



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

General Secretariat

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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

pjcis@aph.gov.au

Dear Sir/Madam

Review of the Foreign Influence Transparency Scheme Bill 2017

This submission is from the Australian Catholic Bishops Conference (ACBC). The ACBC is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The Catholic community is the largest religious group in Australia with more than one in five Australians identifying as Catholic. The Church provides Australia's largest non-government grouping of hospitals, aged and community care services, providing approximately 10 per cent of healthcare services in Australia. It provides social services and support to more than 450,000 people across Australia each year. It has over 1730 schools enrolling more than 760,000 Australian students.

The ACBC seeks to participate in public debate by making reasoned arguments that can be considered by all people of goodwill.

The ACBC appreciates the opportunity to make a submission to the Committee's *Review of the Foreign Influence Transparency Scheme Bill 2017*.

Summary

The ACBC supports the objective of the *Foreign Influence Transparency Scheme Bill 2017* (the Bill) "to improve the transparency of activities undertaken on behalf of foreign principals" and will argue that:

1. The Explanatory Memorandum (EM) to the Bill at paragraphs 352 and 357 suggests that the Catholic Church in Australia is affiliated with the foreign government of “Vatican City”. This is a common misunderstanding. The Catholic Church in Australia is not affiliated with Vatican City State nor any other foreign government. There is a possibility the Catholic Church is captured by the Bill because the definition of foreign principal under paragraph (e) is “an individual who is neither an Australian citizen nor a permanent Australian resident”. This may be interpreted to include the Pope or other Church officials.
2. The exemption for religion proposed in clause 27 is drafted based on the incorrect belief that the Catholic Church in Australia acts on behalf of a foreign government, i.e. Vatican City State. Given the Catholic Church in Australia does not act on behalf of a foreign government, the clause would confer no exemption on members of the Catholic Church in Australia.
3. The exemption for religion in clause 27 does not address the potential for the Pope or other Church officials being interpreted as a “foreign principal” under paragraph (e) of the definition, i.e. “an individual who is neither an Australian citizen nor a permanent Australian resident”.
4. Consequently, the Bill, as it is presently drafted, potentially requires every bishop, priest, deacon, religious sister, brother, lay person or Catholic-controlled legal entity advocating or communicating in relation to public policy to register and report on their activities under the terms of the Bill. More than 5.2 million Australians identified as Catholic in the 2016 Census.
5. The Bill is very broad in scope and tighter definitions would help focus the draft legislation to help avoid unintended consequences. The Bill will add red tape where it is not needed to achieve its objective and may create an unintended and unwarranted chilling effect on legitimate public policy advocacy.
6. The ACBC suggests amendments: (i) to strengthen the exemption in clause 27 to provide certainty to the members of the Catholic Church and other charities, (ii) to amend clause 11 to protect innocent or coincidental action and (iii) to add a new clause 14A to protect public communications that will be fully disclosed or which do not raise foreign influence concerns.

Introduction

The ACBC supports the objective of the *Foreign Influence Transparency Scheme Bill 2017* (the Bill) “to improve the transparency of activities undertaken on behalf of foreign principals”, but has concerns about a number of provisions. The Bill is drafted in very broad and general terms, so there remains uncertainty as to its application to the Catholic Church. The Bill has also been drafted, as evidenced by the EM, without a full understanding of the structure of the Catholic Church. The EM incorrectly characterises the Catholic Church as “affiliated with [a] foreign government” (EM, 352) and states that

the Church's positions on some issues of public policy are "determined by Vatican City" (EM, 357). As a result, if Church activities are captured by the Bill, the proposed exemption for religion in clause 27 is not adequate and should be amended.

Broad and general terms

The Bill is drafted with extraordinary breadth. Terms in the Bill such as "foreign principal", "lobby", "communications activity" or "donor activity" are very broad, general and unqualified, which means there is great potential to catch innocent and unintended persons and behaviour, and are of doubtful utility and effectiveness.

The inclusion in the definition of "foreign principal" in Clause 10(e) of an individual who is neither an Australian citizen nor a permanent Australian resident will apply to a wide range of individuals who cannot be identified with precision at any time.

Clause 11(3) sets a very low threshold, where a person acts on behalf of a foreign principal if both the actor and the principal "knew or expected" that the actor "would or might" undertake the potentially registrable activity.

Organisations in civil society engaged in the important responsibility of assisting in the development of public policy, and which already have substantial reporting obligations, should not be subject to additional burdensome requirements unless it is very clear they are targets of the Bill. To do so has the potential to create an unintended and unwarranted chilling effect on legitimate public policy advocacy.

