

## Catholic Archdiocese of Sydney

### Submission to the Joint Standing Committee on Electoral Matters Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

#### Executive summary

- 1 The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (**Bill**) was introduced into parliament on 7 December 2017. Its amendments to the *Commonwealth Electoral Act 1918*, are intended to safeguard Australian electoral processes from foreign influence, by restricting the use of foreign donations for purposes broadly defined as 'political'.
- 2 The Catholic Archdiocese of Sydney (**Archdiocese**) submits that if enacted, the Bill will adversely affect the practice of its religion in material ways. For example, accepting anonymous donations by religious individuals will be impractical, engaging in advocacy in connection with the broad range of charitable causes in which it is engaged will be limited or curtailed and, most fundamentally, the freedom of Priests to preach the Word of God and speak to relevant issues of social significance will be undermined.
- 3 In addition, there is likely to be a negative impact for the Australian charities and not-for-profits sector, in which it plays a prominent role, by limiting the ability of those organisations to meaningfully engage in political discourse in relation to matters of significance to them. The restrictions and obligations imposed by the Bill will impede the practice of religion and the work of charitable organisations and religions, and are likely to create substantial confusion as to their compliance requirements.
- 4 In restricting the use of funds for a wide range of activities the Bill will have significant implications for the implied protection of free communication relating to political and governmental matters. The scope of the Bill and its application if enacted, will be broader than is required to achieve its intended purpose. The Archdiocese is of the view that the Bill is susceptible to legal challenge, on that basis. Whether intended or not, it is anticipated that the Bill will also affect the practices of religious organisations, such that it may be susceptible to legal challenge due to the way in which it is likely to impinge upon the Constitutional protection provided to religious freedom.
- 5 The Archdiocese suggests an exemption for charities and religious organisations, that would permit those entities to engage in advocacy for issues relevant to their ministry or cause, provided that such advocacy does not extend to the support or opposition of any political party or candidate. Alternatively, having regard to legislation enacted for similar purposes in overseas jurisdictions, the Archdiocese submits that the Bill should be amended to incorporate a particular time period in connection with elections or electoral campaigns, during which the restrictions that it seeks to impose on third parties would operate.

## Introduction

- 1 The Archdiocese welcomes the opportunity to provide this submission to the Joint Standing Committee on Electoral Matters (**JSCEM**) in response to the draft Bill.
- 2 The Archdiocese recognises the importance of the Bill for Australian political processes by seeking to eliminate the potential for foreign influence in Australian political elections. As presently drafted, the Bill requires the registration of entities, the political expenditure of which exceeds certain thresholds. It also restricts the use of foreign donations for political purposes, by those entities.
- 3 The Bill defines 'political expenditure' as "*expenditure incurred for one or more political purposes*", and 'political purpose' as including "*the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election)*".
- 4 Given that any number of social issues have the potential to become issues "*likely to be before electors in an election*", the Archdiocese's involvement in and advocacy in respect of issues relevant to its ministry, will likely be considered a 'political purpose'. In essence, the Bill will regulate the Archdiocese and other like charities and religious institutions, which, as detailed below, would appear to go beyond the scope of its stated purpose.
- 5 The Archdiocese considers that the current Bill should not be enacted because:
  - a. it will negatively impact the ability for Australian charities to continue the vital work they perform for the Australian community and particularly the support that they provide to vulnerable members of the community;
  - b. if enacted, the Bill might be susceptible to a legal challenge due to its impact on the implied protection of free communication relating to political and government matters and the limited Constitutional protection of religious freedom;
  - c. the Bill is not appropriately directed to achieving its purpose because its scope is far broader than is required to achieve its purpose and goes beyond the regulations adopted by other democratic governments in responding to equivalent issues; and
  - d. the Bill has the potential to cause confusion among the charities sector as to the compliance requirements that are intended to affect them.

## The Archdiocese

- 6 The Archdiocese is comprised of 137 separate parishes and caters to around 593,000 Catholic persons within its geographical region. It provides support and services to its parishioners and to the general community, through its charitable and pastoral work in areas including (but not limited to) aged care, education and health care.

- 7 The Archdiocese carries out its charitable work through 43 separate associated charities and not for profit organisations, including primarily, CatholicCare, Aboriginal Catholic Ministry, Ephpheta Centre, twelve residential aged care facilities and retirement villages, the Charitable Works Fund, Priests' Retirement Foundation and St Mary's Cathedral.
- 8 Although concerned with social justice and societal issues relevant to its ministry, the Archdiocese is not aligned with any political party, candidate or political ideology. Rather, the Archdiocese, its individual parishes and its separate charitable entities (180 in total) are 'charities' for the purposes of the *Charities Act 2013* (Cth) (**Charities Act**). Each individual charity is also registered with the Australian Charities and Not for Profits Commission (**ACNC**). Those entities will be referred to collectively throughout this Submission, as 'the Archdiocese'.
- 9 The Archdiocese, and individual Archdiocesan parishes also engage in discourse on social and political issues relevant to the ministry of the Catholic Church and the teachings of Jesus Christ. This engagement allows the Archdiocese to engage with the community, share important lessons and advocate for social improvements based upon the information learnt from its direct social and charitable engagement. The Archdiocese considers that the combination of direct charitable work and, where appropriate, advocacy on key issues enables it to achieve the greatest impact for the social advancement of all Australians.
- 10 Further, a key role of any Priest is to preach God's Word to the public, and to interpret that Word in the context of the society in which we live. Priests are informed by their conscience and their relationship with Jesus Christ and God. A Catholic Priest would properly consider that there is no limit, save for the aforementioned teachings of Jesus Christ and the Catholic Church, on the matters that he may preach about and advocate. The Archdiocese and its Priests have advocated for a wide range of issues including health, poverty, domestic violence, marriage, family life, the environment, homelessness, euthanasia, equality of opportunity, religious freedom, anti-slavery and the treatment of refugees.
- 11 The Archdiocese does not rely on funds from foreign individuals or foreign companies to perform its advocacy and social charitable works.

