

## **Opinion on the “Q&A on Responding to Child Abuse Related to Religious Beliefs” Document from a Constitutional Theory Perspective**

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### **1 Introduction**

On December 27, 2022, the Director-General of the Child and Family Bureau of the Ministry of Health, Labor and Welfare issued a document titled "Q&A on Dealing with Child Abuse Related to Religious Beliefs, etc." (hereinafter referred to as "Q&A") addressed to "prefectural governors and mayors of municipalities" (Child Welfare Bulletin No. 1227-1).

The content of this document appears to be questionable in light of the "rights and duties concerning the education of children," "freedom of religion," "equality under the law," and the "principle of separation of religion from politics" guaranteed by the Constitution of Japan (hereafter referred to as the "current Constitution" or "Constitution").

Unfortunately, the Ministry of Health, Labor and Welfare (MHLW) does not disclose the process of how this "Q&A" document was drafted and prepared. Therefore, what is available are the documents on the Internet, which, when organized, reveal the following timeline.

- October 12, 2022: The president of the "Japan Society for Cult Exclusion" ("JSCPR") submitted a request to the government to recognize "a new type of child abuse" by "cult-like groups" against second-generation or subsequent generation religious people.
- October 31, 2022: Minister of Health, Labor and Welfare Katsunobu Kato instructed the Secretariat of the Ministry of Health, Labor and Welfare to prepare a "Q&A" on "child abuse" by religious organizations. Minister Kato publicly announced that he had issued this directive at a press conference the following day, November 1, 2022.
- December 5-20, 2022: MHLW officials held intermittent closed-door meetings with the JSCPR chairman regarding the contents of the "Q&A".
- December 23, 2022: The final draft of the "Q&A" was approved.
- December 27, 2022: The Ministry of Health, Labor and Welfare (MHLW) published a "Q&A" and sent it to local governments throughout Japan.

If the above timeline is correct, the "Q&A" was drafted and finalized in only 18 days (December 5-23, 2022). There was no public comment process in the drafting of the "Q&A" and no review by

outside experts to determine whether the "Q&A" violated the Constitution or international human rights treaties ratified by Japan. Considering that the Q&As affect core constitutional rights guaranteed even to religious minorities in Japan, there is a fundamental problem with the process by which the Q&A was prepared.

As discussed in this written opinion, almost all of the "Q&A" content violates the Constitution. In addition, the Q&A document is likely to provoke intolerance and discrimination against minority religions, as well as acts of hate motivated by hatred and hostility. To prevent or mitigate such damage, the government must immediately halt the use of the "Q&A" and allow sufficient time for experts to review the Q&A document independently from the government. In order for Japan's obligations under the International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR") and the Convention on the Rights of the Child (hereinafter referred to as "CRC") to be complied with, the equality before the law guaranteed by Article 14 of the Constitution, the freedom of thought and conscience guaranteed by Article 19, the freedom of religion guaranteed by Article 20, and the freedom of education guaranteed by Article 26 must be fulfilled. This is essential to determine whether the Q&A should be revised or completely revised in order to comply with the obligations of Japan under the International Covenant on Civil and Political Rights ("ICCPR") and the Convention on the Rights of the Child ("CRC").

Hereafter, we will focus on "Rights and Duties Concerning Children's Education," "Freedom of Religion," "Equality before the Law," and "Principle of Separation of Religion from Politics," which are in conflict with the Q&A document. The author will begin by clarifying the contents of these four topics.

## **2 Rights and Obligations Concerning Children's Education**

### **(1) Parties concerned with the child's right to receive education**

The current Constitution has a provision on children's education in Article 26, paragraph 2. This article stipulates that "All citizens are obligated to provide their sons and daughters under their care with a general education as provided by law. Compulsory education shall be free of charge." This passage uses the terms "sons" and "daughters". However, here we use the term "children." Since there are many parties involved in the education of children and the rights and obligations among them are complicated, we will begin by unraveling them.

If we organize the party entities that appear in actual educational situations, we can point out three main parties involved in education: "All citizens" and "their sons and daughters under their protection" from the viewpoint of Article 26, Paragraph 2, and those who have "children under their protection," in other words, their guardians (parents and others, hereinafter referred to as

"guardians"). However, since it is the government that establishes the school education system, the government appears as the fourth party concerned as the party obligated to develop the school education system. The government, however, is indirectly involved in education through the Ministry of Education, Culture, Sports, Science and Technology (MEXT), which is in charge of education in the central government (the national government); boards of education, superintendents of education, and school directors, which manage and operate education in local governments (local public entities); and prefectural governors, municipal mayors, and local assemblies.

## **(2) Rights of the child**

To summarize the relationship between the rights and obligations of these parties, "children" have the right to demand that the government improve the educational system and facilities and guarantee equal opportunities, in other words, they have the right to demand the government act. The child also has the right to demand that the content of the education he or she receives be of a level and content that is necessary and sufficient for his or her mental formation.

The child has the right to exclude actions that violate his or her right to learning and that require him or her to do things that are unrelated to his or her right to learning, i.e., the right to demand inaction.

Children are not obligated to receive education.

## **(3) Rights and obligations of parents/guardians**

Article 26 of the Constitution clearly stipulates only the duty of parents to educate their children. However, even without such a provision, it is a natural law obligation, so to speak. On the other hand, parents have the freedom to educate their children in accordance with their own educational policy, and this freedom is a natural assumption even if the Constitution does not mention it explicitly. This point is shown as the nature of universal rights and duties before constitutional rights and duties in the provision of Article 6, Paragraph 2 of the German Basic Law, which states that "the upbringing and education of children is a natural right and first and foremost a duty imposed on parents." In Japan, Article 820 of the Civil Code clearly states this point: "The person who exercises parental authority has the right and the duty to take care of and educate the child for the child's benefit."

The history of the public education system, in which the government determines and provides the content of education, generally begins in the modern era. It was during this period that the principle of the "individual" (which means a person who can think and speak for himself/herself in

direct confrontation with the government; the first sentence of Article 13 of the Constitution states that "All citizens are respected as individuals") was recognized, and it was indicated that parents could be an obstacle to their children growing up and becoming individuals. It can be pointed out that the education provided by the guardians within the family has come to be regarded as inadequate in terms of the demands of society, in other words, in terms of the social function of education. This is the reason why the government has imposed the obligation on parents to provide their children with public education.

