LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

RELIGIOUS DISCRIMINATION BILL AND OTHER RELATED BILLS

ANSWERS TO QUESTIONS ON NOTICE

25 JANUARY 2022

PROFESSOR NICHOLAS ARONEY

1. During the public hearing of the Senate Legal and Constitutional Affairs Legislation Committee on Thursday 20 January 2022 several questions were asked to which I was unable to offer an answer due to problems with the video transmission and time constraints. I have therefore prepared the following answers to the questions I was not able to answer fully during the hearing.

QUESTION 1: DOES INTERNATIONAL LAW REQUIRE PROTECTION OF THE RIGHTS OF GROUPS AND ORGANISATIONS?

2. Article 18.1 of the International Covenant Civil and Political Rights states that freedom of religion and belief includes freedom to manifest religion or belief "in community with others". Freedom of religion therefore has a collective aspect, under which religious bodies and organisations ought to be free to manifest the religious beliefs of their members.[1]

3. Consistently with the principle that international human rights are indivisible and universal, the collective aspects of the right to freedom of religion are supported by other international human rights that have collective dimensions, including the right to freedom of association (ICCPR article 22) and the right of religious minorities in community with the other members of their group to profess and practise their own religion (ICCPR article 27).

4. The associational, collective and institutional aspects of the human right to freedom of religion and belief are specifically affirmed by several international instruments and official international commentary. These include:

   (a) *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (General Assembly resolution 36/55, 25 November 1981), article 6:

[1] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153, 178-181 (available at: https://ssrn.com/abstract=2507045); Nicholas Aroney and Patrick Parkinson, 'Associational Freedom, Anti-Discrimination Law and the New Multiculturalism' (2019) 44 *Australasian Journal of Legal Philosophy* 1, 8-13 (available at: https://ssrn.com/abstract=3543308).

"the right to freedom of thought, conscience, religion or belief" includes the right "to establish and maintain appropriate charitable or humanitarian institutions".

(b) *UN Declaration on the Rights of Indigenous Peoples* (2007): recognises the rights of indigenous peoples, communities and families, including rights to autonomy or self-government in matters relating to their internal and local affairs (article 4), maintenance of distinct social and cultural institutions (article 5), manifestation, practice, development and teaching of spiritual and religious traditions, customs and ceremonies (article 12), and development and maintenance of institutional structures and distinctive customs, spirituality, traditions, procedures and practices, including juridical systems (article 34).

(c) *International Covenant on Economic, Social and Cultural Rights* (1966), article 13.3: "The States Parties … undertake to have respect for the liberty of parents … to choose for their children schools, other than those established by the public authorities … and to ensure the religious and moral education of their children in conformity with their own convictions".

(d) UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*: freedom of religion includes "acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, [and] the freedom to establish seminaries or religious schools".[2]

(e) Arcot Krishnaswami, UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, "Individual and collective aspects of freedom to manifest religion or belief", in *Study of Discrimination in the matter of Religious Rights and Practices* (1960) (UN Document E/CN.4/Sub.2/200/Rev.1) pp 20-22.

(f) Heiner Bielefeldt, United Nations Special Rapporteur on Freedom of Religion or Belief, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN General Assembly, Elimination of all Forms of Religious Intolerance, 7 August 2013, A/68/290, para [57]:

- "[Freedom of religion includes] the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding".

- "Religious communities … need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members".

[2] Forty-eighth Session of the Human Rights Committee, 30 July 1993 CCPR/C/21/Rev.1/Add.4, para [4].

- "Freedom of religion or belief therefore entails respect for the autonomy of religious institutions."

(g) Human Rights Committee, *Delgado Paez v Colombia* (Comm. No. 195/1985, UN Doc CCPR/C/OP/3 (12 July 1990), para [5.7].

