Submission on behalf of the Religious Denomination Christian Science to Commonwealth Attorney General’s Consultation on Religious Freedom

Submission confined to section 27 issues - the reasonableness of faith and reliance upon prayer

1 October 2019

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# TABLE OF CONTENTS

Overview of the submission and summary point ........................................ 3
Faith, Christian Science and the foundations of concern ............................ 3
  The Christian religion, divine law, healing and miracles of faith ............ 3
  Christian Science .............................................................................. 3
  Faith in action .................................................................................. 4
  The criminal code of Queensland .................................................... 4
  Interim summary ............................................................................. 5
The concern arising out of section 27 ...................................................... 5
  Introduction .................................................................................... 5
  The effect of the double negative and the elements ............................ 6
  Person includes many ..................................................................... 6
  Expressing and holding a belief ....................................................... 6
  Reasonableness and the exercise of discretions ................................. 7
  Having regard to all the circumstances and the reasonableness of faith .. 7
  Counselling, promoting, encouraging, or urging conduct ................. 8
Suggestions – ways forward .................................................................... 8
  There is a need for further clarity .................................................... 8
  Require conviction or at least the laying of charges ........................... 8
  Change the test from a reasonable judgement ................................... 9
  Delete the section .......................................................................... 9
Concluding comments ........................................................................... 9
Overview of the submission and summary point

1. The Christian Science Church (the Church) is supportive of the Bill but is concerned that s 27 could be read in a way that deprives it of its right to the protections the legislation is intended to provide.

2. It is concerned that s 27 does not adequately protect the freedom of persons, their family and friends, their congregations and their denominations where a lawful choice is made to rely on prayer for health needs over medical intervention.

3. The focus of this submission is on the impact of s 27 on the Christian Science congregations and the denomination, but the potential impact is more extensive.

4. All of these concerns may well be capable of resolution and the Church is hopeful that these concerns will be allayed or addressed before the legislation is enacted.

5. The submission first sets out some information about Christian Science and its practice, giving an example of how the concern might arise. It then discusses s 27 including concerns about the use of an objective “reasonable person” test to determine if that clause applies and the exercise of discretions. The submission closes suggesting a number of ways forward.

Faith, Christian Science and the foundations of concern

The Christian religion, divine law, healing and miracles of faith

6. Healing is integral to Christianity. In some expressions of faith, healing is considered the natural product of divine law, and in no sense miraculous, and in others there is a view that such healing is miraculous.

7. Indeed, the teaching of many, if not most Christian traditions, through their founders and then dating back through the creeds to the resurrection, as recorded in the Bible, look to some form of healing and a life beyond that presently experienced.

Christian Science

8. Christian Science is a Christian religion based on the Bible. It is practised throughout the world and has been practised in Australia for more than a century.
9. It is a religion that has great respect for law and compliance with it. It also recognises the important role that law plays in protecting minorities. It sees this proposed legislation as an important legal protection for it in its expression of faith.

10. Christian Science teaches that prayer and scriptural study bring an increased understanding of one’s relationship to God that results in healing of problems of all kinds, including those relating to ill health.

11. The Church has been publishing accounts of healing experiences, some of which relate to medically verified health conditions, in its periodicals for more than a hundred years.

12. Christian Scientists are not alone in having a belief that prayer heals. Other denominations also have a long history of reliance on faith for healing. The Roman Catholic Church makes a miracle a precondition of canonisation as a saint and similar.

13. There is no doctrinal prohibition on seeking medical treatment in Christian Science.

**Faith in action**

14. It follows from the above that most people who practise Christian Science are accustomed to turning to prayer rather than medical care for health problems, even in cases of serious illness.

15. This turning to prayer might be because they have had personal experiences of healing, or the healing of those close to them. It might be for some other reason which an objectively reasonable person might consider completely irrational.

16. Once that decision is made, in practice this person is likely to be supported in the carrying into effect of their decision by a partner, friends, family and possibly other church members or adherents.

17. Moreover, it is likely that an individual Christian Scientist will have voiced what he or she wants or does not want in terms of health care. The individual may have even made an advance health care directive in accordance with State law or provision for the appointment of an Enduring Power of Attorney if he or she were to become incapacitated.

