Dr Stephen Mutch PhD LLB
Honorary Associate
Modern History, Politics and International Relations
Macquarie University
Sydney, Australia

6 June 2010

Mr John Hawkins
Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hawkins

I refer to your invitation to make a submission to the Senate Economics Legislation investigation into the Tax Laws Amendment (Public Benefit Test) Bill 2010 proposing the introduction of a statutory requirement that religious and charitable organisations meet a public benefit test to qualify for tax exempt status. I am pleased to respond to your invitation as my 2004 doctoral thesis, undertaken at the University of New South Wales, attempts to provide some practical ideas for the ongoing resolution of some of the important public policy issues relevant to the matter under investigation.

The Bill seeks to provide statutory guidance to prevent some entities from receiving income tax exempt status under Commonwealth law and to disqualify other entities from receiving income tax exempt status if the aims and activities of the entity do not meet the public benefit test, the general principles of which are defined under the Bill. Other provisions relating to the manner in which the test is to be applied are to be provided in regulations made by the Minister.

The explanatory memorandum to the Bill refers to serious concerns raised by the sponsor of the Bill, Senator Xenophon, about the activities in Australia and the treatment of Australian citizens both here and abroad by the Church of Scientology. These include allegations of coerced abortions, false imprisonment, breaches of Occupational Health and Safety Laws, stalking, harassment and extortion. It is noted that examples of things that might be detrimental or harmful, and hence to be included in the proposed regulatory framework for the Bill, would be activities dangerous to mental or physical health, the promotion of hatred or violence and restricting a person's freedom.

Although the memorandum refers specifically to the Church of Scientology as a possible example of an entity whose income tax exempt status might warrant closer scrutiny, the overall objective of the Bill is generic; to more effectively regulate the Not-For-Profit (NFP) sector with a view to weeding out a very small minority of groups which do not meet acceptable community standards expected of entities receiving the privilege of income tax exempt status. The Bill provides both a disincentive against poorly behaving groups and a positive incentive for groups to improve their behaviour.

In the proposed Bill Senator Xenophon seeks to strengthen the public benefit test applicable under the Common Law of Charity by codifying it and requiring that the benefit must be to a 'significant' section of the public (rather than a 'sufficient' section), by noting that the 'benefit must be balanced against any detriment or harm', and ensuring that the test is applied to religious institutions as well as religious charities. I note that the Sheppard Inquiry recommended the merger of the category of 'religious institution' into that of 'altruistic entity'. This might be acceptable if an altruistic religious entity is defined to be one that is beneficial rather than harmful to people within an organisation – and is not deemed to be harmful to those outside the organisation!

I support in particular the effort by Senator Xenophon to ensure that any supposed benefit of any NFP entity is balanced against evidence of harmful conduct. This is the piece in the puzzle where the present regime seems most unsatisfactory from an administrative perspective. Possibly (subject to consultation and clarification with the ATO) the public benefit test could be made applicable to both religious institutions and charitable entities (including religious) if the words 'significant section of the public' were replaced with 'sufficient section of the community', in that this allows a broader scope to entitle smaller groups with some mutual benefit - which might in a pluralistic society be seen as an overall public benefit. (In my 2004 thesis I note the ATO example of a long standing shrine run by an association composed of a group of families which qualified as a religious institution but not as a religious charity). However, all exempt groups should be absent the type of harmful conduct referred to by Senator Xenophon and should be subject to specific, transparent regulatory oversight in this regard.

So there might be a relevant distinction worth preserving between those entities pursuing activities with an external dimension and those focused internally; the former requiring a statutorily defined public benefit (and the absence of internal and external harm) and the latter requiring a positive internal ethic properly defined (and an absence of internal and external harm). This might be an efficacious distinction in light of s. 116 of the Australian Constitution in that it would preserve basic religious freedoms with a minimum of regulatory interference (which should be transparent and codified) and at the same time imposing possibly stricter and more transparent regulatory controls on the external works of religious groups. In this respect Senator Xenophon has provided an important public service by highlighting the inscrutable nature of the ATO qualifying process, upon which this inquiry should shine some light. Indeed, I suspect that officers of the ATO would welcome greater political guidance on the administration of definitions and political support for the decisions they need to make. It should also be noted that regulatory control of religion is not an affront to religious autonomy, but rather a

practical necessity in an age of multi-faith pluralism, through which the government can help to protect the ethical integrity and public reputation of religious faiths.

