Submission on behalf of The Presbyterian Church of Queensland to the Commonwealth Attorney General regarding Religious Discrimination Bill 2019

Concerning:

❖ S.116 and the Objects
❖ Commercial activities, and
❖ The Charities Act, marriage and Public Policy

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The Presbyterian Church of Queensland, Covenant Communities and Religious Freedom

The Presbyterian Church of Queensland (‘the Church’) is a Protestant, church established by Letters Patent and supported by Queensland legislation enacted in 1900 and 1971. It is distinguished from many other Christian denominations by remaining ‘firmly committed to the Reformed faith as the most consistent presentation and outworking of Biblical Christianity’.

The reform theology is sometimes known as covenantal theology. The idea of covenant, and the idea of covenant relationships, underpin the points made in this submission.

At the heart of covenant theology is a belief that God calls people into a community – of faith. Put inversely it is a theology that focuses on building and expressing community rather than individual expressions of faith. What that means in practice is that it forms expression of community as its primary expression of faith and invites others to join it – on its terms. That is, if it establishes a church for people to worship, or school to educate its children, or an aged care facility to care for ageing Presbyterians, it welcomes the wider community to join it, provided, and this is the critical proviso, those who participate accept that they do so as a part of a communal expression of the covenantal faith to which they adhere.

This recognition of communities of faith that need space independent of the state and others in the wider community has a long history dating back, at least to the Reformation.

The Presbyterian Church arose out of the Reformation. It follows that the church is generally supportive of the Bill. As an independent Protestant church with its roots tracing back to the Reformation, it has a deep appreciation of the need to protect religious freedom. It is in that broader context that the three subject areas explored in this submission are made.

The Objects, s.116, covenant communities and S.10

Neither the Bill nor the Explanatory Note address the way in which the Bill interfaces with section 116 of the Constitution. The Explanatory Note accompanying the Exposure Draft of the Religious Discrimination Bill sets out in some detail the constitutional foundations for protection of religious freedom in the Religious Discrimination Bill 2019. It does not though engage the one section of the Constitution that expressly addresses religious freedom, s.116. It should. Section 116 is in the following terms:

116 Commonwealth not to legislate in respect of religion
The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The Bill and section 116 both have the same object, the protection of the rights and freedoms of citizens to practice their religion free of interference. Both confront the same challenge; mapping the limits of religious freedom. The focus of the Bill is mapping where the limits of religious freedom lie when balancing competing interests between citizens. The focus of the Constitution section 116 is that same boundary, expressed in contest with government. Given this overlap section 116 should be engaged. It should be engaged because it could be read as both a threat to, and in support of, the Bill.

The threat is that section 116 might render the Bill or parts of it beyond the power of the commonwealth parliament. The heading to section 116 states that the intention of the section is to prohibit the commonwealth from legislating with respect to religion and the text states that if any law amounts to a prohibition on the free exercise of religion that law is beyond parliament’s constitutional power.

The origins of the section are in a common-law jurisprudence preserving space for religious expression. That jurisprudence has a history that is traceable through the first chapter of the Magna Carta Libertatum to the tenth century declaration by King Edgar that ‘the church must have its law’. Most of the provisions of Magna Carta have been repealed but the first chapter, which guarantees the freedom of the English Church, remains in force – at least in England and possibly in Australia. If the Bill impinges on religious freedom it is at risk of being invalid based on section 116 read in the light of this common-law jurisprudence.

Section 116 might also be read as providing support for the legislation, both directly and indirectly. As to direct support, it might be argued that the purpose of the Bill is to carry the intent expressed in section 116 into a more detailed, tangible expression. Indirectly, as section 116 is a statutory expression of the common-law jurisprudence, that common-law jurisprudence underpinning section 116 might inform the development of the jurisprudence for the Bill. For example, section 116 is clearly intended only to act as a shield and not a sword. The Bill is intended to operate similarly. The constitutional jurisprudence might, then, provide guidance in the interpretation of the Bill on this matter. More generally, as both section 116 and the Bill both endeavour to map the limits of religious freedom the overlapping issues might mean that the common-law jurisprudence and jurisprudence on section 116 could inform the interpretation of the provisions of the Bill.