5. The High Court's jurisprudence affirms that incorporated religious organisations have standing to commence legal proceedings alleging that a law contravenes the free exercise clause of s 116 of the Constitution. In *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 a majority of the Court affirmed that the incorporated body of Jehovah's Witnesses in Adelaide was a party competent to maintain an action before the High Court in which they contended that there had been a contravention of the "religious free exercise" clause of s 116 of the Constitution.[3] In *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120, the High Court held that the Church of Scientology was a "religious institution" for the purposes of the *Pay-roll Tax Act 1971* (Vic). Mason ACJ and Brennan J defined "religion" in a way that expressly included "an individual's or a group's freedom to profess and exercise the religion of his, or their, choice"; Wilson and Deane JJ considered that one of the five key indicia of a "religion" is that "adherents … constitute an identifiable group or identifiable groups"; and Murphy J stated that "[a]ny body which claims to be religious, and offers a way to find meaning and purpose in life, is religious."[4] In *Minister for Immigration & Ethnic Affairs v Lebanese Moslem Association* (1987) 17 FCR 373, the standing of the Lebanese Moslem Association to commence legal proceedings alleging a contravention of s 116 was accepted by the Full Court of the Federal Court of Australia. In *Kruger v Commonwealth* (1997) 190 CLR 1, Gummow J observed that s 116 protects the free exercise of "the systems of faith and worship of Aboriginal people" and that that one aspect of the freedom is the rearing and instruction of Aboriginal children in the "religious beliefs of their community"; Toohey J similarly referred to "the spiritual beliefs and practices of the aboriginal people"; and Gaudron J considered that s 116 protects the freedom of aboriginal people to carry out religious practices "in association with other members of the aboriginal community" and to "participate in community practices".[5]

6. Many academic specialists affirm that religious freedom has "both an individual and a collective aspect" and that there is an "ineradicable collective or communal dimension" of religious freedom.[6]

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[3] (1943) 67 CLR 116, 150 (Rich J), 156 (Starke J), 168 (Williams J) (answer to Question 1 in the case stated). The Jehovah's Witnesses were unsuccessful in their claim under s 116, but the Court accepted their right to commence the proceedings in their corporate name and style.

[4] (1983) 154 CLR 120, 136, 151, 173-4.

[5] (1997) 190 CLR 1, 86, 132-3, 160-61.

[6] Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 37; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 325; see also W. Cole Durham, 'The Right to Autonomy in Religious Affairs: A Comparative View' in Gerhard Robbers (ed), *Church*

7. Under Australian law, freedom of religion is routinely exercised through an array of legal institutional forms, including charitable trusts, unincorporated associations, incorporated associations, companies limited by guarantee and corporate bodies formed under special legislation or by letters patent.[7] It would be entirely inconsistent with long-standing Australian legal practice to deny that religious freedom is appropriately manifested in a variety of associational and corporate forms and that religious organisations have legal rights.

QUESTION 2: WILL CLAUSES 11 AND 12 OF THE BILL BE PROCEDURALLY UNWORKABLE?

8. As outlined in my written submission to the committee, it is correct that most discrimination cases are heard by State and Territory tribunals and that most of these tribunals do not have jurisdiction to determine "federal matters", such as matters arising under Commonwealth law.[8] However, as I also indicated in my submission, the jurisdictional limits of State tribunals has arisen in many legal contexts and is an ongoing issue requiring broader legal reforms. These other legal contexts have involved existing Commonwealth and State laws bearing on topics such as discrimination,[9] vilification,[10] fair trading,[11] retail tenancy,[12] residential tenancy,[13] rights to public housing,[14] and liquor licencing.[15] Indeed, it has been observed that federal matters can arise in potentially any topic of adjudication.[16] The solutions to these problems do not lie in repeal or amendment of the relevant Commonwealth and State laws. One solution could be the reconstitution of the State tribunals so that they will be deemed to be courts of record, as in Queensland.[17] An alternative would be to allow Local, Magistrates or District Courts to hear

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Autonomy: A Comparative Survey (Peter Lang, 2001) 1; Paul Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 291; John Witte, 'Introduction' in John Witte and Johan D. van der Vyver (eds), *Religious Human Rights in Global Perspective* (Martinus Nijhoff, 1996) xvii, xxvi; Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 317-8.

[7] Queensland Law Reform Commission, *A Review of Religious and Certain Other Community Organisation Acts: Report* (Report No 7, December 2013) ch 2; Penny Knight and David Gilchrist, *Australia's Faith-based Charities* (Australian Charities and Not-for-profits Commission, 2015) 25-6.