### **Impact of the Bill on the Archdiocese**

- 12 In the *Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Federal Donations (JSCEM Report)*, the JSCEM identified the need to regulate third party organisations that do not identify their activities as political campaigning, but which enable foreign donors to influence Australian elections, through the use of their not-for-profit and 'deductible gift recipient' status.<sup>1</sup> The Committee noted that any such regulation "*must not*

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<sup>1</sup> JSCEM Report (p. 11, para 2.22) accessed on 23 January 2018 at <http://parlinfo.aph.gov.au/parlInfo/download/committees/reportint/024053/toc.pdf/Secondinterimreportontheinquiryintotheconductofthe2016federalectionForeignDonations.pdf;fileType=application%2Fpdf>.

*impose unnecessary burdens or restrictions on the majority of non-government organisations and charities that use both domestic and foreign funds to undertake charitable work and policy advocacy in accordance with their deductible gift recipient status”.*<sup>2</sup>

- 13 The Archdiocese respectfully submits that the Bill does not achieve that balance.
- 14 As is common for parishes of the Catholic Church throughout Australia and indeed most other Christian religions:
- a. grassroots parish life in the Catholic Church is predominantly funded by donations of parishioners, from which the Priests draw a stipend, and the upkeep and maintenance of the parish is funded;
  - b. those donations are in substantial part given and received anonymously, in collections taken during the mass;
  - c. the most important role of Priests is to lead Worship, by being the celebrant of the Mass. In the Catholic tradition, as part of the celebration of Mass, this involves the Priest preaching the Word of God to his parishioners and delivering a homily interpreting and reflecting upon the Word of God in a way that relates the messages in the Bible to the common issues of the day and the lives of the parishioners;
  - d. in preaching the Word of God and delivering a homily, the Priest will commonly advocate and commentate on the types of matters that are identified at paragraph 10 above;
  - e. Priests are also called to speak, give opinions, deliver sermons and engage with the wider community, on the issues of the day in order to promote Catholic teachings outside of Mass. In doing so, the Priest will commonly advocate and commentate on the types of matters that are identified at paragraph 10 above. Of course, in the modern age they do so not only in person, but in various forms of written and electronic media, including on social media.
- 15 The Bill in its current form essentially mandates that this core work of a Priest constitutes a ‘political purpose’ and imposes significant regulation upon the receipt and use of donations that are intended to support religion.
- 16 In short, the Bill purports to regulate preaching and other ordinary activities of religious organisations as the practice of religion is commonly understood and experienced in Australia. **The Archdiocese does not believe that would ever be the intention of any Government of Australia.**

Registration and reporting

- 17 If the Bill is enacted in its current form, the Archdiocese anticipates that each of its 180 ACNC registered and regulated entities (most of which are parishes) will need to be registered as either a ‘political campaigner’ or a ‘third party

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<sup>2</sup> JSCEM Report (Chair’s Forward, p. XI).

political campaigner'. The Archdiocese does not anticipate a relevant difference between the resources that it would need to direct towards compliance with the Bill, if enacted, depending on whether its entities were required to register as a 'political campaigner' or a 'third party political campaigner'.

18 Plainly, the ambit of the Bill's definition of 'political expenditure' and 'political purpose' is intended to be broad. The Archdiocese's advocacy, broadly outlined above, would regularly be characterised as a public expression of a view on an issue that is likely to be before electors in an election. In circumstances where Australia's federal electoral cycle is ordinarily around 3 years and the federal parliament is empowered to make laws on a broad variety of issues, it is difficult to conceive of any social issues which could not fall within the ambit of the Bill's definition of 'political purpose'.

19 The High Court has observed that political discussion in Australia is broad precisely because:

*"The interrelationship of Commonwealth and State powers and the interaction between the various tiers of government of Australia, the constant flow of political information, ideas and debate across the tiers of government, and the absence of any limit capable of definition of the range of matters that may be relevant to the debate in the Commonwealth Parliament and to its workings, make it unrealistic to attempt to confine the freedom of matters relating to the Commonwealth government..."*<sup>3</sup>

20 The Bill proposes a variety of mandatory reporting obligations. In order to satisfy those obligations the Archdiocese would need to re-direct resources within its organisation to ensure appropriate monitoring of all funds received by it so that it does not inadvertently engage in conduct that would be 'criminal' and to meet the direct reporting required of it. The replication of those efforts across 180 entities is likely to consume considerable resources which the Archdiocese could otherwise dedicate to providing frontline charitable services.

21 Practically speaking, entities registered as 'political campaigners' and 'third party campaigners' will be required to at least take the following steps:

- a. understand the source and intention of any donation of \$250 or greater;
- b. understand the source and intention of smaller donations to understand whether the \$250 threshold has been reached in respect of individual donors;
- c. maintain a thorough and detailed register of the source of any donation of \$250 or greater (while this step is not mandated by the Bill, it is likely that a prudent charity would do so in order to be able to properly respond to allegations of contraventions);

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<sup>3</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 122-3 (Mason CJ, Toohey and Gaudron JJ).