In reality, public education, or school education, became the center of children's education, and parents' freedom of education was reduced to that extent. The Supreme Court also held that "parents' freedom of child's education is mainly expressed in the freedom to choose education and schools outside of school, such as home education, for the child" (Asahikawa Achievement Test Case, SCD on May 21, 1976, Penal Code, Vol. 30, No. 5, p. 615). Therefore, when the government provides parents with choices in public education, the freedom of parents to decide the content of education based on their own educational policy is still reserved. In Japan, private schools play a part in public education, and parents have the right to decide whether to choose a public school or a private school. Parents also have the right to choose a private school that offers religious education if the private school is established with a religious doctrine. The late Dr. Nobuyoshi Ashibe stated that "the freedom of parents to educate their children in the religion of their choice and to send them to the religious school of their choice, and the freedom to receive or not receive religious education (some consider this freedom of religious education as a form of freedom of religious action) also derive from the freedom of faith" (Nobuyoshi Ashibe, Constitution [Takahashi (Nobuyoshi Ashibe, Constitution [Kazuyuki Takahashi, 8th ed., 2023, Iwanami Shoten], p. 166). As one of the contents of the parents' (guardians') freedom of education, this freedom should be considered to be superimposed and guaranteed by Article 20, paragraph 1 and Article 26, paragraph 2.

In a case where a parent's educational policy conflicted with the school, a district court decision (Sunday class visit case, Tokyo District Court, March 20, 1986, Gyosei Gyosei Shiho, Vol. 37, No. 3, p. 347) rejected the parent's argument that special treatment of children participating in religious activities infringed on the religious neutrality of public education. This case appears to be a conflict between the parents' freedom of education and the school's authority to provide education. However, it is understood that the court should consider the issue from the perspective of whether giving priority to the parents' freedom of education would infringe on the children's right to learn.

This point is clearly indicated by a later Supreme Court decision (Kendo Practice Refusal Case, SCD on March 8, 1996, Minshu Vol. 50, No. 3, p. 469).

In a case in which a student who refused to take kendo practices in a required physical education class because of his religious beliefs sought to have the punishment rescinded, the Supreme Court held that "the punishments in question are extremely inappropriate in the eyes of society and are illegal beyond the scope of discretionary authority. In other words, "it is difficult to say that kendo is mandatory at a technical college, and it is possible to achieve the educational purpose of physical education through other physical education courses by alternative methods, such as taking other physical education courses." Moreover, while the plaintiff's "reason for refusing to participate in kendo is a genuine one that is closely related to the core of [the plaintiff's] faith," "it is also clear that the disadvantage is extremely great. Although "the dispositions in this case do not in themselves order [plaintiff] to act contrary to the tenets of his faith," they are "in the nature of forcing [plaintiff] to act contrary to the tenets of his faith by taking kendo practice in order to avoid the serious disadvantages caused by such conduct."

In contrast, "it is possible to adopt alternative measures in an appropriate manner and style that do not cause unfairness to other students." Additionally, such measures "cannot be said to have religious significance in their purpose and to have the effect of aiding, encouraging, or promoting a particular religion, or to have the effect of oppressing or interfering with other religious or non-religious persons." It cannot be said that the measures have the effect of oppressing or interfering with other religious or non-religious persons," and that "it cannot be said that it violates the religious neutrality of public education for a school to conduct an investigation to ascertain whether the reason is merely a pretext for neglect or whether there is a reasonable connection between the religious beliefs explained by the parties and the refusal to take the course in order to determine whether the reason is valid or not. The court held that "it cannot be said that it violates the religious neutrality of public education.

If the government fails or deviates from its role of providing a school education system that enables children to become economically independent and mentally self-sufficient, and attempts to provide education that is harmful to the children, the parents, as legal representatives, can claim a violation of their children's right to learning. The right to demand that the government fulfill its obligations arises as a breach of the education contract with a reservation, so to speak, which was entrusted to the government on the condition that a part of their inherent freedom of education would be restored and that their children would be given adequate education.

#### **(4) What is important**

The parents have the right to educate their children according to their own educational policy as described above. The education provided by parents to their children has the aspect of economic freedom in the sense that it imparts knowledge and skills for the children to become economically

independent in society. However, it also has the aspect of psychological freedom in the sense that it imparts ways of seeing and thinking for the children to become mentally autonomous in society. In the end, additionally, it is the parents' responsibility to provide their children with the education they need. In other words, the burden of proof is on the government to prove that it has a "truly compelling interest" in restricting and intervening in the process.

Furthermore, parents have the constitutionally guaranteed right to their children's education in the first place, and the government (the national government) has only the authority to assist and in some cases supplement this right in the second place.

The "Q&A" document must also be examined in detail from this perspective.

### **3 Religious Freedom**

#### **(1) Freedom of religion**

Religious freedom has contributed significantly to the development of human rights provisions in modern constitutional history. The spirit and principles of liberalism, which constitute the core of human rights, were developed through the shedding of human blood in the history of resistance against religious oppression in the Middle Ages, literally "enduring many trials and tribulations" (Article 97), and have seen fruition in constitutions. Religious freedom, therefore, continues to occupy an important place in the constitutions of nations to the present day.

The Constitution of the Empire of Japan (hereinafter referred to as the "Meiji Constitution" or "Former Constitution") was no exception, stating in Article 28 that "The subjects of Japan shall have freedom of religion to the extent that they do not disturb peace and order and do not transgress their duties as subjects." However, it gave Shinto shrines the character of de facto state religion, and gave only very weak protection to other religions, and from around the beginning of the Showa era (1926-1989), the new religion "Omoto," the Hitonomichi Church, the Holiness Church, the Soka Kyoiku Gakkai, and others were suppressed by using disrespectful crimes and the Public Order Maintenance Law, as stipulated in the Penal Code.

The current Constitution guarantees the freedom of religion as a right to individuals in the first and second paragraphs of Article 20, paragraph 1, and establishes the principle of separation of religion from politics in the second and third paragraphs of Article 20, paragraph 1, while Article 89 supports the principle of separation of religion from politics in a financial aspect.

Freedom of religion includes (1) freedom of belief, (2) freedom of religious action, and (3) freedom of religious association. Here, (2) and (3) together are referred to as freedom of worship

or freedom of religious practice. (1) is the internal spiritual activity, or "thought and conscience" guaranteed by Article 19 of the Constitution, which has a religious flavor, and (2) and (3) are the external spiritual activities, or "assembly, association, speech, publication, and all other expressions" guaranteed by Article 21 of the Constitution, which have a religious flavor. As mentioned earlier, there is a strong view that the freedom of religious education is included, and this freedom is superimposed as one of the contents of the freedom of education of parents (guardians) guaranteed by Article 26.

In Japan, it is recognized that "most of the people in the country believe in Shintoism as a member of the local community and Buddhism as an individual, and they use different religions for ceremonial occasions such as weddings and funerals without feeling any sense of contradiction" (Tsu Jichinsai Litigation, SCD on July 13, 1977, Minshu Vol. 31, No. 4, p. 533).

While this perception may exist, we must not misunderstand the nature of the guarantees of religious freedom. Religious freedom is a freedom born from the recognition that it is essential to protect the freedom of religion of a few heretics and protestants against the religion of the majority or orthodoxy, and thus to protect the spiritual life of each individual. Additionally, "Even if the opinions of a few may be seen as being based on a sense of virtue, an invasion of their freedom of religion or conscience cannot be permitted even by a majority vote" (additional dissenting opinion by Chief Justice Masuzo Fujibayashi in the Tsu Jichinsai lawsuit, SCD on July 13, 1977, Minshu Vol. 31, No. 4, p. 533). The current Constitution guarantees "freedom of religion" as a precondition. Therefore, in cases where freedom of religion is an issue, vague socially accepted ideas such as "the level of religious interest of the public in general" should not be used as a criterion for judgment, and moreover, religious tolerance should not be forced on religious minorities.