**The criminal code of Queensland**

18. While there are a few potential serious offences that risk being enlivened in supporting a person on this journey the section that best illustrates the reason for the Church’s concern
in this jurisdiction of Queensland is s 285 of the Queensland Criminal Code and the related party provisions. Section 285 is in the following terms:

285 Duty to provide necessaries
It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.

19. There are 'party' provisions which make persons who help the person charged liable as if they were the principal offender. A breach of s 285 carries a maximum penalty of two years or more.

20. It follows that where a person is refusing medical treatment those around them helping could be at risk of falling within the scope of s 285 and consequently must be very careful. Christian Scientists do provide support to people in these circumstances.

21. There has not been, on our instructions, any person charged with a serious offence in this country related to Christian Scientists supporting such a person in these or similar circumstances.

Interim summary

22. Faith and reliance upon prayer is integral to the expression of Christian faith. Christian Science as a denomination teaches that prayer and scriptural study bring an increased understanding of one’s relationship to God and that results in healing. This religious teaching inherently leads to a belief in that teaching by individuals. Those individuals pray and study with a view to healing. In some of those cases individuals may also choose to decline medical treatment. Those individuals who decline medical treatment are likely to be supported by their family, family, friends, and other Christian Science adherents, and may have made their wishes known via an advance health care directive.

The concern arising out of section 27

Introduction
23. The concern is that s 27 could be read in a way that deprives the Church, a congregation or individuals involved, in the protections the legislation is intended to provide. This might
arise in circumstances where a person pursues prayer for healing and a person responsible for deciding the application of the protection of the legislation decides that the elements of s 27 have been made out using the process of reasoning set out below.

**The effect of the double negative and the elements**

24. The opening words of s 27 are drafted with double negatives. Is it intended that the section be read by recasting the double negatives as a positive? If so, the section reads that it is lawful to discriminate against a person on the ground of the person’s religious belief or activity unless certain conditions are satisfied.

**Person includes many**

25. The definition of ‘person’ can include a particular church congregation or religious denomination. This is because the definition of person in s 5 imports the meaning of ‘person’ within the Acts Interpretation Act 1901. Under section 2C of the Acts Interpretation Act 1901, an expression that is used to denote a person includes a body corporate, which may include a religious body or other religious institution. It follows in the circumstance mentioned above that an individual, a family member, friend, congregation or denomination could all be persons within the scope of s 27 and consequently the subject of discrimination if the preconditions are satisfied.

**Expressing and holding a belief**

26. The Church and its members are explicit in expressing and holding of a belief that healing flows from prayer, so conditions 27(1) and (c) are unlikely to be contested. The issues will therefore arise in interpretation and application of 27(1)(b) and in particular the meaning of:

- a reasonable person,
- having regard to all the circumstances,
- in expressing the belief, … counselling, promoting, encouraging or urging,
- conduct that would constitute a serious offence.

27. It is our client’s concern that s 27 as drafted may be interpreted to apply even in the absence of the commission of a serious offence. All that is required for a person to lose the benefits of the Act is for a judgement to be exercised reasonably. It is the judgement - that there is a connection between an expressed belief and possible serious offence. All that the decision maker will be required to show to defend the decision is that in all the circumstances there is a connection from the expression of the belief to certain conduct which he or she thought would constitute the offence and a reasonable person could form that connection. This is an overly broad and insufficient standard to apply.
28. The basis for these concerns are now explored in more detail.

Reasonableness and the exercise of discretions
29. The challenges that arise from the exercise of a discretion by a government official over the reasonableness of a decision based on religious beliefs such as the decision are not insignificant.

30. The legislation provides no guidance to the decision maker on what causal connection is required between a religious teaching and a decision based on religious belief, such as the decision by a person to decline medical assistance.

31. The Australian Charities and Not-for-profits Commission Act 2012 gives a similar power to the Commissioner established under that Act to form views and at a similar stage. In the Bill process the Senate Standing Committee for the Scrutiny of Bills, stated that it was 'not clear what is required to prove that the decision of the Commissioner is wrong or should have been made differently'.\(^1\) That issue was addressed in 2017 when the Administrative Appeals Tribunal decided the drafting placed the onus on the applicant, gave the Commissioner very broad discretions and prevented the Tribunal from considering the issue de novo.\(^2\) This Bill raises the same sort of issues but in a much more complex environment than a charity registration decision.

