



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

General Secretariat

9 April 2018

Mr Patrick McClure AO
Review Panel Chair
ACNC Legislation Review
Via Email: acncsecretariat@acnclegislationreview.com.au

Dear Mr McClure and Members of the Review Panel,

This is a supplementary submission to the Review Panel in relation to the exemptions provided to Basic Religious Charities under the Australian Charities and Not-for-Profits Commission Act 2012 (“ACNC Act”) and follows the discussion at the BRC focus group meeting on 26 March attended on behalf of the Catholic Church by Father Brian Lucas and Mr Francis Moore.

1. Background

The Australian Catholic Bishops Conference (ACBC) supports retention of the concept of a Basic Religious Charity and stated its support in its formal submission to the Legislation Review.

With the opportunity to peruse a number of submissions to the Legislation Review, this additional submission provides supplementary material on the technical considerations underpinning the case for retaining the current arrangements for BRCs.

We note that the ACNC’s Advisory Board, ACNC and several churches saw no need for change in the current BRC arrangements. However, other commentators have put the case for change in the exemptions for BRCs without, perhaps, a full appreciation of the underlying policy and technical and legal issues involved. This supplementary submission elaborates these issues.

In her submission, Professor Ann O’Connell noted that the clauses in the ACNC Act relating to BRCs were only added after the tabling of the first draft of the bill in 2012. The ACBC understands that the redrafting was necessary to avoid constitutional difficulties exposed in the first draft of the bill. Specifically, the exercise of any powers of the ACNC to replace and appoint responsible persons in religious entities or to direct religious bodies to alter governance rules and structures could have been subject to constitutional challenge. In the design of the BRC arrangements the Government of the day also took the sensible decision to exempt Basic Religious Charities from onerous and unprecedented annual reporting.

The BRC exemption is an umbrella term encompassing three elements:

- Removal of the Commissioner’s powers to replace and appoint responsible persons in BRCs
- Removal of BRCs from the requirement to adhere to governance standards set by the ACNC
- Exemptions from annual financial reporting

Each of these elements is examined in turn.

2. EXEMPTION FROM COMMISSIONER’S POWER TO REPLACE AND APPOINT RESPONSIBLE ENTITIES

Clause 100-5 of the ACNC Act defines the exemption for Basic Religious Charities from the Commissioner’s power to suspend and remove responsible officers of a charity.

Subdivision 100-B—Suspension and removal of responsible entities 100-5 Commissioner’s exercise of power under this Subdivision

(3) The Commissioner cannot exercise a power under this Subdivision in relation to a registered entity that is a Basic Religious Charity.

There was concern in some quarters that this power might be challenged under Clause 116 of the Australian Constitution which reads:

116. Commonwealth not to legislate in respect of religion

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

As the Law Institute of Victoria points out in its submission to the ACNC Legislation Review, there are other sources of support for limiting the powers of the ACNC in relation to basic religious charities:

The LIV notes, with particular interest, the approach taken by the European Court of Human Rights (**ECtHR**) to interpreting similar rights within the *European Convention on Human Rights* (ECHR), as described by Christopher McCrudden in his article ‘Multiculturalism, Freedom of Religion, Equality and the British Constitution: The JFS Case Considered’:

‘...the ECtHR has refused to permit states to interfere in the choice of leaders of particular churches. In a series of cases, the Court has held that the state must ensure that religious organizations retain their autonomy in relation to the selection of their own leaders...In [Hasan and Chaush v. Bulgaria (2002)

34 Eur Court HR (ser A) 55], Article 9 [of the ECHR, concerning freedom of religion] was violated because of “an interference with the internal organization of the Muslim community”.

The Law Institute of Victoria states:

In fact, the ability for the Commissioner to remove and replace responsible entities raises potential freedom of association issues for all charities, not just religious entities.