The freedom of religion guarantees (i) freedom of belief, which is given a special legal status of freedom of thought and conscience. Its contents include (i) prohibition of coercion of faith, nonbelief, or nonbelief in a particular religion, (ii) prohibition of oppression or other disadvantageous treatment on the grounds of faith, nonbelief, or nonbelief in religion in general or in a particular religion, and (iii) prohibition of forced confession (such as image trampling, where a "fumie" plate with a picture of Christ or the Virgin Mary was used to identify Christians by making them step on it) of one's faith or the content of one's faith. The prohibition of disadvantageous treatment based on faith (ii) is prohibited as discrimination based on "creed" under Article 14, Paragraph 1, as compared to non-belief or relationship with other faiths.

## **(2) Freedom of religious practice**

Freedom of religious acts (religious activities) is the freedom to perform or not to perform

religious rites, propagate and promote religion, and other acts of sending out messages about one's faith. Article 20, paragraph 2 of the Constitution, which stipulates that "no one shall be compelled to participate in religious acts, celebrations, rites, or events," was stipulated from the perspective of freedom not to engage in worship, a religious act, in light of the prewar compulsion of the people to participate in Shinto events.

### **(3) Limitations of Guarantee**

Since religious freedom is a matter of the inner mind, it is absolutely guaranteed as long as it remains inner. Religious acts, however, are subject to certain restrictions because the effects of the exercise of that freedom may extend to others. However, when the court examines such restrictions, it must examine them under the strictest standards of review (whether the purpose of the pending legislation or act is "to protect a truly compelling right or interest," whether the means chosen to achieve the legislative purpose are the minimum necessary, whether the means are indispensable to achieve the purpose, and whether the purpose of the act is "to protect a truly compelling right or interest"). The standard for examining whether the means chosen to achieve the legislative purpose are the minimum necessary or whether the means are indispensable to achieve the purpose) is applied.

Refusal of certain acts on the grounds of religious freedom, such as refusal of medical treatment, is also guaranteed as a component of religious freedom if the decision is made by a person who has sufficient capacity to make a judgment about the consequences of the act (Supreme Court, February 29, 2000, *Minshu* Vol. 54, No. 2, p. 582).

Freedom of religious acts does not include harming the life or body of others (*Kajo Prayer case*, maximum judgment, May 15, 1963, *Penal Code*, Vol. 17, No. 4, p. 302). The life or body of another person is a truly compelling interest that requires the highest level of protection, and provisions that focus on ex post facto results and punishments without regard to religious motives are the minimum necessary. On the other hand, there are cases in which the illegality of an act may be prevented depending on the manner of the religious act, even if the act is externally in violation of the Penal Code (*Pastoral Activities Case*, *Kobe Brief HANREI*, February 20, 1975, *HANREI JIHO* No. 768, p. 3).

### **(4) What is important**

Freedom of religion, which is at the core of religious freedom, is the highest freedom in the constitutional system of human rights (in the constitutions of European countries and the states of the United States, "conscience" is considered synonymous with "faith"), and since Article 19 of the

Constitution provides for the inviolability of conscience and Article 20 guarantees freedom of religion as its Given that Article 19 of the Constitution provides for the inviolability of conscience and Article 20 guarantees freedom of religion as a special legal provision, any government action that restricts or intervenes in the content of religion must be taken with the utmost caution, and the burden of proof as to the existence of a "truly compelling interest" is on the government to intervene in educational policy as an expression of parents' religious beliefs. This is the same as the aforementioned right of parents to education.

If it imposes a special disadvantage on a specific religious group or religious groups in general, it violates the general rule of prohibition of disadvantages, which is inextricably linked to the prohibition of privileges in Article 20, Paragraph 1, and also violates the principle of "equality before the law" guaranteed in Article 14, Paragraph 1 of the Constitution, which is the general norm of the prohibition. In the case of this "Q&A," among the contents of "freedom of religion" guaranteed by Article 20 of the Constitution, it directly violates "(ii) Prohibition of adverse treatment, including oppression, on the grounds of belief or non-belief in religion in general or in a particular religion, or on the grounds of non-belief. Since "faith" is a religious character of "thought and conscience" guaranteed as inviolable by Article 19 of the Constitution, discrimination based on faith is in double conflict with discrimination based on "creed" under Article 14, Paragraph 1 of the Constitution, and is a typical example of a presumption of unconstitutionality based on the current constitutional theory.

The "Q&A" document must also be examined in detail from this perspective.

#### **4 Principle of Separation of Religion from Politics**

The second sentence of Article 20, paragraph 1 of the Constitution states that "No religious organization shall receive privileges or exercise political power from the State," and paragraph 3 states that "The State and its organs shall not engage in religious education or any other religious activities." These provisions stipulate the principle of separation of government (state) and religion, namely, the principle of separation of religion from politics. The Supreme Court has held that these articles are "so-called provisions of institutional guarantees, which do not directly guarantee freedom of religion itself, but indirectly seek to ensure freedom of religion by guaranteeing the separation of state and religion as an institution" (Tsu Jichinsai Litigation, Supreme Court Decision, July 13, 1977, Minshu (Tsu Jichinsai lawsuit, High Court Decision on July 13, 1977, Minshu Vol. 31, No. 4, p. 533).

##### **(1) Prohibition of granting "privileges**

The second sentence of Article 20, Section 1 of the Constitution prohibits the granting of

"privileges" to religious organizations. "Privilege" means favoring a particular religious group over other religious groups, or favoring religious groups in general over other groups. Conversely, the provision prohibits the granting of preferential treatment to certain religious organizations over religious organizations in general, since such treatment would be preferential to religious organizations in general, as noted above.

## **(2) Prohibition of "exercise of political power"**

The second sentence of Article 20, Paragraph 1 of the Constitution prohibits religious organizations from exercising "political power." The exercise of "political power" here refers to the power of governance that should be exercised by the government, and prohibits, for example, the exercise of tax collection rights and the sharing of duties such as the preparation of the sect's revision ledger (equivalent to the current family register) in the Edo period. The exercise of "political power" is the power of governance that is supposed to be exercised by the government.

## **(3) Prohibition of religious activities**

Article 20, paragraph 3 of the Constitution stipulates that "the State and its organs," i.e., government agencies, "shall not engage in religious education or any other religious activities." The term "religious education" refers to education aimed at encouraging or condemning the beliefs of a particular religion. It does not prohibit teaching tolerance of religion in general or the historical or social status of religion in particular.

