TAX LAWS AMENDMENT (PUBLIC BENEFIT TEST) BILL

CHURCH OF SCIENTOLOGY

MEMORANDUM OF ADVICE

1. I have been asked to provide an opinion to the Church of Scientology ("Scientology"**)** on the proposed operation of the *Taxation Laws Amendment (Public Benefit Tests) Bill* ("The Bill") and the *Explanatory Memorandum* ("EM") that accompanies that Bill circulated by authority of Senator N Xenophon.

2. The Bill proposes to insert a new section 50-51 into the Income Tax Assessment Act 1997 ("the 1997 Act") which will impose a "public benefit test" on "charitable institutions" and "religious institutions" (currently exempt from income tax) that must be satisfied prior to that charitable or religious institution being granted an exemption from income tax.

Summary of my opinion

3. In my opinion, for the reasons set out below:

   (a) the Bill is a bill that imposes taxation and is therefore subject to the limits imposed by s 53 and 55 of *The Commonwealth of Australia Constitution Act 1900* ("The Constitution"). As a bill imposing Taxation where none was imposed before the Bill is contrary to the initiation provisions of the first paragraph of s. 53 of the Constitution. Only the House of Representative may initiate bills

imposing taxation laws, as such, the Bill is in breach of the Constitution;

(b) the Bill when read with the Explanatory Memorandum ("EM") accompanying the Bill, is in breach of s116 of the Constitution as it interferes with the "fourfold guarantee of religious freedom";

(c) the Bill is in breach of the rule of law as it is not a legitimate or desirable use of Parliament's power to delegate legislation, particularly as the body of the Bill is proposed to be contained in regulations;

(d) As regulations may not be amended by either House of Parliament but are required to be withdrawn in entirety the detail contained in the regulations will be denied the normal process of Parliamentary debate and amendment;

(e) The EM in the second paragraph, but for Parliamentary Privilege, amounts to group libel and false implication libel and should be referred to the Senate Privileges Committee under resolution 5 of the *Privilege Resolutions of 1988*.

A. The Proposed Bill is in breach of s.53 of the Constitution.

4. Because of the central importance of the Bill to this opinion I have reproduced the Bill in full:

> **"50-51 Public benefit test for items 1.1 and 1.2**
>
> *Public benefit test*
>
> (1) The regulations **must** formulate a test (to be known as the public benefit test) against which the aims and activities of an entity maybe assessed.
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> (2) The public benefit test must include the following key principles:
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> (a) there must be an identifiable benefit arising from the aim and activities of an entity;

(b) the benefit must be balanced against any detriment or harm;

(c) the benefit must be to the public or a significant section of the public, and not merely to individuals with a material connection to the entity.

(3) The public benefit test may contain provisions relating to the manner in which the test is to be applied to the aims and activities of an entity, as well as ancillary and incidental provisions.

(4) The Minister must take all reasonable steps to ensure that regulations are made for the purposes of subsection (1) before1 July 2010.

Entities must meet public benefit test

(5) **An entity covered by item 1.1 or 1.2 is not exempt from income tax unless the entity meets the public benefit test. (**Emphasis added**)**

2 Application provision

The amendment made by this Schedule applies in relation to income years that commence on or after 1 July 2010. "

5. I have also reproduced in full ss. 53 of the Constitution:

"53 Powers of the Houses in respect of legislation

Proposed laws appropriating revenue or moneys, or **imposing taxation, shall not originate in the Senate**.

But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have

> equal power with the House of Representatives in respect of all proposed laws."(emphasis added)

6. The question of what constitutes a tax for the purpose of the Constitution was considered by the High Court in *Luton v Lessels*[1]. The Court held that the features identified by Latham CJ in *Mathews v Chicory Marketing Board (Vict)* as typical of tax -"a compulsory exaction of money by a public authority for public purposes enforceable by law, and is not a payment for services rendered[2]"-remained important when determining whether a tax was imposed.

