

Submission to the Review of the
Australian Charities and Not-for-profits
Commission (ACNC) legislation

Adventist Development and Relief
Agency Australia Ltd, Seventh-day
Adventist Aged Care, Compassion
Australia and Anglicare Sydney

Contents

Executive Summary	4
About the Lodgers of the Submissions.....	4
ADRA.....	4
Seventh-day Adventist Aged Care.....	5
Compassion Australia	5
Anglicare Sydney	6
The Concern.....	7
The Solution	8
Relevant Associational and Religious Freedoms	9
Solutions Drawn from the Law’s Understanding of Faith and Action	9
Overview of the Relevant Common Law Authorities	11
Policy Rationales Supporting this Conclusion	15
The Amendments	16
Part I – The Concern and its Context.....	22
Part II – The Law	26
What is the applicable test in anti-discrimination law for the determination of whether a body is a religious body?	26
The High Court.....	26
Victoria.....	27
Is the ACNC correct when they state that a religious PBI may have a religious motivation, but not a religious purpose?	30
Justice Dixon’s Judgement in Roman Catholic Archbishop of Melbourne v Lawlor.....	30
Does ejusdem generis apply to Dixon J’s reasoning?.....	32
Thistlethwaite	38
London Hospital	38
Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council	39
Justice Mahoney’s Judgement in Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council.....	40
Glebe Administration Board.....	42
Dominican Sisters	43
Walsh v St Vincent de Paul Society (No. 2).....	43
OV & OW v Wesley Mission	45
CYC v Cobaw.....	47
Application.....	48
Conclusion	50
The Dominant Purpose Test for PBIs	53
Reasons This Conclusion Should be Reached in Policy.....	54
Part III - Amendments	56
The State of Current State and Commonwealth Anti-Discrimination Law	56
The History of the SDA Exemption.....	57
The Meaning of Religious Body	60
Summary of Statutory Tests	62
Summary of Judicial Tests	63
The Array of Charitable Purposes that may be undertaken by Faith Based Bodies.....	65

Proposed Amendments	68
Amendments to the SDA	68
Amendments to the Charities Act	69
Amendment to the ITAA 97	70
Amendment to the FBTA	71
Retrospectivity	71
Application to Faith-Based Charities	72
Contrary Commonwealth and State Based Laws	73
The Applicable International Human Rights Law	76
The Age Discrimination Act	83
Annexure A	84
Queensland	84
New South Wales	84
Northern Territory	85
South Australia	85
Victoria	86
Western Australia	87
Tasmania	87

Executive Summary

About the Lodgers of the Submissions

1. We welcome the opportunity to make submissions to the Review of the Australian Charities and Not-for-profits Commission (ACNC) legislation. These submissions are submitted on behalf of Adventist Development and Relief Agency Australia Ltd (ADRA), Seventh-day Adventist Aged Care,¹ Compassion Australia and Anglicare Sydney.

ADRA

2. ADRA is the official humanitarian agency of the Seventh-day Adventist church, part of the global ADRA network which operates in more than 120 countries worldwide. ADRA implements a range of community development projects in Africa, Asia and the Pacific, and provides vital humanitarian assistance when disasters strike. In Australia, ADRA supports major projects including community centres and women's refuges, as well as 30 Opportunity Shops around the country. Open Heart International, which merged with ADRA Australia in 2016, sends medical professionals overseas to mentor local medical staff and conduct life-changing surgery to hundreds of patients each year, providing the opportunity for those living in developing countries to receive the specialised healthcare they deserve but cannot access.
3. Financially:
 - (a) In the 2016-17 financial year, ADRA spent \$20.2 million to help people thrive in 31 countries (including Australia).
 - (b) In 2017, ADRA Australia received \$3.6 million in grants from the Department of Foreign Affairs and Trade (DFAT).
4. ADRA Australia is registered as a charity with the Australian Charities and Not-for-Profits Commission, has full accreditation with DFAT and is a full member of ACFID.

¹ Seventh-day Adventist Aged Care is comprised of the following entities throughout Australia:

- Seventh-day Adventist Aged Care (Greater Sydney) Ltd;
- Seventh-day Adventist Aged Care (North New South Wales) Ltd;
- Seventh-day Adventist Aged Care (South Queensland) Ltd;
- Seventh-day Adventist Care (Western Australia) Ltd; and
- Seventh-day Adventist Aged Care (Victoria) Ltd.

Seventh-day Adventist Aged Care

5. Seventh-day Adventist Aged Care is comprised of the following entities throughout Australia:

- (a) Seventh-day Adventist Aged Care (Greater Sydney) Ltd;
- (b) Seventh-day Adventist Aged Care (North New South Wales) Ltd;
- (c) Seventh-day Adventist Aged Care (South Queensland) Ltd;
- (d) Seventh-day Adventist Care (Western Australia) Ltd; and
- (e) Seventh-day Adventist Aged Care (Victoria) Ltd.

6. The following table sets out the Residential Care Beds and Independent Living Units utilised by each of the entities under the Seventh-day Adventist Aged Care banner.

State	Residential Care Beds	Independent Living Units
Greater Sydney	172	167
North New South Wales	214	596 expanding to 735 at completion of the current development cycle
South Queensland	333	421
Victoria	19	84
Western Australia	57 with additional residential care beds currently under construction	67 with a further 86 independent living units currently under construction
TOTAL	795 (plus additional currently under construction)	1,335 (expanding to a total of 1,560 including those currently under construction)

7. In addition, Seventh-day Adventist Aged Care (Western Australia) Ltd operates 17 disability services residential care beds.

Compassion Australia

8. Compassion is a Christian international holistic child development organisation. Through Compassion's Child Sponsorship and Critical Needs Programs, more than 1.8 million

children are currently being assisted through education, health care, and socio-emotional support to overcome the challenges of poverty. While Compassion is a distinctly Christian organisation, Compassion assists children and their families living in poverty regardless of their beliefs, gender or background. Compassion addresses the holistic needs of the individual child so that they can become responsible and fulfilled adults, equipped to change their communities. Programs are delivered in partnership with local churches in developing countries.

Anglicare Sydney

9. Anglicare Diocese of Sydney (Anglicare Sydney) is a not-for-profit organisation of the Anglican Church and one of the largest Christian community service organisations in Australia. Anglicare formed on 1 July 2016 by the merger of Anglicare Sydney and Anglican Retirement Villages.
10. Anglicare exists to serve people in need in our community, enrich lives, and share the love of Jesus. We respect and value every person as made in the image of the living God. We seek to serve those who are ageing, vulnerable or marginalised by meeting their material, physical, emotional, social and spiritual needs. In partnership with parishes and others, we provide a range of services that promote dignity, safety, participation and wellbeing for people in their relationships, homes and communities.
11. We operate a wide range of community and aged care programs across the Sydney Metropolitan, Illawarra and Shoalhaven regions of New South Wales with an annual revenue of \$343m and assets of \$1,734m. Our 3,900 staff and more than 3,000 volunteers operate across a diverse range of community services including: foster care and adoption services; early intervention family support; counselling and family support services; Family Relationship Centres; residential and community aged care services; retirement village living; services for migrants and refugees; carer support services; disability respite; mental health support; youth services; emergency relief for people in crisis; social and affordable housing; opportunity shops providing low-cost clothing; emergency management in times of natural disaster; and chaplains in hospitals, prisons, mental health facilities and juvenile justice institutions.

The Concern

12. The Australian Charities and Not-for-profits Commission (ACNC), in a recently released Commissioner's Interpretation Statement (CIS) has taken a position that, for the purposes of charity law, a public benevolent institution (PBI) cannot be a main purpose religious charity at law.² As further elaborated below, given a recent judgement of the Victorian Court of Appeal, the ACNC's position has the effect that public benevolent institutions cannot argue that they satisfy the requirement for exemption granted religious bodies under anti-discrimination law in Victoria. That decision will be highly influential on other State courts interpreting State anti-discrimination legislation, which requires (through various wording) that in order to access exemptions, an entity must be 'a body established for religious purposes.' This approach to public benevolent institutions has also meant that in Queensland the St Vincent de Paul Society has been held, because of its primary welfare benefitting purposes, to not be a religious body. The result was that it was not able to require that a president of a local conference be a Catholic.³
13. When this reasoning is applied to the public benevolent arms of religious institutions, in effect, the requirements of charity law disentitle such bodies from the exemption under anti-discrimination law. This has the practical consequence that such bodies will not be able to require that their governing members or staff (the persons who effect their purposes) ascribe to, or act in accordance with, a set of religious beliefs. They thus forego discretion over the character and voice of their institutions. Ironically, such a position would remove the very foundational convictions grounded in faith that inspired their establishment. Arguably over time this interpretation will lead to a hollowing out of the efficacy of these faith-based welfare benefitting bodies. The concern is not limited to any one PBI, it concerns all faith based PBIs in Australia. The concern is not abstract, in the financial year 2016, 16 out of the top 25 charities in Australia are faith based (by total revenue) (after pure religious charities are removed, where charities included list their main activity as either economic, social and community development; aged care activities;

² This is reflected in the following statement contained in the recently released ACNC Commissioner's Statement on PBIs: 'For ACNC purposes, a PBI is a charitable institution with a main purpose of providing benevolent relief to people in need.'

³ *Walsh v St Vincent de Paul Society Queensland (No.2) (Walsh)* [2008] QADT 32.

income support and maintenance; or social services).⁴ Furthermore, the concern is not limited to the Christian faiths, in a pluralistic society it extends to all faiths.

The Solution

14. As further outlined below, we consider that, drawing upon existing common law authorities, there are arguments that may be made that are contrary to the ACNC's position that a faith-based PBI may have a religious motivation, but not a religious purpose. They essentially are that where a body's main purpose is to provide benevolent relief as a means to advance a religious faith, it should be registered as a PBI by the ACNC. It should also be then recognised as a body established for religious purposes for the purposes of anti-discrimination law. Drawing on these authorities, and with reference to the amendment to the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017*, first moved by Senator Dean Smith that was proposed by Andrew Broad MP in the Commonwealth Parliament, this submission then formulates legislative amendments that will address the issue it highlights. The principal amendment suggested is to clarify that the phrase 'body established for religious purposes' under section 37 of the *Sex Discrimination Act 1984 (Cth) (SDA)* includes faith based charities, including public benevolent institutions. Because religious institutions have established or controlled a wide range of charities, other than just PBIs, the recommendations extend to all faith-based institutions. In order to ensure the amendment does not detrimentally affect the existing charitable and taxation endorsements of PBIs, consequential amendments to the *Charities Act 2013 (Cth) (Charities Act)* and the *Income Tax Assessment Act 1997 (Cth) (ITAA 97)* are also proposed. These amendments draw upon the applicable judicial authorities, and thus can be seen as a mere clarification of the law as it has been understood by courts for the majority of the last century through to today.
15. In order to develop this reasoning, Part I of these submissions provides a brief overview of the central concern that arises when anti-discrimination law is applied to faith-based public benevolent institutions and the context in which it has arisen. Part II then outlines the current law. We set out these arguments in order to demonstrate that the law has always, and should continue to recognise, the salience of the religious impulses that

⁴ Analysis of 2016 ACNC Annual Information Data undertaken by the writer.

underpin faith based charities and in order to uncover the means by which it has accorded this recognition. Drawing upon the materials of the current law, Part III then proposes solutions to address the concern raised.

Relevant Associational and Religious Freedoms

16. There are obvious religious and associational freedoms that come into play in this discussion. The ability of a religious body to determine the appointment of its leaders (the people who determine its doctrine), and the people who are its voice to the wider society is a fundamental condition of both religious freedom and associational freedom. The issue concerns the ability of the State to dictate the content of religious doctrine and practice. It also enlivens a fundamental condition for the fulfilment of religious and associational freedoms, namely that the State must commence and thereafter conduct its engagement with expression of the sacred (historically the Church in the Western tradition) in a manner that seeks to comprehend the nature of religious conviction and the self-conception of those expressions.

Solutions Drawn from the Law's Understanding of Faith and Action

17. The Victorian Court of Appeal has recently held that the question of whether a body is a religious body for the purposes of anti-discrimination law is to be determined by application of the charity law test for characterisation of religious purposes.⁵ In light of this, Part II considers whether the ACNC can be correct, at law, when it states in its Interpretation Statement on PBIs that a faith-based PBI may have a religious motivation, but not a religious purpose. The ACNC asserts that 'For ACNC purposes, a PBI is a charitable institution with a main purpose of providing benevolent relief to people in need.'⁶ On this basis it is contended that a PBI cannot have a main purpose of advancing religion. We find that not only do the common law authorities run contrary to the reasoning adopted by the ACNC Commissioner, they also provide significant resources from which the solutions in Part III are then fashioned.

⁵ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] AVSCA 75.

⁶ Paragraph 2.1.

18. In *Roman Catholic Archbishop of Melbourne v Lawlor*⁷ (*Lawlor*) Dixon J included in his seminal statement of the boundaries of religion for the purposes of charity law ‘gifts to religious bodies, orders or societies, if they have in view the welfare of others.’⁸ After providing a contextual analysis of his Honour’s reasoning, it is asserted that the welfare benefitting activities of faith-based PBIs spread spiritual teaching in the following ways:

- (a) A common understanding held by many faith traditions and their followers is that welfare benefitting purposes are spiritual activities where undertaken as an expression of the relevant faith. The understanding is that such activities communicate the nature of the faith by action, the nature of the individual’s conviction and are undertaken as a fulfilment of religious obligation. Such offerings are conceived of as sacred acts.
- (b) Welfare benefitting activities are undertaken as a means of advancing the faith of the donors or members of an entity, through the realisation of that faith in action and the demonstration or communication of its nature to others.
- (c) That advancement is undertaken by enabling members of the body to effectuate their religious belief through philanthropic and benevolent acts, effected both through financial contribution and contribution of their time and personal labour.
- (d) Many faith traditions, including Buddhist, Islamic and Christian traditions, consider works as an expression of religious concern, and as an intrinsically spiritual act. Such acts are conceived as:
 - (i) speaking to, or elaborating upon the nature of their spirituality; and
 - (ii) acts performed in fulfilment of that concern.
- (e) The religious understanding of the religious donor or undertaker of the benevolent act and also of the recipient of that act is advanced in the exchange.

19. Justice Dixon’s inclusion of welfare benefitting purposes reflects a common understanding held by many faith traditions and their followers: that welfare benefitting purposes are spiritual activities where undertaken as an expression of the relevant faith. The understanding is that such activities communicate the nature of the faith by action, the nature of the individual’s conviction and are undertaken as a fulfilment of religious

⁷ [1934] HCA 14; (1934) 51 CLR 1.

⁸ [1934] HCA 14; (1934) 51 CLR 1 at 32 (per Dixon J).

obligation. Justice Dixon's judgement then provides clear authority that benevolent organisations should be considered to be religious bodies at law where they effectuate the religious imperatives of the faithful. In the contemporary Australian context, which, since Dixon's J time has seen the advent of multiculturalism and pluralism, the sacred aspects of religiously inspired philanthropy is not a uniquely Christian conception. Many faiths, including the Jewish faith, the Muslim faith and the Buddhist faith similarly regard the spiritual character of other benefitting acts. The question for consideration, and the question considered in these submissions, then is: is Dixon J's reasoning outdated?

Overview of the Relevant Common Law Authorities

20. Turning to analyse the subsequent judicial authorities in Part II we submit that there is what may be termed a 'thread' running through the authorities in respect of the bounds of religious endeavour. That thread is that certain 'secular' activities which would otherwise constitute another charitable purpose, will be religiously charitable where they can be considered to be conducive to the advancement of religion. The reasoning is that religious purposes may be advanced through other activities that would, apart from their association with the religious institution, be considered secular activities. A parallel might correctly be drawn between a religious body and an affiliated poverty relief charity or PBI.
21. Drawing the common law authorities that concern the determination of religious purposes for the purposes of charity law together we reach the following conclusions:
 - (a) Justice Dixon's judgement in *Lawlor* enfolds gifts for the welfare of others within religious purposes. Such gifts do not fall within his category of secular activities inspired by a religious motive. Contrary to the position held by the ACNC, motive is not relevant.
 - (b) Apart from the lower Tribunal authority of *Walsh v St Vincent de Paul Society Queensland (No.2)*⁹ (*Walsh*) and the ATO's citation of the Commonwealth Taxation Board of Review, there is no subsequent authority which carves welfare from religion. The ATO's authority for its proposition (in Tax Ruling 2003/5 (now withdrawn), which reflected the ACNC's position) that welfare purposes are not charitable purposes are Commonwealth Taxation Board of Review Decisions of

⁹ [2008] QADT 32.

1945 and 1986 that are to be clearly distinguished from a PBI that considers its welfare benefitting acts as advancing its faith, in the sense outlined in these submissions. These are very weak authorities for the ATO's proposition, and run contrary to the statement of a Justice of the High Court in *Lawlor*.

- (c) There exists a thread within the case law concerning the boundaries of religion that characterises certain activities which would otherwise constitute another charitable purpose, as religiously charitable where they are 'conducive' to the advancement of religion. Authorities supporting this proposition include:
- i. *Thistlethwaite*, wherein the High Court acknowledged that educational, religious and philanthropic agencies and the preservation of civil and religious liberty can in certain circumstances be conducive to the advancement of religion.
 - ii. *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council*, wherein the New South Wales Court of Appeal accepted the finding of the trial judge that 'the maintenance of [a retirement] home was conducive to the advancement of religion.'¹⁰
- (d) In *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* the NSW Court of Appeal affirmed the trial judge's conclusion that the acts of religious persons directed towards the relief of 'those who are deprived' effect 'the preservation, confirmation and advancement of the faith of the converted and other believers'. This reflects the precise reasoning that forms the basis of our submissions that there is no basis for the assertion that a PBI cannot be a 'religious institution' or 'a body established for religious purposes' for the purposes of anti-discrimination legislation. In that case, Mahoney J also considers that Dixon J intended to enfold community focussed welfare acts within religious purpose in his judgement in *Lawlor*.
- (e) Member Wensley QC in the Queensland Anti-Discrimination Tribunal decision of *Walsh* held that the St Vincent de Paul Society was not a 'body established for religious purposes' for the purpose of exemptions in the *Anti-Discrimination Act*

¹⁰ (1978) 38 LGRA 199 at 205.