- d. ensure that any donation of greater than \$250 where the source is either foreign or not known is not used for a 'political purpose';
  - e. maintain separate bank accounts sufficient to ensure that funds that are to be used for a political purpose cannot be drawn from donations whose source is either foreign or unknown; and
  - f. provide annual returns to the Electoral Commission at the end of each financial year.
- 22 Failure to take these steps may result in civil or criminal penalties for the entity or its nominated 'financial controller'. The registration and reporting obligations set out above are unnecessary and burdensome and will detract from the Archdiocese's ability to provide frontline charitable services.
- 23 In accordance with Catholic doctrine, donations made to individual Catholic parishes (e.g. collections made during Mass, poor boxes, cathedral and Church maintenance boxes), are often anonymous. Anonymity in making donations and doing good deeds is a key teaching of Christ that Christians strive to emulate (see Matthew 6:3). The Bill would require parishes to know which donations have been made by individual parishioners, to monitor the amounts of those donations, and to understand whether or not parishioners intended for those donations to be used for political purposes. That form of regulation would be difficult or may even be impossible.
- 24 These impacts detract from fundamental Catholic teachings, and to a certain extent, impinge on the freedom of persons to practice their religion. Alternatively, Churches would be prevented from using any donations received during services for 'political purposes' as defined. That would be an extraordinary interference in the role of a Priest.
- 25 In a joint press conference held in relation to the Bill, the Minister for Finance indicated that the Bill is not intended to prevent charities from using any foreign donations for non-political activities in Australia or to prevent charities from engaging in political activities in Australia.<sup>4</sup> However, the Bill apparently seeks to achieve those intentions by prescribing mandatory registration and reporting obligations.
- 26 The above description of the Archdiocese's advocacy efforts above show that it may be difficult to distinguish between political and non-political matters. Other charities are likely to be in a similar position. Accordingly, the cumulative impact of the Bill may actually be contrary to its intention, as stated by the Honourable Minister. If the Bill were to cause charities to refrain from political matters, Australian political discourse would be weakened.

*A further layer of regulation for charities*

- 27 Charities that are registered with the ACNC, are already regulated by the Charities Act, *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) (**ACNC Act**) and the *Australian Charities and Not-for-Profits Commission*

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<sup>4</sup> <https://www.financeminister.gov.au/transcript/2017/12/05/joint-press-conference-foreign-donations>.

*Regulations 2013 (Cth) (ACNC Regulations)*. Together, the ACNC Act and ACNC Regulations impose substantial obligations on registered charities. Australian charities are already adequately regulated. There are approximately 180 Archdiocesan parishes and other entities, each of which is already separately registered and regulated by the ACNC.

- 28 By drawing charities within the ambit of the Bill, the regulatory burden imposed upon charities will be increased and at least partly duplicated. For example:
- a. The Bill will require political campaigners to provide annual returns to the Electoral Commission at the end of each financial year, detailing the total amounts that it has received or expended, and any debts that remain outstanding.<sup>5</sup> It will also require those annual returns to be audited by specific persons, including for example, registered company auditors.<sup>6</sup> Pursuant to s 60-10 of the ACNC Act, medium and large registered charities are already required to provide financial reports to the ACNC for each financial year. Additionally, those charities are required to have their financial reports reviewed or audited, and must be able to provide a reviewer's or auditor's report, if requested.<sup>7</sup>
  - b. Where the Bill requires the nomination of a 'financial controller', registered charities are required to appoint a 'responsible person', who is responsible for ensuring that a charity's finances are managed efficiently and not misused.<sup>8</sup> Those persons must have a level of financial literacy in order to manage the charity's finances, and will face civil penalties for failures of the charity to meet its obligations under the ACNC Act and ACNC Regulations.
  - c. Registration as a 'political campaigner' pursuant to the Bill, will result in the details of an institution and its financial controller, being made publicly available on an online register. Registered charities and their responsible persons are already publicly searchable on an online register maintained by the ACNC. That register lists information about each charity's purpose and activities, names its responsible persons, and provides information about the charity's governance and finances.<sup>9</sup> Where charities have been required to provide financial reports, those reports will be available on the register.
- 29 The ACNC Act and ACNC Regulations are administered by the ACNC. One of the key objectives of the ACNC is to "*promote the reduction of unnecessary obligations on the not-for-profit sector*" and to "*work with other agencies to reduce unnecessary or duplicative administrative requirements imposed on the*

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<sup>5</sup> Bill, cl 314AB.

<sup>6</sup> Bill, cls 314AB(2)(c) and 314ABA(1)(a).

<sup>7</sup> ACNC Act ss 60-20 and 60-25.

<sup>8</sup> ACNC Act, s 40-5.

<sup>9</sup> ACNC Act, s 40-5.

sector".<sup>10</sup> However, in addition to the ACNC, most charities, depending upon their structure, are also regulated by other legislative schemes and bodies including the Australian Investment and Securities Commission and the Australian Taxation Office.