7. When considering the construction of s. 55 of the Constitution Kirby J in *Luton v Lessels* stated: [3]

> "*Characterising the law*: Ultimately, the task of a court addressing the argument that a law is one with respect to or imposing taxation (whether for the purposes of s 51(ii) or ss. 53 and 55 of the Constitution), is to characterise the law in question. A court, performing the task of characterisation, will remember the historical and constitutional purposes behind the provision, the constitutional consequences of a decision that a law is one imposing taxation, and the fact that the phrase is ultimately not a term of art but one of ordinary English language evoking an impression based upon a consideration of the entire legislative scheme."

8. Since the *Income Tax Assessment Act 1915* the "incomes, revenues and funds of religious, scientific, charitable, or public educational institutions has been exempt from Federal income tax"[4].

9. The exemption was continued in s. 23 (e) of the Income Assessment Act 1936 ("1936 Act") and remains in Divisions 50 and 50-B of the 1997 Act. In fact it is a fundamental tenant of our revenue laws on public policy grounds that charitable and religious institutions are exempt from tax,

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1 (2002) 210 CLR 333 per Gleeson CJ at 341-344, Gaudron and Hayne JJ at 352 -354 at [56], Kirby 367-373, Callinan J 383-385 all judgments analyses what constitutes taxation

2 Latham CJ in Mathews v Chicory Marketing Board (Vic) (1938) 60 CLR 263; Australian Tape Manufactures Assoc Ltd v Commonwealth (1993) 176 CLR 480,500; Air Caledonie International v Commonwealth (1988) 165 CLR 462,468Giris Pty Ltd v Federal Commissioner of Taxation (1969) 119 CLR 365, 383y

3 (2002) 210 CLR 333 at 368 par 104

4 s. 11(d) Income Tax Assessment Act 1915

this can be traced back to the Statue of Elizabeth[5], the decision of the Privy council in *Council of Commissioners for Special Purposes of Income Tax v Pemsel*[6] and judicial decisions in the United Kingdom, Australia and other countries that have followed that line of authority.

10. The proposed amendments contained in the Bill involve a fundamental change to this principle as it has been held that *"a general rule is an exception, firmly bedded as the rule itself"*[7] by imposing an impossible to define and administer "public benefit test" on top of the existing requirements that are contained in Div 50 and 50-B of the 1997 Act.

11. As The High Court held in *Re Dymond*[8] the machinery for the administration of a law imposing taxation and for the assessment, levying, payment and recovery of tax and additional tax does deal with the imposition of tax.

12. Any bill that contains a proposed charge or burden where none previously existed must on any reasonable construction of that expression if it is to have any application to taxation legislation be a bill imposing taxation. The Senate practice has been to treat any such bill as a bill to impose taxation[9].

13. Menzies J in *Re Dymond* [10]after noting the Parliamentary practice on which ss.53 and 55 of the Constitution were based held that s 55 had always been given a strict construction by the Court. His Honour decided that " the laws providing machinery for the administration of laws imposing taxation and for the assessment, levying, payment and recovery of tax and additional tax do deal with the imposition of tax and

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5 43 Eliz c 4 (charitable uses Act 1601)
6 [1891] AC 531 at 581-582
7 Federal Commissioner of Taxation v Coombes (no2) (1998) 160 ALR 456 at 466
8 (1959) 101CLR 11 Dixon CJ, Fullagar, Kitto, Taylor, Winderyer , Menzies and McTiernanJ
9 see the debate on Migration Legislation Amendment (Contributory Parents Migration Scheme) Bill 2002,5/3/2003J.1527-9) ,Odgers Australian Senate Practice chapter 13 at 283
10 (1959) 101CLR 11 at 27-28

that the provisions of the *Sales Tax Assessment Act* (No2) upon which the liability of a debtor for sales tax depends are laws of that description."

14. The proposed amendments contained in the Bill involve net revenue for the Commonwealth in that many religious and charitable institutions that have been exempt from taxation in Australia since the first revenue statutes were introduced may now find themselves subject to income tax and goods and services tax under the 1936 act the 1997 Act and the *A New Tax System (Goods and Services Tax) Act 1*999 ("The GST" Act).