1991 (Qld) due to its benevolent purposes. In our opinion, the decision fails to set out the reasoning for its conclusion clearly and does not consider the implications of Dixon J's characterization of religious purposes. However, noting the absence of any judicial authority, it remains the only ruling of a Queensland tribunal body on the question of whether PBIs are religious bodies.

- (f) The 'carving out' of other purposes from religious charitable purposes have been in the areas of political propaganda, closed contemplative orders, education or commercial activities, not welfare benefitting benevolent purposes. No other authority mapping the boundaries of religion at law has displaced Dixon J's enfolding of welfare within religion.
- (g) The New South Wales Court of Appeal decision in *OV & OW v Members of the Board of the Wesley Mission Council*¹¹ (*Wesley Mission*), confirms that a faith-based PBI may be a religious body for the purposes of anti-discrimination law in NSW. The decision provides a contemporary application of Dixon J's enfolding of welfare within religious purposes wherein it states:

One body established to propagate religion may only seek to minister to its adherents and gain others, but another body may treat the provision of welfare services as an essential part of its religious functions.¹²

Although obiter, this reasoning was subsequently affirmed as binding by the NSW Anti-Discrimination Tribunal. The decision confirms that Dixon J's characterization of the enfolding of welfare purposes within religious purposes continues to reflect a contemporary understanding when applied to a faith-based PBI.

- (h) The decision of the Victorian Court of Appeal in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*¹³ (*Cobaw*) only concerned the conduct of commercial activities by religious bodies, not welfare purposes. Therein the Court affirmed Dixon J's statement enfolding welfare purposes within religious purposes and also confirmed that the test for determining charitable purposes at common

¹¹ [2010] NSWCA 155.

¹² [2010] NSWCA 155 at paragraph 62.

¹³ [2014] AVSCA 75.

law applies to the determination of whether a body is a religious body for the purposes of discrimination law.

22. In *Cobaw* the Victorian Court of Appeal held that the test for determining ancillary and incidental purposes in charity law is the applicable test for determination of whether an entity is a 'body established for religious purposes' for the purposes of Victorian anti-discrimination law. The Court also held that the direct and immediate test laid down by Dixon J in *Lawlor* is the applicable test for determining whether a body is a religious body for the purposes of anti-discrimination law. The most obvious means to reconcile Dixon J's judgement with the ancillary and incidental purposes test at charity law (and the means which best preserves the underlying intent of the two tests) is to say that Dixon J's statement in *Lawlor* sets the boundary of the main purpose of religious bodies (which includes welfare benefitting purposes), with the effect that any other purposes must only be ancillary to that main purpose. That is to say that welfare benefitting activities are not ancillary or incidental, they are properly construed as extensions, or effectuations, of religious purposes. Thus the main purpose of a welfare benefitting body may be religious, on Dixon J's reasoning, as affirmed by the Victorian Court of Appeal.
23. On the foregoing basis, in our respectful opinion, the Commissioner's Interpretation Statement (CIS) is an incorrect statement of the law. On this basis we submit that a body that pursues the advancement of religion through the provision of benevolent relief as both a religious entity and a PBI and should be able to take advantage of the benefits associated with each both at charity law insofar as the ACNC is concerned as well as the relevant exemptions and concessions available to such a religious institution under all relevant anti-discrimination legislation. This is on the basis that the main purpose of the body is the advancement of religion through the provision of benevolent relief. That advancement is undertaken by enabling members of the body to effectuate their religious belief through philanthropic and benevolent acts, effected both through financial contribution and contribution of their time and personal labour. We therefore submit that the *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation*¹⁴ (*Perpetual Trustee*) test of 'an institution organized for the relief of poverty, sickness, destitution, or

¹⁴ (1931) 45 CLR 224 per Starke J at 232.

helplessness' falls within Dixon J's characterisation of a religious purpose, where it is undertaken by a religious body. There is no need for the bifurcation that is applied in the CIS, in fact, we submit that it is contrary to the law.

24. It is ultimately our submission that where a faith-based PBI acquits its benevolent welfare benefitting purposes it is at the same time fulfilling its religious purposes in equal measure. The purpose is completely directed towards a benevolent welfare purpose, because all actions are done in furtherance of that purpose. All actions are similarly completely directed to religious purposes, also simultaneously fulfilling that purpose. It is unnecessary to distinguish between the two. The mere fact that both are simultaneously fulfilled is not to detract from the requirement that a PBI must have a dominant purpose of providing benevolent relief. It does have that dominant purpose, as all actions fulfil the purpose. They also concurrently fulfil the other aspect of its main purpose, and that is to advance the relevant religion. Where secular activities in the form of benevolent relief are undertaken by a faith based organisation, they are properly to be construed to be a main purpose of providing benevolent relief for the advancement of religion.
25. As will become apparent from these submissions, we submit that this can be achieved practically by amending the SDA to ensure that faith-based charities can be religious institutions and, at the same time, ensuring that an organisation which is a faith-based charity for the purposes of the SDA is not prevented from being a charity under any other sub-type for the purposes of the *Charities Act* (Cth).

Policy Rationales Supporting this Conclusion

26. There are sound policy considerations that support the position stated in these submissions. They are as follows:
- (a) Adopting this approach to religious bodies avoids the difficulties entailed in drawing arbitrary lines between religious activities and welfare benefitting activities. Carving out the spiritual dynamics of these benevolent welfare benefitting acts is to embark on an exercise in drawing an artificial, arbitrary line. Justice Dixon's characterisation in *Lawlor* avoids the fraught issue of delineating between religious acts and poverty relief.

- (b) As outlined above at paragraphs 18 and 19, many faith traditions, including Buddhist, Islamic and Christian traditions, consider works as an expression of religious concern, and as an intrinsically spiritual act. Such acts are conceived as:
- (i) speaking to, or elaborating upon the nature of their spirituality; and
 - (ii) acts performed in fulfilment of that concern.
- (c) The approach adopted by the Court in *Wesley Mission* and by Dixon J in *Lawlor* arguably is to give proper regard to the self-conceived identification of the religious institution. This approach follows from the requirements of associational freedom, that the State should enter its engagement with associations with the intention of regarding the true and accurate depth of their personality. From that endeavour to regard actuality, the State's role is to create the space for the expression of that personality (where such does not contravene some other legitimate purpose). This is because the State is charged with facilitating associational expressions (including, but not limited to the liberal rationale, that such bodies represent the corporate expressions of the individuals of which they are comprised). In playing its role of supporting associational expressions, the State should regard the true characterisation of the entities with which it engages, not artificial constructions of them.
- (d) The construction that fails to regard the spiritual character of the welfare benefitting act proposes a deeply inadequate, pallid characterisation of an organisation's nature, and disregards their own narrative of self.

The Amendments

27. Having conducted a survey of existing exemptions within Commonwealth, State and Territory anti-discrimination law in Part II, Part III then proposes amendments to clarify that the intention of the SDA is to effect the common law's treatment of faith based charities. The legislative amendments encompass changes to the following regimes:
- (a) The *Sex Discrimination Act 1984* (Cth) (SDA), to allow for inclusion of faith based charities within the definition of religious body;
 - (b) The *Charities Act 2013* (Cth), being the legislation governing the definition of charity at law, which amendments would ensure that a charity which is a faith-

based charity for the purposes of the SDA is not limited insofar as its charity registration is concerned; and

- (c) An amendment to the *Income Tax Assessment Act 1997* (Cth), required in order to ensure that faith based charities retain the tax benefits associated with charitable status (including FBT exemption, income tax exemption and deductible gift recipient status as applicable).

28. In order to address the concerns raised in these submissions, it is proposed that a new section 37(3), (4) and (5) of the SDA be introduced in the following terms:

- (3) *Despite any law (including any provision of this Act and any law of a State or Territory) a body established for religious purposes includes, and shall be deemed to have always included, without limitation, a body:*
- (a) *that is a:*
- (i) *not for profit entity; or*
- (ii) *charity under the Charities Act 2013, including any public benevolent institution (regardless of whether any of the charitable purposes of the entity is advancing religion);*
- (b) *where that body:*
- (i) *is established by or under the direction, control or administration of a body established for religious purposes; or*
- (ii) *is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; or*
- (iii) *is a body to which subsection (4) applies.*
- (4) *A charity that has a charitable purpose pursuant to the Charities Act 2013 that is not advancing religion may be a body established for religious purposes through advancing that other charitable purpose:*
- (a) *where that other charitable purpose is an effectuation of, conducive to or incidental or ancillary to, and in furtherance or in aid of, the advancement of its religious purpose; or*
- (b) *where the advancement of religion is an effectuation of, conducive to, or incidental or ancillary to, and in furtherance or in aid of, that other charitable purpose.*

(5) *Subsection (4) does not limit the circumstances in which a charity that has a charitable purpose that is not advancing religion may be a body established for religious purposes*

29. For the reasons set out in these submissions, these provisions reflect the common law treatment of faith based charities, and are sourced in the reasoning of Dixon J in *Lawlor*, as reflected in various recent judgements, including the NSW Court of Appeal in *Wesley Mission* and as affirmed by the Victorian Court of Appeal in *Cobaw*. As far as public benevolent institutions are concerned, the new provision does not attempt to provide an exhaustive definition of 'public benevolent institution'. Other than those amendments that are necessary to address the concern raised in these submissions, it leaves the common law development of the concept untouched. The concept of a PBI will therefore continue to lie within the common law.
30. Drawing upon other Commonwealth statutes, the drafting is intended to be broad and capture bodies under the control of a religious body, and also those that are not under such control but are administered in accordance with the doctrines of a religion. It also includes in the new definition of 'body established for religious purposes' under the SDA, faith-based charities registered with the ACNC regardless of the explicit sub-type. There are sound policy reasons why such charities should be able to ensure staff, including key managerial staff and governing members, hold, or are amenable to, the faith of the charity. It also affirms, for the purposes of the SDA, the proposition that a body may advance religion through another charitable purpose, including, for example, by providing benevolent relief. It will be noted that the definition is an 'inclusive' one, it thus does not otherwise affect the definition of a 'body established for religious purposes', and only operates as a clarification that the definition is intended to include a certain subtype of religious body, without limiting the inclusion of any other type of religious body.
31. In addition it is necessary to ensure that the amendments introduced to section 37 of the SDA do not detrimentally affect the charitable status of faith-based charities. For this reason amendments are proposed to introduce a new subsection 12(4) into the *Charities Act 2013* (Cth) as follows:

- (4) For the purposes of this section, disregard the fact that an entity is, or has been, a body established for religious purposes within the meaning of section 37 of the *Sex Discrimination Act 1984*.

Note 1: For example, a body that has a purpose of advancing social or public welfare may be registered under subparagraph (1)(c) regardless of whether it is a body established to advance religion under section 37 of the Sex Discrimination Act 1984. It may be both a body that has a purpose of advancing social or public welfare and a body established for religious purposes under section 37 of the Sex Discrimination Act 1984, but for the purposes of paragraph (1)(c) regard is not had to its status under section 37 of the Sex Discrimination Act 1984.

Note 2: For example, a body that has a purpose of advancing religion may be registered under paragraph (1)(d) regardless of whether it is a body established to advance religion under section 37 of the Sex Discrimination Act 1984. It may be both a body that has a purpose of advancing religion under paragraph (1)(d) and a body established for religious purposes under section 37 of the Sex Discrimination Act 1984, but for the purposes of paragraph (1)(d) regard is not had to its status under section 37 of the Sex Discrimination Act 1984.

32. It is also necessary to introduce a new section 30-325 to the *Income Tax Assessment Act 1997* (Cth) to ensure that the deductible status of any charities so registered are not detrimentally affected by the proposed drafting. The proposed drafting is:

A fund, authority or institution does not fail to satisfy the requirements for endorsement under Division 30 of this Act for the reason that the fund, authority or institution is, or has been, a body established for religious purposes within the meaning of section 37 of the *Sex Discrimination Act 1984*.

33. It is finally necessary to introduce amendments to the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBTA) to ensure that the fringe benefit tax exemption of PBIs and health promotion charities are not detrimentally affected by the proposed drafting. The proposed drafting is:

After subsection 123C(2)

Insert:

- (3) An entity does not fail to satisfy the requirements for endorsement in subsection (2) for the reason that the entity is, or has been, a body established

for religious purposes within the meaning of section 37 of the *Sex Discrimination Act 1984*.

After subsection 123D(2)

Insert:

- (3) An entity does not fail to satisfy the requirements for endorsement in subsection (2) for the reason that the entity is, or has been, a body established for religious purposes within the meaning of section 37 of the *Sex Discrimination Act 1984*.

34. It will be noted that the following phrase appears in the above amendments to the SDA: 'shall be deemed to have always included'. The amendments to the *Charities Act 2013* (Cth), the *ITAA 97* and the *FBTA* also state: 'disregard the fact that [an entity] is, or has been' a body established for religious purposes under the SDA. The intention is to ensure that it is clear that the amendments operate to clarify rather than change the law, with the effect that any prior conduct by such charities, and any existing complaints against such bodies under the SDA, would be determined in light of the amendments. The Explanatory Memorandum to the Amending Bill should also state that the amendments (to each of the three Acts) are meant to merely so clarify the law. To ensure consistency with Australia's international obligations, the legislation should prevail against State and Territory laws and we provide further drafting accordingly at paragraphs 160 to 173 in the body of these submissions.
35. Finally, one of the key considerations for legislative change is whether the amendments to Commonwealth law made are intended to overturn the State based anti-discrimination regimes. This is to be preferred, as otherwise a faith-based PBI could be exempt under Commonwealth anti-discrimination law, but be successfully sued under a State or Territory law, giving rise to inconsistent policy outcomes. Drawing upon the amendments proposed by Mr Broad, additional drafting is offered to ensure that the Parliamentary intention to provide uniformity to the religious freedom protection across both Commonwealth and State law is clear.
36. Finally we also consider these amendments in light of Australia's obligations under international law, including:
- (a) the *International Covenant on Civil and Political Rights*;

- (b) the *Universal Declaration on Human Rights*;
- (c) the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*;
- (d) certain cases decided by the Human Rights Committee; and
- (e) various comments made by the Special Rapporteur in relation to alleged contraventions in various international jurisdictions.

37. Human rights law protects the right 'to establish and maintain appropriate charitable or humanitarian institutions' as a manifestation of religious belief. We conclude that if Australian faith-based charities, humanitarian and welfare organisations are denied the ability to practice their faith through the provision of humanitarian and welfare services to those in need (a necessary concomitant of the denial of their ability to define their leadership, staff and volunteers), Australia faces the real risk of being non-compliant with its international law obligations under the ICCPR. Australia has ratified the ICCPR and is also bound by the First Optional Protocol to the ICCPR. This means that individuals may make complaints to the United Nations Human Rights Committee that Australian legislation (including legislation of individual States and Territories pursuant to Article 50 of the ICCPR) does not align with the protections offered by the ICCPR.

Part I – The Concern and its Context

38. In December 2016 the Australian Commissioner for Charities and Not-for-profits took the position that a public benevolent institution cannot be a main purpose religious charity at law.¹⁵ Given a recent judgement of the Victorian Court of Appeal, the ACNC Commissioner's position has the effect that public benevolent institutions cannot satisfy the requirement for exemption under anti-discrimination law in Victoria. That decision will be highly influential on other State courts interpreting State anti-discrimination legislation, which requires (through various wording) that an exempt entity be 'a body established for religious purposes.' This approach to public benevolent institutions has also meant that in Queensland the St Vincent de Paul Society has been held by the former Queensland Anti-Discrimination Tribunal, because of its primary welfare benefitting purposes, to not be a religious body. The result was that it was not able to access the exemption granted to religious bodies under the *Anti-Discrimination Act 1991 (Qld)* and thus was not able to require that a president of a local conference be a Catholic.¹⁶
39. As is set out in Part II below, we consider that there are strong arguments drawing upon existing authorities that may be made that are contrary to this position. They essentially are that where a body's main purpose is to provide benevolent relief (including through the relief of poverty or distress) as a means to advance a religious faith it should be registered as a PBI by the ACNC, and should also be then recognised as a body established for religious purposes for the purposes of anti-discrimination law. We set out these arguments in order to demonstrate that the law has always, and should continue to recognise, the salience of the religious impulses that underpin faith based charities. That approach should continue to be applied in the context both of charity law and antidiscrimination law. These authorities provide much of the material from which the amendments that are proposed in Part III are fashioned.
40. Many faith-based charitable entities that seek to provide the relief of poverty or distress or are otherwise public benevolent institutions will seek to maximise the potential that they

¹⁵ This is reflected in the following statement contained in the recently released ACNC Commissioner's Statement on PBIs: 'For ACNC purposes, a PBI is a charitable institution with a main purpose of providing benevolent relief to people in need.'

¹⁶ *Walsh v St Vincent de Paul Society Queensland (No.2) (Walsh)* [2008] QADT 32.

may rely upon exemption provisions in anti-discrimination law, and in particular, in the employment of staff and volunteers. Such bodies will also logically also seek to ensure that their charitable status (and associated taxation exemptions and concessions) aligns with their desired characterisation in anti-discrimination law.