[8] *Burns v Corbett* (2018) 265 CLR 304.

[9] *Commonwealth v Wood* (2006) 148 FCR 276; *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85; *Murphy v Trustees of Catholic Aged Care Sydney* [2018] NSWCATAP 275; *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361; see also *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15 (subject to appeal).

[10] *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 226 FLR 62; [2006] NSWCA 349; *Sunol v Collier* (2012) 81 NSWLR 619; *Owen v Menzies* [2013] 2 Qd R 327; *Burns v Corbett* (2018) 92 ALJR 423.

[11] *Qantas Airways Limited v Lustig* (2015) 228 FCR 148.

[12] *Trust Co of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77.

[13] *Johnson v Dibbin* [2018] NSWCATAP 45; *Zissis v Zistis* (2018) 97 NSWLR 782; *Attorney-General (NSW) v Gatsby* (2018) 99 NSWLR 1; *Raschke v Firinauskas* [2018] SACAT 19; *Attorney-General (SA) v Raschke* (2019) 133 SASR 215.

[14] *Director of Housing v Sudi* (2011) 33 VR 559.

[15] *K-Generation Pty Ltd v Liquor Licensing Court (SA)* (2009) 237 CLR 501.

[16] Anna Olijnyk and Stephen McDonald, 'State Tribunals, Judicial Power and the Constitution: Some Practical Responses' (2018) 29(2) *Public Law Review* 97, 106, citing submissions of the Queensland Attorney-General in *Burns v Corbett* (2018) 265 CLR 304.

[17] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164(1); *Owen v Menzies* [2013] 2 Qd R 327; Anna Olijnyk and Stephen McDonald, 'State Tribunals, Judicial Power and the Constitution: Some Practical Responses' (2018) 29(2) *Public Law Review* 97, 107-110.

such matters when they involve federal jurisdiction, as in New South Wales and South Australia.[18] There are complexities in finding suitable solutions to this general problem, but the problem is not with clauses 11 and 12 in particular.

9. Absent these wider reforms, clauses 11 and 12 will operate like the many other Commonwealth laws that intersect with State laws that are routinely administered by State tribunals. As in all such situations, decisions of State courts competent to exercise federal jurisdiction may be required to determine any dispute in which clause 11 or clause 12 defences are raised. Once such determinations are made, they will operate as precedents for all similar cases, binding on the State tribunals. The scheme will be no more or less workable than occurs in the many areas of overlapping Commonwealth and State law over which State tribunals have limited jurisdiction, and in which recourse to the courts is sometimes required to resolve disputes in so far as they involve the exercise of federal jurisdiction. It should also be kept in mind that most discrimination matters are resolved by conciliation without resort to a tribunal. The problem arising from the limited jurisdiction of State tribunals will only occur in the limited proportion of cases that are referred to a tribunal, in which a clause 11 or clause 12 defence is raised, and in which there is no court decision that provides relevant guidance.

QUESTION 3: IS THE BILL SUPPORTED BY THE EXTERNAL AFFAIRS POWER?

10. The prospect that there may be litigation to determine whether the Bill, if enacted, is validly enacted under the external affairs power is not unusual. The same possibility attended the enactment of several other progressive Commonwealth laws dealing with discrimination. There was uncertainty as to the constitutional validity of the *Racial Discrimination Act 1975* (Cth) until this question was determined by a close majority of the High Court in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. The constitutional validity of the sexual harassment provisions of the *Sex Discrimination Act 1984* (Cth) was not judicially confirmed until the decision of the Federal Court in *Aldridge v Booth* (1988) 80 ALR 1. The operation of the *Disability Discrimination Act 1992* (Cth) in respect of admission of students in schools depended, to an extent, on assessments of the constitutionally valid application of the relevant provisions as determined by the High Court in *Purvis v New South Wales* (2002) 217 CLR 92. The operation of the *Disability Discrimination Act* in respect of membership of clubs and associations similarly depended, to an extent, on the constitutionally valid operation of the relevant provisions as determined by the Federal Court in *Soulitopoulos v La Trobe University Liberal Club* (2002) 120 FCR 584.[19]

11. The constitutional basis of the Bill, like many Commonwealth laws, is said to rest on a range of Commonwealth legislative powers, including external affairs, constitutional corporations,

[18] *Civil and Administrative Tribunal Act 2013* (NSW) s 34B; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 34B.