15. A consequence of failing the proposed "public benefit test' (which must be meet as a precondition to tax immunity) will have the purpose and effect of raising general revenue. As Kirby J concluded[11] "the weight of authority supports the proposition that the issue of revenue raising is a significant, if not determinative, feature of the law in respect to taxation".

16. Any moneys so raised will be paid through the Consolidated Revenue Fund by which all taxes imposed by the Parliament is bought under the control of the Parliament[12] thereby satisfying another indicia of the imposition of a tax.

17. By restricting the tax exemption to religious and charitable organisations that meet a "public benefit test" the Bill will increase significantly the level of taxes paid by certain, if not all, charitable and religious institutions. As such, even though the Bill proposes to limit an exemption contained in the 1997 Act[13] it remains an appropriation bill having a financial impact and therefore is required to contain an

11 Luton v Lessels [202] 210 CLR 333 at 372[120]

12 Airservices Australia v Canadian Airlines International Ltd (1991) 202 CLR 133 at 178[90]

13 The exemption from Income Tax for religious and charitable institutions has been contained in all previously enacted Federal Government Income Tax Laws since income tax was first introduced by the Federal Government it is not a new or novel concept.

appropriation clause and be first introduced into the House of Representatives.

18. A bill that imposes taxation on a body or organisation hitherto tax exempt is subject to the limits imposed by s. 55 of the Constitution and is ultimately open to be challenged in the High Court[14] as the Senate may not initiate bills imposing taxation [15].

19. It has been the Senate practice to regard[16] bills which are stated to "close a loophole " or "correct an anomaly" but which in fact impose a tax where none was imposed before as bills imposing taxation.

20. A bill that empowers the making of regulations to impose a tax where none was imposed before is still, it would seem,[17] a bill imposing taxation.[18]

21. The Senate cannot introduce its own bill to raise tax as that would clearly be a bill imposing taxation, nor can the Senate move an amendment to a bill to raise the level of tax[19].

22. The view taken in the Senate since 1903 is that a bill dealing with taxation does not contain a proposed charge or burden unless it is a bill imposing taxation[20] . Following the debate on the *Taxation Laws Amendment Bill* (No 4) 1993, *The Customs Tariff Amendment Bill 1994, The Superannuation Contribution Tax Bills, The Taxation Laws Amendment Bill (No1) 1997, The Taxation Laws Amendment (Trust Loss and Other Deductions) Bill* and other cases involving the New Tax System Bills, the

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14 see for example the Taxation (Deficit Reductions) Bill 1993 `
15 Odgers' Australian Senate Practice eleventh Edition chapter 13 page 281, 284
16 Radiocommunications (Transmitter Licence Tax) Amendment Bill 2002; Bankruptcy (Estate Charges) Amendment Bill 2002
17 Lutton v Lessels (2002) 210 CLR 333, Re Dymond (1959) 101 CLR 11;Airservices Australia v Canadian Airlines (2000) 202 CLR 133
18 Migration Legislation Amendment (Contributory Parents Migration Scheme) Bill 2002 see generally Odgers Australian Senate Practice chapter 13 at 281
19 see generally Odgers Australian Senate Practice chapter 13 at 269-297
20 see generally Odgers Australian Senate Practice chapter 13 at 269-297

Senate Procedure Committee, recommended bills which increase taxation be treated as bills imposing taxation.[21].

23. On the above analysis, in my opinion, the Bill which makes it mandatory[22]for regulations to formulate a "public benefit test" that must be satisfied prior to previously tax exempt institutions remaining entitled to tax exempt status is a bill to impose tax. The Bill is therefore unconstitutional as it is in breach of s.55 of the Constitution.

B. The Proposed Bill when read with the EM offends s 116 of the Constitution

24. In his reasons for Judgment in *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria*) when considering an exemption from State Payroll Tax Murphy J held[23]

> "*Religious freedom is a fundamental theme of our* ***society… whenever the legislature prescribes what religion is, this poses a threat to religious freedom.*** *Religious discrimination by officials or by the courts is unacceptable in a free society. The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show its doctrines where true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status****. In the eyes of the law, religions are equal. There is no religious club or monopoly of State privileges for its members. The policy of the law is "one in, all in".***

21 Procedures Committee first report of 1996 (PP 194/1996) recommended a scheme for the interpretation and application of s 53 of the Constitution.