Even if the Constitution of Japan adopts the strict separation principle of religion from politics, it is impossible for the government and religion to be completely separated and cut off from all contact in real society. The question, therefore, is what kind of relationship is permissible, and even if it were permissible, what form of involvement would be allowed.

In a lawsuit filed by residents of Tsu City against the city's payment of expenses for a Shinto ground-breaking ceremony held on the occasion of the groundbreaking for a municipal gymnasium, the Supreme Court held that "the ideal of complete separation of state and religion should be understood as an attempt to ensure the non-religious nature or religious neutrality of the state," while "as a real state system, it is almost impossible in practice to achieve complete separation of state and religion." Additionally, "if the principle of separation of religion from politics is to be realized as an actual state system, it should be based on the premise that the state must have some relationship with religion in light of the social and cultural conditions of each country, and that such relationship should be allowed under any circumstances and to any extent in relation to the fundamental purpose of the system, which is to ensure the freedom of religion. The question is

when and to what extent such involvement is impermissible in relation to the fundamental purpose of the system, which is to ensure freedom of religion." "In light of the purpose and effect of the acts that lead to involvement with religion, such involvement shall be impermissible if it is deemed to exceed the limit considered reasonable in light of the various conditions on the right." The term "religious activity" does not refer to "all acts related to religion, but only to those which go beyond the bounds of what is considered reasonable, and should be understood to mean acts the purpose of which has religious significance and the effect of which is to support, promote, encourage, or oppress or interfere with religion," and that the expenditure was not unconstitutional (Tsu Jichinsai lawsuit, High Court Decision on July 13, 1977, Minshu Vol. 31, No. 4, p. 533). The standard presented here is called the "purpose-effect standard".

Later, in light of this standard, the Supreme Court held that Ehime Prefecture's expenditure of public funds to Yasukuni Shrine and Ehime Gokoku Shrine in the name of tamagushi fees, offering fees and other similar fee titles, had "religious significance" and was unconstitutional because "it cannot be denied that the prefectural government had a conscious special relationship only with certain religious organizations" (SCD on April 2, 1997, Minshu Vol. 51, No. 4, p. 1673).

#### **(4) What is important**

The issue here is the government's intervention in the educational freedom of parents by focusing on religion. In relation to the "principle of separation of religion from politics" examined in this section, the issue must be examined in light of the "purpose and effect standard" established by judicial precedents as a quasi-rule to determine whether this principle is violated.

The "Q&A" document was prepared by focusing on religion and interviewing so-called second-generation religious people and others who claimed to be victims. The purpose of the survey is religiously significant and has the effect of oppressing and interfering with religions by creating a negative image of religious parents and the children under their protection. If the Ministry of Health, Labour and Welfare, a government agency, prepares a "Q&A" document with such a purpose and effect, and if its wording clarifies targeting a specific religion or religious group, it is naturally considered to be having a special effect only with a specific religious group as stated in the aforementioned Ehime Tamagushi fee lawsuit (maximum judgment, April 2, 1997, Civil Vol. 51 No. 4, p. 1673). If the court finds that the statement is true, it will then find a violation of the principle of separation of religion from politics.

### **5 Examination of "Q&A" in Light of the Norms Set Forth in the Constitution**

#### **(1) Purpose of the Child Abuse Prevention Act**

Here, we need to consider the purpose of the Child Abuse Prevention Act, because it is necessary to clarify the legislative purpose of the act, which is to restrict rights and interests, as a way to make constitutional judgments.

The act concerning the prevention of child abuse, referred to as the "Child Abuse Prevention Act" (Act No. 82 of 2000), was established with the following purpose: "Considering that child abuse significantly violates the human rights of children, affects their physical and mental growth as well as their personality development, and raises concerns for the nurturing of future generations in our country, the law aims to promote measures related to the prevention of child abuse. It does so by prohibiting child abuse, preventing child abuse and its early detection among other measures, and stipulating the responsibilities of national and local public bodies in these efforts. It also provides for the protection and support for the independence of children who have been abused. By establishing these measures, the law seeks to advance policies related to the prevention of child abuse and thereby contribute to the protection of the rights and interests of children." (Article 1) The law was promulgated on May 24, 2000, and went into effect on November 20 of the same year.

From the above provisions, the purpose of the Child Abuse Prevention Act is to prevent and detect child abuse at an early stage, and to protect children who have been abused and support their independence.

## **(2) Definition of "child abuse"**

Article 2 of the act defines "child abuse" as follows:

"The term "child abuse" as used in this Act means the following actions taken by someone who is responsible for a child (a parent, a legal guardian, or someone else who looks after the child; the same applies hereinafter) towards the child who is under their care (under 18 years old; the same applies hereinafter):

- (i) To commit an assault that causes or is likely to cause bodily injury to a child
- (ii) To commit an indecent act on a child or having a child commit an indecent act
- (iii) Significant neglect of the child's custody as a guardian, such as severely reducing food intake or leaving the child unattended for a long period of time in a manner that hinders the child's normal development of mind and body, neglect of acts similar to those listed in the preceding two items or the next item by a person living together other than the guardian, or any other neglect of the child's custody as a guardian
- (iv) To use markedly abusive language or extremely rejecting behavior toward a child, to commit violence against a spouse in a family in which the child lives (which refers to unlawful attacks on the body of a spouse (including a spouse who has not registered his or her marriage but is in

fact in a situation similar to marriage) that cause harm to life or body, and words and deeds that have a similarly harmful effect on the mind and body), or to use other words or deeds that cause marked psychological trauma to the child”

According to this provision, "child abuse" as defined in the Child Abuse Prevention Act is mainly physical (including sexual) violence (No. 1 and No. 2), significant reduction in meals to a child and neglect the child for a long time period (No. 3), violence that causes psychological trauma other than physical violence (No. 4), and physical (including sexual) violence (No. 1 and No. 2) by a person living with a child under 18 years of age by a guardian. The following types of violence are defined as: physical or physical (including sexual) violence (No. 1 and No. 2), physical (including sexual) violence committed by a person living with the child other than the guardian (No. 1 and No. 2), or significant reduction in meals or prolonged neglect (No. 3) committed by a person living with the child other than the guardian (No. 4).

There is no dispute that the above-mentioned acts constitute crimes falling under "assault, injury, indecent exposure, forcible sexual intercourse, abandonment by a parent or guardian," as stated in the answer to the "Q&A" document's question, "Q1-2," and should be handled in accordance with the Child Abuse Prevention Act.

### **(3) Problems with the content of the "Q&A"**

There is no reference to religion in the purpose and effect of the Child Abuse Prevention Act, and in this respect, it is understood that the Act was enacted from a neutral perspective toward religion. The problem, however, is that the title of this document, "Q&A on Responses to Child Abuse Related to Religious Beliefs, etc.," clearly states "related to religious beliefs, etc." and in the first paragraph, "We have requested that you ensure that no negative responses are taken solely on the basis of religious beliefs, etc." The first paragraph clearly indicates that there are instructions from the viewpoint of religion regarding the operation of the Act, without having the neutral viewpoint focusing on the behavior of the guardians themselves. Rather, it focuses even more on the religion or religious group that the guardians follow.