Where charities are required to report under the Bill, it should be through the charity regulator, the Australian Charities and Not-for-profits Commission (ACNC). The ACNC was established in part to reduce red tape for the charitable sector and to act as a one-stop shop for reporting to government.

I note that the ACBC has had to commission both canon (church) law and civil law advice to respond to the Bill. The broad terms in the drafting mean it is difficult to know with certainty how the draft legislation would apply to charities like the Catholic Church. I expect other charities would also have spent considerable funds on legal advice. If the Bill remains in its present form, it is likely that there will be the need for extensive and expensive legal advice so that individuals and organisations can understand their obligations and comply. This in itself is damaging to civil society, diverting limited resources away from other community needs.

Structure of the Catholic Church

The Explanatory Memorandum characterises the Catholic Church as "affiliated with [a] foreign government" (EM, 352) and states that the Church's positions on some issues of public policy are "determined by Vatican City" (EM, 357). These descriptions are based on common misunderstandings of the nature of the Church and raise issues relating to three distinct entities: the Catholic Church, the Holy See and Vatican City State, as well

as the status of the Pope. To assist the committee the following explanation of these concepts is set out below.

Catholic Church

The Catholic Church is described in the teaching of the Second Vatican Ecumenical Council as the “People of God”, embracing all those who believe in Christ and accept his call to holiness of life and eternal salvation. “The Church is a visible community through which Christ communicates truth and grace to all peoples,” a key document of that Council explained.¹

The Church is not a single institution divided into different parts. The Church “is a communion of particular Churches”.² “It is in and from these particular Churches [dioceses and archdioceses] that there comes into being the one and only Catholic Church.”³ The Church is to be understood with her double dimension and reality: universal and particular.

All members of the Church by virtue of their baptism are called to participate, albeit in different ways, in the mission of the Church. This mission is complex, comprising a diversity of activities. As well as specifically formal religious rituals, the activity of the Catholic Church covers most areas of human well-being in the fields of health, education, social welfare, pastoral care and advocacy for justice and the promotion of human flourishing.

The Pope is the supreme head of the Catholic Church but the governance of the myriad activities of the Catholic Church is complex with most activities being governed at the local level. There is a centralised administration to assist the Pope in his role as supreme leader of the Church – the Roman Curia. The competency of each department of the Roman Curia is established by specific laws promulgated by the Pope. For example, “the proper function of the Congregation for the Doctrine of the Faith is to promote and safeguard the doctrine on faith and morals in the whole Catholic world, so it has competency in things that touch this matter in any way.”⁴

Holy See

The Holy See is a subject of international law possessing a recognised personality and exercising sovereignty in the law of nations. It is not a state and therefore would not constitute a foreign government. The authority which the Pope exercises in this regard is regulated by the norms of international law.

¹ Vatican II, Dogmatic Constitution on the Church n.8.

² Vatican II, Dogmatic Constitution on the Church n.23.

³ Ibid.

⁴ Pope John Paul II, Apostolic Constitution Pastor Bonus 20 November 1982 n.2. The Apostolic Constitution provided for the reform of the Roman Curia., Art. 48.

It is the Holy See that is a party to various international treaties, concordats and which participates in activities and agencies of the United Nations.

The meaning of the term “Holy See” excludes the College of Bishops, which in communion with the Pope has authority over the universal Church in matters of faith, doctrine and teaching. The example given in EM 357 which refers to “the Catholic Church’s position on voluntary euthanasia, as determined by Vatican City”, is not correct. The Congregation for the Doctrine of the Faith issued a Declaration on Euthanasia on 5 May 1980 and this is an example of the exercise of the Pope’s teaching function.

The promotion of the Catholic Church’s teaching whether at the universal or local level is distinct from the authority of the Pope to determine such teaching. A priest or lay person who proposes such a teaching and advocates a position on this particular social issue does so as a member of the Catholic Church and *not on behalf of any other person*.

Vatican City State

The then-Secretary for Relations with States, Archbishop Dominique Mamberti, explained that in the context of the diplomatic activity of the Holy See, the term Holy See “means the office of the Roman Pontiff. It is therefore to be distinguished from ‘Vatican City State’, a territorial enclave within the city of Rome which functions like other states and exists solely to ensure the autonomy of the Holy See.”⁵

As previously noted, Vatican City State is not a party to the various international treaties and concordats and nor does it participate in activities and agencies of the United Nations.

