FUNDING TERRORISM AND CHARITIES

Blake Bromley

Summary

The previous two issues of *The Philanthropist,* 23(4) and 24(1), featured an article prepared by Blake Bromley for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 in support of his personal testimony in Ottawa on October 26, 2007. The following is the final installment: the text of his letter to David Walker, Development Manager, Compliance and Support Charity Commission: "Comments on Charity Commission Draft Counter-Terrorism Strategy."

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Re: Comments on Charity Commission Draft Counter-Terrorism Strategy

We have read the Charity Commission's Draft Counter-Terrorism Strategy issued in December 2007 and are appreciative that the Charity Commission has invited comments. We assume that you will consider submissions from outside Great Britain. We want to begin by saying that the Charity Commission's balanced and well reasoned treatment of the difficult and sensitive issue of counter-terrorism is the best government strategy document we have read.

We know that the response on our side of the Atlantic is to say that the world changed on 9/11 and terrorism must be addressed with draconian modern anti-terrorism legislation. Since England dealt with terrorism related to the "troubles" in Northern Ireland, it has a much better sense of history and considerable experience in dealing with anti-terrorism prior to 2001. This perspective is reflected in your draft strategy. However, our comments reach much further back into English history, to the period when the law of charity evolved, to seek insight into the current problems.

We believe that an effective counter-terrorism strategy should include an amendment to the statutory definition of charity which precludes "zealotry" without reference to criminal

or anti-terrorism legislation. The purpose of a civil prohibition of zealotry would be to focus on the promulgation of harmful ideas by charities as well as wrongful conduct. We also believe that the Commission should devote more attention to the *members* of a charity, as they are frequently more important agents to counter terrorism than directors. Finally, we suggest that an informal regulator such as the Visitor may greatly assist the Charity Commission in both educating and regulating charities as to appropriate conduct.

The Elizabethan Parliament's approach to terrorism and religious folk

The starting point for the law of charity in England is the *Statute of Elizabeth, 1601*[1] which dealt with the misapplication and abuse of charitable funds. Even at this early date, terrorism was a reality to the English people and charity law sought to redress the problem and alleviate the consequent suffering. This is reflected in the inclusion of "the relief or redemption of prisoners or captives" as a charitable use in its *Preamble*. The Crusades left a legacy of piracy in which corsairs carried on a holy war against the enemies of their faith by capturing Christians at sea and selling them as slaves. These corsairs, who operated from Turkish regencies in northern Africa, attacking maritime traffic in the Mediterranean, saw themselves as warriors of Islam in ways that may parallel modern jihadis. English charities, such as the Redemptionists, responded to these terrorist attacks by raising money to purchase the release of the captives taken by Muslim pirates. This practice of paying ransom funds to terrorists in order to save the lives of Christians would clearly be in contravention of recent laws forbidding the "financing of terrorism." However, it is a reminder that the law of charity has confronted terrorism and found ways to responsibly respond to it. Consideration needs to be given to whether the strategy behind the Elizabethan Parliament's inclusion of "the relief or redemption of prisoners or captives" in the *Preamble* was a more prescient response to terrorism than recent anti-terrorism legislation.

If we look back into earlier years of the reign of Elizabeth I, there is no doubt that Parliament understood the significance of theological allegiances in maintaining peace in the realm. Elizabeth I's very first statute was the *Act of Supremacy,*[2] which required oaths of religious allegiance.[3] The second statute in her reign demonstrated her appreciation of the significance of what theological doctrines were being promulgated as it mandated the uniform usage of the Book of Common Prayer in worship.[4] She also understood the significance and application of religious donations much better than do modern legislators, as demonstrated by her fourth statute, *An Act for the Restitution of the First-fruits to the Crown,*[5] Elizabeth I considered religious beliefs to be a national security issue and legislated religious tests which are entirely unacceptable today.[6]

The intolerance of religious beliefs and doctrines which did not conform to those of the Church of England is a sad chapter in English history. These prejudices were only erased by Parliament many years later through a long line of Toleration Statutes which did not begin until 1688.[7] It was not until 1832[8] that Roman Catholics were able to claim charitable status as a lawful religion. Jews had to wait until 1846 and the enactment of the *Religious Disabilities Act*[9] before achieving legal recognition in charity law. Today such distinctions would be illegal under the *Human Rights Act, 2000* and we are not recommending that the Charity Commission model the behaviour of the Elizabethan Parliament. However, it is important to keep in mind that the English law of charity has an inordinate amount of experience in wrestling with religious and doctrinal distinctions when addressing the interaction of national security issues and charitable activism.