22 50-51 (1) " The regulations must formulate a test (to be known as the public benefit test) against which the aims and activities of an entity may be assessed

23 (1983) 154 CLR 120 at 150 see also the judgments of Mason ACJ and Brennan J at 133 and Wilson and Deane JJ at 173

> "***The onus is on each applicant for tax exemption to prove, on the civil standard, that it is entitled to the exemption – that is more likely than not a religious institution."*** (emphasis added).

25. By prescribing in regulations what is acceptable and for the public benefit and what is detrimental and harmful the Bill, in my opinion, "proposes a threat to religious freedom", and is directly in contradiction to the passage quoted above where Murphy J stated the policy of the law is " one in all in". If the onus of proof for establishing an entitlement to a tax exemption is to alter it is not appropriate to impose an obligation on the regulator to exercise that function. This is a matter dealing with the substance of the 1997 Act not the machinery for carrying out the purpose of the 1997 Act and should be dealt with by the legislator not a regulator.`

26. In this regard Mason ACJ and Brennan JJ in their joint judgment in the same case[24] when considering whether special leave should be granted stated:

> "*Two circumstances combine to give an affirmative answer: the legal importance of the concept of religion and the paucity of Australian authority. Freedom of religion, the paradigm freedom of conscience, is the essence of a free society. The chief function in the law of the definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of section 116 of the Constitution and identifies the subject matter* ***which other laws are presumed not to intend to affect".*** [emphasis added].

27. It would seem, in my view, that the Bill directly offends the emphasised part of the passage quoted above by imposing an unspecified hurdle that may apply to some religious or charitable institutions but not all potentially on a quite arbitrary basis. As currently drafted the Bill and EM provide no guidance as to how "public benefit" is to be assessed and

24 (1983) 154 CLR 120 at 130

weighted; against presumably what is subjectively determined to be public "detriment or harm".

28. Following the unanimous decision of the High Court[25] the beliefs, practices and observances of Scientology were held to be a religion and as such Scientology was entitled to a tax exemption under section 10(b) of the *Pay-roll Tax Act* 1971 (Vict.). As Mason ACJ and Brennan J concluded:

> *" the present case is not concerned with the personal freedom of religion; it is concerned with an exemption of a religious institution from a fiscal burden imposed upon other institutions, but no narrow definition of religion can be accepted on this account.* ***There can be no acceptable discrimination between institutions which take their character from religions which the majority of the community recognise as religions and institutions that take their character from religions that lack that general recognition****. The statutory syncretism which a Parliament adopts in enacting a provision favouring religious institutions is not to be eroded by confining unduly the denotation of the term religion and its derivatives*".(emphasis my own*).*

29. The Bill in my opinion falls foul the above quoted passage by seeking to impose a mandatory "public benefit" test which must, in practical legal effect, discriminate between religious and charitable institutions.

30. In *Commissioner of Taxation of the Commonwealth of Australia v Word Investment Limited* [26]the Majority in their joint reasons (Gummow, Hayne, Heydon and Crennan JJ) when considering whether an organisation (Word) was a charitable institution entitled to be endorsed as an entity exempt from income under subdiv 50-B of the 1997 Act set out the history of the income tax legislation since 1916 (now contained in Division 50 and 50 B of Part 2-15 of the 1997 Act). Their Honours held that once it was concluded that Words sole purpose was charitable the

25 (1983) 154 CLR 120 per Mason ACJ, Murphy, Wilson, Brennan and Deane
26 (2008)236 CLR 204 at 230 – 240

language of s 50-50(a) was such that it was not open to the Commissioner to deny Word exemption from income tax. The same is true here. Once Scientology was held to be a religion, and was found to comply with the requirements of s. 50-50 of the 1997 Act i.e. it had a physical presence in Australia, and incurred expenditure and pursued its objects principally in Australia the consequence was that Scientology, like other religions in Australia, entitled to tax concession status. Once the requirements of Div 50 and 50 B of the 1997 Act are satisfied it is unnecessary to impose another hurdle on tax exempt status.