[19] See the discussion of *Soulitopoulos* by Callinan and Heydon JJ in *XYZ v Commonwealth* (2006) 227 CLR 532, 608 [218].

Commonwealth and Territory matters, interstate trade and commerce, banking and insurance, telecommunications, and defence (clause 65).

12. It is well established that the Commonwealth can legislate under the external affairs power to give effect to Australia's treaty obligations.[20] The Commonwealth law must conform to the treaty, which is to say that it must be "capable of being reasonably considered to be appropriate and adapted" to the giving effect of an international obligation or obligations.[21] This formulation underscores the principle that "it is for the legislature to choose the means by which it carries into or gives effect to the treaty".[22] This is consistent with the principle of international law that state parties to international treaties are accorded a margin of appreciation in the implementation of their international obligations,[23] a principle which Australian courts have recognised when interpreting Commonwealth and State human rights laws.[24]

13. Under the ICCPR, Australia is obliged "to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant" and "to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant" (ICCPR article 2). The Bill does not seek to protect all of the rights recognised by the ICCPR but rather focusses on protecting the right not to be discriminated against on the basis of religion. This focus on religious discrimination does not mean that the Bill cannot be characterised as a law implementing the ICCPR. The High Court has pointed out that a law implementing a treaty need not give effect to all obligations under that treaty, so long as its "partial" implementation does not mean that the law cannot fairly be characterised as a law which implements the treaty and so long as the law does not contain "significant provisions" which render the law "substantially inconsistent" with the terms of the treaty.[25] In *Victoria v Commonwealth*, the Court adopted the statement of Deane J in the *Tasmanian Dam Case* (1983) 158 CLR 1 (at 268) that it is "competent for the Parliament … partly to carry a treaty into effect or partly to discharge treaty obligations leaving it to the States or to other Commonwealth legislative or executive action to carry into effect or discharge the outstanding provisions or obligations or leaving the outstanding provisions or obligations unimplemented or unperformed."

14. As Professor Twomey has noted in her written submission to the committee, an assessment of whether the Bill is supported by the external affairs power raises complex questions concerning Australia's obligation to legislate to protect the right to freedom of religion and only to allow limitations on the freedom that are "necessary" to protect "the fundamental rights and freedoms of others" (ICCPR article 18.3). As noted, complex constitutional and legal questions

[20] *Commonwealth v Tasmania* (1983) 158 CLR 1.
[21] *Victoria v Commonwealth* (1996) 187 CLR 416 at 487-488.
[22] *Victoria v Commonwealth* (1996) 187 CLR 416, 487.
[23] Andrew Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012).
[24] Eg, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615, (Maxwell P) at para [196].
[25] *Victoria v Commonwealth* (1996) 187 CLR 416, 488-9.

have similarly arisen in relation to the Commonwealth's previous laws dealing with discrimination on the basis of race, sex, disability and age. What can be said is that the Bill contains numerous provisions which reflect an attempt to ensure that it does not contain elements that could make it "substantially inconsistent" with the ICCPR. Several aspects of this complex balancing exercise to ensure the protection of the fundamental rights and freedoms recognised by the ICCPR is set out in the paragraphs that follow, dealing with the question whether the Bill is an "orthodox discrimination law".

QUESTION 4: IS THE BILL AN "ORTHODOX" DISCRIMINATION LAW?

15. This question presupposes that there is such a thing as an orthodox discrimination law. To speak of "orthodoxy" in this context runs the risk of placing ossifying restrictions on the progressive realisation of the protection of human rights in Australia. There are significant differences between the existing Commonwealth laws prohibiting discrimination on the basis of race, sex, disability and age. These differences are partly due to changes in the theory and conceptualisation of discrimination over time, partly due to differences in the relevant international treaties upon which the laws are respectively based, and partly due to intrinsic differences in the nature of race, sex, disability and age as protected attributes. As Gummow, Hayne and Heydon JJ pointed out in *Purvis v New South Wales* (2002) 217 CLR 92 (at 153-5), the particular nature of disability as a protected attribute requires a different approach to its legislative protection. The same is the case in respect of religion.