In my opinion none of this would be contrary to s. 116 of the Constitution and the application of the definition of religion derived from the 1983 Scientology decision – and I would also submit that the 1983 decision should not in any event be given the uncontested, authoritative status is appears to have been afforded. (For example, the ATO operates on a one-size-fits-all definition derived from that case and in a letter I received from the PM it is stated that 'Scientology is recognised as a religion in Australia – *a fact established* by the High Court in the Scientology case – my italics). Although it has been claimed by the Church of Scientology that the 1983 decision provides an 'ethically neutral' definition of religion, I refer in my doctoral thesis to a New Zealand case where the presiding judge inferred a positive internal ethic as a definitional requirement from the Australian decision. It should also be noted that the 1983 decision was an appellate decision rather than one decided under the constitution jurisdiction of the Court, even though the Court attempted to be 'helpful' by linking the definition under appeal to s. 116. For a detailed examination of why I think the 1983 decision was questionable and should not be taken as 'Gospel' - I enclose a copy of my 2000 dissertation entitled 'From "Cult" to "Religion"'.

There are two basic approaches to be taken with respect to access to the privileges afforded by governments to religious organisations (noting that individual religious freedom might entail some need to fulfil this in company with others). One is to adopt the approach of exclusion by definition. The other is to adopt a widely (some might say 'wildly') inclusive definition – which is then subject to exclusions on the grounds of public policy. Following the 1983 Scientology case, Australian administrators seem to have adopted the latter definitional approach - but have perhaps been hesitant to apply exclusions because of fears that this might conflict with s. 116 – even where that section does not apply (as in the Australian states). Much of my 2004 doctoral thesis was devoted to an examination of whether s. 116 would impact upon my proposal for a definitions/adjudicative tribunal to sort the wheat from the chaff. I came to the reasonably comfortable conclusion that the High Court would be amenable due to a sensible tendency to read down the section! For your information I attach my article entitled 'Cults and Religious Privileges in England and Australia: Can the Wheat be Separated from the Chaff?'- setting out my reasoning. The title of my 2004 thesis is 'Cults, Religion and Public Policy: A Comparison of Official Responses to Scientology in Australia and the United Kingdom', a copy of which is also provided herewith.

Research for my thesis on official responses to a highly controversial 'cult' (or 'new religious movement') led me to examine the relevance to such groups of the regulation of NFP organisations. The Henry Report on Australia's Future Tax System accurately notes that 'the tax concessions available to NFP organisations are complex and do not fully reflect community preferences', and further that 'the regulatory framework for NFP organisations is inconsistent and opaque'.

I do not support the Henry Report's call for a full-blown national charities commission, which in my view could result in the establishment of a large bureaucracy without necessarily addressing the discrete problems raised by the draft bill under examination. It is unnecessary to establish a national charities commission dealing with all regulatory aspects of the Third Sector when the gate-keeping/definitional functions should be properly exercised by an independent quasi-judicial or judicial body and the on-going regulatory functions could be continued by the ATO – which is already properly supportive of the sector.

My own view on this was arguably supported by the ATO in its submission to the 2001 Sheppard Committee, where it was noted that 'administration would be better served by a single, *independent common point of view of decision making on definitions* leading to conclusions about whether organisations are charitable or non-profit, such as occurs with the Charities Commission in the UK for example' (my italics). This should not be interpreted as support by the ATO for a full-blown Charities Commission, but as recognition of the discrete nature of the gate-keeping function for the sector, which might be undertaken by a more modest proposal. In my view these definitional/gate-keeping functions are judicial in nature and should properly be exercised by an adjudicative tribunal established to determine definitions (and exclusions and disqualifications) for the entire Third Sector (initially for Commonwealth matters but ultimately nation wide), including religious charities and religious institutions. The establishment of a dedicated tribunal would provide a nice (albeit partial) solution for the types of concerns raised by Senator Xenophon and other Senators in the period leading up to the drafting of the proposed Bill. I say partial solution because my thesis proposal would deal with Third Sector organisations rather than for-profit organisations, and Senators might wish to contemplate the establishment of a Prime Ministerial Task Force or similar initiative as a supplementary measure.

Having spent some time researching in the field of official responses to cults, sects and new religious movements, I am disappointed by the failure of policy makers to impose stronger regulatory controls on the Third Sector – and in particular those groups that qualify as religious organisations under an extremely inclusive (and arguably erroneous) administrative application of the definition of 'religious institution'. In a society where there is increasing religious diversity, public confidence can only be maintained in the sector with adequate and transparent regulatory oversight to ensure that privileged organisations operate for the public benefit, or at the very least for the benefit of their members - rather than the oppression of them and the personal gain of those in control.