41. Arguably, the governing members and advisers to many public benevolent institutions that are founded as extensions of faith-based concern have uncritically accepted the conventional wisdom that for the purposes of charity law, a PBI's purposes must be purposes other than religious purposes. This is so even though the entity in question may only exist as a result of the religious unctious of its founders, and its ongoing activities are out-workings of that continuing religious conviction. In our experience we have found this to be a common approach for those entities seeking endorsement as a public benevolent institution. It reflects the understanding of the law that has been expressed by the Australian Commissioner for Taxation, at least from 2003. That interpretation of the law is reflected in the following statement of the Commissioner's position, contained in Taxation Ruling 2003/5:

113. The constituent documents will sometimes explain the organisation's motives. They might be religious or flow from an ethical or philosophical stance. However, where the purpose is the provision of benevolent services, the motives will not detract from public benevolent institution status.

The Tax Ruling proceeds on the assumption of a bifurcation between welfare benefitting purposes and underlying religious motive. For reasons we will explicate, the implication is that a religious motive is not sufficient to characterise an entity as a religious institution for the purposes of charity law, where its main purpose can also be described as a benevolent institution.

42. The ACNC's recently finalised Commissioner's interpretation statement (CIS) on public benevolent institutions (PBIs) provides the following statement:

An entity's motives are not directly relevant to determining its main purposes. For example, if an entity's main purpose is advancing religion it will not be eligible to be registered as a PBI. However if the entity is motivated by religious faith and its main purpose is benevolent, it may still be eligible.

The parallel with the position adopted by the Australian Taxation Office (ATO) in TR 2003/5 is unmistakable.

43. The conclusion drawn in both TR 2003/5 and the newly released ACNC CIS would appear to be inconsistent with a conclusion that a PBI can have its main purpose as advancing religion. This gives rise to a serious concern when the consequences of that conclusion is extended to the requirements of exemptions under anti-discrimination law. The requirements of anti-discrimination law, both at the level of all States and Territories in Australia, and for the purposes of Commonwealth law, are that in order to access exemption a body must be a 'body established for religious purposes' (or like wording).
44. The meaning of this term has received differing application in State based jurisdictions. In Victoria, the Court of Appeal has applied the charity law test for determination of religious purposes to the determination of whether a body is a religious body for the purposes of anti-discrimination law. When this is applied to the public benefitting arms of religious institutions, in effect, the requirements of charity law disentitle such bodies from the exemption under anti-discrimination law. This has the practical consequence that such bodies will not be able to require that their staff ascribe to, or act in accordance with, a set of religious beliefs, thus foregoing discretion over the character of their institutions.
45. There are obvious religious and associational freedoms that come into play in this discussion. The ability of a religious body to determine the appointment of its leaders (the people who determine its doctrine), and the people who are its voice to the wider society is a fundamental condition of both religious freedom and associational freedom. The issue concerns the ability of the State to dictate the content of Church doctrine and practice. It also enlivens a fundamental condition for the fulfilment of religious and associational freedoms, namely that the State must commence and thereafter conduct its engagement with the Church in a manner that seeks to comprehend the nature of religious conviction and the self-conception of the Church.
46. In practical terms, the ACNC's position leads to the conclusion that where a religious body establishes a welfare 'arm', it cannot require that the people who effect the purposes of that arm are people of its faith. Ironically, such a position would remove the very foundational motivations that underpin the concern for the disadvantaged, the convictions grounded in faith that inspired the establishment of the 'arm'. Arguably over time this

interpretation will lead to a hollowing out of the efficacy of these faith-based welfare benefitting bodies. The concern is not limited to any one public benevolent institution, it concerns all faith based public benevolent institutions in Australia. Furthermore, it is not limited to the Christian faiths, in a pluralistic society it extends to all faiths that have within their teachings the imperative to care for the disadvantaged, and who are inspired to establish such other-benefitting organisations.

Part II – The Law

47. In order to elaborate on these concerns and to provide a context from which solutions to the concern may be fashioned, we now address two questions:

(a) What is the applicable test in anti-discrimination law for the determination of whether a body is a religious body?

(b) Understanding the nature of that test, is the ACNC correct when it states that a religious PBI may have a religious motivation, but not a religious purpose?

What is the applicable test in anti-discrimination law for the determination of whether a body is a religious body?

48. The lead decision concerning the characterisation of religious activities in the context of anti-discrimination law is a recent decision of the Victorian Court of Appeal. That decision drew upon a recent judgement of the High Court in the context of charity law. We outline these two authorities here.

The High Court

49. In the *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*,¹⁷ (*Word Investments*) the High Court restated the common law of charity's requirement to look to the purposes of an entity in order to define whether its purposes are charitable:

In examining the objects, it is necessary to see whether its main or predominant or dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable.¹⁸

50. This reflects the main purpose test stated by Gibbs J (Barwick CJ, Menzies and Walsh JJ concurring) in *Stratton v Simpson*:

It is established that 'an institution is a charitable institution if its main purpose is charitable although it may have other purposes which are merely concomitant and incidental to that purpose' or in other words if each of its objects is either charitable in itself or should be construed as ancillary to other objects which themselves are charitable. If however the

¹⁷ [2008] HCA 55 (3 December 2008); (2008) 236 CLR 204.

¹⁸ *Federal Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55; (2008) 236 CLR 204 at [17], see also [37].

non-charitable purpose is not merely incidental or ancillary to the main charitable purpose, the institution will not be charitable.¹⁹

51. In *Word Investments* the High Court held that a body undertaking commercial activities with the purpose of giving rise to a surplus for application to a religious charitable purpose could be a religious charity for the purposes of the common law of charity:

when the 16 purposes enumerated in sub-cl 3(a)(i)-(xvi) are read as a whole, each of them on its true construction states a charitable purpose – a purpose of advancing religion in a charitable sense.²⁰

Victoria

52. Subject to the qualifications we list below in relation to direct and immediate propagation of religion (at paragraphs 55-56), in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*²¹ (*Cobaw*) the Victorian Court of Appeal held that the test for determination of purposes in the common law of charities was the applicable test for determining whether an institution was a religious body for the purposes of exemptions contained in anti-discrimination law.²²

53. In *Cobaw* a majority of justices, comprising Maxwell and Neave JJ held that Christian Youth Camps Ltd, an entity providing camping facilities to the public, was not a religious institution for the purposes of the exemptions to the anti-discrimination provisions in the *Equal Opportunity Act 2010* (Vic).

54. Justice Maxwell, with whom Neave J agreed, reached this conclusion on the basis that:

- a. To be a 'body established for religious purposes' 'it must be able to be said of each of its purposes, or at least of its purposes taken as a whole, that they are religious purposes. In other words, the purpose(s) must have an essentially religious character.'²³ Justice Maxwell referred to the decision

¹⁹ [1970] HCA 45; (1970) 125 CLR 138 at 159-160.

²⁰ [2008] HCA 55 (3 December 2008) at paragraph 20.

²¹ [2014] AVSCA 75.

²² See Maxwell J at 236

²³ Maxwell J at 229.

of Dixon J in *Roman Catholic Archbishop of Melbourne v Lawlor*²⁴ (*Lawlor*) as authority for this proposition:

In order to be charitable the purposes themselves must be religious; it is not enough that an activity or pursuit in itself secular is actuated or inspired by a religious motive or injunction: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it. The purpose may be executed by gifts for the support aid or relief of clergy and ministers or teachers of religion, the performance of whose duties will tend to the spiritual advantage of others by instruction and edification; by gifts for ecclesiastical buildings, furnishings, ornaments and the like; by gifts to provide for religious services for sermons, for music for choristers and organists, and so forth; by gifts to religious bodies, orders or societies, if they have in view the welfare of others. A gift made for any particular means of propagating a faith or a religious belief is charitable; moreover a disposition is valid which in general terms devotes property to religious purposes or objects. But, whether defined widely or narrowly, the purposes must be directly and immediately religious. It is not enough that they arise out of or have a connection with a faith, a church, or a denomination, or that they are considered to have a tendency beneficial to religion, or to a particular form of religion. The law has found a public benefit in the promotion of religion as an influence on human conduct; but it has no standard by which to estimate what public benefit that order is produced indirectly or incidentally by means which although they may be considered to contribute to the good of religion, are not in themselves religious and do not serve directly a religious object (emphasis Maxwell J).²⁵

- b. “if the object (of the gift or the institution) is ‘an activity or pursuit in itself secular’, then that is not a religious purpose even if it is ‘actuated or inspired by a religious motive’”.²⁶

²⁴ [1934] HCA 14; (1934) 51 CLR 1.

²⁵ [1934] HCA 14; (1934) 51 CLR 1 at 32 (per Dixon J).

²⁶ Maxwell J at 231.

c. Whilst the constitution of Christian Youth Camps Ltd did provide for the payment of funds to other charitable purposes, this was not limited to religious charitable purposes.²⁷

d. On a reading of the purposes and the activities of Christian Youth Camps (CYC), Maxwell J held that:

The present case stands in sharp contrast to *Word Investments*, where the commercial activity was ancillary to, and supportive of, the company's religious purposes. Here, the commercial activity of making campsite accommodation available to the public for hire is the very purpose for which CYC exists. That is an activity which is 'in itself secular'. It is not 'intrinsically' religious, as the purposes of *Word Investments* were.²⁸

e. Justice Maxwell made clear that:

The position might have been different if CYC existed for the sole purpose of providing facilities for camps and conferences which were avowedly religious in character — that is, which were held for the purpose of religious instruction, discussion or inquiry. That might properly have been described as a religious purpose, that is, a purpose of propagating or advancing the religion.²⁹

f. Grounding his finding was the conclusion that:

CYC's camps are open to all comers. The only religious aspect of the business resides in CYC's aspiration that the facilities should be managed in a Christian spirit, and that those who use the facilities — from wherever they may come, and whatever their purpose — will be made 'aware that the facilities are a place where God is honoured' and will have 'an opportunity of experiencing the truth of God's love'.³⁰

55. It is not clear that the direct and immediate restriction imposed in *Cobaw* is found within the High Court's reasoning in the *Word Investments decision*, as *Word Investments Ltd* effected its religious purposes by raising funds for another entity to directly advance the Christian religion. It is difficult to reconcile Maxwell and Neave JJ's conclusion that the

²⁷ Maxwell J at 236 to 240.

²⁸ Maxwell J at 245.

²⁹ Maxwell J at 248.

³⁰ Maxwell J at 252.

applicable test is the characterisation of main purpose and ancillary and incidental operations within charity law with their requirement that all of the purposes be ‘directly and immediately religious.’

56. Notwithstanding the inconsistencies with the *Cobaw* decision (between its stated acceptance of charity law principles for determination of purpose (as reflected in the *Word Investments decision*) and the direct and immediate test in *Lawlor*) it is clear that in either case, on the construction adopted by the ACNC in the CIS, it is unlikely that in Victoria a PBI will be able to access the exemptions within the *Equal Opportunity Act 2010-* (Vic).

Is the ACNC correct when they state that a religious PBI may have a religious motivation, but not a religious purpose?

57. Understanding the nature of that test, we turn to consider whether the ACNC can be correct when it states that a religious PBI may have a religious motivation, but not a religious purpose. In the following discussion we set out the applicable judgments in chronological order. Not only do these authorities run contrary to the reasoning adopted by the ACNC Commissioner in the CIS on PBIs, they also provide the resources from which the solutions in Part III are fashioned.

Justice Dixon’s Judgement in Roman Catholic Archbishop of Melbourne v Lawlor

58. The judgement of Dixon J in *Lawlor* provides a seminal statement of the boundaries of religion for the purposes of Australian charity law. That definition is as follows:

In order to be charitable the purposes themselves must be religious; it is not enough that an activity or pursuit in itself secular is actuated or inspired by a religious motive or injunction: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it. The purpose may be executed by gifts for the support aid or relief of clergy and ministers or teachers of religion, the performance of whose duties will tend to the spiritual advantage of others by instruction and edification; by gifts for ecclesiastical buildings, furnishings, ornaments and the like; by gifts to provide for religious services for sermons, for music for choristers and organists, and so forth; *by gifts to religious bodies, orders or societies, if they have in view the welfare of others. A gift made for any particular means of propagating a faith or a religious belief is charitable; moreover a disposition is valid which in general terms devotes property to religious purposes or objects. But, whether defined widely or*

narrowly, the purposes must be directly and immediately religious. It is not enough that they arise out of or have a connection with a faith, a church, or a denomination, or that they are considered to have a tendency beneficial to religion, or to a particular form of religion. The law has found a public benefit in the promotion of religion as an influence on human conduct; but it has no standard by which to estimate what public benefit that order is produced indirectly or incidentally by means which although they may be considered to contribute to the good of religion, are not in themselves religious and do not serve directly a religious object (emphasis ours).³¹

59. We noted above that, along with *Word Investments*, in *Cobaw* this definition, offered in the context of determining the boundaries of religious purposes within charity law, was adopted by the Victorian Court of Appeal as the test for determining whether a body is a religious body in order to access exemptions under the State based anti-discrimination law.
60. In the above statement Dixon J clearly intends to include gifts to religious institutions for the provision of welfare within religious charitable purposes. Similar to the ACNC and the ATO, the limitation outlined by Dixon J focusses upon the concept of motive: “if the object (of the gift or the institution) is ‘an activity or pursuit in itself secular’, then that is not a religious purpose even if it is ‘actuated or inspired by a religious motive’.” However, the disentitling effect of religious motive does not displace the religiously charitable character of gifts provided to religious bodies for welfare relief. Justice Dixon’s clear reasoning is that welfare relief undertaken through religious bodies is not ‘in itself secular’. Religious motive is present, but more than that, the welfare purpose is not secular, it is religious. Welfare relief thus falls within Dixon J’s following description of religiously charitable purposes: ‘*A gift made for any particular means of propagating a faith or a religious belief*’.
61. Thus, where welfare relief and religion are concerned, to embark upon an inquiry into motive (as is offered by the ACNC CIS) is an endeavour in weighing an irrelevant criterion. Welfare relief falls within the boundaries of religious purposes. Although it may be provided in a secular marketplace, alongside other secular welfare providers, welfare relief by religious institutions does not fall within the disentitling realm of secular activity. Motive is

³¹ [1934] HCA 14; (1934) 51 CLR 1 at 32 (per Dixon J).

simply not relevant. To put it another way, Dixon J expressly excludes gifts for the welfare of others from his category of secular activities inspired by religious motive.

Does *eiusdem generis* apply to Dixon J's reasoning?

62. It could be considered that, on one argument, the use of the term 'welfare' in Dixon J's judgment in *Lawlor*³² should be read down to be limited to the welfare offered to church members through the kind of explicitly religious activities that precede the reference to 'welfare' in the judgement (such as teaching, sermons, choristers and the like). By this reading, Dixon J's inclusion of 'gifts if they have in mind the welfare of others' was intended to be a reference to the improvement of the general welfare of members of the church as a result of their receipt of the religious ministrings of the church. If correct, this would preclude the reference to welfare from being a reference to benevolent activities. This is to say that the Latin maxim *eiusdem generis* applies to the term 'welfare' in Dixon J's judgement. Essentially this rule of interpretation operates so that where a general term follows a collection of specific terms, the general term will be limited to the class disclosed in the preceding specific terms.
63. The *eiusdem generis* maxim is subject to the context and any wording that would indicate that the rule is not to apply.³³ The only other reference to the term 'welfare' that Dixon J offers in his judgement supports the conclusion that he had in mind a wider meaning of 'welfare' than that which is provided solely through the strict definition that would result from application of the *eiusdem generis* maxim. Justice Dixon's other reference to 'welfare' is made in respect of a decision of the United Kingdom Court of Appeal. His comment is as follows:

In *In re Bain* a bequest to the Vicar of a Church "for such objects connected with the Church as he shall think fit," was upheld only because it was construed by the majority of the Court as confined to objects directly connected with the Church in contradistinction to objects which are only conducive to the welfare of the parishioners or the congregation who attend the Church; that is, as confined to the support of the Church, its fabric, and its services.³⁴

³² [1934] HCA 14; (1934) 51 CLR 1.

³³ See Harry Geddes and R S Pearce, *Statutory Interpretation in Australia* (Butterworths, 2014) (8th edition) at 4.31.

³⁴ [1934] HCA 14; (1934) 51 CLR 1 at 34 (per Dixon J).

