MODERNISING CHARITY LAW       Religion - Some Comments

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The programme proposes two questions:

Is it time to reform the religious head and strip back its privileges?
Can religion be conceptualised as part of charity other than by tradition?

How are we to define charity?

The Judeo-Christian rules for living require love of God and love of neighbour.¹

There were three Greek words for love: eros, philia and agape. Agape was used in the Greek translation of the Old Testament to translate the Hebrew ahabà. It became the preferred word for love in the Greek New Testament. Caritas was the Latin translation of agape and forms the root of the English word charity.

They are complex words with manifold meanings.

At the heart of any appreciation of human love is awareness of the other and the wellbeing of the other, and, at its highest, a willing self-sacrifice for the sake of the other.

The origin of the word charity suggests a broad meaning encompassing all that promotes human wellbeing. It includes, but is not limited to, practical assistance for those in need. Concern and love of the other means love of the other in his or her totality.

From this starting point we can reflect on the different attributes of the human person and his or her needs – charity, love of the other, is a recognition and response to those needs.

We might then construct an indicative list of human needs as the basis for discussion and then identify organisations/activities that respond to them.

- Physical
  - Health services
  - Health promotion
  - Disability services
  - Aged Care and Child care

¹ Cf Deut 6:5; Lev 19:18, 19:34; Luke 10:25-37; Matt 22:34-40; Mk 12:28-31
Charity is about how we express our concern for the other in the broadest sense of what it means to advance human wellbeing.

On that basis, the advancement of the spiritual dimension of human living is charitable in itself.

I would propose an affirmative answer to the second question: Can religion be conceptualised as part of charity other than by tradition?

**Charity and Privileges**

The submission of the Atheist Foundation to the Henry Taxation Review\(^2\) has a useful statement of the argument that would deny taxation exemption to religious organisations:

> Equity requires that no individual or organisation, business enterprise or social club is given an unfair advantage. At the moment, religious practitioners, religions and religious enterprises are not required to pay income or land tax. This fails any reasonable test of equity and fairness, and by favouring, and therefore encouraging religion, makes a mockery of the notion that Australia is a secular state.

As Mr. Justice Murphy of the High court of Australia noted more than 20 years ago in the case of *Church of the New Faith versus Commissioner of Payroll Tax (Vict.) 1983 154CLR120*: “..... *The crushing burden of taxation is heavier because of exemptions in favour of religious institutions, many of which have enormous and increasing wealth.*”

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There are a number of assumptions in this paragraph that require comment. Firstly it is more helpful to social analysis to regard this country as a pluralist society rather than a secular one, if by ‘secular’ one means a society where there is no place for religion.

Religious practitioners who earn an income, I being one, do pay income tax. In some States land taxes, including local government rates, are payable on land held by religious organisations, depending on its use. I mention these examples as illustrative of the confusion that exists at the popular level in relation to which bodies pay what taxes in various circumstances.

Concern by some people about the wealth of religious bodies is perennial. The dissolution of the monasteries was one rather extreme response.3

Before one speaks of ‘stripping back privileges’ it is necessary to consider what we mean by privilege.

One can easily identify any number of receipts of money by individuals or groups that are not liable to income tax. In Australia we do not impose income tax on the profits from the sale of a principal place of residence, the proceeds of an inheritance, gifts, lottery wins, or children’s pocket money (to use a frequently quoted example of Professor Myles). We do not always identify them as ‘privileges’ or ‘tax exemptions’. Does a failure to impose income tax in these circumstances involve adding to ‘the crushing burden of taxation’?

Religious bodies and other charities do pay taxes of various kinds. Depending on which sub-category they may fall into, they may pay fringe benefits tax, payroll tax, land tax, rates and various local government charges, stamp duty, car parking levies, and even toll road charges.

Social policy dealing with taxation needs to consider:

• The type of tax
• Its purpose
• Those who should bear its burden, and why?
• Those who should not bear its burden, and why?

The decision of the High Court in *Word Investments*4 has put the emphasis back onto ‘purpose’ as the determining element in characterising organisations as ‘charitable.