16. Religion is an attribute that is relevantly unlike the other attributes for which the Commonwealth has previously enacted discrimination laws. It is both an attribute requiring protection from unlawful discrimination (ICCPR article 2) and a freedom to be protected from unjustified limitation (ICCPR article 18). Its protection requires recognition that freedom of religion involves freedom of belief and that intrinsic to the protection of religious freedom is the freedom "to have or adopt a religion or belief of one's choice" (ICCPR article 18.2). Freedom of religion is therefore closely associated with the right "to hold opinions without interference" (ICCPR article 19.1) and to the right to freedom of expression (ICCPR article 19.2), noting that this right includes "freedom to seek, receive and impart information and ideas of all kinds".

17. Freedom of religion is also a right that is characteristically manifested "in community with others" (ICCPR article 18.1) and is thus closely related to the rights to freedom of assembly (ICCPR article 21) and freedom of association (ICCPR article 22.1). Laws which provide protection from discrimination on the basis of religion must therefore recognise the right of religious associations and organisations to determine conditions of membership appropriate to the particular beliefs and convictions of the religion in question.[26] Further, the right to

[26] Because freedom of religion and belief includes freedom not to have or profess a religion, the same rights apply to atheistic, secular or humanist organisations formed for the purposes of advocating non-religious philosophies and belief systems.

freedom of religion also requires states to have respect for "the liberty of parents … to choose for their children schools, other than those established by the public authorities … and to ensure the religious and moral education of their children in conformity with their own convictions" (ICESCR article 13.3). Other protected attributes such as race, sex, disability and age do not have these particular characteristics.

18. For these reasons, the Bill appropriately contains provisions that do not appear in other Commonwealth discrimination laws. The Bill affirms the rights of religious bodies generally to act in accordance with their beliefs, but places appropriate limitations on these rights to ensure that they exercised only in good faith and could reasonably be considered by a person of the same religion as being in accordance with the doctrines, tenets, beliefs or teachings of the religion or to avoid injury to the religious susceptibilities of adherents of the same religion (clause 7). Furthermore, the protection of the rights of religious bodies generally to act in accordance with their beliefs is specifically limited to discrimination under the Bill (clause 7(2) and (4)). The protection has no application to discrimination under other Commonwealth laws. The Bill also limits the rights of religious hospitals, aged care facilities, accommodation providers and disability service providers (clauses 8 and 9). These limitations acknowledge that the right to freedom of religion is not absolute but may be limited "to protect public safety, order, health, or morals or the fundamental rights and freedoms of others", but "only" to the extent "necessary" to do so (ICCPR article 18.3).

19. For similar reasons, the Bill appropriately seeks to override certain State and Territory laws to ensure that religious educational institutions have the right to give preference in employment to persons who hold or engage in a particular religious belief or activity (clause 11) and to ensure that "statements of belief" are not of themselves rendered unlawful under certain State and Territory laws (clause 12). Similarly, the bill seeks to protect against discrimination by professional, trade or occupational qualifying bodies in respect of statements of belief made by persons potentially affected by decisions of such qualifying bodies (clause 15). These provisions are again subject to important limitations to ensure protection of the fundamental rights of others. Thus, the protection of religious educational institutions applies only to employment and not to the admission of students and must be in accordance with a publicly available written policy (clause 11). Similarly, the protection of statements of belief is limited to statements that are made in good faith and genuinely considered to be in accordance with the doctrines, tenets, beliefs or teachings of the religion (clause 5, definition of "statement of belief"). Importantly, the protection also does not extend to statements that are malicious, threatening, intimidating, harassing, vilifying or would otherwise constitute a serious offence (clause 12(2)). A statement directed at a person or a group on the basis of a protected attribute such as race, sex or sexuality that was malicious, threatening, intimidating, harassing or vilifying would receive no protection under the Bill.