The Charity Commission would also do well to consider the Elizabethan Parliament's views on the significance of charitable donations in accomplishing religious and societal goals, because understanding the nature of obligatory religious giving is important when devising a counter-terrorism strategy. It is inadequate to simply extrapolate one's understanding of the motivation and experience of people giving to the opera to donors giving to religious charities. If the Charity Commission fully understood all forms of religious giving, it might be concerned about its statutory mandate to "act in a way which is compatible with the encouragement of *all* forms of charitable giving."[10]

Differences between the traditional trust model and the corporate charity

In our opinion, the Draft Counter-Terrorism Strategy pays too much attention to the traditional trust model, and not enough attention to the modern corporate charity model and the ways in which it differs from the trust. The law of charity grew out of the law of trusts. Historically, the primary charitable vehicles were endowed trusts for charitable purposes. Because the trustees' role was primarily to administer the donated funds of deceased benefactors, the focus of regulation was on the fiscal management, administration, and application of those funds dedicated to charity. Today, the primary charitable vehicle is the charitable corporation. These corporations are much more likely to be seeking current donations of funds for their operations than spending revenues from endowments. When charities are soliciting donations they are much more likely to invoke the emotions and excite the anxieties which are of current topical interest than when they are simply expending revenues from investments.

Trusts are not legal persons and do not have members involved in their governance. By contrast, corporate charities are likely to be membership organizations dependent upon the active participation of individuals who are either legal members of the charity or adherents, devotees, constituents, or beneficiaries engaged in the purposes of the charity. Even when modern charities are structured as trusts with no members, their culture and governance responds to and reflects this reality.

We believe the Draft Counter-Terrorism Strategy needs to be modernized to address the significant role and power of the modern charity's legal members, adherents, volunteers, and activists (which we will refer to as "members", whether or not they have any legal standing as such). The members need to be as actively engaged in the counter-terrorism strategy as trustees, if not more. The *Charities Act, 2006* may also need to be modernized, as it currently limits the "accountability objective" to "donors, beneficiaries and the general public" and makes no reference to members. It is our experience that counter-terrorism strategies frequently focus on members as the primary "villains" because members provide the most funding to the charity. We believe that the members are more often the "victims" because their donations, given in good faith, are misapplied by the charity for improper purposes. Members are often more concerned about the legal compliance of charities than any other constituents of the charitable sector, as they wish to ensure that their fiscal privileges are protected and their donations are used only for appropriate purposes.

We are concerned that the Draft Counter-Terrorism Strategy focuses on the role of the trustees and governance to the exclusion of members. If the trustees are people of goodwill it is useful to develop best practice guidelines and assist them in governance adjustments which will help them overcome administrative and decision making policies

which inadvertently contribute to resources being made available to terrorists. However, these will be of little consequence if the trustees are the real source of the problem. Worse, best practice guidelines which are intended to do good unfortunately have the potential to outline "Safe Harbour" policies which will make it more difficult to detect and convict trustees who are studying Charity Commission guidelines expressly to fund terrorism. The best way to identify wrongful conduct is to motivate and mobilize members to bring their concerns in this regard to the attention of the Charity Commission.

Identifying terrorist intent

Another lesson to be learned from Elizabethan England is that Elizabeth I understood that the actions of those who attended religious services were informed and instigated by the doctrines that were promulgated in the religious charities. An effective counter-terrorism strategy must focus upon what is being promulgated from the pulpit and not just actions which are actually carried out. The Draft Counter-Terrorism Strategy repeatedly speaks of intervention based on "evidence."[11] As we read this document, the Charity Commission is focused on responding to completed actions which have produced evidence of wrongful conduct. While this strategy may be prudent, balanced, and proportional, our concern is that the consequent response might be too late to prevent the terrorism which can devastate the sector and society.