The ACBC recognises that other submissions have raised issues about the strength of powers given to the ACNC in relation to the sector as a whole. Some commentators have queried whether the ACNC should have powers greater than the Australian Securities and Investment Commission (ASIC). The ACBC has not expressed views on these general issues. However, whether the general powers of the ACNC are retained or altered (e.g. replacement of current powers to recommendations to the courts), the fundamental constitutional issue remains with any powers the ACNC might be given to suspend, remove or appoint responsible persons in religious organisations or use statutory backing or to recommend such action to the Courts.

The ACBC believes unreservedly that powers of the ACNC to suspend, remove or appoint responsible persons in registered charities should not extend to Basic Religious Charities.

3. EXEMPTION FOR BASIC RELIGIOUS CHARITIES FROM COMPLIANCE REQUIREMENTS IN RELATION TO GOVERNANCE STANDARDS

Clause 45-15 (5) contains the exemption for Basic Religious Charities from the application of governance standards:

Basic religious charities

45-15 (5) The regulations must not require a registered entity to do, or not to do, a thing (including the things mentioned in subsection (2)) if the registered entity is a basic religious charity.

The exemption for BRCs from the application of governance standards regulated by the ACNC recognises that churches of many faiths have unique governance structures consistent with the beliefs, attitudes and behaviours fostered by the philosophy and theology of their particular faith. Within religions, governance is often integrated with the nature of worship and manifestation of religious belief.

In the case of the Catholic Church in Australia, the roles of physical entities (e.g. diocese and parishes), religious communities (e.g. religious orders of nuns and priests) and clergy (e.g. bishops, priests and deacons) are all set down in Canon Law. Some examples of governance arrangements that apply within the Catholic Church that would not usually apply in other registered charities are:

- A parish priest is the person solely responsible for stewardship of resources at the disposal of a parish with the aim of supporting worship and religious activity within the parish community. Parish priests are identified as the sole “responsible person” in most Catholic parishes. However, the parish priest is not an employee of the Church and is not entitled to receive a wage for the conduct of religious services. Living expenses and accommodation are funded by stipends and donations from within the membership of the parish.
- A parish priest is required by Canon Law to appoint a finance committee. However, these finance committees are advisory in nature and respond to requests for advice from the parish priest. A parish finance committee is not equivalent to a Board of Directors appointed by a company or incorporated charity and a parish priest is not a chief executive officer with responsibility to take direction from the finance committee. Members of parish finance committees serve in a voluntary capacity, but often have skills and experience similar to members of governing boards in commerce and the charitable sector.
- Legal ownership of parish land and buildings is vested in diocesan trusts although the parish priest is responsible for their maintenance.

Different churches will have different arrangements.

Continuation of an exemption from governance standards as applied by the ACNC is appropriate.

4. EXEMPTIONS RELATED TO ANNUAL FINANCIAL REPORTING

Section 60-60 of the ACNC Act contains the clauses relating the exemption for BRCs from providing annual financial reports to the ACNC in these terms:

60-60 Basic religious charities

(1) This Subdivision does not apply to a basic religious charity, or to any report relating to a basic religious charity.

(2) However, this Subdivision applies to a basic religious charity in relation to a financial year, and to any report for the year relating to the charity, if the charity gives the Commissioner a financial report for the year.

Clause 60-60(1) removes the obligation upon BRCs to provide an annual financial report while Clause 60-60(2) indicates that if a BRC voluntarily provides an annual financial report to the ACNC, the reporting standards set down by the ACNC need to be followed.

Removal of this element of the BRC exemptions is the area in which the costs for parishes in terms of volunteer time and/or additional professional services are likely to be disproportionate to the benefits envisioned from greater transparency.

The arguments were stated in the ACBC's original submission to the legislation review as follows:

The ACBC supports retaining the current definition of Basic Religious Charities (BRCs) (Section 205-35). BRC status has been very effective in keeping to a minimum the time and resources involved in regulatory compliance for unincorporated Church entities. For many of these entities, attention to accounting and regulatory compliance is handled by volunteers. In this regard, BRC status is consistent with the ACNC's Object to cut red tape as enunciated in Section 15-5(1)(c): "to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector".

Losing BRC status would result in many parishes which are currently able to rely on volunteers being required to seek professional advice, which could come at a cost disproportionate to the size of their annual revenue.