64. Justice Dixon is here speaking of the application of the conception of 'welfare' found in *In re Bain*.³⁵ In that decision, welfare activities were held to not be enfolded within the description of religious purposes, and as a result, the trust under consideration was held to be charitable. However, Dixon J, rather than following the exclusion of welfare from religion applied in *In re Bain*, included within his description of religion 'gifts to religious bodies, orders or societies, if they have in view the welfare of others'. It is then necessary to consider the description of the activities of the parish considered in *In re Bain*, which by affidavit of Reverend H Ross, the Vicar in question, was broken into two broad groups:

On the appeal an affidavit by the Vicar was read by leave of the Court for the purpose of giving information as to the objects connected with St. Alban's Church, and it stated (clause 3) that the offertories for general church expenses and other general income applicable for purposes in connection with St. Alban's Church were applied (i.) in maintaining the music of the church by paying the salaries of an organist and an assistant organist and the expenses of the hydraulic blowing and tuning of the church organ; (ii.) in doing the necessary repairs to the fabric of the church; (iii.) in lighting and heating the church; (iv.) in paying the salary of a verger; (v.) in insuring the church against fire and burglary; (vi.) in paying for certain essentials of the church services; and (vii.) in defraying certain miscellaneous expenses of small amount. In clause 3 it was stated that in addition to general church expenses, there were in connection with St. Alban's Church certain other purposes or objects of which the accounts were distinct from the churchwardens' accounts. These were the St. Alban's District Mission House, the income of which went to maintain the Mission House and to give assistance to poor parishioners, the St. Alban's Nursery, where young children of poor parents were looked after while their parents were away at work, the St. Alban's Schools Emergency Fund, used for painting and repairing schools connected with the church, St. Alban's Men's Club, a branch of the Clewer Sisterhood, a community which gave services without payment to the poor,"

65. It is the latter group, comprising welfare activities, both directed to parishioners and non-parishioners which was excluded from the gift. Lord Hanworth Master of the Rolls held:

It appears to me that the words "such objects connected with the Church," that is the Church of St. Alban's, are to be interpreted narrowly or rather, perhaps, as relating to the church in contradistinction to relating to the parish; and it is not disputed that if the objects

³⁵ *In re Bain* [1930] 1 Ch 224, CA.

were confined to the support of the church, its fabric and its services, that would be a good charitable bequest. I see no reason to import into “objects connected with the Church” parochial activities which would embarrass our interpretation as against an interpretation connecting the use of the funds to the specific church indicated of which the recipient is the Vicar.³⁶

66. Lord Justice Lawrence agreed with Hanworth M.R, and added the following comment:

The cases where the gifts were for purposes conducive to the good of a religion or to the good of a particular church are in my opinion distinguishable from the present case. Here the words, to my mind, are apt and proper to describe objects which are directly connected with the church in contradistinction to objects which are only conducive to the welfare of the parishioners, or to the congregation who attend the church; and I think that the words in question do not have the operation of extending and thus defeating the primary gift to the ecclesiastical body.³⁷

67. In its historical context, Lawrence L.J.’s reference to ‘parishioners’ is to the persons located in the geographical locality falling within the Anglican church parish boundary. This is affirmed by the distinction he draws between ‘parishioners’ and ‘the congregation’, the latter grouping being those believers who attend the church. This understanding is also reflected in the affidavit of Reverend Ross, cited above at paragraph 64. In any event, regardless of whether the acts are directed to persons who are members of the parish or not, the description of activities provided by Reverend Ross, and which Lawrence L.J. references as being ‘conducive to the welfare’ of persons in the parish (both parishioners and congregants) include the welfare benefitting activities of an entity that would be endorsed as a PBI. They are clearly not read down to be only those activities which contribute to the welfare offered to church members through the kind of explicitly religious activities of the Church (such as teaching, sermons, choristers and the like).

68. The point is that, in adopting the meaning of welfare in *In re Bain*, Dixon J has in mind that, contrary to the decision of the English Court of Appeal, religion does include welfare benefitting acts, as those acts are described in *In re Bain*. It is important to note that, at the time of Dixon’s J judgement, in the Australian judicial system, although ‘very highly

³⁶ *In re Bain* [1930] 1 Ch 224,CA, 232 (per Hanworth M.R.).

³⁷ *In re Bain* [1930] 1 Ch 224,CA, 234 (per Lawrence L.J.)

persuasive', the High Court was not bound by English Court of Appeal judgements.³⁸ Thus it is concluded that Dixon J's earlier reference to 'welfare' did intentionally mean the support of parishioners outside of the support of the Church, its fabric and services, being acts of a benevolent nature.

69. Furthermore, the *ejusdem generis* maxim applies where there is a genus established in the preceding terms. Justice Dixon's judgement includes within the genus 'the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it.'³⁹ It is our submission that welfare benefitting activities do spread spiritual teaching, and thus, rather than being excluded, fall within the genus.

70. The link between advancing religion and welfare acts may be outlined as follows:

- (a) A common understanding held by many faith traditions and their followers is that welfare benefitting purposes are spiritual activities where undertaken as an expression of the relevant faith. The understanding is that such activities communicate the nature of the faith by action, the nature of the individual's conviction and are undertaken as a fulfilment of religious obligation. Such offerings are conceived of as sacred acts.
- (b) Welfare benefitting activities are undertaken as a means of advancing the faith of the donors or members of an entity, through the realisation of that faith in action and the demonstration or communication of its nature to others.
- (c) That advancement is undertaken by enabling members of the body to effectuate their religious belief through philanthropic and benevolent acts, effected both through financial contribution and contribution of their time and personal labour.
- (d) Many faith traditions, including Buddhist, Islamic and Christian traditions, consider works as an expression of religious concern, and as an intrinsically spiritual act. Such acts are conceived as:
 - i. speaking to, or elaborating upon the nature of their spirituality; and
 - ii. acts performed in fulfilment of that concern.

³⁸ *Pratt & Goldsmith v Pratt* [1975] VR 378, per Starke J at 390-1.

³⁹ [1934] HCA 14; (1934) 51 CLR 1 at 32 (per Dixon J).

71. The religious understanding of the religious donor or undertaker of the benevolent act and also of the recipient of that act is advanced in the exchange. To take an example from the Jewish and Christian faiths, it is taught that the religious believer, in undertaking a religious inspired act of benevolence, also gains greater understanding of the nature of her religion, her faith and her relationship with God in the doing of the act.⁴⁰
72. It is reasonable to conclude that Dixon J's inclusion of welfare benefitting purposes in this short statement was not done without intention or adequate consideration. It reflects a common understanding held by many faith traditions and their followers: that welfare benefitting purposes are spiritual activities where undertaken as an expression of the relevant faith. The understanding is that such activities communicate the nature of the faith by action, the nature of the individual's conviction and are undertaken as a fulfilment of religious obligation. Such offerings are sacred acts. It is reasonable to assume that this reasoning, which reflected a common understanding of religious purposes in 1934, explicates Dixon J's inclusion of welfare benefitting within religious purposes. It is also to be noted that in a contemporary Australian context, which, since Dixon's J time has seen the advent of multiculturalism and pluralism, that the sacred aspects of religiously inspired philanthropy is not a uniquely Christian conception. Many faiths, including the Jewish faith, the Muslim faith and the Buddhist faith similarly regard the spiritual character of other benefitting acts.

⁴⁰ See for example *Holy Bible* Isaiah 43:10 "You are my witnesses," declares the LORD, "and my servant whom I have chosen, so that you may know and believe me and understand that I am he. Before me no god was formed, nor will there be one after me." (NIV)

73. In *Lawlor* Dixon J goes on to give a listing of non-charitable religious purposes. These were:

- (a) Political propaganda, on the basis of *Bowman v Secular Society*.⁴¹ The application of *Bowman* in Australia law has been displaced by the High Court's judgement in *Aid/Watch Incorporated v Commission of Taxation*,⁴²
- (b) Contemplative order of nuns, on *Gilmour v Coats*.⁴³ Such orders are now deemed to be charitable by section 10 of the *Charities Act 2013* (Cth).
- (c) A Catholic newspaper.

74. Thus, even on the strict result of Dixon J's reasoning (which excluded the Catholic newspaper in question from charitable status), his Honour did not exclude welfare benefitting purposes from religious purposes.

75. Finally, although in *Lawlor* the High Court was divided equally on the issue being considered, Dixon J's judgement:

- (a) Fell within the half of the Court that aligned with the Victorian Court of Appeal's decision that the newspaper was not charitable; and
- (b) As we will see, has been cited in recent times as authority on the question of what is a 'religious purpose' and has otherwise consistently been referred to as authoritative on the question in the common law.

76. If Dixon J's reasoning no longer applies to enfold welfare purposes within religious purposes, the contrary argument must be that there is some authority that touches upon public benevolent institutions and which holds that benevolent welfare provision is not to be contained within religious purpose or characterised as the extension of a religious purpose. Can we find this? The question for consideration then is: is this reasoning outdated? Our task is then to consider the authorities that deal with the boundaries of religious purpose. We find that there is what may be termed a 'thread' running through the authorities in respect of the bounds of religious endeavour. That thread is that certain 'secular' activities which would otherwise constitute another charitable purpose, will be

⁴¹ [1917] AC 406.

⁴² (2010) 241 CLR 539.

⁴³ [1949] AC 426.

religiously charitable where they can be considered to be conducive to the advancement of religion. We consider the central authorities to be as follows, in chronological order.

Thistlethwaite

77. The High Court in *Congregational Union of New South Wales v Thistlethwaite (Thistlethwaite)*⁴⁴ held:

We are here concerned with the question whether a particular corporate body is a charitable institution. Such a body is a charity even if some of its incidental and ancillary objects, considered independently, are non-charitable. The main object of the Union is predominantly the advancement of religion ... an institution is a charitable institution if its main purpose is charitable although it may have other purposes which are merely concomitant and incidental to that purpose. The fundamental purpose of the Union is the advancement of religion. It can create, maintain and improve educational, religious and philanthropic agencies only to the extent to which such agencies are conducive to the achievement of this purpose. The same may be said, *mutatis mutandi*, of the other object, the preservation of civil and religious liberty.⁴⁵

78. In *Thistlethwaite* the High Court thus acknowledged that educational, religious and philanthropic agencies can in certain circumstances be conducive to the advancement of religion, as can a purpose of civil and religious liberty. Importantly, the reasoning provides clear authority that religious purposes may be advanced through other activities that would, apart from their association with the religious institution, be considered secular activities.

London Hospital

79. In many respects, such an approach is consistent with the recognition in the common law of charities that charitable purposes may be pursued by a number of affiliated providers, even though one entity might, if its operations were considered only in isolation, by itself not be charitable. This approach for example has been adopted in respect of education providers and affiliated colleges and student unions. The approach is outlined in the

⁴⁴ (1952) 87 CLR 375.

⁴⁵ (1952) 87 CLR 375 at 442.

following statement of Brightman J in *London Hospital Medical College v Inland Revenue Commissioner (London Hospital)*:

The London Hospital Medical College is a school of learning existing for the benefit of the community. It is therefore charitable. A club which provides athletic and social activities for its members is not, per se, charitable. Therefore, the union, standing alone, is not charitable under the general law. But if the union exists solely to further, and does further, the educational purposes of the medical college, then in my judgment it is clearly charitable.⁴⁶

A parallel might correctly be drawn between a religious body and an affiliated poverty relief charity or PBI.

Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council

80. In *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council*⁴⁷ a majority of the New South Wales Court of Appeal comprising Glass AJ and Moffitt P, held that a retirement village operated by the Presbyterian Church was undertaken in pursuit of the charitable purpose of advancing religion. Acting Justice Glass and Moffitt P, delivering the judgement of the Court applied with approval the statement of the High Court in *Thistlethwaite* provided above at paragraph 77 (absent the final sentence). Having construed the main purpose of the Trust as being the advancement of religion, the Court in *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* accepted the finding of the trial judge that ‘the maintenance of the home was conducive to the advancement of religion.’⁴⁸ The majority concluded:

Since, by finding of the trial judge, the maintenance of the home was conducive to the advancement of religion, he fell into no error of law in reaching the ultimate conclusion of fact that the home was being used for the purposes of the public charity.⁴⁹

81. The decision thus again supports the conclusion that certain activities which would otherwise constitute another charitable purpose, will be religiously charitable where they are conducive to the advancement of religion.

⁴⁶ [1976] 1 WLR 613 at 620.

⁴⁷ [1978] 2 NSWLR 387.

⁴⁸ (1978) 38 LGRA 199 at 205 (per Glass J. A.).

⁴⁹ (1978) 38 LGRA 199 at 205 (per Glass J. A.).

82. Importantly, as noted above, the Court affirmed the judgement of the trial judge. The judgement of the trial judge included the following statement:

There are two consideration which, in my view, lead to this problem being resolved in favour of the appellant. The first of these considerations is that, on the evidence, the establishment and maintenance of Woolway Home for the relief of the aged have the consequence of advancing the Presbyterian faith. In the words used in *Congregational Union of New South Wales v. Thistlethwayte*, the fundamental purpose of the appellant is the advancement of religion, and it may create and maintain educational, religious and philanthropic agencies to the extent (but only to the extent) that they are conducive to the achievement of this purpose. The evidence as a whole shows that Woolway Home is an agency of that description. The point was particularly well made by Mr. Waterman, the superintendent of the Presbyterian Social Services Department, when he said in his evidence: 'Suffice to say that it is, in our opinion in the Presbyterian Church, a *living testimony of the words of our Lord Jesus Christ that we go out into the community and relieve those who are deprived. Without that source of inspiration we may look at our mission's work in a different way. But that is the wellspring for the advancement of religion as the Church sees it.*' *The advancement of religion, as I see it, connotes, not only proselytizing, but also the preservation, confirmation and advancement of the faith of the converted and other believers.*" (our emphasis added).

83. The trial judge, affirmed by the NSW Court of Appeal, includes within his description relief of 'those who are deprived', which would include persons who require benevolent relief. He states as the rationale for this proposition that such acts concern 'the preservation, confirmation and advancement of the faith of the converted and other believers'. This reflects the precise reasoning that forms the basis of our submissions to the ACNC Review, and as outlined at paragraphs 20 to 21 and 25 to 27.

Justice Mahoney's Judgement in *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council*

84. In *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* Mahoney J provides detailed consideration of Dixon J's inclusion of gifts to religious institutions where 'they have in view the welfare of others' within religious purposes in *Lawlor*. In that decision, Mahoney J reached the same conclusion as the majority of the NSW Court of Appeal (that an aged care home is pursuing a religious purpose where

undertaken by a religious institution), but asserted that ‘I would arrive at that conclusion by different reasoning’.

85. On the question of when a secular activity might be undertaken for a religious purpose, rather than placing reliance upon the recognition in *Thistlethwaite* that secular activities can be conducive to religion where undertaken by a religious body, Mahoney J preferred to rely upon the test for determining ancillary purposes:

in my opinion, where a church or analogous body has as one of the purposes to which its property may be applied a purpose which is not a mere ulterior secular purpose, but one directed to and able to be seen as assisting in the advancement of its religious purpose, then the purpose of that religion will be able to be held religious for present purposes.⁵⁰

86. In so doing, Mahoney J provides a lengthy discussion of the use of the term ‘welfare’ in Dixon J’s judgement. Justice Mahoney’s interpretation of the phrase ‘by gifts to religious bodies, orders or societies, if they have in view the welfare of others’ does not accord with the strict *ejusdem generis* reading countenanced at paragraph 62 above. Discussing various authorities that concerned the definition of religion, he held:

His Lordship referred to *Gilmour v. Coats*, and said: “The present case, however, is quite different. If the hurdle of spirit and intendment can be surmounted I see no difficulty in the second. This community is by no means closed. It receives and tends the needs of those members of the public who need help for divers reasons, such as drug addiction, or drink, or having been in prison, or even loneliness or mere failure to stand up to the strains of life.” In the case of a religious society whose activities involve “the welfare of others” the fact that the society and its members see their primary purpose as the service of their Supreme Being, and the sanctification of their souls and their “welfare” activities as relevant substantially for those purposes, would not, in my opinion, result in their being held not religious societies in the sense referred to by Dixon J. in Lawlor’s case.⁵¹

87. Justice Mahoney’s judgment states that a main purpose of religion can be achieved through ancillary welfare purposes. It also supports the submission that welfare activities may be undertaken in furtherance of religious activities. Importantly, for our current purposes, Mahoney J’s judgement provides authority that Dixon J’s reference is to

⁵⁰ (1978) 38 LGRA 199 at 222 (per Mahoney J).

⁵¹ (1978) 38 LGRA 199 at 220 (per Mahoney J).

‘welfare’ in the wider sense of community benefitting welfare activities, and not in the more limited sense that an *eiusdem generis* reading would apply to it.

Glebe Administration Board

88. The next authority on the question of the boundaries of religious purposes we consider is *Glebe Administration Board v Commissioner of Pay-roll Tax (NSW)*⁵² (*Glebe Administration Board*). In that decision, Priestly J, with whom McHugh J concurred, held that the Glebe Administration Board was not a religious body on the basis that it was ‘doing commercial work within limitations fixed by reference to religious principles’. The commerciality of the operation, although conducted in accordance with religious principles, was such as to preclude the conclusion that it was a religious body. The decision however concerns a body conducting commercial operations, not a welfare benefitting body. It is thus distinguished from the law concerning PBIs. It does not affect the characterisation of welfare benefitting purposes as enfolded within religious purpose, as provided by Dixon J in *Lawlor*.

89. It is also to be noted that the scope of the ruling in *Glebe Administration Board* was considered by the High Court in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited*,⁵³ (*Word Investments*). Therein the majority distinguished the application of Priestly J’s judgement from the operations of Word Investments Ltd in the following terms:

In contrast to the view which the Court of Appeal took of the Board in that case, the correct view in this case is that Word was using its powers to employ commercial methods to raise money for its purposes: it was not doing commercial work within limitations fixed by reference to religious principles.

90. As noted above the High Court concluded:

when the 16 purposes enumerated in sub-cl 3(a)(i)-(xvi) are read as a whole, each of them on its true construction states a charitable purpose – a purpose of advancing religion in a charitable sense.⁵⁴

⁵² *Glebe Administration Board v Commissioner of Pay-roll Tax (NSW)* (1987) 10 NSWLR 352.

⁵³ [2008] HCA 55 (3 December 2008).

⁵⁴ [2008] HCA 55 (3 December 2008) at paragraph 20.

91. The authority in *Word Investments* thus may be relied upon to assert that a body that undertakes commercial activities as a means to raise monies for religious charitable purposes is a religious body.

Dominican Sisters

92. The next authority considered relevant to the boundaries of religious purposes at law is *Commissioner for Australian Capital Territory Revenue Collections v. Council of the Dominican Sisters of Australia (Dominican Sisters)*.⁵⁵ In that matter Morling, Neaves and Foster JJ held that a religious educational institution was not a religious body. The matter, again, does not displace the characterisation of religious purposes as enfolding welfare benefitting purposes, provided by Dixon J in *Lawlor*.