- 30 With respect to the Archdiocese in particular, its school system, which is registered as a charity and subject to ACNC regulation, is also heavily regulated by legislation including the *Education Act 2013* (Cth) and by the Department of Education and Training. Given that it receives government funding under state and federal funding schemes, it is also subject to stringent reporting obligations and oversight of its finances. Imposing yet another layer of reporting on the Archdiocesan school system, would be impracticable and likely to result in resources being redirected away from the actual operation of Catholic schools within the system and duplication of its existing reporting efforts.
- 31 Whilst the 43 separate Archdiocesan charities are required to submit financial statements for each financial year to the ACNC, its 137 parishes are exempt from that requirement by virtue of these entities being 'basic religious charities'.<sup>11</sup> Those parishes are generally comprised of a parish Priest, a parish secretary employed on a part-time basis, and in some cases, a volunteer accountant. Requiring parishes with limited personnel to comply with the added obligations that would be imposed on them if registered as political campaigners or third party campaigners, would be particularly burdensome. Recognition of those entities as 'basic religious charities' is itself an acknowledgment that they should not have more onerous obligations placed on them.
- 32 It is the Archdiocese's position that the Bill prescribes a further layer of regulation which is too broad and which is unnecessary having regard to their existing regulatory obligations.

*The Bill may cause confusion as to the extent to which charities may engage in political campaigning*

- 33 An entity is granted charitable status if it is a not-for-profit entity with charitable purposes that are for the public benefit.<sup>12</sup> The advancement of religion, providing support to the elderly or disabled, the advancement of education and the relief of poverty, illness, distress or disadvantage, are purposes that are presumed to be charitable and for the public benefit.<sup>13</sup> The Archdiocese's charitable status is based upon its engagement with those purposes.
- 34 In order to maintain its charitable status, the Archdiocese, and any other registered charity must not engage in any disqualifying purpose, including

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<sup>10</sup> ACNC Regulatory Approach Statement, [https://www.acnc.gov.au/ACNC/About\\_ACNC/Regulatory\\_app/ACNC/Regulatory/Reg\\_approach.aspx](https://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/ACNC/Regulatory/Reg_approach.aspx)

<sup>11</sup> ACNC Act, s 60-60.

<sup>12</sup> Charities Act, s 5(1) and (b).

<sup>13</sup> Charities Act, s 7 and s 12.



promoting or opposing a political party or candidate for political office.<sup>14</sup> Accordingly, charities will risk their status as a charity if they participate in political campaigning.

- 35 However, that prohibition does not extend to the distribution of information or advancement of debate about the policies of political parties or candidates, or the promotion or opposition of changes to law or policy, where such changes are in furtherance of, or in opposition to, the charitable purposes of the particular charity.<sup>15</sup>
- 36 What the Charities Act would permit, the Bill would use to characterise the Archdiocese as a ‘political campaigner’, essentially “*re-cast[ing] issue-based advocacy as partisan, political work*”.<sup>16</sup> Although the Bill’s function and purpose differs from that of the Charities Act, the labelling and registering of certain religious institutions or charitable organisations as ‘political campaigners’, might have repercussions for the charitable status of those institutions or confuse the scope to which charities are allowed to participate in social advocacy. The need for such a change with respect to organisations that are already registered and regulated has not been clearly explained.
- 37 In particular, where the charitable status of an organisation under one piece of federal legislation is at least partly contingent on its exclusion from political campaigning, but other activities in which it is able to participate will require it to register as ‘political campaigner’ under the Bill, there is a real risk that the Bill will lead to confusion within the charities sector. It may also be difficult for an entity which is first registered as a political campaigner pursuant to the Bill, to subsequently become registered as a charity with the ACNC, the practical effect of which might be to create an additional hurdle to the creation of new charities. Where individuals are seeking to engage with charitable causes, they will not be assisted by further regulatory compliance.
- 38 At present, charities are required to ensure that they continue to meet their registration requirements, by confirming that their purpose continues to be charitable and for the public benefit, and does not involve the support or opposition of a political party. It is not clear whether the requirement to register as a ‘political campaigner’ under the Bill would have any impact on a charity’s ability to obtain or maintain its status as a charity. Even if there is no actual impact, the proposed framework has the potential to create uncertainty.
- 39 The Archdiocese opposes greater red tape and unnecessary regulation of charities. The Archdiocese has long maintained that the benefits of regulation should outweigh the cost of compliance and that regulation should be proportional to both risk and the size of the charity.

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<sup>14</sup> Charities Act, ss 5(c) and 11(b).

<sup>15</sup> Charities Act, ss 11(b) and 12.

<sup>16</sup> Karp, P., “Foreign donation and charity law changes ‘likely’ to face High Court challenge”, *The Guardian*, 12 January 2018.

*Deterrence from advocating/participating in public debate*

- 40 Commenting on and advocating for or against significant social and political issues, is necessary for charities and religious organisations in particular. Those organisations engage on a day to day basis with various social justice issues, with public debates on matters that form part of their ministry, and with marginalised members of the community. Charities and religious organisations need to be able to engage in public debate and advocacy, in order to meet the needs of the communities that they serve, and to achieve necessary changes and improvements for those communities.<sup>17</sup>
- 41 The Archdiocese's function and contribution to the Catholic community and to Australian society more generally, requires it to interact with broader social and cultural developments, which may at times become significant political issues. The differing treatment of religious organisations and charitable institutions by the Bill, the Charities Act, and existing regulatory regimes, has the potential to create a level of confusion and administrative burden amongst charitable organisations, that could ultimately deter those organisations from engaging in social and political issues relevant to their purposes.
- 42 Given that commenting on social issues which have the potential to become electoral issues will require charities and religious organisations to become registered as 'political campaigners', many may instead choose to limit or even cease their engagement with those issues. This is particularly so, if becoming registered as a political campaigner will increase or duplicate compliance and administration for those organisations, and where registration as a political campaigner could have implications for their charitable status.
- 43 In a joint media statement released on 27 November 2017, Australian charities including Amnesty International, Caritas Australia and Oxfam Australia, noted that there "*is a categorical difference between donations to political parties and philanthropy for charitable purposes*".<sup>18</sup> Where the application of the Bill to political parties, and other political lobbyists or activist groups is necessary to meet the Bill's express purposes, it is not entirely clear how its application to charitable institutions will do so. If charities and religious organisations are deterred from engaging in social issues, the impact of the Bill would appear to be disproportionate to achieving its primary purpose of preventing foreign influence on domestic elections.