The charitable sector needs to become the first line of defence in preventing the dissemination of views and doctrines which result in its adherents subsequently engaging in terrorist activities. In our view, the Charity Commission could function most effectively as a counter-terrorism agency if it could develop an effective civil mechanism to identify the dissemination of these views within the charitable sector before they translate into criminal acts. We have no illusions about how difficult this could prove to be, but we believe that it is a concept which should be given consideration. The intent of this proposal is to develop a concept which is entirely civil so that it remains within the jurisdiction of the Charity Commission[12] and does not necessarily engage the law enforcement agencies responsible for dealing with criminal or terrorist activities.

For want of a better term, we will refer to this concept as "zealotry." The concept of zealotry must be much stronger than the notion of disbenefit and must explicitly contemplate fomenting and encouraging unacceptable radical activities. It could be defined, for example, as "the promulgation or dissemination of a doctrine, axiom or hypothesis that a reasonable person would apprehend would lead to destructive conduct unbefitting a charity." Zealotry would become a term which applies to those who take theological, ideological, political, and possibly other "charitable" positions to an extreme. The concept of zealotry will also need to be applied to proponents of secular radicalism such as eco-terrorists and animal rights extremists, as fanaticism is not a problem which exists only in religious communities. In order not to unduly limit free speech and so as not to involve the law enforcement agencies, zealotry would not be defined as a criminal or terrorist act. The primary objective of the concept would not be to prosecute offenders but to provide the civil regulator with a point of entry into the activities of a charity in order to prevent the dissemination of destructive views.

Let us suggest several ways this concept could be implemented, acknowledging that it would require significant further thought. The least radical would be to expand the juris-

diction of the Charity Commission over the communications of charities by amending the *Charities Act, 2006* to forbid the promotion of zealotry. The supposition would be that charities have a privileged position in the social structure of Great Britain and enjoy a great deal of public trust. Being accepted on to the Register of Charities by the Charity Commission inevitably bestows the imprimatur of government sanctioned acceptability onto a charity. It must not abuse this position of public trust by promulgating zealotry. Further, if an organization wants the fiscal benefits of charity status, it must accept this limitation. Focusing on communications highlights the capacity for charities to do harm through the promulgation of ideas which may lead members to take inappropriate actions for which the trustees may not be accountable. The communications may have come through itinerant guest preachers who are not subject to the governance sanctions of the trustees.

A more fundamental change would be to amend the statutory definition of charity to clarify that zealotry is an unacceptable component of charity whether or not it is being communicated. If zealotry is to become a component of the definition of charity, it is important to find a conceptual link between this idea and the legal concept of charity. The link may be found in the fact that the common law of charities is fundamentally about "purposes" rather than "activities." The settlor of the charitable trust sets out purposes of sufficient public benefit to qualify as being charitable purposes. Meeting the "charitable purposes" test is essentially an "intentionality" test which is charity law's counterpart to criminal law's "mens rea" test. What we are proposing is that the intention must be to carry on charitable purposes with the further intention that the charitable purposes not be carried on in ways which amount to zealotry. This has a conceptual parallel to an assessment that charitable purposes such as relief of poverty or education must not be carried on in ways which amount to private benefit.