The ACBC wishes to acknowledge that bulk lodgement of the Annual Information Statement (**AIS**) has proved very useful for parishes and a big time-saver. It is considered essential by many Catholic entities for BRCs with multiple entities managed by the one administrative function.

In considering the impact of a change to the BRC reporting arrangements the ACBC representatives have consulted with Catholic Religious Australia.

These comments in reply are pertinent:

The information which might be required to be produced (including its type and detail) if the BRC status is abolished is a substantial issue. If basic religious charities are to lose their exemption from reporting then the appropriateness of applying all accounting standards must be critically examined. There are some accounting standards which cause significant reporting costs and the information serves no purpose other than being able to comply with accounting standards. The value added needs to be critiqued particularly given recent media attention to the value of Church assets which cannot be put to an alternate use (e.g.: St Patrick's Cathedral which is more than likely heritage listed so its value in exchange may very well be severely impacted). The asset revaluation standard is one in particular and it appears that the leasing standard may become another. Not all charities are the same and not all charities are the same size. If the BRC status is lost then a classification of charities is required. As an example, the ASX classifies by size and by industry. The same is true of charities and especially so when Standard Chart of Accounts is discussed. Amongst many challenges, an example would be the coding of the costs of living for religious.

It needs to be appreciated that this change would not just involve an increase in reporting thresholds. Many organisations have chosen their current governance structures, often across multiple entities, based on these classifications. These

would require detailed review to ensure that any future structures, asset holdings and related arrangements are both fit for purpose and meet legislative standards.

The ACBC has seen no argument in submissions to the Legislation Review to indicate that the benefits for either the regulator or society in general would justify the removal of the reporting exemption for Basic Religious Charities.

On the contrary, the experience of Catholic parishes with savings on annual financial reporting suggests that the Legislation Review could usefully examine how far such an exemption from annual reporting could be extended to charities other than Basic Religious Charities.¹

In addition, the ACBC recommended that the Legislation Review give consideration to raising the threshold below which a charity would be classified as small to \$1,000,000. In the experience of the Catholic Church, there is little to distinguish small and medium-size charities in practice as per the application of current thresholds.

5. CRITERIA FOR DETERMINING A BASIC RELIGIOUS CHARITY

Section 205-35 of the ACNC Act outlines the criteria that a charity needs to meet to be eligible to be treated as a Basic Religious Charity:

205-35 Basic religious charity

(1) An entity is a **basic religious charity** if:

- (a) the entity is a registered entity; and
- (b) the entity is registered as the subtype of entity mentioned in column 2 of item 4 of the table in subsection 25-5(5) (Entity with a purpose of advancing religion); and
- (c) the entity is not entitled to be registered as any other subtype of entity.

(2) However, an entity is not a **basic religious charity** if:

- (a) the entity is a body corporate that is registered under the *Corporations Act 2001*; or
- (b) the entity is a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; or
- (c) the entity is a corporation registered under the *Companies Act 1985* of Norfolk Island; or
- (d) the entity is incorporated under any of the following:
 - (i) the *Associations Incorporation Act 2009* of New South Wales;
 - (ii) the *Associations Incorporation Act 1981* of Victoria;
 - (iii) the *Associations Incorporation Act 1981* of Queensland;
 - (iv) the *Associations Incorporation Act 1987* of Western Australia;
 - (v) the *Associations Incorporation Act 1985* of South Australia;

¹ The argument here relates to annual financial reporting, but not to an extension of the exemption BRCs have in relation to governance standards and the ACNC's powers to suspend, remove and appoint responsible persons. Some submissions (e.g. ACOSS) have pointed out that misconduct can occur equally in small as well as large charities).