The authority the Roman Pontiff exercises as the Head of Vatican City State is determined by its Fundamental Law, the State’s constitutional law. The authority is restricted to matters relating to Vatican City State as sovereign in its own right as an independent state. The Fundamental Law makes no provision for the Roman Pontiff to use the office as Head of State to determine the teaching of the Church.

Therefore, it cannot be sustained that Vatican City State determined the Church’s position on voluntary euthanasia. Whenever the authentic teaching of the Church is promoted, it is never an activity that is undertaken on behalf of Vatican City State.

⁵ Dominique Mamberti, “The Diplomatic Activity of the Holy See”, *The Australasian Catholic Record* Volume 92 No 1 January 2015 p, 82.

The Pope

As the Bishop of the Diocese of Rome and the successor of Peter, the Roman Pontiff/the Pope is also necessarily the “the head of the College of Bishops, the Vicar of Christ, and the Pastor of the Universal Church”.⁶

Bishops to whom the pastoral governance of particular Churches [arch/dioceses] has been entrusted are not the delegates of the Pope; each governs the particular Church “as the vicar and ambassador of Christ”.⁷ The power of the Pope as the pastor of the universal Church does not nullify the power of the diocesan Bishop, “on the contrary it is affirmed, reinforced and defended”.⁸

Conclusion

The three entities – the Catholic Church, the Holy See and Vatican City State – are distinct entities and each pursues specific purposes distinct from the purposes pursued by the others.

The Pope is the common factor in regard to the authority exercised in each of the entities. However, the authority of the Pope is distinct and specific in accordance with the diversity of the nature and purpose of the three entities.

The Catholic Church in Australia carries out its Australian religious mission under authority conferred by Church canon law on local people as principals in their own right, not as agents of a foreign principal. The Church’s Australian mission is determined by Australian residents of the Church including local bishops, priests, deacons, religious women and men, lay persons and Church-controlled entities.

The activities of the Catholic Church should not be subject to the Bill because the activities of the Church are not “on behalf of” a foreign principal and, even if they were, that principal is not a foreign government. However, whether that conclusion would be adopted by an Australian court would require it to be proved by expert evidence and accepted by the court. We therefore cannot be sure that this argument would prevent members of the Catholic Church in Australia from being caught by the Bill.

Amendments to the Bill

The ACBC suggests a number of amendments to improve the exemption in clause 27, to protect innocent or coincidental activity in clause 11 and to protect public communications that are already fully disclosed or which do not raise foreign influence concerns.

⁶ The 1983 Code of Canon Law was promulgated by John Paul II on 25 January 1983 and came into effect on 27 November 1983. The original text Codex Iuris Canonici is in Latin. CIC canon 331.

⁷ Vatican II, *Dogmatic Constitution on the Church* n.27.

⁸ Congregation for Bishops, *Directory for the Pastoral Ministry of Bishops*, 14 (Città del Vaticano: Libreria Editrice Vaticana, 2004) 24.

Exemptions are always problematic because they can be portrayed as an unjust special permission granted in contradiction to the general law, rather than as recognition of a just case. Exemptions can also be withdrawn.

Given the uncertainty over whether the proposed law would apply to the Catholic Church, the exemption should be as clear and comprehensive as possible, so it achieves its intention.

The proposed exemption for religion in clause 27 in the current Bill does not ensure that the Catholic Church and all its associated entities are exempt. The exemption applies only to activities undertaken on behalf of a foreign government and the Catholic Church in Australia does not undertake activities on behalf of a foreign government.

The exemption in clause 27 also does not address the potential for the Pope or members of the Roman Curia being interpreted as a “foreign principal” under paragraph (e) of the definition, i.e. “an individual who is neither an Australian citizen nor a permanent Australian resident”.

The ACBC suggests that clause 27 be amended using the United States *Foreign Agents Registration Act* approach⁹ and that of existing Australian Lobbyist Codes¹⁰ to provide an exemption for charitable and not-for-profit purposes.

The US model excludes acts in furtherance of religious, scholastic or scientific pursuits (para (b)). The Australian Lobbyist Codes exclude charitable and not-for-profit organisations from the definition of lobbyist (para (a)).