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4 Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd [2008] HCA 55 (High Court of Australia, 3 December 2008).
In the context of ‘religion’ that purpose will be the advancement of the spiritual dimension of human living. This may then involve a myriad of other practical initiatives in the areas of health, social welfare, education, and the arts.

These may be carried out through separate bodies leading to different taxation consequences.

For example, religious organisations do not pay payroll tax, but their subsidiary bodies might. This was the outcome in the cases of the Dominican Sisters\(^5\) (relating to a teachers' college) and The Glebe Administration Board\(^6\) (relating to commercial and investment activities).

Enterprises should be characterised taking into account their connection to the religious purpose which gives rise to them.

Which charities pay which tax is then a separate question.

**Issues in Defining Religion as Charity**

The law does not, nor ought it, recognise as charitable every organisation that might claim to be a religion.

The usual indicia include:
- faith in a higher being or power,
- forms of worship or devotion, and
- a system of doctrines and rules of living

If one accepts the premise that charity is about our relationship with ‘the other’, then it follows that there must be a ‘public benefit’.

This is consistent with the comments made by the Charities’ Commission (December 2008) para 1.6:\(^7\)

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

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Some comments on the current received wisdom about ‘public benefit’ are offered to stimulate further discussion.

In looking for public benefit, one must not limit ‘benefit’ to that which is only material. Nor does one determine benefit by evaluating the respective truth claims of diverse religions. Nor should one necessarily accept the trend of the case law to exclude benefits limited only to the adherents of a religion. In this respect the inclusion of ‘self-help’ groups in an extended definition of charity⁸ recognises that participation in the group is usually as much about what one does for the other as what one does for oneself.

It is said that ‘fostering individual private piety is not charitable’ (Charity Commission para 2.6). Can one assume that personal piety, however demonstrated, does not have a public benefit? One’s personal piety may well prove to be the very basis on which one develops and then demonstrates that love for others which is at the heart of charity.

However, personal piety has a value in itself. By acknowledging and promoting the personal piety of the other, are we not encouraging the other to fulfill the spiritual dimension of human living and thus promoting human wellbeing?

One may speak of the edifying effect of public religious services in order to demonstrate public benefit but this is an incapable of proof as the benefit of private prayer.

How is meditating by oneself different from mediating in a group? All that should be required is that the organisation promotes meditation, (or prayer, or worship) assuming the other indicia of religion are present.

Australian legislation sought to overcome the problem of finding ‘public benefit’ for contemplative Religious Orders by including in the extended charity definition, a requirement that they ‘regularly undertake[s] prayerful intervention at the request of members of the public’.⁹ One can only speculate how the tax authorities will define ‘regularly’ and how they will distinguish prayers made at the request of the public from those that arise spontaneously from the members themselves.

This artificiality would not be necessary if one accepted that the promotion of the spiritual dimension of the human person is as ‘charitable’ as promoting the material needs of the poor, the physical needs of the sick or the aesthetic needs of the culturally deprived.

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⁸ Extension of Charitable Purpose Act 2004 s.5(1)(a) and s.5(2)
⁹ Extension of Charitable Purpose Act 2004 s.5(1)(b); cf Cocks v. Manners LR 12 Eq 585, Gilmore v. Coats [1949] AC 426 [1949 All ER 848, Charity Commission op cit para 2.6
What organisations ought to be excluded?

Religious organisations that promote violence or disorder ought to be denied recognition. Likewise cults and sects that are manifestly harmful to adherents can be excluded.

In some places there is a legitimate anxiety about links between religious groups and terrorist organisations. However, by way of caution, one might like to ponder the circumstances that led to the Penal Laws. Are there lessons there for today?

One can use other ‘anti-avoidance’ provisions to deny recognition to groups that purport to be religious but operate only to enrich their promoters.

Another useful test is to ask whether the organisation that purports to be a religion would exit at all if the tax laws were different?

**Conclusion**

A more appropriate approach to understanding religion as charity is to acknowledge the spiritual dimension of human wellbeing. From that starting point one can then identify organisations that promote the development of spirituality. This may be done through public activity or the public promotion of private religious devotion.

Then, by way of exception one can exclude those that are manifestly harmful to adherents or members of the public, or are merely a sham, or a device for the enrichment of a few.