Prior to the enactment of the *Charities Act, 2006* there was a presumption that the first three heads under the Pemsel classification had the requisite degree of public benefit. This presumed that the settlor/donor of the charitable trust intended to carry on the purposes in ways which were consistent with charity law. However, public benefit is now determined on the basis of "evidence" of how the intended purposes are actually carried on. Our initial instincts are that, with regard to zealotry, it would be very counter-productive to co-mingle the statutory concept of "public benefit" with the proposed intentionality test. This is not a question of there being "more detriment than benefit" as set out in Principle 1c of the Public Benefit Guidance. It would also not be helpful to import the Scottish concept of "disbenefit"[13] into this counter-terrorism discussion. This is a concept which in our minds has grown out of the specific need to amend the law of charity to find civil as opposed to criminal means to pursue a counter-terrorism strategy. It also seeks to be defined so as to allow the regulator to address zealotry when only the "mens rea" element has been triggered without waiting for evidence of the "actus reus" because by that time the terrorist activity will have been completed. However, if zealotry could be defined as a civil rather than a criminal intentionality test that could be applied by the Charity Commission in a manner which is comparable to the private benefit test, it might be much easier to administer.

It might be possible to incorporate the concept of zealotry into the definition of charity without a statutory amendment. The statutory definition provides that a charity must

be "established for charitable purposes only"[14] so it already has the framework to exclude zealotry. A charity which has been established to further its charitable purposes through zealotry will fail the "only" test because it will go beyond the accepted intentionality boundaries of charitable purposes. The question is whether this concept could be brought within the concept of public benefit and defined by the Charity Commission in "guidance". As indicated earlier, we are of the opinion that the more important question is whether this concept *should* be brought within the concept of public benefit. It is doubtful that Parliament intended the "public benefit" consultations and consequent guidance to apply to counter-terrorism. The fact that the Charity Commission has responded to counter-terrorism independently of the public benefit consultations suggests that it shares that view. A statutory amendment would not only provide a much stronger legal basis for the Charity Commission to pursue this course of action, it would signal to the charitable sector and law enforcement agencies that the government stands behind an "independent civil regulator" having this ability to operate according to its discretion in Great Britain's counter-terrorism strategy. However, if it is impossible to obtain a statutory amendment in the near future, we believe there are ways this change could be achieved under the current legislation.

The potential role of the "Visitor" in a counter-terrorism strategy

We believe the history of the common law may also contain a solution or mechanism which is extremely useful in addressing the concept of zealotry within the charitable sector. Our recommendation is that consideration be given to modernizing the concept and role of the "Visitor." The Visitor is an informal regulator appointed by each charity to address the governance and compliance obligations of only that charity. Since the charity appoints its own Visitor, this is not a hostile or threatening obligation. Re-introducing the Visitor as an informal, charity-specific regulator would also be a means of encouraging members to take a more active role in promoting better compliance and counter-terrorism policies within their own charity, as they would have someone with whom to informally discuss their concerns internally without contacting the Charity Commission or law enforcement agencies. In our view, it would be beneficial to develop a two-stage process whereby a person encountering zealotry within a charity first went to the regulator appointed by and for that charity (the Visitor), before going to the independent regulator appointed by the government. This process would be consistent with the preventative objective of the zealotry concept. It is commonly conceded that no counter-terrorism strategy will succeed in the charitable sector unless it engenders trust within the community. It is our hope that the combination of an increased role for members and the renewed role of the Visitor can be important first steps in achieving this goal.

The definition and exercise of the Visitor's role may necessarily vary among different parts of the charitable sector. It must be a concept that is adaptable to secular as well as religious zealotry. The role of the Visitor could also be adapted so that it functioned as the "contact of first instance" between the regulator and the charity. This would mean that when the Charity Commission has reason to be concerned about zealotry or issues of non-compliance, it would contact the Visitor prior to formal steps being taken with the trustees. Consideration would have to be given to the merits and problems of confining the consultative role of the Visitor to extraordinary problems such as zealotry or having the Visitor be the contact of first instance for all regulatory issues.

The public confidence objective and the counter-terrorism strategy

The *Charities Act, 2006* states that the first objective of the Charity Commission is "the public confidence objective"[15] which is "to increase public trust and confidence in charities". This mandate assumes that the Charity Commission has the trust and confidence of the public and charities. While this may be true in long established English communities and charities, we would suggest that it should not be presumed that new and ethnic charities share this view. We are proposing that an important, if unstated, component of the Counter-Terrorism Strategy must be to increase the public trust and confidence in the Charity Commission among communities and charities that are vulnerable to exploitation by terrorist sympathizers.