93. In any event, the Court's reasoning was reliant on the fact that, in the case of the Dominican Sisters, the absence of a requirement that students undertake religious education as a component of the curriculum provided was a material determinant:

'Reliance was particularly placed upon the absence of any requirement that students of the college be of a particular religious persuasion or that they undertake all religious units of study or have an intention only to teach in the Catholic school system and that the greater proportion of time was spent teaching secular subjects.'

94. The following three judgments consider the meaning of a religious body in the specific context of anti-discrimination law.

Walsh v St Vincent de Paul Society (No. 2)

95. The next relevant authority on the question of the bounds of religious purposes is *Walsh v St Vincent de Paul Society Queensland (No.2)*⁵⁶ (*Walsh*) a decision of Member Wensley QC in the now disbanded Queensland Anti-Discrimination Tribunal. Member Wensley QC, in considering the genuine occupational requirements test contained in section 25(1) of the *Anti-Discrimination Act 1991* (Qld), held that the section did not permit the local Queensland chapter of the St Vincent de Paul Society to require that its President be a Catholic.

⁵⁵ *Commissioner for Australian Capital Territory Revenue Collections v. Council of the Dominican Sisters of Australia* [1991] FCA 426.

⁵⁶ [2008] QADT 32.

96. He held that, although, on the express terms of section 25(1) it need not be established that the organisation is a 'body established for religious purposes' in order to rely upon the subsection, a body's purpose will be relevant to the determination as to whether a requirement that a person be of a given faith is a 'genuine occupational requirement'. His reasoning did not expressly rely upon charity law principles for determination of purpose. The Tribunal looked to the primary function of the organisation and found that it was not 'to inculcate the Catholic faith in its members',⁵⁷ as asserted by the Society. Relevant to this conclusion was its welfare and other public benefitting activities and a lengthy consideration of the doctrines of the Society. Member Wensley QC thus rejected the Society's submission that 'the primary function of the Society is to inculcate the Catholic faith in its members and that, by inference, the charity, welfare, organisational and administrative aspects of the president's duties are secondary to the primary function',⁵⁸ holding that 'the submission that the function to aid the poor and needy is only a secondary function ... is not made out'.⁵⁹ Whilst Wensley QC's reasoning at times conflates consideration of the definition of a religious body with elements of the genuine occupational requirements test, the welfare and other public benefitting activities and the doctrines of the Society were central to his conclusion. Also relevant to his conclusion were the following factors:

119 ... The Society is undoubtedly Catholic in character, although it is open to all who wish to live their faith by loving their neighbour in the person of the needy. An essential aspect of the Society is that its members seek through prayer, meditations on the scriptures, the teaching of the Catholic Church, through their daily lives, and in their relationship with those in need, to bear witness to the love of Christ. The charitable services they perform are part of the life of the Church. The Rule provides that members are those who, desirous of living their Catholic faith by loving and serving their neighbour in need, participate effectively in the meetings and charitable activities of the Society, although it must be noted at this point that members may be non-Catholic.⁶⁰

⁵⁷ At 92.

⁵⁸ At 92.

⁵⁹ At 108.

⁶⁰ At 119.

97. With respect, as the reasoning is not explicit, the grounds for this conclusion are not entirely evident. Furthermore, Member Wensley QC did not consider the charitable tests for determination of the purposes of a body as relevant and made no reference to the judgement of Dixon J in *Lawlor*. Wensley QC's conclusion in respect of the effect of welfare and public benefitting purposes is inconsistent with the decision of Dixon J in *Lawlor*. We consider it to be an inadequate statement of the current law, particularly in light of the judgement of the New South Wales Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council*⁶¹ (*Wesley Mission*), the next decision discussed. However, whilst the decision in *Walsh* is of a lower court and is in contrast in certain respects to those cited above, it remains a possible source of authority for any future Queensland judicial body and serves to illustrate the concern underpinning these submissions.

OV & OW v Wesley Mission

98. The next relevant authority is the judgement of the New South Wales Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council*⁶² (*Wesley Mission*). In that matter the Court (comprising Handley and Basten JJ, with whom Allsop P concurred on the relevant points) held that Wesley Mission, a public benevolent institution,⁶³ was a religious body for the purposes of section 56(d) of the *Anti-Discrimination Act (NSW)*. This is in direct opposition to the judgement in *Walsh*.

99. The Court held that it was not 'ultimately in dispute that the Wesley Mission was "a body established to propagate religion"'.⁶⁴ Basten JA and Handley AJA held:

there might be a question, not relevant in the present case, as to whether paragraph (d) applies to conduct undertaken by a religious body in managing an investment property which includes residential lettings. That question is obviously in a different category to the attempted distinction between activities in the propagation of religion and the provision of welfare services.⁶⁵

⁶¹ [2010] NSWCA 155.

⁶² [2010] NSWCA 155.

⁶³ Although Wesley Mission subsequently undertook a corporate restructure, the then unincorporated body was a public benevolent institution at the time of the acts with which the litigation was concerned, during the course of the litigation and at the time that the New South Wales Court of Appeal held that it was a 'body established to propagate religion'.

⁶⁴ [2010] NSWCA 155 at paragraph 32.

⁶⁵ [2010] NSWCA 155 at paragraph 62.

100. The approach adopted by the Court was that the law should have regard to the characterisation adopted by the religious institution itself upon the nature of its welfare benefitting activities, reflected in the following comment:

One body established to propagate religion may only seek to minister to its adherents and gain others, but another body may treat the provision of welfare services as an essential part of its religious functions.⁶⁶

We submit that this approach reflects that adopted by Dixon J as to the nature of welfare benefitting activities by religious institutions. It provides a contemporary affirmation of the religious nature of welfare benefitting activities where undertaken by a religious institution. The Court's ruling was that Wesley Mission as a PBI was a religious institution.

101. It is important to acknowledge that the statement of the Court in the preceding paragraph was made as obiter in reply to the following alternative argument put by the plaintiffs:

that the act or practice in question must be one undertaken by the body in order to propagate its religion. That, it was submitted, is because for such an act to "conform to" the doctrines of that religion it must be an act involved in the propagation of the religion.⁶⁷

The Court of Appeal said that there was no need to consider this argument, but then went on to make the comments in the foregoing paragraph. The comments were thus treated as obiter (and non-binding) by the Court of Appeal. The matter was then returned to the New South Wales Administrative Decisions Tribunal for final determination on the facts. The contention raised by the plaintiffs was then considered by the Tribunal. After extracting the full comments of the Court of Appeal on the contention (which included the statement in paragraph 100 above) the Tribunal concluded:

We agree that the applicant's contention as to an alternative interpretation of s 56 should be rejected for reasons given by Allsop P and in the joint reasons. Apart from the practical difficulties mentioned in the joint judgment the generality of s 56(d) seems to preclude any writing down of its terms.⁶⁸

⁶⁶ [2010] NSWCA 155 at paragraph 62.

⁶⁷ [2010] NSWCA 155, at paragraph 61.

⁶⁸ [2010] NSWCA 155, at paragraph 30.

The Tribunal thus affirmed the reasoning of the Court of Appeal that a 'body may treat the provision of welfare services as an essential part of its religious functions'.⁶⁹ Thus the Court of Appeal's statement is binding law, at the level of the Tribunal.

102. Regardless, on the facts, the Court of Appeal held that a public benevolent institution was a 'body established to propagate religion' under the *Anti-Discrimination Act 1977 (NSW)*.

CYC v Cobaw

103. The next decision concerning the boundaries of religious bodies, and which applied in the context of anti-discrimination law, is *Cobaw*. Christian Youth Camps Ltd was not a PBI. It was a commercial camping operator applying profits to other purposes which were not limited to charitable purposes. As noted above, in *Cobaw* the Victorian Court of Appeal held that the test for determining ancillary and incidental purposes in charity law (which they considered to be the test applied by the High Court in *Word Investments*) is the applicable test for determination of whether an entity is a 'body established for religious purposes' for the purposes of Victorian anti-discrimination law. They also said Dixon J's direct and immediate test in *Lawlor* (as set out above) is the applicable test for determining whether a body is a religious body for the purposes of anti-discrimination law.
104. Although such is not recognised by Maxwell and Neave JJ, *prima facie*, these two tests appear to set differing standards. This thus gives rise to the question as to whether they are able to be reconciled. The most obvious means to reconcile Dixon J's judgement with the ancillary and incidental purposes test at charity law (and the means which best preserves the underlying intent of the two tests) is to say that Dixon J's statement in *Lawlor* sets the boundary of the main purpose of religious bodies (which includes welfare benefitting purposes), with the effect that any other purposes must only be ancillary to that main purpose. That is to say that welfare benefitting activities are not ancillary or incidental, they are properly construed as extensions of religious purposes. Thus the main purpose of a welfare benefitting body may be religious, on Dixon J's reasoning, as affirmed by the Victorian Court of Appeal.

⁶⁹ [2010] NSWCA 155 at paragraph 62.

105. The Court held that CYC was not religious body because of its essentially commercial operations. As CYC was not a welfare benefitting body, the judgement, again, does not affect the reasoning of Dixon J's enfolded welfare benefitting purposes within religious purposes. It is also to be noted that the *Cobaw* decision was handed down after the New South Wales Court of Appeal judgement in *Wesley Mission*. The *Cobaw* judgement only acknowledged the judgement in *OV and OW v Members of the Board of the Wesley Mission Council*⁷⁰ in a footnote as authority for proposition that a religious body can lose religious character over time. Thus the *Wesley Mission* decision's finding that a PBI could be a religious body for the purposes of anti-discrimination law was left untouched.

Application

106. In light of these authorities, what is to be made of the following statement in the ACNC CIS on PBI:

5.5.3. An entity's motives are not directly relevant to determining its main purposes. For example, *if an entity's main purpose is advancing religion it will not be eligible to be registered as a PBI*. However if the entity is motivated by religious faith and its main purpose is benevolent, it may still be eligible. (our emphasis added)

107. The ACNC's position appears to follow the ATO's position, as declared in TR 2003/5:

95. To be a public benevolent institution an organisation must be at least predominantly for the direct relief of poverty, sickness, destitution or helplessness. Other purposes or activities must be incidental to the main purpose or minor in extent and importance...

113. The constituent documents will sometimes explain the organisation's motives. They might be religious or flow from an ethical or philosophical stance. However, where the purpose is the provision of benevolent services, the motives will not detract from public benevolent institution status.

108. TR 2003/5 further states:

154. **Religious organisations** can be public benevolent institutions only where their primary purpose and predominant activity is the direct relieving of poverty, sickness, suffering, distress, misfortune and helplessness. An example was the Hobart City Mission:

⁷⁰ (2010) 79 NSWLR 606 at 617 [35]-[36].

see Case 101 (1945) 12 CTBR 823. If the benevolent activities are subsidiary to, or coordinate with, the religious purposes they will not qualify (see paragraph 99).

The highest authority cited by the ATO for this proposition is *Hobart City Mission*: see Case 101 (1945) 12 CTBR 823 (Commonwealth Taxation Board of Review Decisions). Therein it was stated ‘If the benevolent activities are subsidiary to, or coordinate with, the religious purposes they will not qualify (see paragraph 99).’

109. The Commissioner then offers one further authority, again a Commonwealth Taxation Board of Review Decision, wherein he provides the following statement:

99. In Case T13 86 ATC 188; Case 17 (1986) 29 CTBR (NS) 138 the St Columban’s Mission Society provided various benevolent services in developing countries. However, its dominant function was evangelisation. Its benevolent works were purely subsidiary to its spiritual role, rather than the reverse, and so it was not a public benevolent institution.

The predominant function of evangelisation, if reflected in activities to the extent that any welfare provision activities are minor compared to proselytism efforts, may well preclude a body from being a PBI. However this is to be distinguished from a circumstance where welfare benefitting activities are undertaken as a means of advancing the faith of the donors or members of an entity, through the realisation of that faith in action and the demonstration or communication of its nature to others (as further explicated at paragraphs 20 and 21 above).

110. Although not explicitly stated, it is conventionally assumed that the Commissioner’s position in TR 2003/5 draws upon the reasoning of Starke J in *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation*⁷¹ (*Perpetual Trustee*):

In the context in which the expression is found, and in ordinary English usage, a “public benevolent institution” means, in my opinion, an institution organized for the relief of poverty, sickness, destitution, or helplessness.

111. It has to be asked why the propositions put in TR 2003/5 have been so uncritically accepted by many advisers to the sector as the conventional wisdom? Is it possible that advisers to the sector and charity governors have taken the conservative reading of *Perpetual Trustee*, without regard to Dixon J’s enfolding of welfare within religion, in effect following the incorrect view of the Commissioner of Taxation? If so, has this then led to a

⁷¹ (1931) 45 CLR 224 per Starke J at 232.

widespread practice within the sector, thus enshrining a self-fulfilling prophecy? Ultimately how the assumptions came about is not consequential to the argument we have set out. The point is that widespread practice is irrelevant to the question of ‘what is the law?’

Conclusion

112. The *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (ACNC Act) now provides that a ‘public benevolent institution’ is a subcategory of charity for the purposes of Commonwealth law. Thus the law concerning the characterisation of charitable purposes is the relevant law for determining the characterisation of public benevolent institutions. Drawing the above authorities on the determination of religious purposes for the purposes of charity law together we reach the following conclusions:

- (a) Justice Dixon’s judgement in *Lawlor* enfolds gifts for the welfare of others within religious purposes. Such gifts do not fall within his category of secular activities inspired by a religious motive. Motive is not relevant. A contextual reading of the other reference to ‘welfare’ in his judgement requires this conclusion.
- (b) Apart from the lower Tribunal authority of *Walsh* and the ATO’s citation of Commonwealth Taxation Board of Review, there is no subsequent authority which carves welfare from religion.
- (c) There exists a thread within the case law concerning the boundaries of religion that characterises certain activities which would otherwise constitute another charitable purpose, as religiously charitable where they are conducive to the advancement of religion. Authorities supporting this proposition include:
 - i. *Thistlethwaite*, wherein the High Court acknowledged that educational, religious and philanthropic agencies and the preservation of civil and religious liberty can in certain circumstances be conducive to the advancement of religion.
 - ii. *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council*, wherein the New South Wales Court of Appeal accepted the finding of the trial judge that ‘the maintenance of [a retirement] home was conducive to the advancement of religion.’⁷²

⁷² (1978) 38 LGRA 199 at 205.

- (d) In *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* the NSW Court of Appeal affirmed the trial judge's conclusion that the acts of religious persons directed towards the relief of 'those who are deprived' effect 'the preservation, confirmation and advancement of the faith of the converted and other believers'. This reflects the precise reasoning that forms the basis of our submission that the ACNC CIS is incorrect, and for the reasons outlined at paragraphs 20 to 21 and 25 to 27. In that case, Mahoney J also considered that Dixon J intended to enfold community focussed welfare acts within religious purposes in his judgement in *Lawlor*.
- (e) The decision of Member Wensley QC in *Walsh*, in our opinion, fails to set out the reasoning for its conclusion clearly and does not consider Dixon J's characterization of religious purposes.
- (f) The ATO's authority for its proposition that welfare purposes are not charitable purposes are a Commonwealth Taxation Board of Review Decision of 1945 and a decision of 1986 that is to be clearly distinguished from a PBI that considers its welfare benefitting acts as advancing its faith, in the sense outlined in these submissions. These are very weak authorities for the ATO's proposition, and run contrary to the statement of a Justice of the High Court in *Lawlor*.
- (g) The 'carving out' of other purposes from religious charitable purposes have been in the areas of political propaganda, closed contemplative orders, education or commercial activities, not welfare benefitting purposes. No other authority mapping the boundaries of religion at law has displaced Dixon J's enfolding of welfare within religion.
- (h) The New South Wales Court of Appeal decision in *Wesley Mission*, confirms that a PBI is a religious body for the purposes of anti-discrimination law in NSW. The

decision provides a contemporary application of Dixon J's enfolding of welfare within religious purposes wherein it states:

One body established to propagate religion may only seek to minister to its adherents and gain others, but another body may treat the provision of welfare services as an essential part of its religious functions.⁷³

Although obiter, this reasoning was subsequently affirmed as binding by the NSW Anti-Discrimination Tribunal. The decision confirms that Dixon J's characterization of the enfolding of welfare purposes within religious purposes continues to reflect a contemporary understanding when applied to PBI.

- (i) The decision of the Victorian Court of Appeal in *Cobaw* only concerned the conduct of commercial activities by religious bodies, not welfare purposes. Therein the Court affirmed Dixon J's statement enfolding welfare purposes within religious purposes and also confirmed that the test for determining charitable purposes at common law applies to the determination of whether a body is a religious body for the purposes of discrimination law.

113. On the foregoing basis, in our respectful opinion, paragraph 5.5.3 of the ACNC CIS is an incorrect statement of the law. On this basis we conclude and submit that, contrary to the position put in the CIS, a body that pursues the advancement of religion through the provision of the relief of distress or poverty should be registered by the ACNC as both a religious entity and a PBI. This is on the basis that the main purpose of the body is the advancement of religion through the relief of poverty and distress. That advancement is undertaken by enabling members of the body to effectuate their religious belief through philanthropic and benevolent acts, effected both through financial contribution and contribution of their time and personal labour. We therefore conclude that the *Perpetual Trustee* test of 'an institution organized for the relief of poverty, sickness, destitution, or helplessness' falls within Dixon J's characterisation of a religious purpose, where it is undertaken by a religious body. There is no need for the bifurcation that is applied in the CIS, in fact, it is contrary to the law.

⁷³ [2010] NSWCA 155 at paragraph 62.