**The Bill is susceptible to legal challenge which could see it declared void**

- 44 The JSCEM recommended that any donation reform be consistent with the four principles of "*transparency, clarity, consistency and compliance*", and elaborated by stating that the principle of compliance should be achieved

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<sup>17</sup> Australian Charities, "Silencing Australians: the result of the Federal Government's proposed donations ban", Joint Media Statement, 27 November 2017 accessed on 23 January 2018 at <https://350.org.au/press-release/silencing-australians-the-result-of-the-federal-governments-proposed-donations-ban/>.

<sup>18</sup> Ibid.

*“through enforceable regulations with minimal, practicable compliance burdens”*.<sup>19</sup>

- 45 The Archdiocese does not contend that the stated principles are incorrect. Its position is that the Bill is not appropriately directed towards achieving the Bill’s purpose or those principles, and its validity may be susceptible to legal challenge because:
- a. the Bill impinges on the implied Constitutional freedom of political communication, and will not be enforceable;
  - b. the compliance burden that is proposed to be introduced under the Bill cannot be described as minimal or proportionate; and
  - c. the Bill is framed more broadly than is necessary to achieve its stated objective of eliminating foreign influences in Australia’s political processes.

*Implied freedom of political communication*

46 The JSCEM acknowledged, consistent with High Court authority, that *“donations are a legitimate form of participation in Australia’s political process”* and that *“political donations are included in the implied constitutional freedom of political expression”*.<sup>20</sup>

47 The High Court has separately held that the generation of public debate concerning the efficiency of matters of social importance such as the relief of poverty was a purpose beneficial to the community and apt to contribute to the public welfare.<sup>21</sup> That comment was made in the context of the use of foreign aid to alleviate poverty in other countries. Accordingly, the generation of public debate around poverty and related welfare issues within Australia must also be an important contribution towards the public welfare and legislation which effectively curtails or limits that contribution must be closely examined.

48 The scope of the Bill is concerning in circumstances where the High Court has previously declared that *“each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia”*<sup>22</sup> because *“a free flow of communication between all interested persons is necessary to the maintenance of representative government”*.<sup>23</sup>

49 The proposed burden that would flow from the enactment of the Bill must be considered not only from the perspective of the ability of the Archdiocese (and other organisations) to make public expressions relating to political matters, but

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<sup>19</sup> JSCEM Report at 2.7.

<sup>20</sup> JSCEM Report at 2.2.

<sup>21</sup> *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at [47] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>22</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571 (**Lange**).

<sup>23</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530 at [27] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (*Unions NSW*).

also from the perspective of other members of the Australian community, each of whom has a “*legitimate interest*”<sup>24</sup> in receiving a free flow of communications from organisations such as the Archdiocese, relating to political matters. Where those communications are restricted, the Australian democracy is weakened.

- 50 The members of the Australian community who enjoy that legitimate interest should be understood in the broad sense of that word, including organisations such as religious institutions and charities, because the implied political freedom in relation to political matters is not limited to enrolled electors of government. The High Court has recognised that:<sup>25</sup>

*“Political communication may be undertaken legitimately to influence others to a political viewpoint. It is not simply a two-way affair between electors and government or candidates. There are many in the community who are not electors but who are governed and are affected by decisions of government. Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that such persons and entities have a legitimate interest in governmental action and the direction of policy.”*

*The Bill may be susceptible to challenge on the basis that it infringes on the implied freedom*

- 51 The High Court has held that the combined effect of sections 7, 24, 64 and 128 of the Australian Constitution is the provision of an implied freedom of communication in relation to political and governmental matters.<sup>26</sup>

- 52 A law will be void:

- a. if it effectively burdens the implied freedom of political communication about government and political matters either in its terms, operation or effect; and
- b. it is not reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of a constitutionally prescribed system of representative and responsible government.

- 53 The real question on any challenge will be whether the Bill places an impermissible burden on the implied freedom of communication on political and governmental matters which is implied in the Australian Constitution. The implied freedom is not absolute,<sup>27</sup> and is not a personal right but rather, the

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<sup>24</sup> *Unions NSW* at [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>25</sup> *Ibid* (citations omitted).

<sup>26</sup> *Lange* at 560-1 (High Court); *Unions NSW* at [103] (Keane J).