31. In fact in their joint judgment in *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria*) Mason ACJ and Brennan J[27] stated that "*the relevant inquiry (for the purposes of the case) is to ascertain, what is meant by religion as an area of legal freedom or immunity and that inquiry looks to those essential indicia of religion which attract that freedom or immunity. It is in truth an inquiry into legal policy*." (emphasis added)

32. The Bill, in my opinion, proposes to remove an immunity from tax for some, but possibly not all, religious and charitable institutions and as such is essentially a review of the inquiry into the legal policy of religion settled by the High Court unanimously and in detail in *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria*).[28] Such a significant change to legal policy should not be the subject of delegated legislation.

33. Having made that enquiry, the High Court was satisfied that the "canons of conduct" practiced by Scientology did not offend the ordinary laws. Mason ACJ and Brennan J[29] commented,

27 (1983) 154 CLR 120 at 133
28 (1983) 154 CLR 120
29 The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria) (1983) 154 CLR 120 at 135-136

> "*the freedom to act in accordance with ones religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not protected by the plea of religious obligations to teach. Religious conviction is not a solvent of religious obligation*".

34. In the same case Wilson and Deane JJ[30] in concluding Scientology was a religion held:

> " *...we do not consider the present case, when approached on this basis, as a borderline one .* ***Regardless of whether the members of the applicant are gullible or misled or whether the practices of Scientology are harmful or objectionable, the evidence in our view, establishes that scientology must, for relevant purposes be acceptable as 'a religion' in Victoria. That does not mean that either the practice of the applicant or its rules are beyond the control of the State*** *".*

35. The proposed Bill when read with the EM, in my opinion, is in direct conflict with the passages from the joint judgments of Mason ACJ and Brennan JJ and Wilson and Deane JJ quoted above. Scientology was held, for the purposes of exemption from a State revenue statute, to be a religion, but not above the relevant laws of the Commonwealth of Australia or the various States and Territories of Australia. The imposition of a "barrier", via regulations, to an entitlement to immunity from tax because of unsubstantiated allegations made in the second paragraph of the EM presupposes that Scientology is not worthy of that taxation exemption and by doing so fails to treat all religions as equal before the law. It is trite law to say a man is innocent until proven guilty – the same is true of religious and charitable institutions. The question needs to be asked – what cannon of moral conduct has Scientology breached that disentitles it to the presumption of innocence?

36. The Australian Taxation Office granted Scientology exemption from the payment of income tax under section 26(e) of *The Income Tax Assessment*

30 The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria) (1983) 154 CLR 120 at 176

Act 1936 ("The 1936 Act")[31] and subsequently under Subdivision 50-B of the *Income Tax Assessment Act* 1997 ("The 1997Act"). Scientology has also been granted an exemption from *A New Tax System (Goods and Services Tax) Act 1*999 ("The GST").

37. The Bill when read together with the EM seeks, it would appear from the language of the second paragraph of the EM, to remove what as already been granted by the Commissioner of Taxation by implying that unsubstantiated breaches of State laws and regulations makes Scientology unworthy of the tax exemptions already granted. The Bill however makes no reference to the behaviours of any other religious or charitable organisation despite the enormous amount of public scrutiny and criticism some of those bodies have been subjected to for various crimes committed by members of those organisations. In so doing Senator Xenophon has interfered with the "fourfold guarantee of religious freedom"[32] contained in section 116 of the Constitution, and considered at length by the High Court in *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria*).

38. The EM that accompanies the Bill in the second paragraph cites alleged unsubstantiated behaviour (in some instances criminal) on the part of some members of the community who profess to practice the religion of Scientology as the reason for imposing a "public benefit test" on all "religious and charitable institutions seeking tax exemption." These organisations will now be required to demonstrate "public benefit through [their] aims and activities".

39. By suggesting that some but not all religious and charitable institutions are deserving of tax exempt status because they are able to satisfy a test (as yet unidentified), to show their aims and activities, on balance, are

31 Exemption granted 24 October 1984, and confirmed on 5 June 1986 under 26(e) of the 1936 Act, 16 June 2000 under sub-div 50B of the 1997 Act and 15 June 2000 under the New Tax System (Goods and services Tax) act 1999.