The Dominant Purpose Test for PBIs

114. The ACNC Commissioner's Interpretation Statement on PBIs asserts that 'For ACNC purposes, a PBI is a charitable institution with a main purpose of providing benevolent relief to people in need.'⁷⁴ On this basis it contends that a PBI cannot have a main purpose of advancing religion.
115. Support for the contention that a PBI must have a dominant purpose of providing benevolent relief may be found in the case law. For example in *Commissioner of Pay-roll Tax (Vic) v. Cairnmillar Institute* Gobbo J held:
- The findings of the leaned primary judge were that the service was prewash predominantly the treatment of mental conditions or disability by psychotherapy and that these conditions were such as to arouse community compassion and so engender the provision of relief. Those findings were sufficient in my opinion to bring the respondent within the concept of public benevolent institution as described in the *Perpetual Trustee* case and so demonstrate the element of benevolence.⁷⁵
116. It is ultimately our submission that where a faith-based PBI acquits its welfare benefitting purposes it is at the same time fulfilling its religious purposes in equal measure. The purpose is completely directed towards a welfare purpose, because all actions are done in furtherance of that purpose. All actions are similarly completely directed to religious purposes, also simultaneously fulfilling that purpose. It is unnecessary to distinguish between the two. The mere fact that both are simultaneously fulfilled is not to detract from the requirement that a PBI must have a dominant purpose of welfare relief. It does have that dominant purpose, as all actions fulfil the purpose. They also concurrently fulfil the other aspect of its main purpose, and that is to advance the relevant religion.
117. Support for this proposition may also be found in the High Court judgement in *Central Bayside*,⁷⁶ where the High Court recognised that one set of activities could fulfil two differing purposes simultaneously, in that case the purpose of advancing health and the purpose of pursuing government policy.⁷⁷

⁷⁴ Paragraph 2.1.

⁷⁵ *Commr of Pay-roll Tax (Vic) v. Cairnmillar Institute* 23 ATR 314 at 319 per Gobbo J.

⁷⁶ *Central Bayside General Practice Association Limited v Commissioner of State Revenue* [2006] HCA 43; (2006) 229 ALR 1; (2006) 80 ALJR 1509 (31 August 2006).

⁷⁷ *Central Bayside* paragraph 39-41.

118. We say that the main purpose is to provide relief of poverty as a means to advance the religious faith. Where is the requirement that the purpose be split in two? Nothing in the argument detracts from satisfaction of Starke J's definition of a PBI:

In the context in which the expression is found, and in ordinary English usage, a "public benevolent institution" means, in my opinion, an institution organized for the relief of poverty, sickness, destitution, or helplessness.⁷⁸

Drawing on the authorities we have set out, essentially our submission is that where secular activities in the form of welfare relief are undertaken by a faith based organisation, they are properly to be construed to be a main purpose of providing welfare relief for the advancement of religion. This satisfies the necessary criteria for registration as a PBI.

Reasons This Conclusion Should be Reached in Policy

119. There are sound policy considerations that support the position stated in these submissions. They are as follows:

- (a) Adopting this approach to religious bodies avoids the difficulties entailed in drawing arbitrary lines between religious activities and welfare benefitting activities (as has been occasioned for example in the context of the Overseas Aid Gift Deductibility Scheme's proscription of proselytism). Carving out the spiritual dynamics of these welfare benefitting acts is to embark on an exercise in drawing an artificial, arbitrary line. Justice Dixon's characterisation in *Lawlor* avoids the fraught issue of delineating between religious acts and poverty relief.
- (b) As outlined above at paragraphs 20 and 21, many faith traditions, including Buddhist, Islamic and Christian traditions, consider works as an expression of religious concern, and as an intrinsically spiritual act. Such acts are conceived as:
 - (i) speaking to, or elaborating upon the nature of their spirituality; and
 - (ii) acts performed in fulfilment of that concern.
- (c) The approach adopted by the Court in *Wesley Mission* and by Dixon J in *Lawlor* arguably is to give proper regard to the self-conceived identification of the religious institution. This approach follows from the requirements of associational freedom, that the State should enter its engagement with associations with the intention of

⁷⁸ *Perpetual Trustee Co Ltd v. FC of T* (1931) per Starke J at 232.

regarding the true and accurate depth of their personality. From that endeavour to regard actuality, the State's role is to create the space for the expression of that personality (where such does not contravene some other legitimate purpose). This is because the State is charged with facilitating associational expressions (including, but not limited to the liberal rationale, that such bodies represent the corporate expressions of the individuals of which they are comprised). In playing its role of supporting associational expressions, the State should regard the true characterisation of the entities with which it engages, not artificial constructions of them. The objects of the ACNC Act are relevant in this regard, and in particular the object to 'support and sustain a robust, vibrant, independent and innovative not-for-profit sector'.

- (d) The construction that fails to regard the spiritual character of the welfare benefitting act proposes a deeply inadequate, pallid characterisation of an organisation's nature, and disregards their own narrative of self.

120. We conclude that, from a policy perspective, a much more natural way of engaging with these ideas, and which allows for full contemplation and expression of the diversity of the sector, is Dixon J's enfolding of welfare activities within religious purposes. This also reflects the historical and ongoing underpinnings of the Australian charity sector with expressions of faith noting that, in the financial year 2016, 16 out of the top 25 charities in Australia are faith based (by total revenue) (after pure religious charities are removed, where charities included list their main activity as either economic, social and community development, aged care activities; income support and maintenance; or social services).⁷⁹

121. Therefore we conclude that, contrary to the position held by the ACNC, welfare benefitting purposes are religious purposes, where they are undertaken by a religious institution and fall within Dixon J's characterisation. It is not then correct to state that if the main purpose is religious the entity cannot be registered as a PBI. A faith-based religious charity (presuming it meets the relevant tests) may be both a PBI and a religious body where it has as a main purpose the advancement of religion through the provision of benevolent relief to those in need.

⁷⁹ Analysis of 2016 ACNC Annual Information Data undertaken by the writer.

Part III - Amendments

122. In the final part of these submissions we propose legislative amendments that will address the concern raised in Part I. These proposed legislative amendments encompass changes to the following regimes:

- (a) The *Sex Discrimination Act 1984* (Cth), to allow for inclusion of faith based public benevolent institutions within the definition of religious body;
- (b) The *Charities Act 2013* (Cth), being the legislation governing the definition of charity at law, which amendments would ensure that a faith-based charity which characterised as a body established for religious purposes for the purposes of the SDA does not have any adverse consequences arise for its charity registration as a result; and
- (c) An amendment to the *Income Tax Assessment Act 1997* (Cth) and *Fringe Benefit Tax Assessment Act 1986* (Cth), required in order to ensure that faith based public benevolent institutions retain the tax benefits associated with PBI status (including FBT exemption, income tax exemption and deductible gift recipient status as applicable).

The State of Current State and Commonwealth Anti-Discrimination Law

123. In addition to the overview provided in the body of these submissions, Annexure A sets out in detail the additional array of terminology used in Commonwealth, State and Territory legislation to describe bodies established for religious purposes. The next section contains a brief overview of this terminology. This existing legislative framework provides a source of potential terminology for the drafting of amendments to address the concern raised in these submissions. As we are only proposing amendments to Commonwealth legislation and as a means to ensure consistency in terminology, we take as uncontentious the presumption that the terminology currently used at the Commonwealth level is to be preferred.

The History of the SDA Exemption

124. The current exemption for religious bodies is provided at section 37 of the *Sex Discrimination Act 1984 (Cth)*. It is as follows:

37 Religious bodies

- (1) Nothing in Division 1 or 2 affects:
 - (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
 - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
 - (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
 - (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

- (2) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:
 - (a) the act or practice is connected with the provision, by the body, of Commonwealth funded aged care; and
 - (b) the act or practice is not connected with the employment of persons to provide that aged care.

125. The SDA does not define the term 'a body established for religious purposes' used in section 37(d). Section 38 of the SDA provides an exemption for religious schools. It is curious that while 'religious bodies' and 'religious schools' have an exemption in the law, 'religious welfare bodies' do not. It is possible that it was intended that the original exemptions in anti-discrimination law would cover such religious welfare bodies, but with the effluxion of time, and alterations in Australian society this understanding has been lost. Some clarification may be gleaned by having regard to the supplementary Parliamentary materials surrounding the introduction of the SDA.

126. The *Sex Discrimination Bill* was first introduced into the House in 1981 by Senator Ryan, then in opposition. The religious exemption clause was in the following terms:

Religious bodies

112. Nothing in this Act affects-

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
- (c) any other practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

127. Senator Ryan, then in Government, introduced a subsequent Bill on 02 June 1983. After consultation with religious groups, a further Bill was introduced on 29 November 1983. That Bill presented the current wording of section 37:

Religious bodies

37. Nothing in Division 1 or 2 affects-

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
- (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

The second 1983 Bill thus introduced the additional subclause (c). It also abandoned the concept of 'body established to propagate religion' and instead adopted the concept of 'body established for religious purposes'. In her reading speech on 29 November 1983 in introducing the amended Bill, Senator Ryan stated: 'There are alterations in clause 37 dealing with religious bodies to extend it to the selection and appointment of acolytes, deacons and so on and in the language of the final paragraph which has been broadened.'

128. The Digest to the 29 November 1983 Bill provides:

Also exempt from the provisions of Division 1 and 2 are charities (cl.36) voluntary bodies (cl.39) and religious bodies (cl.37). The ordination or appointment of priests, ministers of religion or members of any religious order, and their training or education are matters which are thus exempt from the provisions. The exemption also covers any act or practice of a body established for religious purposes being an act or practice which conforms to the doctrines or benefits of the religion or is necessary to avoid injuring religious susceptibilities (sub-cl.37(d)).

129. The Explanatory Memorandum to the *Sex Discrimination Bill 1983* (Cth) provides:–

Clause 37 - Religious bodies

This clause provides an exemption from Divisions 1 and 2 of this Part in regard to certain activities of religious bodies including the education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order. –

Clause 38 - Educational institutions established for religious purposes

Sub-clause (1) of this clause provides an exemption in relation to discrimination on the ground of sex, marital status or pregnancy for the hiring or dismissal of staff for employment at an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion or creed where the discrimination is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Sub-clause (2) provides a similar exemption in relation to the hiring or dismissal of contract workers. Sub-clause (3) provides a similar exemption in relation to discrimination on the grounds of marital status or pregnancy for educational institutions with regard to their educational practices.

130. The Digest and the Explanatory Memorandum therefore do not provide clarification on the meaning of religious body beyond the express terms of the section itself. What is clear from this analysis is that the abandoned concept of a body established to 'propagate religion' represented a more limited criteria than that ultimately adopted, being a 'body established for religious purposes'. As indicated by Senator Ryan, after consultation with religious bodies, the definition was 'broadened'. Thus it is clear that that the definition was intended to broad and encompassing of a wide range of religious bodies in operation,

certainly wider than those who merely 'propagate' religion. Further, the later inclusion of subclause (c), pertaining to direct spiritual observance or practice, necessarily expands the scope of subparagraph (d) to include acts of religious bodies that are not direct spiritual observances or practices. This reading thus supports the application of section 37(d) to a wider scope of activities. There is no reason to suppose that such activities would not include those of the nature of faith-based charities.

The Meaning of Religious Body

131. Turning to the various Territory and State based regimes, although variations on the wording of the bodies and persons able to access the exemptions do vary, the majority of regimes locate the religious freedom exemption, like the SDA, upon 'a body established for religious purposes':
- (a) Queensland – *Anti-Discrimination Act 1991* (Qld) (Qld Act) – section 25(2)(b);
 - (b) South Australia – *Equal Opportunity Act 1984* (SA) (SA Act) – section 50;
 - (c) Australian Capital Territory – *Discrimination Act 1991* (ACT) (ACT Act) - section 32(d);
 - (d) Northern Territory - *Anti-Discrimination Act* (NT) (NT Act) - section 51(d); and
 - (e) Western Australia *Equal Opportunity Act 1984* (WA) (WA Act) – section 72.
132. Section 351 of the *Fair Work Act 2009* (Cth) (FWA) provides an exemption from the protections against adverse action for an 'institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'.
133. Section 56(d) of the *Anti-Discrimination Act 1977* (NSW) (NSW Act) refers to 'a body established to *propagate* religion'. It thus aligns with the wording of the original *Sex Discrimination Act Bill 1983* (Cth).
134. Section 81 of the *Equal Opportunity Act 2010* (Vic) (Vic Act) has a definition of 'religious body' that includes:
- (a) 'a body established for a religious purpose'; and
 - (b) an entity that 'establishes, or directs controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles'.

The Vic Act also provides an exemption to a 'person' at section 84.

135. Section 51 of the *Tasmanian Anti-Discrimination Act 1998* (Tas) (Tas Act) exempts a 'person' from certain provisions of the Act. Section 3 of the Tas Act provides 'person includes an organisation'.
136. Sections 35(2b) and 85ZB(3) of the *Equal Opportunity Act 1984* (SA) grant an association 'administered in accordance with the precepts of a particular religion' certain exemptions in relation to its dealings with members and prospective members.
137. All of the Acts at State, Territory and Commonwealth levels provide exemptions to educational institutions. They are cast in the following terms:
- (a) Commonwealth SDA section 38 – refers to 'an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'.
 - (b) Queensland - Section 25(2)(a) refers to an 'educational institution (an employer) under the direction or control of a body established for religious purposes'.
 - (c) NT - Sections 30(2), 37A and 40(2A) refer to 'An educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion'.
 - (d) SA – Section 34 refers to an 'educational institution ... administered in accordance with the precepts of a particular religion'.
 - (e) Victoria – section 83 refers to an 'educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles'.
 - (f) WA - Section 73(1) refers to 'an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'.
 - (g) Tasmania - Section 51A contains the phrase 'an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion'.

Summary of Statutory Tests

138. By way of summary, the central descriptions then are:
- (a) 'body established for religious purposes' test.
 - (b) the 'in accordance with' test:
 - i. 'an educational institution that is conducted *in accordance with* the doctrines, tenets, beliefs or teachings of a particular religion or creed' (SDA).
 - ii. an 'institution conducted *in accordance with* the doctrines, tenets, beliefs or teachings of a particular religion or creed' (FWA).
 - iii. an 'entity that is intended to be, and is, conducted *in accordance with* religious doctrines, beliefs or principles' (Vic Act).
 - iv. 'educational institution that is, or is to be, conducted *in accordance with* religious doctrines, beliefs or principles' (Vic Act).
 - v. 'administered *in accordance with* the precepts of a particular religion' (SA Act).
 - vi. 'An educational authority that operates, or proposes to operate, an educational institution *in accordance with* the doctrine of a particular religion' (NT Act).
 - vii. 'educational institution ... administered *in accordance with* the precepts of a particular religion' (SA Act).
 - viii. 'an educational institution that is conducted *in accordance with* the doctrines, tenets, beliefs or teachings of a particular religion or creed'. (WA Act).
 - ix. 'an educational institution that is or is to be conducted *in accordance with* the tenets, beliefs, teachings, principles or practices of a particular religion' (Tas Act).
 - (c) The 'under the control' or 'operates' test:
 - i. '*establishes, or directs controls or administers*, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles' (Vic Act).

- ii. 'educational institution (an employer) *under the direction or control* of a body established for religious purposes' (Qld Act).
- iii. 'An educational authority that *operates, or proposes to operate*, an educational institution in accordance with the doctrine of a particular religion' (NT Act).

Summary of Judicial Tests

139. In addition, certain terminology arises from the review of case law provided in Part II above to describe the circumstance where a welfare benefitting body advances religion. These may be summarised as follows:

(a) The 'conducive to' test:

- i. *Thistlethwaite*, wherein the High Court held that religious bodies 'can create, maintain and improve educational, religious and philanthropic agencies only to the extent to which such agencies are *conducive to* the achievement of this purpose.'⁸⁰
- ii. *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council*, wherein the New South Wales Court of Appeal accepted the finding of the trial judge that 'the maintenance of [a retirement] home was *conducive to* the advancement of religion.'⁸¹

(b) The 'assisting in the advancement' test:

in my opinion, where a church or analogous body has as one of the purposes to which its property may be applied a purpose which is not a mere ulterior secular purpose, but one directed to and able to be seen as assisting in the advancement of its religious purpose, then the purpose of that religion will be able to be held religious for present purposes.⁸²

⁸⁰ (1952) 87 CLR 375 at 442.

⁸¹ (1978) 38 LGRA 199 at 205.

⁸² (1978) 38 LGRA 199 at 222 (per Mahoney J).

(c) The 'essential functions' test:

'the provision of welfare services as an essential part of its religious functions'.⁸³

(d) The 'ancillary or incidental' purposes test:

Thistlethwaite, wherein the High Court noted the common law doctrine that 'a body is a charity even if some of its incidental and ancillary objects, considered independently, are non-charitable.'

140. It is also to be noted that the definition of charity in the *Charities Act 2013* (Cth) refers to 'purposes that are incidental or ancillary to, and in furtherance or in aid of' charitable purposes.

141. In the above judicial authorities, the following phrases were also used to describe the operations of welfare benefitting religious organisations:

(a) 'the spread or strengthening of spiritual teaching within a wide sense';⁸⁴ and

(b) 'the preservation, confirmation and advancement of the faith of the converted and other believers'.⁸⁵

142. It was also argued, to reconcile the seemingly contrasting tests for 'body established for religious purposes' in *Cobaw*, that the most obvious means to reconcile Dixon J's judgement with the ancillary and incidental purposes test at charity law (and the means which best preserves the underlying intent of the two tests) is to say that Dixon J's statement in *Lawlor* sets the boundary of the main purpose of religious bodies (which includes welfare benefitting purposes), with the effect that any other purposes must only be ancillary to that main purpose. That is to say that welfare benefitting activities are not ancillary or incidental, they are properly construed as extensions, or effectuations, of religious purposes. It was thus concluded that the main purpose of a benevolent welfare benefitting body may be religious, on Dixon J's reasoning, as affirmed by the Victorian Court of Appeal.

