entities receive entitlements should be transparency and accountability, hearings of the proposed tribunal should generally be public and decisions published.

This framework for the operation of the proposed tribunal, in which written complaints about recipients of third sector entitlements were directed initially to the ATO, would provide a sound basis on which to enhance the intelligence gathering capacity of the government with respect to potentially problematic third sector groups. On the other hand, beneficial religious groups should have little to fear from a framework in which entitlement questions were referred to an independent body from which appeals would lie to the ordinary courts.

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