32 (1983) 154 CLR 120 at 133

more beneficial to the public than harmful, the Bill erodes the equality of religious liberty and freedom the Courts have struggled so hard to ensure.

40. Whether or not the allegations made in the EM are true, the actions by certain individuals professing to practice a particular religion cannot taint the entire religious body[33]. Neither should they, but if the proposed Bill is enacted which will require that " any public benefit the charity provides must outweigh any harm it causes," this is a potential consequence.

41. The exempt tax status provided by the Federal Parliament for religious and charitable institutions does not mean those organisations are beyond the control of the laws of the relevant States. Breaches of State laws and regulations should be dealt with by bringing actions under those laws, rather than by seeking to remove or impose restrictions, upon qualification for Federal Government tax concession.

42. By requiring regulations that will allow a regulator to determine which charity or religious body is deserving of a tax concession and which is not the Bill offends the principles of s. 116 of the constitution.

C. The Bill is not an appropriate use of the power to delegate legislation

43. As Barwick CJ stated in *Giris Pty Ltd v Federal Commissioner of Taxation*[34] when considering the operation of s.99Aof the 1936 Act " *No doubt while Parliament may delegate legislative power it may not abdicate it*". It is the legislature that needs to determine the grounds of liability leaving only

33 See the Commissioners Ruling TR 2005/21 on charities at para 101 which correctly states that the mere fact an organisation or its employee has breached a law would not of itself show the organisation has a non charitable purpose. Instances of illegality in relation to occupational health and safety, employee entitlements and regulatory requirements would be unlikely to point towards a non charitable purpose. Towards the other extreme would be a planned and coordinated campaign of violence"

34 (1969) 119 CLR 365 at 373

the Commissioner to resolve the relevant facts nominated by the legislature as requisite to attract the stated liability.

44. Of particular concern is the delegation of the detail of the Bill. The Bill provides regulations "must" as opposed to "may" formulate a test – which in my opinion is outside of Parliaments powers and is open to challenge by the courts as being *ultra vires* as the Bill contains no criteria or limitations as to what could be considered relevant in applying the 'public benefit test"[35]. As the Full Federal Court in *Turner v Owen*[36] held a provision of the *Customs (Prohibited Imports) Regulations (Cth)* which prohibited the importation of 'Goods which, in the opinion of the Minister, are of a dangerous character and a menace to the community' constituted an unlawful delegation to the minister of the power to determine what goods should be prohibited from importation. French J stated:

> "*On any functional analysis of the regulation it effectively places the power of prohibition in the hands of the Minister. The words 'dangerous character and menace to the community' are not indicative of a factual criterion or class description limited by any intelligible boundary. They are almost entirely normative. They may be applied with equal facility to offensive weapons, non-biodegradable plastic bags, or publications espousing political ideas with which the Minister disagrees. They are legislative in character … They ask the Minister to do what the Governor- General is supposed to do that is to prohibit."*

45. The Bill leaves the Commissioner to decide that it is unreasonable to apply the test to some religious and charitable institutions while applying it to others thereby permitting discrimination between religious and charitable institutions which will be determined on a subjective basis even if the regulations manage to set out an objective set

35 Swan Hill Corporation v Bradbury (1937) 56 CLR 746 at 757 per Dixon J, Turner v Owen (1990) 96 ALR 119 per French J at 142 and Pincus J at 127

36 Turner v Owen (1990) 96 ALR 119 per French J at 142 and Pincus J at 127

of criteria[37]. Given the operation of s 116 of the Constitution what the Commissioner will be required to decided is in truth a function of the legislature.

46. Given the degree of difficulty the Courts have encountered in "*developing the law towards complete religious liberty and religious equality*"[38] and in formulating a test for charitable institutions[39]if the law in relation to religious and charitable institutions is to be codified Parliament needs to direct its mind to the precise circumstances of how such a "public benefit test will operate".