Parliament could provide significant assistance to those who must interpret the Bill by some commentary on the convergences and divergences between the Constitution s.116 and the Bill. It might also be appropriate to make reference to s.116 in the Objects. This is because the

2 9 Geo IV c 31 s 1; Statute Law Revision Act 1873 (Eng.&W).
3 See Statute Law Revision Act 1872 (Eng.&W). Its enforceability in other jurisdictions will be dependent upon the rules governing the reception of English laws into those jurisdictions and subsequent enactments within those jurisdictions. See B H McPherson, The Reception of English Law Abroad (2007) 8, 205.
protection of space for religious communities is clearly part of the Object of the Bill, particularly as expressed in section 10 of the Bill.

As the intention of the Constitution and the Bill is to protect religious freedom the Church’s first submission is that the Objects be strengthened by a new first Object that references the protection granted by section 116 of the Constitution and links to it, as a more general expression of the ideas that find more concrete expression in section 10 of the Bill. Section 10 of the Bill makes it clear that it is intended that the legislation will protect faith communities and therefore some reference to this in the Objects is appropriate.

Commercial activities

One of the first things the coalition did following its election to government in 2013 was announce that it would abandon many of the charity law ‘reforms’ that the labour government endeavoured to introduce. One of those reforms was a tax on ‘commercial activities’ by charities. The definitional challenges around the concept of ‘commercial activities’ are immense. So while there are ideological arguments about how the sector should be funded and whether or not taxes should be imposed upon charities, there was high levels of agreement that distinguishing charitable activities from commercial activities is, in a practical sense, very difficult and in some cases impossible.

The issues are compounded by the cases distinguishing (quite properly) purposes from activities. A corporation running a funeral home conducted by a religious institution, is pursuing a charitable purpose the High Court held in the Word Investment case.\(^4\) In the Central Bayside case the High Court held that government purposes and charitable purposes can overlap substantially and it is reasonable to expect that commercial and charitable activities can similarly overlap. That will make interpreting the scope of the section difficult.

The issues are also compounded by the ‘trading corporations’ jurisprudence setting a very low threshold for a charity to be a trading corporation. In \(E v\) Australian Red Cross Society (1991) 27 FCR 310, the Federal Court of Australia found the Australian Red Cross Society, the NSW Division of the Society and the Royal Prince Alfred Hospital to be trading corporations. The question will be whether, if a charity is a trading corporation it is pursing commercial activities.

There are officials within Treasury who can assist the Attorney-General with understanding why the coalition abandoned the taxation of commercial activities by charities and of the anticipated complexities of distinguishing charitable from commercial activities.

There are also broader policy concerns raised by the proposal. The Presbyterian Church has, historically kept its commercial activities within the church. All aged care provision is an expression of the legal entity that is the church. It had a school that was separately incorporated

but it has rolled the church back into the church also. There are, though, some entities separately incorporated which are wholly owned by the Church. It follows that the limitations set out in s 10 might require it to reconsider its position on separate incorporation of these entities.

For example, one of the separate entities is a provedore to the aged care facilities and also supplies to the general public. The Church is aware of the risk that it might be approached through that corporation to bake a cake with the inscription ‘support gay-marriage’ when the Church does not support gay marriage. If it were the case that by making the provedore work a ministry of the Church rather than leaving it separately incorporated it would be more likely to be able to avail itself of the protections under the Bill it may well decide to roll the provedore work back into the Church.

There are, then, wider public policy implications that may flow from this proposed carve-out if religious institutions decide to consolidate such bodies within their Church. Treasury may be able to also provide some comment on these wider policy matters.

In summary then, one of the reasons why the government decided to abandon ‘reforms’ to introduce a tax on ‘commercial activities’ undertaken by charities was because distinguishing commercial activities from charitable activities is very difficult. The practical effect of the commercial activities test may well be that it leads to a restructure of the sector to bring commercial activities within churches and that has public policy implications which ought to be considered.