However, I am heartened by the extraordinary efforts of Senator Xenophon and by the apparent goodwill of those Senators who have allowed this inquiry on the Bill to proceed. I would urge Senators to take note of the serious concerns raised in good faith by their colleagues and to deal with this as a non-partisan issue. Having been a parliamentarian at both state and federal levels in a former life, I am well aware of the political sensitivities raised by the issues under examination. In my academic research I have attempted to look at public policy issues with an understanding that proposed solutions must be realistic. In this instance the partial 'solution' or framework in which solutions can be worked out on

an incremental basis for the Third Sector should ideally be acceptable to all political parties and receive on-going support at the highest level of the political executive.

In this respect I note the existence in France of a high level mission operating under the direct supervision of the Prime Minister, the *Mission interministerielle de vigilance et de lutte contre les derives sectaries* (MIVILUDES). The French have shown a bi-partisan determination to come to grips with problems presented by high-demand *sectes* or cults. Knowing full-well the dangers presented to those seen to be critical of such groups, including those officials charged with oversight responsibilities, the French government provides support and security for this inter-ministerial mission operating in a controversial area. It is interesting that in its report the Sheppard inquiry referred to a number of countries in a limited exercise in comparative public policy, but did not look to the French experience. This is perhaps understandable because there is a tendency to look to systems that are deemed to be similar for ideas, and often common law countries are our first port of call. However, in this instance the French government has shown compassion for the victims of sectarian groups (cults) and has sought to redress the serious power imbalance between well resourced, tax-exempt cultic groups and their victims. The French possibility of administrative dissolution should be examined by this committee to determine whether it might prove efficacious in our context – and a continuing examination of approaches abroad should be part of the remit of an ongoing tribunal or commission (and/or a Prime Ministerial Inter-ministerial Task Force mentioned above) tasked to deal with and/or advise on these issues. I know that MIVILUDES would be only too happy to assist Senators in their inquiries.

At present it is difficult to determine the levels and extent of suffering in our communities occasioned by the intolerant behaviour of some cultic groups. There are numerous public authorities to whom complaints might be made with respect to particular organisations, but no system to my knowledge by which complaints are formally referred for a determination of the extent and degree of seriousness of complaints made (relative to the size of an organisation), and leading to some sanction or administrative consequence. Senator Xenophon has raised numerous instances of individuals complaining about the treatment meted out to them in one high demand group operating in Australia – which should be gauged against the size of the organisation in Australia and if proved detrimental to individuals and/or society, should lead to some sanction. From time to time we have media exposés of aberrant cultic behaviour – then the issue fades from public attention until the next inevitable eruption. From a political perspective the issue is therefore relevant on an intermittent basis. It can be managed politically by expressions of sympathy for victims and nothing further. For an ongoing solution to be instigated requires acknowledgement of a problem and genuine empathy from Senators for the plight of victims – as well as a modicum of political good-will and political courage.

In 1982 the Hon Haddon Storey noted that:

… *there is a large file* in the Attorney-General's Department of complaints about all sorts of sects or pseudo-sects in this State, and about the *harm that can be caused to*

***people* who allow themselves to be "sucked in" by them, to their detriment. *No country that I know of has been successful in finding a formula* for dealing with these sorts of problems. The *Standing Committee of Attorneys-General has discussed it and was unable to come to any conclusion* but that, provided the law is complied with, these sorts of sects should be allowed to carry on their practices in the *interests of speech and association* (my italics).**

I refer to this quotation because it encapsulates the dilemma of policy makers and a rationale for inaction. First, the existence of harm is acknowledged and a level of complaint confirmed. It is complained that no other country has found a formula for dealing with such complaints. It is noted that Attorneys-General had pondered the problem but had decided not to act because of some general concern about freedom of speech and association. So in the end there remains a file of complaints sitting in limbo – with those in public service washing their hands of the responsibility to address the cries of anguish contained therein.

The point I make is that things have changed little in Australia - but some overseas countries have found partially successful formulas for dealing with this problem. My 2004 thesis looked with approval at the adjudicative mechanism exercised by the Charity Commission for England and Wales to determine public benefit and definitional issues – even though I thought that this function would be best undertaken by an adjudicative tribunal separate to the body administering and supporting the charitable sector. In addition, I have noted above the operation in France of MIVILUDES – which is also a model that should be looked at by Senators because it is empowered to deal with and provide advice on sectarian abuses across all governmental sectors. Further, I note that the Standing Committee of Attorneys-General Model Criminal Code Officers Committee recommended in September 1998 that there be a criminal office of recklessly or intentionally causing harm to a person's mental health, including 'significant psychological harm'. I note in my thesis that:

The Committee had canvassed in a discussion paper 'the emergence of so-called "cults" and obsessive small religious groups who are said to employ high pressure "persuasive" techniques which amount to mental or emotional coercion'. Representatives of the Church of Scientology had 'produced a very lengthy submission responding to the proposed offence, arguing that the "activities of religious groups should not be included but rather the activities of 'de-programmers' should be". The Committee observed that 'the manifest inconsistency of such an approach did not appear to occur to them', noting that; 'freedom of religion' is not freedom, for example, to defraud, nor is it freedom to cause significant psychological or psychiatric harm to any person'.