⁸³ [2010] NSWCA 155 at paragraph 62.

⁸⁴ [1934] HCA 14; (1934) 51 CLR 1 at 32 (per Dixon J).

⁸⁵ *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* (1978) 38 LGRA 199.

143. Thus a body established for religious purposes may pursue the advancement of religion through the provision of benevolent relief. Drawing on the authorities we have set out in these submissions, essentially our submission is that where secular activities in the form of welfare relief are undertaken by a faith based organisation, they are properly to be construed to be a main purpose of providing welfare relief for the advancement of religion.

The Array of Charitable Purposes that may be undertaken by Faith Based Bodies

144. Having set out the various resources available in the existing law, and before turning to proposed amendments, it is necessary to set out the context of the definition of charity at law. Section 12(1) of the *Charities Act 2013* (Cth) provides the list of charitable purposes at law. It is instructive of the types of purposes that may be pursued by faith based organisations, and for which religious exemptions to anti-discrimination law may be sought. They are as follows:

12 Definition of *charitable purpose*

(1) In any Act:

charitable purpose means any of the following:

- (a) the purpose of advancing health;
- (b) the purpose of advancing education;
- (c) the purpose of advancing social or public welfare;
- (d) the purpose of advancing religion;
- (e) the purpose of advancing culture;
- (f) the purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
- (g) the purpose of promoting or protecting human rights;
- (h) the purpose of advancing the security or safety of Australia or the Australian public;
- (i) the purpose of preventing or relieving the suffering of animals;
- (j) the purpose of advancing the natural environment;
- (k) any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j);

Note: In the case of a purpose that was a charitable purpose before the commencement of this Act and to which the other

paragraphs of this definition do not apply, see item 7 of Schedule 2 to the *Charities (Consequential Amendments and Transitional Provisions) Act 2013*.

- (l) 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, if:
 - (i) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or
 - (ii) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

145. The purpose of advancing social or public welfare is further expanded upon at section 15 of that Act:

15 Purpose of advancing social or public welfare

(1) Without limiting what constitutes the purpose of advancing social or public welfare, the ***purpose of advancing social or public welfare*** includes the purpose of relieving the poverty, distress or disadvantage of individuals or families.

(2) Without limiting what constitutes the purpose of advancing social or public welfare, the ***purpose of advancing social or public welfare*** includes the purpose of caring for and supporting:

- (a) the aged; or
- (b) individuals with disabilities.

(3) Without limiting what constitutes the purpose of advancing social or public welfare, the ***purpose of advancing social or public welfare*** includes the purpose of caring for, supporting and protecting children and young individuals (and, in particular, providing child care services).

(4) Without limiting what constitutes the purpose of advancing social or public welfare, the ***purpose of advancing social or public welfare*** includes the purpose of assisting the rebuilding, repairing or securing of assets after a disaster if:

- (a) the disaster developed rapidly and:

- (i) resulted in the death, serious injury or other physical suffering of a large number of individuals; or
- (ii) caused distress to a large number of individuals and resulted in widespread damage to property or the natural environment; and
- (b) the rebuilding, repairing or securing is in furtherance or in aid of the purposes of one or more exempt entities (within the meaning of the *Income Tax Assessment 1997*); and
- (c) the purpose of assisting is directed to providing benefits that are commercial or private only to an incidental and ancillary extent, if at all; and
- (d) the assets are assets of entities that:
 - (i) are not government entities; or
 - (ii) would be charities were they not government entities.

146. There is no statutory definition of 'public benevolent institution'. The definition lies within the common law. As noted above, the ACNC's CIS on PBIs in summarising this law defines a PBI as 'a charitable institution with a main purpose of providing benevolent relief to people in need'.

Proposed Amendments

Amendments to the SDA

147. In order to address the concerns raised in these submissions, it is proposed that a new section 37(3) of the SDA be introduced in the following terms:

(3) *Despite any law (including any provision of this Act and any law of a State or Territory) a body established for religious purposes includes, and shall be deemed to have always included, without limitation, a body:*

(a) *that is a:*

- (i) *not for profit entity; or*
- (ii) *charity under the Charities Act 2013, including any public benevolent institution (regardless of whether any of the charitable purposes of the entity is advancing religion);*

(b) *where that body:*

- (i) *is established by or under the direction, control or administration of a body established for religious purposes; or*
- (ii) *is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; or*
- (iii) *is a body to which subsection (4) applies.*

(4) *A charity that has a charitable purpose pursuant to the Charities Act 2013 that is not advancing religion may be a body established for religious purposes through advancing that other charitable purpose:*

- (a) *where that other charitable purpose is an effectuation of, conducive to or incidental or ancillary to, and in furtherance or in aid of, the advancement of its religious purpose; or*
- (b) *where the advancement of religion is an effectuation of, conducive to, or incidental or ancillary to, and in furtherance or in aid of, that other charitable purpose.*

(5) *Subsection (4) does not limit the circumstances in which a charity that has a charitable purpose that is not advancing religion may be a body established for religious purposes.*

148. Drawing upon other Commonwealth statutes and the common law authorities outlined above at Part II, the drafting is intended to be broad and capture bodies under the control of a religious body, and also those that are not under such control but are

administered in accordance with the doctrines of a religion. Subsection (4) also affirms, for the purposes of the SDA, the proposition that a charity may advance religion by advancing another charitable purpose, for example the provision of benevolent relief. It will be noted that the definition is an 'inclusive' one, it thus does not otherwise affect the definition of a religious body, and only operates as a clarification that the definition is intended to include a certain type of body, without limiting any other type of body. The phrase 'effectuation of' is included to reflect Dixon J's reasoning that welfare benefitting activities are not ancillary or incidental, they are properly construed as extensions of religious purposes. The phrase 'conducive to' is drawn from the judgement of the High Court in *Thistlethwaite*. The phrase 'incidental or ancillary to, and in furtherance or in aid of' is lifted from the definition of charity in the *Charities Act 2013* (Cth). As outlined above, the phrase 'conducive to' has a separate jurisprudence to the incidental and ancillary test and is therefore separately included.

Amendments to the Charities Act

149. In addition to the introduction of new definition of 'body established for religious purposes' under the SDA, it is necessary to ensure that the amendments introduced to section 37 of the SDA do not detrimentally affect the tax treatment of charities.

150. For this reason amendments are proposed to introduce new provisions into the *Charities Act 2013* (Cth). The phrase 'public benevolent institution' does not appear in the *Charities Act 2013* (Cth). It appears in the *Australian Charities and Not-for-profits Commission Act 2013* (Cth), as a body eligible for registration as a charity. Nevertheless the *Charities Act 2013* (Cth) contains the principal definitions of charitable purposes, and it is therefore thought that this is the most suitable place for any provisions that impact upon the definition of a PBI or other form of faith-based charity.

151. It is proposed that the following provision be inserted into section 12 of the *Charities Act*:

- (4) For the purposes of this section, disregard the fact that an entity is, or has been, a body established for religious purposes within the meaning of section 37 of the *Sex Discrimination Act 1984*.

Note 1: For example, a body that has a purpose of advancing social or public welfare may be registered under subparagraph (1)(c) regardless of

whether it is a body established to advance religion under section 37 of the Sex Discrimination Act 1984. It may be both a body that has a purpose of advancing social or public welfare and a body established for religious purposes under section 37 of the Sex Discrimination Act 1984, but for the purposes of paragraph (1)(c) regard is not had to its status under section 37 of the Sex Discrimination Act 1984.

Note 2: For example, a body that has a purpose of advancing religion may be registered under paragraph (1)(d) regardless of whether it is a body established to advance religion under section 37 of the Sex Discrimination Act 1984. It may be both a body that has a purpose of advancing religion under paragraph (1)(d) and a body established for religious purposes under section 37 of the Sex Discrimination Act 1984, but for the purposes of paragraph (1)(d) regard is not had to its status under section 37 of the Sex Discrimination Act 1984.

152. It will be noted that the new provision does not attempt to provide an exhaustive definition of public benevolent institution. The concept of a PBI will therefore continue to lie within the common law.

Amendment to the ITAA 97

153. It is also necessary to introduce a new section 30-325 to the *Income Tax Assessment Act 1997* (Cth) to ensure that the deductible status of PBIs are not detrimentally affected by the proposed drafting. The proposed drafting is:

A fund, authority or institution does not fail to satisfy the requirements for endorsement under Division 30 of this Act for the reason that the fund, authority or institution is, or has been, a body established for religious purposes within the meaning of section 37 of the *Sex Discrimination Act 1984*.

154. Division 30 of the *Income Tax Assessment Act 1997* (Cth) concerns the eligibility for endorsement as a deductible gift recipient.

Amendment to the FBTA

155. It is also necessary to introduce amendments to the *Fringe Benefits Tax Assessment Act 1986* (Cth) (FBTA) to ensure that the fringe benefit tax exemption of PBIs and health promotion charities are not detrimentally affected by the proposed drafting. The proposed drafting is:

After subsection 123C(2)

Insert:

- (3) An entity does not fail to satisfy the requirements for endorsement in subsection (2) for the reason that the entity is, or has been, a body established for religious purposes within the meaning of section 37 of the *Sex Discrimination Act 1984*.

After subsection 123D(2)

Insert:

- (3) An entity does not fail to satisfy the requirements for endorsement in subsection (2) for the reason that the entity is, or has been, a body established for religious purposes within the meaning of section 37 of the *Sex Discrimination Act 1984*.

Retrospectivity

156. It will be noted that the following phrase appears in the above amendments to the SDA and the *Charities Act 2013* (Cth): 'shall be deemed to have always included'. The amendments to the *Charities Act 2013* (Cth), the *ITAA 97* and the *FBTA* also state: 'disregard the fact that [an entity] is, *or has been*' a body established for religious purposes under the SDA. The intention is to ensure that it is clear that the amendments operate to clarify rather than change the law, with the effect that any prior conduct by faith based charities, and any existing complaints against such bodies under the SDA, would be determined in light of the amendments.

157. The Explanatory Memorandum to the Amending Bill should also state that the amendments (to each of the three Acts) are meant to merely so clarify the law as it has always existed. As authority for this proposition, we rely upon the judgement of Douglas J in *Dixon v Anti-Discrimination Commissioner of Queensland*, wherein Douglas J held:

The Discrimination Law Amendment Act 2002 was not, in its terms, declaratory of the meaning of the word “religion” but it is appropriate these days for me to take account of the explanatory notes to conclude that the Bill was meant to clarify rather than change the meaning of the word “religion”; see also the discussion in Pearce and Geddes, *Statutory Interpretation in Australia*, (5th ed., 2001), at [10.12].⁸⁶

There may be some Constitutional limitations upon this approach, to the extent that the legislation endeavours to prevail against State and Territory laws. We make further comments on the means to address this concern at paragraph 171 below.

Application to Faith-Based Charities

158. *As we have noted above, while the principal concern underlying this submission has been prompted by the ACNC CIS on PBIs*, there are a wide range of Australian charities that, in addition to public benevolent institutions, are faith based. Having regard to section 12(1) above, these include, for example, faith-based:

- (a) Hospitals;
- (b) Health promotion charities;
- (c) Religious organisations established to promote culture (such as faith-based radio stations);
- (d) Human rights promotion charities;
- (e) Environmental groups;
- (f) Bodies advancing social or public welfare, which includes faith-based charities with a purpose of:
 - i. relieving the poverty, distress or disadvantage of individuals or families,
 - ii. caring for and supporting:
 - 1. the aged; or
 - 2. individuals with disabilities
 - iii. purpose of caring for, supporting and protecting children and young individuals (and, in particular, providing child care services); or
 - iv. disaster relief (these are dealt with in the preceding section).

⁸⁶ [2004] QSC 058, per Douglas J (at paragraph 17).

159. The drafting proposed above is deliberately broad enough to encompass all faith-based charities, where they can be said to satisfy one of the tests section out at 37(3) and (4).

Contrary Commonwealth and State Based Laws

160. One of the relevant considerations for legislative change is whether the amendments to Commonwealth law made are intended to overturn the State based anti-discrimination regimes. This is to be preferred, as otherwise a faith-based charity could be exempt under Commonwealth anti-discrimination law, but be successfully sued under a State or Territory law, giving rise to inconsistent policy outcomes. For this reason the drafting of legislation that would have as its starting place the uniformity of the religious freedom protection both in Commonwealth and State law is to be preferred. Currently State and Territory law gives varying and incomplete protection to the internationally recognised rights of freedom of religion.
161. It is also to be noted that any proposal to amend the SDA will also need to consider the effect on the protections currently offered under State law. If the amendment is adopted it will:
- (a) Permit conduct that may be prohibited under State based law;
 - (b) Prohibit conduct that may be permitted under State based law, where:
 - i. the State exemption is wider than the Commonwealth exemption
 - ii. the State law does not contain a protected attribute, but the Commonwealth does.
162. As the proposed amendment provides a clarification that the section 37 exemption applies to faith-based charities, it is not considered that the proposal will amount to the removal of any protections to such bodies under State based exemptions. To the contrary, if the definition is to be applied for the purposes of State law, it will merely clarify that such bodies are exempt under State law, but will leave the existing State or Territory definition otherwise unaltered.

The statutory context is that subsections 10(3) and 11(3) of the SDA provide that the Act does not intend to oust or limit the operation of any law of a State or Territory that is capable of operating concurrently. They are in the following terms:

10 Operation of State and Territory laws

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.

11 Operation of State and Territory laws that further objects of relevant international instruments

(3) This Act is not intended to exclude or limit the operation of a law of a State or Territory that furthers the objects of a relevant international instrument and is capable of operating concurrently with this Act.

In light of this context, it will be noted that, with the intention of ensuring subsection 37(3) prevails against both subsections 10(3) and 11(3) and any contrary State or Territory law, the following phrase is inserted at the commencement of the proposed subsection 37(3): 'Despite any law, (including any provision of this Act and any law of a State or Territory)...'.

163. In addition the following drafting is proposed as a means to ensure that the intent of Parliament is clear against any Court that may wish to limit the exemption provided under State or Territory law to exclude faith based charities from being religious bodies.

38A Sections 37 is intended to "cover the field"

- (1) Despite any law, but subject to subsection (3), it is the intention of Parliament that, in order to recognise the protections, rights, privileges and entitlements of a body or institution to which section 37 applies, and to ensure that such protections, rights, privileges and entitlements are recognised equally and without discrimination in all States and Territories, section 37 operates:
- (a) to cover the field in relation to those protections, rights, privileges and entitlements; and
 - (b) to provide a complete, exhaustive and exclusive statement of the law relating to those protections, rights, privileges and entitlements; and
 - (c) to exclude and limit the operation of the laws of the States and Territories in relation to those protections, rights, privileges and entitlements.
- (2) For the avoidance of doubt, and without limiting subsection (1), but subject to subsection (3), despite any law, if a protection, right, privilege or entitlement

granted, or a limitation provided for under section 37 of this Act, is inconsistent with a protection, right, privilege or entitlement granted, or a limitation provided for, under a law of a State or Territory, this law shall prevail, and the State or Territory law shall, to the extent of the inconsistency, be invalid.

(3) The protections, rights, privileges and entitlements of a body or institution to which section 37 applies are in addition to the protections, rights, privileges and entitlements provided under any law of the Commonwealth or a State or Territory. Nothing in subsections (1) or (2) shall exclude or limit the operation of the laws of the Commonwealth or a State or a Territory that are more protective of those protections, rights, privileges and entitlements.

164. The application of this drafting to include existing section 38 of the SDA may also be considered.

165. The phrase 'recognised equally and without discrimination in all the States and Territories of the Commonwealth' in subsection (1) adopts the wording of the full High Court in *Viskauskas v Nilan*.⁸⁷ Therein the High Court, considering provisions of the *Racial Discrimination Act 1975* (Cth), held that the:

enactment operates equally and without discrimination in all the States of the Commonwealth. It could not, for example, admit the possibility that a State law might allow exceptions to the prohibition of racial discrimination or might otherwise detract from the efficacy of the Commonwealth law.

Support for the provision might also be found in *Dao v Australian Postal Commission*⁸⁸ and *AMP v Goulden*.⁸⁹

166. The phrase 'complete, exhaustive and exclusive' in subsection (1) adopts the wording of Dixon J in *Ex parte McLean*.⁹⁰

167. The phrase 'exclude and limit' in subsection (1) adopts the wording of section 6A of the *Racial Discrimination Act 1975* (Cth).

168. Adopting the above provisions will ensure that exemption from the adverse action protections granted at section 351(2) of the *Fair Work Act 2009* (Cth) will then apply to faith-based charities. This is because section 351(2) provides that section 351(1) cannot

⁸⁷ (1983) 153 CLR 280, at 292

⁸⁸ (1987) 162 CLR 317.

⁸⁹ (1986) 160 CLR 330.

⁹⁰ (1930) 43 CLR.

be used against a body that is exempt under the SDA or State based anti-discrimination law.