The Presbyterian Church’s submission on this issue is that the reference to commercial activities be deleted. The definitional problems cannot be addressed adequately and should not be legislated. The structures the Church takes should not have to take into account access to its right to freedom of religion.

Amendments to the Charities Act and ‘public policy’

The Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 proposes to amend the Charities Act 2013 by adding the following to the end of s 11:

(2) To avoid doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life, is not, of itself, a disqualifying purpose.

11 Disqualifying purpose

In this Act:

**disqualifying purpose** means:

(a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
Example: Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.

Note: Activities are not contrary to public policy merely because they are contrary to government policy.

(b) the purpose of promoting or opposing a political party or a candidate for political office.

Example: Paragraph (b) does not apply to the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies).

Note: The purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country may be a charitable purpose (see paragraph 1(l) of the definition of charitable purpose in subsection 12(1)).

The fact that there is enough concern for ss. (2) to have even found its way to this stage suggests that there is a fundamental problem that needs to be considered. This raises two issues the first relates to ss 2 and the second the broader concern.

Our client is generally supportive of the insertion of ss 2. It points out, though, that it is to very narrow effect. The litigation engaging Christian worldviews has moved beyond the definition of marriage to matters of gender. Litigation is underway against religious schools that hold to a view that God made people male and female biologically based on a Christian worldview. The current ideological battlefield is whether Christian institutions such as schools can assert a traditional view that God made people male and female, gender not being fluid, but corresponding with their biological sex. So the more fundamental issue then, is whether the intent of the section is to provide a space for the expression of a traditional Christian worldview of which marriage has been the most publicly contested of the issue or whether it is only to protect the narrow issues of a view of marriage. This leads to the second issue.

The concept of ‘public policy’ is not a difficult one where there is a relatively homogeneous society sharing a relatively unified worldview. In an increasingly diverse, commonwealth comprising not only different states, but very different communities, what is ‘public policy’ can become a very contest idea.

What this means in practise, in the case of the Charities Act 2013 which will be interpreted by the Australian Charities and Not-for-profits Commission is that a commonwealth official, located in the electorate of Melbourne will decide at first instance whether to register or de-register a charity based on their understanding of public policy. Is it public policy for a school conducted by the Presbyterian Church in Queensland in Toowoomba to be a space independent of the wider community for Presbyterians to express their world? Is it public policy to require Presbyterians to treat a student who enrolled as one gender in their school as if they belong to another gender contrary to the school’s theological view of gender if so requested? The entitlement to registration as a charity of a Presbyterian school may turn on the construction taken by that commonwealth official of public policy in that disqualify section of the Charities Act.
It is submitted that the simpler and more comprehensive solution is to delete the words ‘or contrary to public policy’ from the ACNC Act s. 11 rather than add the proposed amendment.

Concluding comments

The Presbyterian Church arose out of the Reformation and it is generally supportive of the Bill. It is very keen to see its right to express its faith as a community not merely as individuals enshrined in the Bill.

As neither the Bill nor the Explanatory note address the way in which this legislation interfaces with section 116 of the Constitution the Church submits that it should. It submits that Section 10 of the Act makes it clear that it is intended that the legislation will protect faith communities and therefore reference to this in the Objects is appropriate.

Commercial activities cannot be adequately defined independent of charitable activities and the legislation should not be enacted with these definitional problems embedded. As a matter of policy the legal structures the Church takes for its entities should not have to take into account access to its right under this Bill but that might be the practical effect of this qualifier. Accordingly it has been submitted that the reference to commercial activities should be deleted.

The proposed amendment to the Charities Act 2013 by the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 is supported but it is submitted it is inadequate. It is submitted that a more comprehensive response is to delete the words ‘or contrary to public policy’ from the ACNC Act s.11 rather than add the proposed amendment.

With Compliments

Dr Matthew Turnour