The occurrence of such behaviour in for-profit organisations might attract Senators to a high level inter-ministerial commission (or task-force) based somewhat on the French model – as well as an adjudicative/definitions tribunal for Third Sector entities. The NSW Deputy State Coroner found last year that the death of Sydney woman Rebekah Lawrence was linked to her involvement in a self-help course known as the Turning

Point. The type of psychological practices involved in such courses can be found in both the for-profit and not-for-profit sectors – with religious designation often being pursued as a cloak to shield perpetrators from scrutiny because of official reticence to interfere with religious group autonomy. Someone of the calibre of Australian of the Year Professor Pat McGorry would be an ideal person to head up a Prime Ministerial Task Force to recommend on nation-wide strategies for dealing with these issues. Indeed, it is refreshing to see that Professor McGorry and some of his colleagues in the field of mental health have spoken out on the concerns raised by Senator Xenophon. Senators might not fully appreciate the fortitude this takes and the change of tide that this willingness to speak out represents.

The types of groups we are concerned with here do not respond kindly to criticism. In 1992, 1993 and 1994 I spoke at length in the NSW Legislative Council detailing a litany of complaints about a personal development course known as KENJA – an organisation set up by Ken Dyers, a former Scientologist, who utilized techniques borrowed from Scientology. (24/11/1992 ADJ Kenja Cult; 22/04/1993 Cult Activity in NSW & again after interruption 22/04/1993 Cult Activity in NSW; 15/03/1994 Governor's Speech: Address in Reply – all accessible online through NSW Hansard). In the course of my parliamentary activities I interviewed girls who had been sexually assaulted by Ken Dyers. After I referred these complaints to the NSW Police, Dyers was charged on a number of counts. I was called as a witness in the proceedings. In an attempt to attack my credibility (the matter was raised in Court) and in an effort to intimidate me, I was accused of indecent assault by a woman in the Kenja organisation. The allegation was entirely concocted. The episode was recently featured in an article reporting that a former Kenja member has now signed a statutory declaration that the woman involved had admitted to him that the allegations against me were entirely made up at the instigation of Dyers and another. In the article the mother of the former cult member also confirmed that the accusation was fictitious. (Tim Elliott, 'Fighting dirty against a cultbuster', *SMH* 27 February 2010 – which also details some of the other harassment I have been subjected to). Dyers managed to escape justice on a number of charges and had one conviction overturned by the High Court – the matter was returned for re-consideration by the NSW DPP. After he was again accused of numerous further assaults on young girls and was to face further charges, Dyers killed himself in 2008. Suicides and missing persons have also been connected with the group. Kenja featured in an article written by Professor Robert Manne entitled 'The Unknown Story of Cornelia Rau' (*The Monthly*, September 2005), which makes harrowing reading.

In the preparation of my parliamentary speeches concerning Kenja I consulted a distinguished academic connected with an important university. Although the academic generously provided me with a detailed professional assessment of the psychological consequences of the Kenja form of 'processing', which I tabled in Parliament, in particular because of the Scientology connection with Kenja the academic was adamant that the opinion must remain absolutely anonymous. I am in no doubt that this was a sensible attitude to take at the time. I noted then that a number of professionals I had consulted would be prepared to give evidence to a parliamentary committee - but only on condition that it would be strictly in-camera. As with those former members of Kenja

who gave me detailed information in confidence (and another senior academic in the field of education who initially supported Kenja and then thoroughly recanted in a confidential letter to me), any critic of Scientology is subjected to a 'fair game' policy - which Scientology protests has long been abandoned. Professionals in the area of psychology and psychiatry have been particularly concerned not to attract personal attacks which could prove damaging to their careers, or vexatious litigation which could destroy their financial security.

The seeming impotence of authorities to adequately deal with serious allegations raised concerning a few highly intolerant and harmful organisations utilizing damaging techniques of mental manipulation, often run for their own benefit by criminal or mentally unstable individuals, continues to astonish me. I hope that Senators will determine that there is sufficient, serious concern raised about the activities of some high demand groups (which sometimes claim tax-exempt religious status but sometimes do not) to support Senator Xenophon's Bill as an effective first step which should be enacted without delay. I would urge Senators not to be thwarted by expressions of concern (however sincere these might be) mixed with entreaties for delay and promises of more comprehensive action in the future. Despite the best of intentions, such promises can turn to dust.

Yours sincerely

Stephen Mutch