<sup>27</sup> *Lange* at 561 referring to *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 51, 76-77, 94-95; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142-4, 159, 169, 217-8; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 126; *Stephens v West Australian Newspapers Ltd* (1994)

implied right precludes the curtailment of the protected freedom by the exercise of legislative or executive power<sup>28</sup> and the implied freedom must be broad enough to ensure that the form of responsible and representative government provided under the Constitution is achieved. It is worth noting that the High Court has recognised that:

*“The complex interrelationship between levels of government, issues common to State and federal government and the levels at which political parties operate, necessitate that a wide view be taken of the operation of freedom of political communication”.*<sup>29</sup>

- 54 What may be considered a ‘political matter’, and which is capable of influencing the participation of, and choice made by, individuals in federal elections, is broad. The Bill proposes a definition of ‘political purpose’ to include, relevantly, *“the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election)”*.<sup>30</sup> During the course of an election cycle, the ambit of political matters that are likely to be before the public at an election is extensive.
- 55 Further, at any given time, a political matter that is, or which appears to be, politically relevant (and therefore likely to be an issue which is before the electorate at the next election) would necessarily fall within the definition of political purpose, whether or not that matter is ultimately still relevant at the time of the next election.
- 56 Where a law burdens the implied freedom, it must be suitable and necessary to achieve its purpose and it must properly balance the competing interests of the restriction on the implied freedom and the need for the law.<sup>31</sup>
- 57 The Bill affects the public expression by a large number of organisations on practically every political matter. It also affects the use by each of those organisations of resources by mandating that some resources must be directed towards compliance with the terms of the Bill.
- 58 The scope of the burdens imposed should be understood as broad and relatively indiscriminate regardless of the extent to which an organisation engages in ‘political purposes’ or, assuming certain minimum thresholds are passed, the amount of money an organisation spends on ‘political purposes’. Further, no difference is recognised between donations directly to political parties on one hand, and the type of advocacy on individual issues that are likely to be engaged in by charities on the other hand.
- 59 More specifically, the burdens that will be imposed by the Bill include:

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182 CLR 211 at 235; *Cunliffe v Commonwealth* (1994) 182 CLR 272 at 336-7, 387; *Langer v Commonwealth* (1996) 186 CLR 302 at 333-4.

<sup>28</sup> *Monis v The Queen* (2013) 249 CLR 92 at [60] (French CJ).

<sup>29</sup> *Unions NSW* at [25] ((French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>30</sup> Bill, cl 287(1) **political campaigner** (b).

<sup>31</sup> *McCloy v New South Wales* (2015) 257 CLR 178 at [2] (French CJ, Kiefel, Bell and Keane JJ).

- a. a mandatory system of registration and reporting for organisations including charities that have very limited resources and will detract from their ability to perform advocacy work;
- b. a real risk that organisations like charities will refrain from participating in, or limit the extent to which they participate in, political matters and advocacy to ensure that they do not have to comply with the obligations under the law, thus weakening the political discourse on the areas of concern to those organisations, their members and followers; and
- c. other practical and logistical difficulties such as those described above.

60 Accordingly, the Archdiocese submits that there will be an effective burden on the implied freedom of political communication by reducing the extent to which some charities and religious organisations engage with matters of public concern.

61 Individuals who participate in politics through making donations to charities and religious organisations whose values and interests align with their own, may also effectively be removed from the political debate. Those individuals will not be able to engage in political communications as they presently do if the charity to whom they had previously donated is no longer able to, or elects, for practical or financial reasons not to, participate in political matters through advocacy.

62 There is limited evidence available to suggest that foreign actors are attempting to influence political elections in Australia. Notwithstanding that fact, the Archdiocese does not contend that the elimination of foreign influences in elections cannot be a legitimate purpose for government legislation.

63 However, there is also no evidence that, to the extent any foreign actors are attempting to influence Australian political elections, they are doing so by providing funds to charities and religious organisations so that those charities and religious organisations can use those funds to advance political purposes to further their own foreign interests.

64 In those circumstances, there is a real question as to whether it is necessary for the Bill to require compliance by charities and religious organisations.

65 Where the practical effect of the Bill will be to reduce the engagement by charities and religious organisations in public debate on political matters, and may eliminate the ability or desire for other charities and religious organisations to engage in communications relating to political matters at all, the laws must be very closely directed to the purpose of that legislation to be legitimate.

66 It is the Archdiocese's position that the scope of the Bill is unnecessarily broad because it requires compliance by organisations that cannot afford to, and who, it has not been demonstrated should be, regulated in the manner proposed by the Bill. The Bill does not achieve an appropriate balance from the perspective of charities and religious organisations, between its stated

purpose and its impact on the implied freedom of communication in relation to political matters.

Constitutional freedom of religion

- 67 In addition to the arguments relevant to charities, Churches are further protected by the constitutional protection of religious freedom.<sup>32</sup> In particular, the Commonwealth is not allowed to make any law which “*prohibits the free exercise of any religion*”.
- 68 This freedom has been described by the Federal Court of Australia as “*an important freedom generally accepted in society*”.<sup>33</sup> Internationally, the United Nations Universal Declaration of Human Rights (**UDHR**) enshrines an individual’s freedom to manifest his [or her] religion or belief in teaching, practice, worship and observance whether in public or private.<sup>34</sup> Similarly, the International Covenant on Civil and Political Rights (**ICCPR**) provides that “*everyone shall have the right to freedom of thought, conscience and religion*” including to “*manifest*” that religion in “*worship, observance, practice and teaching*”.
- 69 The ability to comment on, preach about, and engage in advocacy for or against social issues that go to the fundamental beliefs of Catholicism, is essential to the observance, practice and teaching of Catholicism as a religion.
- 70 The ability for people to donate anonymously to their parish and Church and for Priests to use those donations for their ordinary work is effectively removed by the Bill. As set out above, the Catholic Mass involves anonymous collections of donations to fund the Priest and the works of the parish and Church. Anonymity in doing good deeds is a key teaching of Christ. The Bill would require the Church to ascertain who donates what amounts and the citizenship and immigration status of that person. It would be required to keep tallies of who has donated what to ascertain which parishioners have reached the \$250 per annum cap. It would be required to return or give to the Commonwealth any donations over that cap, if it cannot identify the donor, or if it believes the donor to be a foreign national. It would impose heavy criminal penalties upon people within the Church and its parishes if there is a failure to comply with these extraordinary and onerous regulations. In deterring the Archdiocese from those practices, the Bill impinges on protections afforded to religious freedom in international law and constitutes a prohibition on the free exercise of religion contrary to section 116 of the Australian Constitution.
- 71 Australian legislation should be interpreted, so far as its language permits, so as not to be inconsistent with established rules of international law.<sup>35</sup> As a signatory to the UDHR and the ICCPR which provide clearly established principles of international law, the Australian government is presumed not to