47. It is the Parliament not the regulator that must determine what constitutes an "identifiable benefit," how that benefit is to be measured, what the phrase "benefit or harm" will encompass, when individuals will be deemed to be "materially connected to the religious or charitable entity" so as to disqualify any benefit and most importantly what objective criteria will form the basis of determining when "any public benefit the charity provided outweighs any harm it causes".

48. As Lord Hoffman pointed out in *Environment Agency v Empress Car Co Ltd*[40] an answer to the question of whether A has caused B will differ according to the purpose for which the question is asked.

49. In *Technical Products Pty Ltd* v *State Government Insurance Office (Qld)* Brennan, Deane and Gaudron JJ observed[41] that the requisite connection will not exist unless there is 'some discernible and rational link' between the two subject matters which the statute requires to be linked. How such a test will fit with religious and charitable bodies is unclear given

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37 See for example the problems the Courts have had dealing with the application of Part IVA of the 1936 Act

38 (1983) 154 CLR 120 at 133

39 Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited [2008] 236 CLR 204 per Kirby J at 240 par 76 "The law on charitable institutions is "difficult", "very artificial", noted for its "illogicalities"

40 [1999] 2 AC 22 at 29

41 (1989) 167 CLR 45 at CLR 47

the nature of these types of organisations: see Kirby's judgment in *Commissioner of Taxation of the Commonwealth of Australia v Word Investment Limited*[42].

D. The Power to make regulations

50. The making of Regulations is governed by the *Legislative Instruments Act 2003 (*which replaced *the Interpretation Act 1901)*. The procedures for making delegated legislation are markedly different from those used in the enactment of statute. There are no stages for legislative passage or opportunity for amendment, and there are no procedural restraints on rushed legislation.

51. The main provisions are that regulations must be registered in a *Federal Register of Legislative Instruments* and laid before each House of the Parliament within 6 sitting days, and then subject to disallowance by either house. Regulations must be disallowed in their entirety and may not be disallowed in part.

52. Given that regulations cannot be amended in the Senate but are required to be rejected in totality[43], which in practice rarely occurs, it is not appropriate for such significant amendments to be delegated to regulations.

53. The Bill if passed will have the impact of taxing or increasing the tax burden on some religious and charitable organisations that previously have been tax exempt, as such the detail of these changes should be fully considered, debated and capable of amendment by both Houses of Parliament.

E. The Bill and the EM are a Misuse of Parliamentary Privilege

42 (2008) 236 CLR 204 at 261-269
43 *Thomas Borthwick & sons (Pacific) Ltd v Kerin and Other* (1989) 87 ALR 527

54. The purpose of any explanatory memorandum that accompanies proposed legislation is to explain the reason for the bill and to provide details of the bill and how it is to be administered. It is to give guidance and clarity on the legislation proposed, not to suggest tests that are so vague as to be unreasonable and impossible to administer.

55. It may be an improper use of Parliamentary Privilege under the guise of an amendment to the 1997 Act to make criminal allegations (which have not been the subject of complaints before the appropriate State body) against Scientology, which will be repeated in submissions made to the Inquiry into the Bill, placed on the Parliaments website and broadly circulated and publicised under the guise of absolute privilege. It is not clear to me how the allegations made in the second paragraph of the EM could be said to be made for the "safe administration of justice"[44] and therefore deserving of the absolute privilege guaranteed under the *Parliamentary Privileges Act 1987*. Resolution 9 of the Privilege Resolution of 1988 enjoins Senators to exercise their freedom of speech responsibly. The matter may be appropriate to be referred to the Privileges Committee under resolution 5 of the Privilege Resolutions of 1988.

56. If the legislation in its current form where enacted and subsequently Scientology was denied tax exempt status such a determination by a regulator may be subject to challenge on the basis that the regulator was unduly influenced by the emotive language and unsubstantiated claims made in the second paragraph of the EM.

Louise Mc Bride

Barrister-at-Law

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44 *Mann v O'Neill* (1996) 191 CLR 204 at 213, *Gibbons v Duffell* (1932) 47 CLR 520 at 528

Ground Floor

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3 June 2010

CHURCH OF SCIENTOLOGY

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