It is a surprise to any constitutional scholar that the title of this document and the excerpted text from the first paragraph contain no reference to the need to keep in mind the guarantee of freedom of religion guaranteed in Article 20 of the Constitution.

Acts that fall under the category of criminal offenses should not be permitted under any circumstances except when there are grounds for illegality or reasons for denial of responsibility as stipulated by the Penal Code. However, the definition of child abuse includes 'psychological

violence that causes trauma' (Article 2, Item 4), which cannot be judged solely by its appearance. Despite the potential deep connection with the guardians' constitutional rights to freedom of education and religion, the law's approach, through issuing notifications that discourage passive responses, seems to overlook the possibility of a conflict with the constitutional obligation of all public officials to adhere to the constitution (Article 99). Instead of promoting a careful assessment of whether an action amounts to 'psychological violence that causes trauma,' this approach does not appear to consider the potential clash with constitutional duties.

Furthermore, the "Q&A" document is problematic in that it treats all "children" (newborns through age 18) uniformly and restricts parents from making religious decisions for their "children."

Indeed, international treaties ratified by Japan state that parents have the authority to make decisions for their children in all matters involving their children, including religious matters, while considering the child's developing level of competence. While newborns and infants do not have the capacity to make important decisions, this capacity is developed, albeit gradually, as the child grows up. Treating them uniformly as incapable of making decisions is prejudicial to the child.

Japan has ratified the International Covenant on Civil and Political Rights (ICCPR), and according to Article 98 of the Constitution, treaties must be "faithfully observed." Article 18, paragraph 4 of the ICCPR stipulates that "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions." Furthermore, Article 27 of the ICCPR obliges governments to protect the rights of individuals belonging to religious or linguistic minorities in countries where such minorities exist, including the right "to profess and practice their own religion."

The CRC, which Japan has also ratified, guarantees in Article 14, Paragraph 2, that the State shall "respect the rights and obligations of parents ... to give instructions to their children in a manner compatible with their developing abilities. Article 18, Paragraph 1 of the Convention stipulates that the State must respect the fact that the parents "have primary responsibility for the care and development of the child. Furthermore, Article 12, Paragraph 1 of the Convention, which establishes the rights of the child, can be interpreted as requiring the State to respect that the parents give "direction" to the child and make decisions for the "care and development" of the child "in accordance with the age and maturity of the child". In practice, when children are young, parents make all decisions for their children in all aspects of life, including religious matters. This means that decisions are made according to what the parents believe is in the "best interest" of the child. As children mature and approach adulthood, parents naturally come to respect the opinions and

preferences of their children.

Both the ICCPR and the CRC impose binding obligations on the State and not on the parents, who are private individuals. The State is the addressee of the Convention. In other words, the Government of Japan, as a party to both international conventions, is obligated in its laws, regulations, and guidelines to fully respect the right of parents to give instructions to their children and to make decisions in all matters in accordance with the age and maturity of the child.

#### **(4) Constitutional issues in the "Q&A" document**

As noted earlier, the biggest flaw in the "Q&A" is that it focuses solely on "religious beliefs" and does not apply to parental decisions or actions based on non-religious reasons. This is discriminatory and violates the government's duty of neutrality. In this regard alone, the entire "Q&A" violates Articles 14, 19, 20, and 26 of the Constitution.

Furthermore, each of the questions and answers in the "Q&A" is constitutionally flawed, as shown below.

**"Question 1-1"** asks, "In terms of whether or not it constitutes child abuse, is there any particular part of the case that is treated differently from other cases because it is a religious case?" The answer is as follows: "Taking into consideration the fact that Article 14 of the Convention on the Rights of the Child stipulates that the rights of children to freedom of thought, conscience, and religion should be respected, and that children do not always follow a religion of their own free will, etc."

As we have already seen, this answer is largely incorrect: CRC Article 14, paragraph 1 states that "States Parties shall respect the right of the child to freedom of thought, conscience and religion" and says nothing about parents. Furthermore, Article 14, paragraph 2 of the CRC provides that "States Parties shall respect the right and obligation of ..... parents and, as the case may be, legal guardians to give instructions to children in a manner compatible with their evolving capacities." Furthermore, Article 18, paragraph 4 of the ICCPR provides that "the States Parties to the present Covenant undertake to respect the freedom of parents ... to ensure the religious and moral education of their children in accordance with their own beliefs."

Therefore, the correct answer to "Q1-1" should clarify that a parent making decisions, including religious decisions, on behalf of a child does not constitute "child abuse," especially when the child has not grown up enough to make such decisions.

The response to Q1-1 incorrectly expands the definition of "child abuse" in Article 2 of the Child

Abuse Prevention Law to include the "cases" presented in Q2-1 through Q5-1. As a matter of fact, these cases include completely peaceful and loving parental decisions that cannot reasonably be defined as "child abuse."

**Question 1-2 asks**, "What should be done if a parent or guardian commits an act that constitutes child abuse under the instruction or instigation of a third party, such as a member of a religious organization, a believer, or other related person?" The "Answer" to this question is merely a response to a criminal law question. The "Answer" to this question merely explains the application of complicity in criminal law. However, as explained above, limiting this answer to "religious" individuals or groups is discriminatory and a violation of the government's duty of neutrality. This question and answer should be applied to any individual or group that is complicit in criminal activity.

**Question 2-1 asks**, "Does the use of corporal punishment to force a child to participate in religious activities constitute child abuse?" The "Answer" here explains that physical punishment that causes or is likely to cause physical injury to a child constitutes physical abuse, but this is unnecessary, as it is defined in the Child Abuse Prevention Law. Article 2 of the Child Abuse Prevention Law prohibits corporal punishment that may cause trauma by a guardian for any reason. Limiting this question and answer to "religious activities" is a faith-based disadvantageous treatment and a violation of the government's duty of neutrality because it gives a special negative image that religious activities are always accompanied by such acts. If this question is necessary, then this question and answer should apply to corporal punishment by any parent or guardian, regardless of whether the reason is religious or not.

**Q2-2:** This question and answer has the same flaw as "Q2-1."

The answer to the second sentence of "**Q2-3**," "Does an act of forcing a child to participate in religious activities, etc. until late at night constitute child abuse?" states that "an act of forcing a child to participate in religious activities, etc. until a time that may interfere with the child's schooling or daily life" constitutes neglect.

First, the term "late at night" in the answer is vaguely worded and it is unclear and undefined what specific hours it refers to.

The answer focusing on religious activities is also discriminatory. Many parents send their children to cram school until late at night, such as 9:00 or 10:00 p.m., for non-religious reasons, which, according to this "answer," may also be considered "child abuse." It is unconstitutional to treat a parent's decision to have their children attend religious services with their parents in the

evening as "child abuse," while not treating a parent's decision to have their children attend cram school until late at night as "child abuse" as well, because it is disadvantageous treatment based on faith.