Having regard to all the circumstances and the reasonableness of faith
32. In having regard to all the circumstances is the efficaciousness of prayer in this case or any other matter to be taken into account? How is the decision-maker to have regard to the basis for a religious belief? What experience has the individual had with following his or her religious beliefs in the past? Clearly these are part of all the circumstances in the case set out above.

33. Is the decision maker to agree with the Australian academic lawyer Denis Ong who has asked: ‘How can it ever be possible to prove that any religious (supernatural) purpose is capable of conferring earthly (natural) benefits’?\(^3\) Does the decision-maker endeavour to engage with the evidentiary material? Does the decision-maker proceed on some other basis?

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\(^2\) Waubra Foundation v Commissioner of the Australian Charities and Not-for-profits Commission [46] and 48

\(^3\) Denis Ong, Trusts Law in Australia (3rd ed, 2007) 349.
Counselling, promoting, encouraging, or urging conduct

34. Section 27(1) applies to ‘religious beliefs expressed outwardly by a person’, whether orally or in writing. By its terms, this could include the expression of a belief that prayer heals physical ills in accordance with the theology of Christian Science.

35. While s 27 is not intended to capture a person merely stating the beliefs of a particular religion the reality, in practice, is that beliefs when stated lead to action. Arguably the purpose of almost all, if not all religious teaching is a call to action or inaction – a response of some kind.

36. Where under this section does counselling, promoting, encouraging, or urging conduct begin and end?

37. The concern is that Christian Scientists, in the expression of their desire to rely on prayer for health problems, as well as expressions of encouragement and support from family members, friends, and Christian Science adherents, might be perceived as “advocating” a serious offence when all that they are doing is supporting a person in their decision to pursue prayer for healing. Furthermore, they may be exercising that decision in perfectly legal ways, such as a decision by a competent adult to decline medical treatment or through the implementation of a validly executed advance health care directive.

Suggestions – ways forward

There is a need for further clarity

38. Further subsections could be added addressing at the concerns raised above. Those subsections could set out:

a. What ‘circumstances’ will lead to loss of the protections of the Act;
b. How religious belief is to be accommodated in assessing the outcomes that lead to a serious offence;
c. Whether and to what extent it is reasonable for regard to be had to an individual’s personal circumstances, the outcomes of reliance on prayer, and how these are to be assessed in cases such as that set out above.

Require conviction or at least the laying of charges

39. One option is to remove the discretion of the decision maker to decide what would constitute a serious offence. The provision might apply only following a conviction. Arguably a person exercising executive authority should not have to, nor be empowered

4 Explanatory Note, [289-90]
to, determine the legality or illegality of conduct independent of the relevant law enforcement powers.

40. Another option is to consider removing the discretion completely where there is an Enduring Power of Attorney, Advance Health Directive or other documentation making it clear that an adult of full capacity is exercising a legal right.

**Change the test from a reasonable judgement**

41. It is appropriate to clarify both the onus and the test to be satisfied in challenging a decision that s 27 applies. If it is intended that setting aside a ‘reasonableness’ decision requires an individual to establish that the decision was so unreasonable that no reasonable person, who was deciding the issue in a reasonable way at the relevant time could have possibly made the decision (the Wednesbury test) that should be spelt out. It is our submission that that is not an appropriate test.

**Delete the section**

42. The question should be asked whether the section is needed. If it were deleted in its entirety would the current law insufficient? We submit that it may well be.

**Concluding comments**

43. In closing we reiterate that the Church is generally supportive of the Bill. It is only concerned that it, and others, might be deprived of the Bill’s legislative protections by the ambiguities remaining in s 27. It is particularly concerned about circumstances where a lawful choice is made in favour of prayer rather than medical intervention.

44. The submission has set out a concrete example of how the section might apply that raises this concern for Christian Scientists. This concern is unlikely to be limited to Christian Scientists. As various faiths that believe in the power of prayer become aware of the potential consequences under s 27 of teaching these traditional beliefs, more denominations and religious adherents may come forward with similar expressions of concern.

45. The submission has therefore suggested some matters for clarification and a number of ways forward.

46. The Church appreciates the opportunity to make this submission and trusts that this submission assists in improving this legislation.
With Compliments

Dr Matthew Turnour