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<sup>32</sup> *Australian Constitution*, s 116.

<sup>33</sup> *Evans v New South Wales* (2008) 168 FCR 576 at [79] (The Court).

<sup>34</sup> Article 18.

<sup>35</sup> *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309 at 363

intend to legislate in a manner which is inconsistent with those international law principles, except where the language is clear. Where, in the present case, it is the effect, rather than the language of the Bill which is likely to impede the practice of religion, it is likely that the restrictive impact of the Bill goes beyond the intention of the Parliament.

- 72 Domestically, laws that exert an “*undue infringement on religious freedom*” are susceptible to being declared void.<sup>36</sup> Australian courts will prefer a construction of a law which does not require an infringement on religious freedom, except where the language of the law is unambiguous.<sup>37</sup> Laws that impinge on religious freedoms would result in Australia breaching well-established principles of international law.
- 73 Many religions, including Catholicism, strongly encourage followers to engage with assisting vulnerable members of society through charitable causes and works. As noted above, one way of achieving the greatest impact towards admirable charitable goals is to advocate publicly in relation to those goals and to increase awareness around the issues that have been learnt during the performance of those charitable works.
- 74 A law that impacts upon the ability of religious individuals to achieve charitable works and outcomes whether by themselves or together with other members of their chosen religion or church, where the performance of charitable works is a central aspect of the religion, interferes with a person’s ability to practice their religion. For the reasons set out above, it is the Archdiocese’s opinion that the Bill may have the effect of interfering with the practice of religion by many Australians.

### **Comparative international laws**

- 75 The problem of foreign funds being used to influence political elections is not unique to Australia. Other countries, where democratic elections are a central tenet of government, have also sought to protect against foreign influence. Their experience might be instructive in terms of an appropriate regulatory framework to meet this challenge.
- 76 For example, in the United Kingdom (**UK**), Canada and the United States of America (**US**) bans on foreign donations to political parties and third parties actively campaigning in elections have been implemented.<sup>38</sup> New Zealand has implemented a limit on the amount that may be donated by a foreign entity to a political party.<sup>39</sup>
- 77 In the UK, Canada and New Zealand, regulation of third parties is generally connected to electoral campaigning aimed at promoting particular parties or

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<sup>36</sup> *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 131.

<sup>37</sup> *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525.

<sup>38</sup> *Canada Elections Act*, ss 331, 351, 358 and 363(1).

<sup>39</sup> [Electoral Act 1993](#) (NZ), s 207K (**NZ Act**).



candidates during a regulated period equivalent to the ‘election period’ under the *Electoral Act 1918 (Cth)*.<sup>40</sup>

78 Generally speaking, activities undertaken by charities as a part of ‘issues advocacy’ even if relating to issues live in a particular election which are not intended to encourage people to vote in a particular way, do not fall within the purview of the relevant electoral regulations.

79 This approach first of all recognises the important contribution of the ‘political’ activities of charities and, is consistent with the overarching prohibition on charities engaging in electoral campaigning; a prohibition which is often tied to their tax exempt status.

United Kingdom

80 In the United Kingdom, a review after 12 months of operation of the UK regulations equivalent to the Bill<sup>41</sup> was conducted by Lord Hodgson who presented his opinions and recommendations to the Parliament in March 2016.<sup>42</sup>

81 Relevantly, Lord Hodgson recommended that the current definition of ‘controlled expenditures’ should be narrowed to cover purely campaigning activities carried out by third parties with **an intention** to support a particular candidate or candidates, or party in an election.<sup>43</sup> Lord Hodgson criticised the existing definition of ‘controlled expenses’ as being too broad and uncertain on the basis that it operates by reference to a purpose which can be “*reasonably regarded as intended to promote or procure electoral success* [of election participants] *at any relevant election*”.<sup>44</sup> Accordingly, the definition being capable of having the unintended<sup>45</sup> and unwelcome ability of capturing advocacy activities of charities related to issues that become active during the electoral campaign. On the other hand, Lord Hodgson submitted, the narrow definition that operates by reference to ‘actual intention’ would exclude pure advocacy activities of charities and NGOs which are not conducted with an intention of influencing election results. As such, charities complying with the legal limits on their political activities imposed by the applicable charity law (prohibiting them from supporting political parties or candidates) would not fall

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<sup>40</sup> *Electoral Act 1918 (Cth)*, s 287(1) “**election period**”.

<sup>41</sup> Provided for by amendments made to Part 6 of the *Political Parties, Elections and Referendums Act 2000 (UK) (UK Act) 2014 Transparency in Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (UK)*.