20. As noted (at para 14 above), these features of the Bill reflect an attempt to ensure that it implements Australian's obligations under the ICCPR (and other relevant treaties) and does not

contain elements that might make it substantially inconsistent with the ICCPR. Such features render the Bill arguably "capable of being reasonably considered" to be appropriate and adapted to the giving effect of Australia's relevant treaty obligations.

QUESTION 5: WHY IS AN ALTERATION TO CLAUSES 11 AND 12 NEEDED?

21. In my submission to this committee I proposed amendments to clauses 11 and clause 12. These amendments are advisable because, as currently drafted, clauses 11 and 12 purport to determine the meaning and effect of the prescribed State laws, and decisions of the High Court have raised doubts about whether this would be constitutionally effective.

22. Under the Constitution, the Commonwealth Parliament has power to make laws for the peace order and good government of the Commonwealth in relation to the particular matters set out in ss 51 and 52. Section 107 of the Constitution provides that:

> Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

23. In *Western Australia v Commonwealth* (*Native Title Act Case*) (1994-1995) 183 CLR 373, at 464, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ commented as follows:

> Section 107 of the Constitution confers on or confirms to the Parliaments of the respective States the powers vested in those Parliaments as at the establishment of the Commonwealth except to the extent that any power is "exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State". It is beyond the power of the Parliament of the Commonwealth to enact a law that is inconsistent with s 107. It is therefore beyond the legislative power of the Commonwealth Parliament to withdraw from any State Parliament a legislative power that is conferred on or confirmed to that Parliament by s 107. Nor does the Parliament of the Commonwealth have power directly to control the content of a State law. By virtue of s 107 of the Constitution, a valid law of a State operates according to its tenor except to the extent, if any, that s 109 of the Constitution renders the State law "invalid".

24. The relevant point from this paragraph is that a valid law of a State operates according to its tenor except to the extent that s 109 of the Constitution renders the State law invalid. The proposition that state laws operate according to their tenor is twice repeated in the joint majority judgment (at pp 468, 472). As Brennan J observed in *Gerhardy v Brown* (1985) 159 CLR 70 at 121:

> It is ... outside the powers of the Commonwealth Parliament to prohibit the Parliament of a State from exercising that Parliament's powers to enact laws,

> whether discriminatory or not, with respect to a topic within its competence. It is not to the point that a law, if enacted by the State Parliament, will be invalid by reason of its inconsistency with a Commonwealth law. A Commonwealth law purporting to prohibit a State Parliament from enacting a law finds no support in s 109 of the Constitution; rather, s 109 operates on a law that a State Parliament has lawfully enacted.

25. Accordingly, as Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ observed in the *Native Title Act Case* (at 465), the effect of s 109 is to render a State law inoperative only to the "extent of the inconsistency", and the extent of the inconsistency "depends on the text and operation of the respective laws". The Commonwealth may make a law which is deliberately inconsistent with a State law in some particular respect, thereby activating the operation of s 109 to render the State law inoperative to the extent of that inconsistency. It may even identify the State law by name. However, the inconsistency depends on the text and operation of both the Commonwealth and the State law. The Commonwealth cannot alter the content or tenor of the State law per se; it can only legislate in such a manner that the State law is rendered invalid under s 109 in some particular respect.

26. There is one sentence in the joint judgment in the *Native Title Act Case* upon which the Commonwealth might rely in support of the drafting of clauses 11 and 12. At 466, their honours observed:

> If the application of State law to a particular subject matter be expressly excluded by a valid law of the Commonwealth, a State law which is expressed to apply to the subject matter is inconsistent with the Commonwealth law and s 109 of the Constitution is thereby enlivened.