169. If a more direct route to exemption under section 351(2) of the FWA is to be preferred, the existing phrase 'an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed' could be defined to include a faith-based public charity adopting the wording of proposed subsection 37(3) of the SDA, with the necessary amendments made *mutatis mutandi*.
170. Further thought should be given to the need for transitional provisions that deal with any existing complaints lodged against faith based charities with the Australian Human Rights Commission or Commonwealth Tribunal or Court or any State or Territory Commission, Tribunal or Court. Section 6A(2) of the *Racial Discrimination Act 1975* (Cth) may provide guidance.
171. As noted above at paragraphs 151 to 152, the amendments to the SDA intend to operate retrospectively. If the legislation is to operate so to prevail against State and Territory law, consideration will need to be given to the judgment of the High Court in *University of Wollongong v Metwally*.⁹¹ Therein the Court held that the Commonwealth Parliament could not legislate retrospectively to remove citizen's rights under section 109 of the Constitution. If it is thought that this judgement cannot be overcome, the retrospective clauses within the proposed drafting may require inclusion of the clarification that they operate only 'so far as is permitted by law.'

The Applicable International Human Rights Law

172. These proposed amendments are consistent with *The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* Proclaimed by General Assembly of the United Nations on 25 November 1981. Article 6 (b) of the Declaration provides: The right to freedom of thought, conscience, religion or belief [under Article 18 of the ICCPR] includes the freedom, "To establish and maintain appropriate charitable or humanitarian institutions". To remove the ability of such institutions to control the appointment of their staff and leaders (as occurred in *Walsh*) is to remove their ability to maintain their faith-based character, and thus a direct

⁹¹ (1983) 158 CLR 447.

impingement on their religious freedom rights. The proposed amendments to section 37 give recognition to these rights.

173. In so doing, the proposed amendments thus exclude or limit the operation of the laws of States or Territories that are inconsistent with the rights protected therein. Such is intended to effect consistency in Australia's acquittal of its obligations under international law. Pursuant to Article 50 of the *International Covenant on Civil and Political Rights*, the Commonwealth is held to account for the actions of the State and Territories in failing to protect human rights, including the right to religious freedom under Article 18. Where State or Territory law protections to religious freedom do not fulfil the protections guaranteed under international human rights law, including where exemptions in State or Territory anti-discrimination law do not reflect the scope of religious freedom protections, the Commonwealth is responsible. The amendments clarify the scope of the existing protections against discrimination in the *Sex Discrimination Act* but in giving effect to the Commonwealth's obligations under international law, should prevail over any inconsistent State or Territory law to ensure that the applicable rights are recognised equally and without discrimination in all the States and Territories of the Commonwealth.

174. Insofar as Australia's international obligations are concerned, Article 18 of the ICCPR, which was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 provides as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

175. Article 18 of the *Universal Declaration on Human Rights* proclaimed by the United Nations General Assembly in Paris on 10 December 1948 provides as follows:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with

others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

176. The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* proclaimed by General Assembly of the United Nations on 25 November 1981 (the Declaration) considers the scope of the manifestations that are enfolded within the protection to religious freedom provided under Article 18 of the ICCPR. Article 6 of the Declaration is in the following terms:

In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

177. This Declaration was declared "an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993. This means that individuals and organisations may lodge a complaint with the Australian Human Rights Commission alleging a breach of the Declaration.

178. Paragraph (b) of the Declaration is apposite, clearly contemplating the fact that a person or organisation may choose to be involved with, and establish, charitable or humanitarian institutions consistent with his or her religion or belief.

179. In 2005, the United Nations Human Rights Committee, cited Article 6(b) in the case of *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*.⁹² That matter concerned a refusal of the Sri Lankan Government to pass a 'Bill' that would have enabled the incorporation of an order of Catholic nuns. The activities undertaken by the nuns included the provision of 'assistance to others'. The Committee cited Article 6(b) of the Declaration in making the following comments on Article 18(3) of the ICCPR:

7.2 As to the claim under article 18, the Committee observes that, for numerous religions, including according to the authors, their own, it is a central tenet to spread knowledge, to propagate their beliefs to others *and to provide assistance to others. These aspects are part of an individual's manifestation of religion and free expression, and are thus protected by article 18, paragraph 1, to the extent not appropriately restricted by measures consistent with paragraph 3 [here the Committee cites paragraph 6(b) of the Declaration].* The authors have advanced, and the State party has not refuted, that incorporation of the Order would better enable them to realize the objects of their Order, religious as well as secular, including for example the construction of places of worship. Indeed, this was the purpose of the Bill and is reflected in its objects clause. *It follows that the Supreme Court's determination of the Bill's unconstitutionality restricted the authors' rights to freedom of religious practice and to freedom of expression, requiring limits to be justified, under paragraph 3 of the respective articles, by law and necessary for the protection of the rights and freedoms of others or for the protection of public safety, order, health or morals. [emphasis added]*

180. The Human Rights Committee ultimately found in favour of the Order as follows:

7.3 *In the Committee's view, the grounds advanced in the present case therefore were insufficient to demonstrate, from the perspective of the Covenant, that the restrictions in question were necessary for one or more of the enumerated purposes. It follows that there has been a breach of article 18, paragraph 1, of the Covenant.*

...

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the

⁹² *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v. Sri Lanka*, Communication No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005).

facts as found by the Committee reveal violations by Sri Lanka of articles 18, paragraph 1, and 26 of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy giving full recognition to their rights under the Covenant. The State party is also under an obligation to prevent similar violations in the future. [emphases added]

181. As is clear from the emphases added in the quote in paragraph 179 and the citation of the Religious Declaration therein, the Human Rights Committee clearly contemplate that an individual's religion may be manifested through the provision of assistance to others and the establishment of charitable and humanitarian institutions and that to unnecessarily place restrictions on such an individual's ability to do so is inconsistent with international law. The inclusion of such activities within the permissible manifestation of religious belief reflects the reasoning of Dixon J in *Lawlor*.

182. The United Nations Special Rapporteur on freedom of religion or belief has also given targeted consideration to the right to "establish and maintain appropriate charitable or humanitarian institutions" under paragraph (b) of Article 6 of the Declaration.⁹³ The Special Rapporteur has made the following comments on the scope of the protection:

35. The Special Rapporteur has also noted with concern that the freedom to establish and maintain religious, charitable or humanitarian institutions is not always fully respected and protected in accordance with appropriate national legislation and in conformity with international human rights law. On a domestic level, some religious minorities are, for example, not authorized to extend their religious activities into social, health or educational matters.

36. While the right to establish religious, charitable or humanitarian institutions and to receive funding is not unlimited, any restrictions imposed must be prescribed by law and must be necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others, for example in order to prevent such institutions being misused to advance their cause through violence.⁹⁴

⁹³ Paul M Taylor, *Freedom of Religion UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 248-250 (including footnote reference set out therein).

⁹⁴ UN Doc, A/65/207 (2010) p. 12-13, paras. 35-36.

183. In 1986 the Special Rapporteur made the following statement:

51. The freedom to establish and maintain appropriate charitable or humanitarian institutions (art.6 (b)) is brought into question when a religion or sect is banned by law, as is regrettably the case with various denominations in several countries. Further, this freedom is at times expressly restricted or denied. In one country where a religious community has been declared unlawful, a decree forbids the members of this denomination to engage in any community activity. In another country where the registration of religions and sects with the official authorities is a prerequisite for the legal exercise of religious observances, *this registration amounts in practice to relinquishing the freedom to establish charitable or humanitarian institutions*. In yet another country, a decree issued by the Ministry of Justice officially declared a religious commission which sought social progress to be unlawful and transferred its property to the State.⁹⁵ [emphasis added]

184. The role of the Special Rapporteur, in part, is to review the performance of countries from around the world. Particular insights can then be gained from the comments that the Rapporteur has made in relation to the observance of this right in other countries:

a. In his report of 6 January 1988, the Special Rapporteur reported the following in relation to the Islamic Republic of Iran:

It has been alleged that, since 1979, all the Baha'i holy places and religious sites have been confiscated by the authorities. According to a decree of August 1983, the Baha'is have reportedly been deprived of institutions necessary for *the proper practice of their religion and the maintenance of the social, educational and humanitarian activities of their community*, as well as permission to hold public meetings, to express their faith openly or to publish religious literature.⁹⁶ [emphasis added]

b. Since Viet Nam banned all faith-based charitable institutions in 1975 it has been in receipt of several disapproving conclusions. In his report of 20 January 1994 the Special Rapporteur reported the following:

Large numbers of religious schools, seminaries, hospitals and orphanages were reportedly also closed or nationalized, as was the case with the Evangelical Nha Trang Seminary.⁹⁷

⁹⁵ UN Doc, E/CN.4/1987/35 (1986) p. 16, para. 51.

⁹⁶ Un Doc, E/CN.4/1988/45 (1988) p. 5, para, 15 (Islamic Republic of Iran).

⁹⁷ Un Doc, E/CN.1/1994/79 (1994) p. 113, para 79.

In his report of 29 December 1998 the Special Rapporteur concluded:

115. Lastly, the controlled areas of religious freedom described above are part of a general situation in which limitations, and even prohibitions, in the religious sphere continue. It is therefore essential for these areas of freedom gradually to be extended to the entire religious sphere and, at the same time, for most of the limitations which are illegal under international law to be eliminated and only those limitations retained which are admissible according to the International Covenant on Civil and Political Rights, the 1981 Declaration and the case law of the Human Rights Committee.

116. The current situation of the religious communities, in which circumscribed areas of freedom are emerging within a general framework of controls, limitations and even prohibitions, appears to be valid for all religious dominations (considered as a whole rather than each community group specifically), Buddhist, Catholic, Cao Dai, Hoa Hao, Protestant and Muslim (the representatives of the Muslim community said that they enjoyed freedom of religion and freedom to practise their religion, but also that their association was the only Muslim association approved by the authorities for all of Viet Nam).

117. These limitations are the following: [...]

(h) *The religious communities are not, generally speaking, authorized to extend their religious activities into social, health or educational matters. In addition, the cultural, educational, social and hospital functions removed from the religious communities after 1975 have generally not been restored by the authorities.*⁹⁸

185. These quotes demonstrate that the Special Rapporteur is of the opinion that, insofar as international law is concerned, the practice of religion includes activities of a humanitarian nature which are undertaken in pursuance of those religious beliefs. The removal of the ability of a religious body to ensure that the staff, leaders and volunteers engaged by its charitable arms share the faith of the religious body, is a removal of the

⁹⁸ UN Doc, E/CN.4/1999/58/Add.2 (1998) p. 28-30, paras. 115-117 (Viet Nam).

ability to establish and maintain such institutions. This is so because it is a removal of the ability:

- a. to ensure the institution adopts and retains the preferred religious identity; and
- b. to appoint only the persons whom the body wishes define the body's direction, goals and imperatives into the future.

186. If Australian faith-based charities, humanitarian and welfare organisations are denied the ability to practice their faith through the provision of humanitarian and welfare services to those in need, Australia faces the real risk of being non-compliant with its international law obligations under the ICCPR. Australia has ratified the ICCPR and is also bound by the First Optional Protocol to the ICCPR. This means that individuals may make complaints to the United Nations Human Rights Committee that Australian legislation (including legislation of individual States and Territories pursuant to Article 50 of the ICCPR) does not align with the protections offered by the ICCPR.

The Age Discrimination Act

187. Section 35 of the *Age Discrimination Act 2004* (Cth) (ADA) contains the only other direct exemption from discrimination provisions for a body established for religious purposes in Commonwealth law. It is in the following terms:

35 Religious bodies

This Part does not affect an act or practice of a body established for religious purposes that:

- (a) conforms to the doctrines, tenets or beliefs of that religion; or
- (b) is necessary to avoid injury to the religious sensitivities of adherents of that religion.

188. Consideration might also be given to introduction of the amendments proposed in these submissions into the ADA, with the necessary alterations, *mutatis mutandi*.

189. We take this opportunity to thank the Panel for its consideration of the concerns we have raised in these submissions. We appreciate that these submissions are lengthy and that you may well wish to discuss its aspects. We would be pleased to discuss these matters with any member of the Panel at his or her convenience.

Annexure A

Queensland

190. Section 25(2)(a) of the Qld Act refers to an 'educational institution (an employer) under the direction or control of a body established for religious purposes'. Section 25(8) provides that in section 25 'religion includes religious affiliation, beliefs and activities.'

191. Section 41 refers to 'An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion'. Section 89 refers to 'An educational authority that operates, or proposes to operate, an educational institution wholly or mainly for students of a particular sex or religion'.

192. Section 134(5), of the Qld Act provides that the following bodies may lodge a complaint:

relevant entity means a body corporate or an unincorporated body, a primary purpose of which is the promotion of the interests or welfare of persons of a particular race, religion, sexuality or gender identity.

193. The Dictionary to the Qld Act contains the following terms:

religious activity means engaging in, not engaging in or refusing to engage in a lawful religious activity.

religious belief means holding or not holding a religious belief.

New South Wales

194. Section 56(d) of the NSW Act refers to 'practice of a body established to propagate religion'.

195. In NSW there exists a broad exemption granted to private educational authorities that is not limited to religious educational bodies.

196. Section 59A of the NSW Act introduces the concept of 'faith-based organisation':

59A Adoption services

(1) Nothing in Part 3A or 4C affects any policy or practice of a faith-based organisation concerning the provision of adoption services under the *Adoption Act 2000* or anything done to give effect to any such policy or practice.

Note. Section 8 (1) (a) of the Adoption Act 2000 requires decision makers to follow the principle that, in making a decision about the adoption of a child, the best interests of the child, both in childhood and in later life, must be the paramount consideration.

(2) Subsection (1) does not apply to discrimination against any child who is or may be adopted.

(3) In this section, faith-based organisation means an organisation that is established or controlled by a religious organisation and that is accredited under the *Adoption Act 2000* to provide adoption services.

Northern Territory

197. Section 5(4) of the NT Act provides 'For the purposes of this Act, religious belief or activity shall be construed to include Aboriginal spiritual belief or activity.'
198. Sections 30(2), 37A and 40(2A) refer to 'An educational authority that operates, or proposes to operate, an educational institution in accordance with the doctrine of a particular religion'.
199. Section 40(3) refers to 'the accommodation concerned is under the direction or control of a body established for religious purposes'.
200. Section 51(d) refers to an 'act by a body established for religious purposes if the act is done as part of any religious observance or practice'.

South Australia

201. Sections 34(3) and 85Z of the SA Act adopt the test of 'an educational institution administered in accordance with the precepts of a particular religion'.
202. Section 85ZE(5) refers to 'an educational authority administered in accordance with the precepts of a particular religion'.
203. Sections 35(2b) (sexual orientation or gender identity) and 85ZB(3) (same sex domestic partners on the ground of marital or domestic partnership status) grant an exemption to a prohibition on discrimination by an association against its members and prospective members 'if the association is administered in accordance with the precepts of a particular religion'.

Victoria

204. Section 4 of the Vic Act provides the following definition:
 religious belief or activity means—
- (a) holding or not holding a lawful religious belief or view;
 - (b) engaging in, not engaging in or refusing to engage in a lawful religious activity;
205. Sections 39 and 61 refer to:
 An educational authority that operates an educational institution *or program*⁹⁹ wholly or mainly for students of a particular sex, race, religious belief, age or age group or students with a general or particular disability...
206. Section 81 provides:
- 81 Definition of religious body**
- For the purposes of sections 82 and 83, religious body means—
- (a) a body established for a religious purpose; or
 - (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.
207. This is the same definition as provided in section 38(5) of the *Charter of Rights and Responsibilities 2006* (Vic). The Explanatory Memorandum to that Act states:
 Sub-clause (5) contains the definition of "religious body" in this clause. "Religious body" is defined to mean a body established for a religious purpose or an entity that establishes, or directs, controls or administers an educational or other charitable entity that is conducted in accordance with religious doctrines, beliefs or principles.
 It thus does not clarify the intention.
208. Section 83 of the Vic Act refers to 'a person or body, including a religious body, that establishes, directs, controls, administers or is an educational institution that is, or is to be, conducted in accordance with religious doctrines, beliefs or principles.'
209. It is likely that the combined effect of section 81, 82 and 83 is that PBIs are excluded from the exemption under the Act. This is because section 82 provides an exemption that applies to religious education bodies, but section 81(b) removes from the

⁹⁹ The words 'or program' do not appear in section 61.

definition of religious body an 'educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles'.

210. Section 84 provides an exemption to persons:

84 Religious beliefs or principles

Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

Western Australia

211. Section 73(1) refers to 'an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'.

Tasmania

212. The Tas Act provides the following definitions:

religious activity means engaging in, not engaging in, or refusing to engage in, religious activity;

religious belief or affiliation means holding or not holding a religious belief or view;

213. Section 27 refers to, but does not define, a 'religious institution'.

214. The religious exemptions contained in Part 5, Division 8 of the Tas Act are given to 'persons'. They are as follows:

Division 8 - Exceptions relating to religious belief, affiliation or activity

51. Employment based on religion

(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.

(2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable,

the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

51A. Admission of person as student based on religion

(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person as a student to an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion.

(2) Subsection (1) does not apply to a person who is enrolled as a student at the educational institution referred to in that subsection.

(3) Subsection (1) does not permit discrimination on any grounds referred to in section 16 other than those specified in that subsection.

(4) A person may, on a ground specified in subsection (1), discriminate against another person in relation to the admission of the other person as a student to an educational institution, if the educational institution's policy for the admission of students demonstrates that the criteria for admission relates to the religious belief or affiliation, or religious activity, of the other person, the other person's parents or the other person's grandparents.

52. Participation in religious observance

A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to –

- (a) the ordination or appointment of a priest; or
- (b) the training and education of any person seeking ordination or appointment as a priest; or
- (c) the selection or appointment of a person to participate in any religious observance or practice; or
- (d) any other act that –
 - (i) is carried out in accordance with the doctrine of a particular religion; and
 - (ii) is necessary to avoid offending the religious sensitivities of any person of that religion.

215. Section 51A of the Tas Act contains the phrase 'an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion'.