Neither the Charity Commission nor law enforcement agencies can effectively counter terrorism in the charitable sector unless there is a level of trust between the "problem communities" and the regulator. Many of the charities which are of the most concern represent ethnic religious communities. Many of the members of these communities are immigrants from countries where there is no regulator comparable to the Charity Commission. It may be assumed that many of them equate any regulator to a law enforcement agency. Consequently, the final Counter-Terrorism Strategy should place even more emphasis on the fact that the Charity Commission's jurisdiction is only civil. While the Charity Commission is allied with law enforcement agencies, there is merit in ensuring that ethnic communities perceive the Charity Commission as being a friendly civil regulator rather than a hostile police agency. It is doubtful that these communities understand how careful Parliament was to legislatively protect the independence of the Charity Commission from the government of the day.

It may also be assumed that many in these communities come from countries where charities do not receive tax benefits comparable to those provided in the United Kingdom. The Charity Commission should not only educate constituents about these benefits, but emphasize the consequent fiduciary duty to make sure that the tax supplanted budgets of these charities are properly deployed. It is important that the basis of the Charity Commission's "interference" be explained in terms of tax benefits and not in terms of counter-terrorism. The more constituents understand the contribution of tax benefits to their charity's funding, the more likely they are to accept the "interference" of the regulator. The Charity Commission must position itself as a benevolent byproduct of a generous system where charities are indirectly funded by the state and as a desirable guardian of the integrity of this generous fiscal system.

It is our opinion that particularly in developing its counter-terrorism strategy the Charity Commission should emphasize that Parliament has made it an independent regulator. This gives it credibility in claiming that it is pursuing the public good independent of any political control or agenda. More importantly, it allows the Charity Commission to stand firm in refusing to implement counter-terrorism policies that it considers to be excessive or counter-productive. However, this strategy is potentially problematic to the extent that its jurisdiction only extends to England and Wales.

The compliance objective and the counter-terrorism strategy

The third statutory objective of the Charity Commission is "the compliance objective" which is "to promote compliance by charity trustees with their legal obligations in exer-

cising control and management of the administration of their charities." As we suggested earlier, we believe that from a counter-terrorism perspective, this objective should be modified to address members, devotees, adherents, or constituents of charities as well as the trustees. Relative newcomers to the charitable sector need to be educated as to the ethos, privileges, and consequent responsibilities of the sector. They need to understand that even in religious charities, trustees and religious leaders have an obligation to conform with secular law. The point needs to be made, with varying degrees of subtlety, that the members have a duty to ensure that the trustees act properly so that the status of the entire charity is not put at risk. Within certain ethnic and religious communities, it may be useful to emphasize that if they want their trustees to continue to operate without interference from the Charity Commission, they must protect the trustees not by withholding information but by addressing potential problems when they are first identified.

It is important that this education process extend beyond the trustees because in certain organizations sympathetic to terrorism, the trustees are likely to be the greatest offenders. It would be helpful if the Charity Commission had the statutory right to give notice to all members of a particular charity and to conduct a public education seminar. If the battle for hearts and minds is to be won domestically in the charitable sector, it is critical that this process not be linked primarily to evidence-based terrorist threats. This needs to be a positive fight to inculcate attitudes which discourage zealotry, rather than a reactive response to catch those who have crystallized a destructive intent. Even when dealing with recalcitrant trustees, the Charity Commission's *modus operandi* should be closer to the "re-education" campaigns of communist societies than the rendition of suspected terrorists in Dick Cheney mode.

The High Court jurisdiction and the counter-terrorism strategy

It is hopeful to think that the problems of funding terrorism could be resolved through a civil concept such as zealotry, monitored by the Visitor. However, it is more realistic to expect that governments will continue to rely on draconian anti-terrorism legislation, such as the *Terrorism Act, 2000*, other financial sanctions legislation, and relevant EU legislation. While this legislation cannot be ignored, it is our opinion that the Charity Commission has much to gain by emphasizing the civil basis for its oversight of charities and that Parliament has created it as an independent regulator.