It also argues that it is child abuse for a parent or guardian to "force a child to participate in religious activities such as worship services, lectures on doctrine, etc. ... and to force a particular movement or posture." The Answer does not define "force." For example, Islam "requires" believers, including boys, to prostrate themselves five times a day during prayer. It could also include the common Christian practice of kneeling in prayer before bedtime.

The "Answer" establishes adverse treatment for parental decision-making when faith is the motive. For example, if a parent wants her 10-year-old child to accompany her to religious services on Sunday afternoons, and the child says she does not want to go, it would be "child abuse" for the parent to demand that the child accompany her, even if there is no threat of physical punishment or other violence. By this logic, for example, if a mother wants her child to attend piano lessons or soccer practice on Sunday afternoons and the child does not want to go, it would also be "child abuse" for the parent to insist that the child attend piano lessons or soccer practice without physical punishment, violence, or threats.

As we have already seen, Articles 18, Paragraph 4 and Article 27 of the ICCPR, and Articles 14, Paragraph 2 and Article 18 of the CRC both guarantee parents or guardians the right to make religious decisions on behalf of their children, which necessarily includes requiring children to participate in age-appropriate religious activities.

On a daily basis, parents require their children to perform certain actions if they do not involve corporal punishment, violence, or threats of violence. For example, parents may ask their children to (1) clean their rooms, (2) go to bed at a certain time, (3) attend piano or soccer practice, (4) attend cram school, (5) go out to dinner as a family, (6) turn off the TV or stop using social media at a certain time, (7) avoid websites and movies that parents consider inappropriate, (8) help with household chores, and (9) go to the hospital. This "answer," which permits all such decisions by parents based on non-religious motives, but prohibits similar parental decisions based on religious motives, is adverse treatment based on faith and constitutes a violation of religious freedom.

**Question 3-1** asks whether child abuse includes "imprinting fear by forcing children to participate in religious or missionary activities, forcing them to make life choices, or threatening them with inspirational language. The "Answer" states that threatening a child with words such as "If you don't do this/If you do that, you will go to hell/be destroyed" are all considered to constitute psychological abuse or neglect.

This question and answer have the same flaw as Q2-3. There is no definition or explanation of what "threat" or "forcing" means. The important thing is to note that Article 2, Item 4 of the Child Abuse Prevention Law defines "psychological abuse" as "to use **extreme** verbal abuse or **extreme** rejection toward a child... or to use words that cause **extreme** psychological trauma to a child."

Parents generally warn their children of the consequences of not following parental instructions. This is done as part of loving parental discipline and education. Such warnings (or reprimands that do not use extreme language or violence) cannot legally be considered "child abuse."

In reasoning with their children, parents may warn their children in a lawful manner that certain undesirable actions will have adverse psychological consequences. As long as such warnings or reprimands do not use "significant verbal abuse" and do not "cause significant psychological trauma to the child," such warnings based on sincere religious beliefs cannot be considered "child abuse."

**Questions 3-2, 3-3, and 3-4** ask whether it constitutes child abuse for a parent to (1) restrict a "child" from marrying a person of another religion or participating in certain social activities or events (such as birthday parties), (2) prohibit a child from engaging in entertainment that the parent considers unwholesome, or (3) to require their children to wear clothing or verbally identify themselves as affiliated with a particular religion, are child abuse. The "Answer" states that restricting a child's "social contacts that are generally accepted by society," restricting a child from engaging in "entertainment that is considered appropriate for the child's age in light of social norms," and requiring a child to identify himself/herself as affiliated with a particular religion are all considered "psychological abuse."

First, with regard to "Q3-2," i.e., (1) above, a person decides whom he/she will marry only after he/she turns 18 years old (Article 731 of the Civil Code) and is no longer a "child" as defined in the Child Abuse Prevention Law (Article 2, pillar of the same law). Thus, a parent's preference regarding the marriage partner of an adult child clearly cannot be "child abuse."

The "answers" to the other questions (1) through (3) are clearly violate Articles 14, 19, 20, and 26 of the Constitution. Put another way, these "answers" are nothing more than assertions that children should be raised by their parents to look, act, and speak like the majority, according to "socially accepted norms," and should not be labeled religious in any way. This is an insult to religious pluralism and to the hundreds of thousands of families belonging to minority religions in Japan, and it violates the government's obligation of religious neutrality, impartiality, and tolerance that constitute the Principle of separation of religion from politics as set forth in Article 20 of the Constitution. It would also result in prohibiting children belonging to religious minorities

such as Judaism, Sikhism, and Islam from wearing clothing or religious adornments that indicate their affiliation with these religions (and prohibiting certain Christian children from wearing crosses or other items associated with Christianity).

Such restrictions also violate Articles 18, Paragraph 4 and Article 27 of the ICCPR, which require States to respect the right of parents belonging to "religious...minorities" to "profess their own religion" with their children. It also violates Articles 2, Paragraph 1 and 2 of the CRC, which require States to respect the right of parents to provide their children with religious education and instruction, as guaranteed by Articles 14 and 18 of the Convention, without any discrimination.

Moreover, these restrictions are simultaneously faith-based beneficial treatment. The government cannot restrict parents from deciding on religious grounds what entertainment (cartoons, music, movies, etc.), groups, and activities may be harmful or beneficial to their children, while allowing parents to make the same decisions for their children on non-religious grounds. The Constitution and international human rights treaties guarantee parents the right to raise their children according to their beliefs and conscience. The government may not interfere with that decision unless it can demonstrate that the decision is harmful based on "genuinely compelling reasons."

**Question 3-5** asks whether it constitutes child abuse for a parent to "repeatedly" force a child to participate in religious proselytizing activities. The "Answer" asserts that "acts such as forcing a child to engage in religious proselytizing activities" through acts such as those described in "Q3-1" and "Q3-2" are also considered as psychological abuse.

This question and answer are unconstitutional for the same reasons already stated with respect to Q3-1 and Q3-2.

**Question 4-1** asks whether or not "an act to induce a child to join a religion... whose doctrine is based on behavior that is extremely out of the socially appropriate level" constitutes "child abuse." The "answer" says "it constitutes neglect."

The concept of social equivalence implies that parents should raise their children to speak, act, and appear like the majority. This undermines religious pluralism, and at the same time, it squarely denies the fundamental norm of the Constitution of Japan, "respect for the individual" in the first sentence of Article 13, and violates Articles 14, 19, and 20 of the Constitution for the reasons already explained with regard to "Q3-2," "Q3-3," and "Q3-4. In particular, from the viewpoint of the freedom of parents to educate their children guaranteed by Article 26 of the Constitution, it is not reasonable to consider parent's having a child join a religion as "child abuse," even if there are

problems with certain actions based on religious doctrine.

However, if this "answer" is limited to cases where a parent enrolls a child in a religion that has been declared illegal in violation of "laws and regulations" and attempts to force the child to engage in an illegal act, if the religion itself is illegal, this is a case where the administrative authorities should criminally prosecute the leader or group of the religion that incited the behavior that has been pointed out.