- (vi) the *Associations Incorporation Act 1964* of Tasmania;
 - (vii) the *Associations Incorporation Act 1991* of the Australian Capital Territory;
 - (viii) the *Associations Act 2010* of the Northern Territory;
 - (ix) the *Associations Incorporation Act 2005* of Norfolk Island.
- (3) An entity is also not a **basic religious charity** if it is a deductible gift recipient.
- (3A) Subsection (3) does not apply at a time in a financial year if:
- (a) paragraph 30-227(2)(a) of the *Income Tax Assessment Act 1997* does not apply to the entity at any time in the financial year; and
Note: Paragraph 30-227(2) (a) of the *Income Tax Assessment Act 1997* applies to funds, authorities or institutions endorsed as deductible gift recipients or mentioned by name in the table in section 30-15 or Subdivision 30-B.
 - (b) the entity is endorsed under Subdivision 30-BA of that Act as a deductible gift recipient for the operation of one or more funds, authorities or institutions at any time in the financial year; and
 - (c) the total revenue of the entity for the financial year in relation to the operation of the funds, authorities or institutions is less than \$250,000 or any greater amount prescribed by the regulations for the purposes of subsection 205-25(1).
- (4) An entity is also not a **basic religious charity** at a time in a financial year if the Commissioner has allowed it (together with one or more other entities) to form part of a reporting group for the year under section 60-95.
- (5) An entity is also not a **basic religious charity** at a time if:
- (a) the total of the grants (however described) (if any) it receives from Australian government agencies in a financial year exceeds \$100,000; and
 - (b) the financial year is:
 - (i) the financial year in which the time occurs; or
 - (ii) either of the previous 2 financial years.

The ACBC recommends that any redrafting of this section of the Act be kept to a minimum. However, in light of submissions made to the Legislation Review, we note here that the ACBC would have no difficulty with:

- removal of CI 205-35 (2) as several commentators have noted that some religions are incorporated and that legal structure should not of itself rule out eligibility for Basic Religious Charity status;
- removal of CI 205-35 (5) relating to receipt of government grants. In practice, there is a negligible number of Basic Religious Charities in receipt of government grants. Where government grants are directed to Catholic charities, the organisations deliver health, education and other social services and are therefore not currently classified as BRCs.

6. COMMUNITY EXPECTATIONS

The ACBC concurs with a comment by Justice Connect in its submission to the Legislation Review that:

Community expectations concerning the level of transparency and accountability that religious organisations should adhere to and be subject to, has likely changed over the last 5 years.

It is reasonable to expect religious organisations to abide by community standards in areas of building standards, occupational health and safety, professional standards relating to care of children and vulnerable members of the general community. Community standards have undoubtedly risen in these aspects of community life.

The Catholic Church in Australia is proceeding apace to strengthen the application of professional standards right across all Church entities. The creation and maintenance of safe environments and behaviours is of paramount importance. Other churches and religions are pursuing a similar course of action. Governments are refining and developing regulatory frameworks to ensure that church organisations and other charities working with children reflect community expectations. In most areas of regulation in which community standards apply across the board, State or national governments have established specific regulators and regulatory frameworks. The Charity Register developed by the ACNC can assist these regulators to understand the charitable sector. Rising community expectations are not themselves an argument for dismantling the Basic Religious Charity exemptions which have worked effectively over the first five years of the operation of the ACNC.

7. CONCLUDING COMMENT

Many churches hold the view that the BRC exemptions have been successful in keeping red tape to a minimum for religious entities. In its submission to the Legislation Review, the Uniting Church in Australia Assembly expressed the issue in terms that many churches and religious could identify with:

Basic Religious Charities provide the opportunity for people of faith and goodwill to operate together in a simple but effectively governed way that finds the balance between red tape and religious freedom of action.

As a result, the Uniting Church in Australia and its many members particularly value the support of the Commission for Basic Religious Charities and we are taking the opportunity to restate our support for these and for the approach the Commission has taken to date.

Any changes to these bodies could have dire impacts on the life of the Church in Australia and the freedom of many religious communities to give expression to the call of the Gospel and would not be supported by the Uniting Church.

In conclusion, the ACBC holds the view that the BRC exemption should be retained and hopes that the additional material presented in this supplementary submission assists the Review Panel in formulating its recommendations and report.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Stephen Hackett" followed by a flourish and the letters "mac".

Rev Dr Stephen Hackett
General Secretary