17 June 2010

Dear Committee,

The Tax Laws Amendment (Public Benefit Test) Bill 2010 (Bill) poses a serious threat to the rule of law in Australia by seeking to subject the Church of Scientology (Scientology) to the unfettered discretion of the Executive government to revoke its tax exemption and thereby significantly hamper its operation. In addition, the Bill is unconstitutional on the ground that proposed laws imposing taxation shall not originate in the Senate.

Arbitrary Interference

The rule of law which pervades our Constitution was succinctly articulated by British Jurist AV Dicey as:

"...no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.".

One of the principles embedded in our Constitution to prevent arbitrary interference with fundamental rights by totalitarian rule is the separation of powers doctrine. This doctrine stipulates that three major organs of the governmental system each perform a single and different function: the Legislature enacts laws of general application; the Executive applies those laws in individual cases; and, in the event that a dispute arises about the meaning or application of a law, the dispute is resolved conclusively by the Judiciary.

By introducing this Bill, Senator Xenophon is attempting to violate the separation of powers doctrine by arbitrarily interfering with Scientology and other Religious and Charitable institutions' operation.

Senator Xenophon already assumed the role of the Judiciary when he announced, under the protection of parliamentary privilege, before the Senate on 17 November 2009 that:

"Scientology is not a religious organisation. It is a criminal organisation that hides behind its so-called religious beliefs"

without an official police investigation, without a trial, and based on the hearsay evidence of a handful of disgruntled ex-members.

Indeed, contrary to Senator Xenophon's personal view, Scientology is a religious organisation as held by the High Court of Australia in 1983.

Having already assumed the role of the Judiciary, it seems Senator Xenophon now has no reservation in assuming Legislative and Executive power to exercise totalitarian control over Scientology.

The Bill seeks to delegate to the Executive (Commissioner for Taxation) unfettered discretion to select the criteria upon which Scientology is considered to benefit the public at large. This is inherently a Legislative and not Executive function. By additionally empowering the Executive to revoke Scientology's tax exemption if it subjectively considers Scientology's practices undesirable, based on criteria it itself chose, the totalitarian impediment to Scientology's operation envisioned by Senator Xenophon has indeed been realised.

An example of an Australian case in which the delegation of such broad decision-making powers to the Executive government was held to be unconstitutional is Turner v Owen.

In this case, the Full Federal Court held that a provision of Regulations which prohibited the importation of "[g]oods 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 which 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."

Similarly, this Bill is unconstitutional on the ground that it delegates to the Commissioner of Taxation the broad, unfettered discretion to revoke the tax exemption of any Charitable or Religious institution it deems to not benefit the public at large based on a test which it itself decides.

Free exercise of religion

Pursuant to section 116 of the Constitution:

"The Commonwealth shall not make any law...for prohibiting the free exercise of any religion...".

This Bill is clearly an attempt to circumvent section 116 of the Constitution by empowering the Commissioner of Taxation to impair and impede rather than outright prohibit the activities of Scientology. With so few fundamental rights expressly or impliedly protected in the Constitution and no Australian equivalent to a Bill of Rights, it is essential that Parliament not allow yet another fundamental right to be eroded through such a basic method of circumvention. Such a tactic could render section 116 useless and potentially open the gate to an all out assault on religion generally.

Proposed Laws Imposing Taxation Shall Not Originate in the Senate

Pursuant to section 50.5 of the Income Tax Assessment Act 1997 (Cth), Scientology is a religion and thereby exempt from income tax.

Pursuant to section 53 of the Australian Constitution, "[p]roposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate." (emphasis added)

By imposing income tax on charitable and religious institutions which would otherwise be income tax exempt, the Bill infringes section 53 of the Constitution.

This view is supported by the decision of Menzies J of the High Court of Australia in Re Dymond in which he held 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."

In addition, this Bill is contrary to the view expressed in Odgers Australian Senate Practice that:

"... bills which are stated to "close a loophole" or "correct an anomaly", but which in fact impose tax where none was imposed before, even if the tax has been collected, are bills imposing taxation (Radiocommunications (Transmitter Licence Tax) Amendment Bill 2002; Bankruptcy (Estate Charges) Amendment Bill 2002)."

The Bill is therefore unconstitutional and should not originate in the Senate.

Conclusion

Whatever Senator Xenophon's private motives for ferociously utilising the tools of Parliamentary privilege, the media, government departments and now legislation to suppress the activities of Scientology, it must be recognised that Senator Xenophon is not above the law and must not be allowed to erode the few Constitutional safeguards Australia has left.

A Bill of this nature could set a dangerous precedent in Australian, and indeed the world, for the erosion of any religious or charitable institution deemed undesirable by a select few in power. For good reason, this Bill is unconstitutional and should be recognised as such and rejected.

The questionable conduct of Senator Xenophon in his relentless campaign against the Church of Scientology should be referred to the Parliamentary Standards Committee and his private motives and interest in this campaign subject to an official investigation.

Yours Faithfully,

James Graham LLB (Hon)