27. It might be argued that clauses 11 and 12 are instances of a Commonwealth law expressly excluding the application of a State law to a particular subject matter. However, such an argument overlooks the emphasis placed by the joint judgment on the proposition that the inconsistency depends upon the text and operation of the State law as much as it depends upon the text and operation of the Commonwealth law, and that a Commonwealth law cannot alter the content or tenor of a State law. The Commonwealth can expressly prevent the application of a particular State law to a specific subject matter, but it cannot determine that particular conduct does or does not contravene the State law, for the question whether particular conduct contravenes the State law depends on the content and tenor of the State law itself. The Commonwealth can only indirectly affect the operation of a State law by legislating in a manner that is inconsistent with it, thereby rendering it inoperative to the extent of the inconsistency under s 109, and thereby preventing the application of the State law to a particular subject matter.

28. In the *Native Title Act Case*, the Court had to consider several provisions of the *Native Title Act* directed at the operation of particular State laws. Section 11 stated that "Native title is not able to be extinguished contrary to this Act". The joint judgment observed that a State law

purporting to extinguish native title "would operate according to its tenor but for any inconsistency" with the *Native Title Act* and other relevant Commonwealth laws. As the joint judgment explained (at 468) and illustrated (at 469-473), a Commonwealth law can determine, by triggering s 109, that a State law shall have only a partial operation or only operate on terms or conditions determined by the Commonwealth law. But this is a result of the inconsistency pursuant to s 109; it is not a result of the Commonwealth altering the meaning or content of the State law itself. The State law continues to operate according to its own tenor (see the joint judgment at 472), subject to those particular respects in which it is rendered inconsistent with the Commonwealth law and therefore has no operation. In those respects in which the particular terms and conditions contained in the Commonwealth law do not apply, "the State law is left with a corresponding field of effective operation" (at 473).

QUESTION 6: HOW WOULD MY SUGGESTED ALTERATIONS TO CLAUSES 11 AND 12 ADDRESS THE PROBLEM?

29. The High Court has affirmed that an inconsistency between a Commonwealth and a State law under s 109 of the Constitution can arise where one law confers a right, immunity, privilege or liberty and the other law takes away that right, immunity, privilege or liberty. As Knox CJ and Gavan Duffy J explained in *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 (at 478), "Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it". As Isaacs J put it in that case (at 490): "[i]f one enactment makes … lawful that which the other makes unlawful, or if one enactment makes unlawful that which the other makes … lawful, the two are to that extent inconsistent".

30. The alterations to clauses 11 and 12 that I have proposed for the committee's consideration would provide that certain described conduct is "lawful" (clause 11) and that other described conduct is "not unlawful". The described conduct in each case is defined consistently with the existing language and intent of clauses 11 and 12. The difference is that in the revised wording I have proposed the Commonwealth law establishes or affirms the existence of a right or liberty to engage in the described conduct. An inconsistency under section 109 will arise in respect of any State or Territory law that would prohibit the described conduct.

31. In the case of clause 11, the revised wording I have proposed provides that it is "lawful" for an educational institution to give preference in employment to persons who hold or engage in a particular religious belief or activity in the specific circumstances set out in the clause. Any State or Territory law that made the same conduct unlawful would be inconsistent with clause 11 and therefore invalid to the extent of the inconsistency under section 109 of the Constitution. This result is supported by the language of the existing subclause (4) of the Bill,

which expresses the Commonwealth's intent that the clause is to apply to the exclusion of any State or Territory law that would otherwise apply to the conduct.

32. In the case of clause 12, the revised wording I have proposed for subclause 12(2) provides that it is "not unlawful" to make a "statement of belief, in and of itself" notwithstanding the State and Territory laws listed in the clause.[27] Subclause 12(3) is included to ensure that subclause 12(2) only applies to statements of belief that are not malicious, are not statements that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group, and do not involve commission of a serious offence. Subclauses 12(4) and 12(5) are included to ensure that subclause 12(2) does not disturb existing State and Territory laws to the extent that under such laws certain conduct which includes but is not limited to a statement of belief might constitute unlawful discrimination. This makes clear that the intention is that subclause 12(2) only operates to ensure that a statement of belief "in and of itself" will not be unlawful under the prescribed State and Territory laws.

33. I submit for the committee's consideration that this revised drafting of clauses 11 and 12 would achieve the same policy objectives as set out in the existing Bill but in a manner that avoids questions about their constitutional effectiveness under s 109 of the Constitution.

[27] "Statement of belief" is defined in clause 5.