**Q4-2 and Q4-3** ask whether or not "a case in which a family life is greatly disturbed due to spending of money through religious activities... and in which an appropriate living environment... is not provided" constitutes "child abuse." The question also asks whether "a case in which there are obstacles to the provision of educational opportunities such as attending elementary school, junior high school, high school, or university" constitutes "child abuse." The "Answer" asserts that these constitute "neglect or psychological abuse."

As explained above, Article 26 of the Constitution imposes on parents the "obligation to have their children receive a general education ... as provided by law." In other words, Article 16 of the School Education Law imposes on parents the obligation to have their children receive a general education (generally up to junior high school) for nine years from the age of six. Therefore, the answers to "Q4-2" and "Q4-3" regarding the children going on to high school or university are beyond the scope of compulsory education and do not fall under the category of child abuse.

The decision to attend college or university is made after the person turns 18 and is no longer a "child" as defined by the Child Abuse Prevention Law. Such a decision by an adult cannot be claimed as "child abuse" even if it is based on parental advice or instruction.

Neglect and psychological abuse are already clearly defined in Article 2, Items 3 and 4 of the Child Abuse Prevention Law. Any parental decisions or actions that do not fall within those strict definitions do not constitute "child abuse."

**Q4-4** concerns income earned by children from part-time jobs. This is not a problem that arises only in relation to religion, but a problem that arises in the relationship between parents and children in general.

**Q4-5** asks whether refusing a child necessary medical treatment (such as blood transfusion) because of religious beliefs constitutes "child abuse." The "Answer" states that "refusing to allow a child to visit a medical institution without reasonable cause or denying a child medical treatment deemed necessary by a doctor (including forcing a child to carry a card indicating his/her refusal of a blood transfusion) constitutes neglect, regardless of the reason."

This "answer" is based on an old stereotype and ignores the common wisdom of advanced medicine, which emphasizes second opinions, that blood transfusions are "necessary" whenever recommended by a physician. That is, the World Health Organization (WHO) explicitly states that **"evidence from all regions of the world"** shows considerable variation in the use of clinical blood between different hospitals, between different clinical specialties, and even between clinicians on the same team. **This suggests that blood and blood products are often used inappropriately** (World Health Organization, "The clinical use of blood in general medicine, obstetrics, paediatrics, surgery and anaesthesia, trauma and burns", Geneva: WHO; 2009, at page 9, <https://apps.who.int/iris/handle/10665/42397>). Clearly, just because a physician considers blood transfusion "necessary" does not mean that blood transfusion is actually necessary, as the World Health Organization (WHO) clearly states.

In addition, the World Health Organization (WHO) recommends that all countries (and by extension all physicians and hospitals) use a method called Patient Blood Management to avoid or minimize blood transfusions. The World Health Organization (WHO) explains that this is due to medically serious "transfusion risks" (World Health Organization, "The urgent need to implement patient blood management: policy brief," 2021, page 1, <https://www.who.int/publications/i/item/9789240035744>). Thus, it is clearly not "child abuse" for a parent to ask a physician to use alternatives to blood transfusion.

The "answer" to "Q4-5" clearly targets the parents of Jehovah's Witnesses, and is a typical example of adverse treatment that gives a negative image of a particular faith and is unconstitutional in light of the aforementioned Supreme Court decision in the Ehime Tamagushi Fee Lawsuit and Grand Chamber decision. In fact, it is widely known that when their own children become ill or sick, parents of Jehovah's Witnesses take their children to doctors and hospitals for treatment. On the rare occasion that the doctor believes that a blood transfusion may be necessary, the parent asks his or her doctor to consult with an experienced physician who is familiar with bloodless treatment. This is not neglect of the child; rather, it is an exercise of the parents' sincere religious beliefs, protected by Article 20 of the Constitution.

If a physician determines that a blood transfusion is urgently needed, the physician may, by law, notify the Child Guidance Center and request its intervention. If, after hearing the parents' opinion, the Child Guidance Center determines that the transfusion is necessary and that no alternative medical treatment is available, the Child Guidance Center would be able to intervene on their behalf. Again, this is not a neglect situation. In such a case, the child would remain in the hospital and receive whatever treatment is objectively deemed necessary.

It is not uncommon for a petition for suspension of parental rights to be filed on the grounds that

blood transfusion is necessary, but the petition itself is withdrawn in response to the course of the proceedings, such as successful bloodless surgery, or changes in circumstances during the proceedings. Considering that nearly half of the cases of loss of parental rights and suspension of parental rights are terminated by withdrawal, careful consideration is necessary. (See Nobuaki Ito, "The Current Status of the System for Termination of Parental Authority and Problems Related to Written Consent for Blood Transfusion: A Case Study of a Successful Bloodless Surgery after a Careful Examination," *Family Law and Justice*, No. 16, p. 141).

**Q4-6** asks whether acts such as restricting a child's participation in various school events on the basis of religious teachings or rules constitute child abuse. As a case related to this question, there is a Supreme Court case (*The Case of Refusal to Participate in Kendo Practice*, March 8, 1996, *Minshu Vol. 50, No. 3, p. 469*) in which the court allowed a child to refuse to take a required physical education class because of religious doctrine. Thus, it is understood that refusal to participate in extra-curricular school events is acceptable as long as the refusal to attend regular courses is acceptable. The "answer" to this question leaves room for the interpretation that even refusal to participate in out-of-class school events constitutes abuse, and this misleading question should be deleted.

**Question 4-7** asks whether or not it constitutes child abuse when a parent or guardian "seriously neglects the upbringing of a child" due to participation in "activities related to religion, such as service activities and missionary activities."

Article 2, Item 3 of the Child Abuse Prevention Law contains an exhaustive definition of "neglect" by guardians. Limiting this answer to "religious activities" is faith-based adverse treatment and a violation of the government's neutrality obligation. If this question and answer is necessary, it should be worded neutrally to prohibit "neglect" for any reason.

**Question 4-8** asks whether forcing a child to pursue a career path for reasons such as religious doctrine constitutes "child abuse" when the child goes on to higher education or finds employment. This issue is a friction over career paths between parents and children that often arises regardless of religious doctrines, and it is not clear why parents are forced to sign documents or fill in emergency contact information. It is enough to encourage discussion between the parents and the children, and it does not fall under the category of "child abuse."

Furthermore, there are constitutional issues similar to those discussed in "Q2-3," "Q3-1," "Q4-2," and "Q4-3."

**Q4-9** asks whether it constitutes "child abuse" when a parent or guardian fails to take special

measures in spite of violent acts or oppressive behavior or attitudes toward a child at a facility owned by a religious organization, etc. The answer states "it constitutes neglect."