<sup>42</sup> “Third Party Election Campaigning – Getting the Balance Right” (**Lord Hodgson’s Report**), The Lord Hodgson of Astley Abbotts CBE, “Third Party Election Campaigning – Getting the Balance Right: Review of the operation of the third party campaigning rules at the 2015 General Election” March 2016 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/507954/2904969\\_Cm\\_9205\\_Accessible\\_v0.4.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/507954/2904969_Cm_9205_Accessible_v0.4.pdf).

<sup>43</sup> Lord Hodgson’s Report, [4.29] - [4.35]; Recommendation 4.

<sup>44</sup> UK Act, s 85.

<sup>45</sup> See Lord Hodgson’s Report, [2.20] quoting Andrew Lasley statement from the UK Hansard, HC Deb 3 September 2013, vol 567, col 170.

under the third party provisions of the UK Act and any breach of that law should be properly dealt with by the relevant charity regulators.<sup>46</sup>

- 82 Lord Hodgson recommended that the regulated period for third parties in relation to general elections should be reduced from 365 days to four months and accompanied by anti-avoidance provisions aimed at ensuring that registered political parties, could not, during the longer period use third parties as a vehicle for incurring unregulated spending.<sup>47</sup> Thus, the onus of ensuring charities were not used for political purposes would rest with the political parties rather than existing charities.

### Canada

- 83 The *Canada Election Act* (**Canada Act**) allows political donations (in the amount up to proscribed limits in a calendar year) to be made only by Canadian citizens or permanent residents.<sup>48</sup> Foreign donations to third parties are regulated by reference to election advertising which cannot be financed by anonymous or foreign donations. There is also a general prohibition on foreign interference in the elections which prohibits anyone who does not reside in Canada during an election period from in any way, inducing electors to vote or refrain from voting, generally or in relation to a particular candidate, unless that person is a Canadian citizen or permanent resident.<sup>49</sup>
- 84 The Canada Act also regulates involvement in elections by third parties. Third parties in broad terms cannot be foreign and are regulated by reference to sources and limits<sup>50</sup> of their spending on election advertising during an election period.<sup>51</sup> Election advertising refers to all forms of communication to the public “during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party or candidate is associated”<sup>52</sup> and is in broad terms equivalent to “electoral expenditure” defined in s 308 of the *Electoral Act 1918* (Cth).
- 85 Third parties that reach a modest threshold of expenditure on election advertising during an election period must immediately apply for a registration which is valid only for the particular election.<sup>53</sup>
- 86 Consequently, charities (which generally speaking will include churches) are not caught by the Canada Act so long as they are not incurring expenditures for the purpose of election advertising. They are free to engage in political

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<sup>46</sup> Lord Hodgson’s Report, [4.37].

<sup>47</sup> Lord Hodgson’s Report, Recommendations 6 – 8.

<sup>48</sup> *Canada Elections Act*, ss 363(1) and 367(1).

<sup>49</sup> *Canada Elections Act*, s 331.

<sup>50</sup> *Canada Elections Act*, s 350.

<sup>51</sup> *Canada Elections Act*, Pt 17.

<sup>52</sup> *Canada Elections Act*, ss 319 and 349.

<sup>53</sup> *Canada Elections Act*, s 351.

advocacy, provided it does not breach the limits of political engagement arising from their tax exempt status as charities, and there is no general obligation of registration and reporting to the electoral regulator.

New Zealand

- 87 In New Zealand, the participation of third parties in political debate is only regulated during a regulated period linked to an election and the regulation is achieved by restricting who may publish election advertising during that regulated period, capping the allowable expenditure, and providing registration requirements.

United States

- 88 In the US churches and other non for profit organisations are prohibited from engaging in political campaigning under federal tax law.<sup>54</sup> The prohibition, however, does not prevent churches and other s 501(c)(3) organisations from public advocacy on issues consistent with their purposes as long as the advocacy is not an attempt “to use issue discussion as a guise for campaign intervention”<sup>55</sup> often referred to as “sham issue advocacy”.<sup>56</sup> The factors that may be relevant to determining whether the advocacy in question infringes the political campaigning ban include: whether the statement in question identifies a candidate, if it was made close to an election, or if it advocates participation in voting.
- 89 In particular, the US Tax Code states that churches and other s 501(c)(3) organisations (including charities) cannot “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” This prohibition includes any activities endorsing or advocating defeat of parties or candidates for public office, making donations and reimbursements to campaigns, or distributing partisan literature. Furthermore, a substantial part of the activities of these organisations may not include “carrying propaganda, or otherwise attempting, to influence legislation.”

There are other options available to achieve the Bill's purposes

- 90 Having regard to the experience of other countries, it is clear that where legislation has been passed with the aim of protecting against foreign influences in elections, there has not been the need to introduce such broad legislation as that proposed under the Bill. In particular, the government could:
- a. reduce the time during which restrictions on third parties would operate to be temporally linked to an election and/or an election campaign; or

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<sup>54</sup> Internal Revenue Code, s 501(c)(3) (**US Tax Code**).

<sup>55</sup> Donald B Tobin, “Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy” (2007) 95(4) *The Georgetown Law Journal* 1313 at 1354.

<sup>56</sup> Richard L. Hasen, “Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy” (2000) 48 *UCLA Law Review* 265 at 268.

- b. allow charities and religious organisations to engage in advocacy on issues relevant to them so long as they do not engage in advocacy which supports a particular party or candidate to the extent that they properly fall within the limits of allowable political activities under the Charities Act.