We would recommend that greater significance be given to the unique provision in the UK definition of charity which requires charities "to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities."[16] This provision affords the Commission the opportunity to design a civil oversight by making it a positive requirement that charities bring any activities which give rise to concern that they may be funding terrorism, even internationally, under the jurisdiction of the High Court. We do not know enough about the law in England and Wales to know how operational impetus is given to this provision. However, the Charity Commission should develop "a balanced, evidence- and risk-based approach" which requires charities to "voluntarily" contract or otherwise agree to bring selective foreign and even risky domestic activities expressly under the jurisdiction of the High Court. This would confirm a civil regulatory role which could be refined with experience to more effectively target questionable activities while also relaxing some of the blanket regulatory initiatives which are proving to be counter-productive.

It is important that the Counter-Terrorism Strategy not staunch the flow of funds from charities to areas and activities which hold an obvious risk because the best way to "win hearts and minds" both in the domestic funding charities and the foreign service delivery charities is to have significant funds flow to address genuine problems in a responsible manner. We have written about the importance of keeping private charitable funds deployed to assist victims of terrorism and those whose daily lives suffer from the fact that they live in areas effectively controlled by terrorist forces. We are confident that the Charity Commission is fully cognizant of and sympathetic to this problem so will not spend more time on it in this submission.

Conclusion

We are very aware that one of the dangers of developing a more effective counter-terrorism strategy for charities is that terrorists may seek to use vehicles and techniques outside the jurisdiction of the Charity Commission. However, that is one of the problems which goes beyond the remit of this consultation or this submission.

Thank you for allowing us to make this submission and we wish you the wisdom which will be required to develop the most effective and efficient counter-terrorism strategy which still allows charities to function as normally and effectively as possible.

Yours sincerely,

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Principal

Notes

1. 43 Eliz. 1, c. 4, also cited as the Charitable Uses Act, 1601 (Eng.), or Statute of Charitable Uses

2. (1558-59) 1 Eliz. c. 1. "*An Act to restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all foreign Powers repugnant to the same.*"

3. In the early years of her reign the penalty for religious deviation was treason.

4. (1558-59) 1 Eliz. c. 2. "*An Act for the Uniformity of Common Prayer and Service in the Church, and Administration of the Sacraments.*"

5. (1558-59) 1 Eliz. c. 4. "*An Act for the Restitution of the First-Fruits and Tenths, and Rents reserved nominee decimae, and of Parsonages impropriate, to the Imperial Crown of this Realm.*"

6. Elizabeth I passed three separate statutes indexed under the heading "Religion" but all having the title "*An Act to retain the Queen's Majesty's subjects in their due obedience*", being (1581) 23 Eliz. c. 1; (1587) 29 Eliz. c. 6; and (1592) 35 Eliz. c. 1.

7. 1688 (1 Will & Mary), c. 18. "*An Act for exempting their Majesties protestant subjects, dissenting from the church of England, from the penalties of certain laws.*"

8. (1832) 2 & 3 Will. IV, c. 115. "*An Act for the better securing the Charitable Donations and Bequests of His Majesty's Subjects in Great Britain professing the Roman Catholic Religion.*"

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

10. *Charities Act 2006* (U.K.), 2006, c. 50, s. 7 1D(2)2.(a)

11. DC-TS paras 2.1, 2.2, 3.2, 4.3, 5.1, 5.3, 5.4, 6.9, 6.10

12. The Draft Counter-Terrorism Strategy makes it clear that the regulatory jurisdiction of the Charity Commission is civil rather than criminal, and that the Charity Commission will refer criminal conduct to the appropriate law enforcement agencies: DC-TS para 1.4 and 4.1.

13. *Charities and Trustee Investment (Scotland) Act, 2005,* s 8

14. *Charities Act 2006* (U.K.), 2006, c. 50, s. 1(1)(a)

15. *Charities Act 2006* (U.K.), 2006, c. 50 s. 1B (2)

16. *Charities Act 2006* (U.K.), 2006, c. 50, s. 1(1)(b)