First of all, an "attitude" by itself, without any concrete action, cannot constitute an act of child abuse. With regard to "acts of violence" and "acts of oppression," Article 2, Items 1, 3, and 4 of the Child Abuse Prevention Law provide comprehensive definitions of violence and neglect. Nevertheless, limiting acts of violence and oppressive acts to those committed by religious organizations is adverse treatment based on faith and violates the government's religious neutrality. If "Q4-9" is to be retained, it must be worded in a neutral manner that prohibits unlawful conduct by any person or group, religious or non-religious.

In addition, these acts are not only a problem for religious organizations, but those who commit such violent acts should be charged with assault (Article 208) or injury (Article 205), and those who tolerate such acts should be charged with abandonment of a person responsible for protection (Article 218) or abandonment of a child (Article 219), etc.

In "Q4-10," the question is whether or not a custodian's refusal to consent to a surgical abortion on the basis of religion constitutes child abuse, even though a girl who became pregnant against her will wishes to have an abortion is considered child abuse.

The fact that a person with parental authority does not consent to an abortion procedure is a problem that arises regardless of religion. The Maternal Protection Law does not require parental consent for abortion. It is not clear why the consent of a person with parental authority should be forced in such a case. Furthermore, the act of taking the life of an unborn child through an abortion can be regarded as the ultimate act of abuse against the unborn child, and it is an issue that goes to the core of the parental authority's own thought and conscience. It is not easy to assume that a parent's refusal to consent to an abortion is "child abuse."

**Question 5-1**" states that showing a child material containing sexual expressions inappropriate for the child's age or verbally telling a child about them, under the guise of education to learn religious doctrines, etc., constitutes child abuse. **Q5-2**" states that forcing a child to tell a staff member of a religious organization or other persons concerned about the child's sexual experiences constitutes child abuse.

First, in "Q5-2," there is no definition or explanation of what it means to "force" a child to perform each of the above acts. Therefore, the same flaw as "Q2-3" exists. Many Christians, including the Catholic Church, have a religious act called "confession." This act also covers cases in which an adolescent minor confesses sexual sins to a priest. Such sincere religious acts cannot

constitute "child abuse."

There is no doubt that parents have the right and obligation to provide their children with sex education according to their age and maturity. Doing so is also important for the protection of their children from sex offenders.

To begin with, if the acts related to "Q5-1" and "Q5-2" are included in the definition of sexual abuse set forth in Article 2, Item 2 of the Child Abuse Prevention Law, "committing an indecent act on a child or causing a child to commit an indecent act," then both of them are problems that arise regardless of religion. There is no need to mention them in this document. This is a question designed to create a negative image of religion and is unconstitutional in light of the aforementioned Ehime Tamagushi Lawsuit and the Grand Court decision.

**Q6-1 to Q6-5** deal with "points to keep in mind when responding to child abuse and supporting self-reliance." However, since these issues arise regardless of religion, there is no need to address them in the "Q&A". Even when it is necessary to mention relevant issues, religiously neutral expressions should be used to avoid violating Articles 20 and 14 of the Constitution.

As for "**Q7-1**," there is no difference in legal treatment between a biological child and an adopted child, so the same response as in "Q1-1" through "Q6-4" should be taken, but the same problems exist for adopted children. The same applies to foster parents in "**Q7-2**," as shown in the "Answer," but each of them has its own problems.

## **(5) Disclosure of "Q&A" preparation process**

In "(3) Problems with the contents of the Q&A", I have briefly pointed out some problems with the contents of the document, but here we would like to point out some problems in the preparation procedure.

The issues in the process of preparing this document are as follows. (1) What triggered the creation of this "Q&A," (2) Who and what events led to the creation of this document? (3) Which department was in charge, and was there any exchange of opinions with the Ministry of Education, Culture, Sports, Science and Technology, which has jurisdiction over religious affairs, regarding the preparation of the "Q&A," and (4) In preparing this document, were the opinions of experts (specialists) heard, or was an advisory council held in the first place? What are the backgrounds of the members of the Advisory Council? (5) What kind of materials were used in preparing the "Q&A," what kind of opinions were expressed and what kind of discussions were held in the process of preparing the "Q&A," and were the minutes of the proceedings prepared? (6) What precedents on freedom of religion have been issued, and which of these precedents were referred

to in the preparation of this report, and what were the contents of these precedents? (7) There are many precedents on religious activities issued by the European Court of Human Rights, the Supreme Court of the United States of America, etc. How were the contents of these precedents referred to in preparing the "Q&A"? (8) We would like to request the disclosure of whether the explanations and opinions of not only those who claim to be victims of a specific religion but also those from the religious side were fully considered.

In the case of the present case, when administrative organs such as child guidance centers make judgments by referring to the "Q&A," they will be concerned with the freedom of thought, conscience, and religion, which form the core of the right to freedom of mind, and the freedom of education of the guardians. Even if the basis for administrative activities that would restrict such constitutional rights is the "Q&As," i.e., guidelines used within the administrative organization that are not legally binding, their effects extend to ordinary private citizens outside the administrative organization. Therefore, judgments made with reference to "Q&A" can be regarded as shackling acts that administrative bodies cannot make discretionary judgments. In other words, administrative organs should determine whether a case falls under the category of "child abuse" as defined in each item of Article 2 of the Act on the Prevention, etc. of Child Abuse, by faithfully following the wording of the said items. Even if administrative organs have a certain amount of discretion, it is discretionary restraint. Therefore, if the illegality of a decision made with reference to the "Q&A" were to be challenged in a lawsuit, a more rigorous judicial review would be conducted, rather than a judicial review in the direction of allowing broad discretion by the administrative body, which would be an abuse or overreach of discretionary power.

Furthermore, it should be noted that, as a recent trend in the courts' decision-making methods concerning administrative organs, in cases where legislative discretion (including administrative legislative discretion) or administrative discretion is at issue, decision-making process review is now widely conducted even in the area of the right to life, where administrative legislative discretion was previously granted on a discretionary basis for convenience (The Supreme Court, February 28, 2012, Minshu Vol. 66, No. 3, p. 1240, etc.) If a lawsuit were to be filed to challenge the constitutionality of the "Q&A," the above-mentioned factors (1) through (8) would be strictly scrutinized, including what kind of evidence the "Q&A" was prepared based on. In order to avoid such a situation, the process of preparing the "Q&A" and the materials on which it is based should be disclosed before a dispute arises.

## **6 Conclusion**

As stated above, the Government of Japan must immediately stop using the "Q&A" document and have it reviewed by experts independent from the Government. Doing so is essential to ensure that the

guarantees in Articles 14, 19, 20, and 26 of the Constitution are fulfilled, to fulfill the obligations imposed on the Government of Japan under the ICCPR and the CRC, and to determine whether the "Q&A" document should be revised, possibly completely revised, or withdrawn for the proper implementation of the Child Abuse Prevention Law. If a poorly drafted "Q&A" is applied in a hasty manner, it is inevitable that it will cause unnecessary confusion and be challenged in court. The best way to avoid going to trial is to read this opinion carefully, which describes the current standard of constitutional theory, and to take prompt and judicious action after hearing the opinions of experts.