Adapting these concepts to the drafting style of the Bill, a revised clause 27 could read:

Clause 27: Exemption: Charitable and Not-for-profit purposes

A person is exempt in relation to an activity the person undertakes if:

- (a) the person is:
 - (i) a charitable, religious or other organisation or fund that is registered as a charity with the Australian Charities and Not-for-profits Commission; or

⁹ 22 US Code, section 613(e): exemption from registration for “Religious, scholastic, or scientific pursuits: Any person engaging or agreeing to engage only in activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts”.

¹⁰ Australia, *Lobbying Code of Conduct* (2008) cl 3.5; *Integrity Act 2009* (Qld), s 41(3)(a) and (b); *Victorian Government Professional Lobbyist Code of Conduct* (2013) cl 3.4; *Lobbyists Act 2015* (SA), s 4(1); *Integrity (Lobbyists) Act 2016* (WA), s 9(a), (b), (c).

- (ii) a not-for-profit association, body or organisation constituted in Australia to represent the interests of its members acting for its purposes; or
 - (iii) any other not-for-profit association, body or organisation constituted in Australia for charitable purposes acting for its purposes; or
- (b) the activity is, or is for the purposes of, acting in good faith for predominantly religious, philanthropic, educational, scientific or artistic purposes.

The following changes should also be made: first, to amend the scope of clause 11, to remove innocent and coincidental action.

Clause 11: Definition of ‘on behalf of’

Clause 11(1)(e): amend, consistent with the US model, so as to read: “with funding or supervision of the activity in whole or major part by the foreign principal”;¹¹

Clause 11(1)(f): (“collaboration”) Delete – this is unnecessary in light of scope of balance of clause 11(1), which captures all forms of agreement, arrangement and control. “Collaboration” casts the net too broadly;

Clause 11(3): (“expectation that person might act”) Delete – unnecessary in light of scope of clause 11(1); casts the net too broadly.

A further provision should be introduced to protect certain public communications that will be fully transparent or which do not raise foreign influence concerns. This will ensure that the Bill does not unreasonably burden the implied freedom of communication on governmental and political affairs.¹²

The clause will reduce administrative burden on both actors and the register. The drafting is modelled on existing provisions of Australian Lobbyist law and codes.¹³

¹¹ See *Foreign Agents Registration Act* - 22 US Code, s 611(c)(1): an agent of a foreign principal includes a person any of whose activities is “financed or subsidized *in whole or in major part*” by foreign principal.

¹² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; *Unions NSW v NSW* (2013) 252 CLR 530 and *McCloy v NSW* (2015) 257 CLR 178.

¹³ Adapted from *Integrity (Lobbyists) Act 2016* (WA), ss 4(3) and (4).

Clause 14A: Exempt activities – implied freedom

- (1) Despite sections 12 and 13, a person does not undertake activity for the purpose of political or governmental influence or undertake communications activity only by:
 - (a) petitioning the House of Representatives or the Senate, or both Houses;
 - (b) petitioning the Governor-General or Executive Council;
 - (c) communicating with a committee of the House of Representatives or the Senate, or a joint committee of both Houses;
 - (d) communicating with a person who is a Minister or a Parliamentary Secretary, in that person's capacity as a member of either House of Parliament and not as a member of the Executive Government, in relation to a constituency matter or other matter that is not within that person's responsibilities as a Minister or a Parliamentary Secretary;
 - (e) subject to subsection (2), communicating as part of an activity of a grassroots campaign nature in an attempt to influence government decision-making, for example, encouraging letter-writing, phone-calling or emailing campaigns;
 - (f) responding to —
 - (i) a call for submissions; or
 - (ii) a request for tender, request for expression of interest, request for a proposal or a request of a similar nature;
 - (g) providing information in response to a request from a Commonwealth public official or Commonwealth authority;
 - (h) communicating only for the purpose of making an application under a written law or policy, if the application is considered and decided under that written law or policy by a Commonwealth public official or Commonwealth authority;
 - (i) subject to subsection (2), making a public statement; or
 - (j) communicating about a matter that relates only to a person's personal, family or household affairs and is not related to any business or commercial activity, on behalf of —
 - (i) the person making the communication; or

- (ii) a friend or relative of that person.
- (2) Neither paragraph (1)(e) nor (1)(i) applies in relation to any communication by a person for any commission, payment or other reward (whether pecuniary or otherwise).

Conclusion

The ACBC supports the objectives of the *Foreign Influence Transparency Scheme Bill 2017* but common misunderstandings about the Catholic Church and the extraordinary breadth of the Bill mean it would only increase red tape for the Church and other charities for no clear benefit. The ACBC urges the Committee to recommend amendments to the Bill as outlined in this submission.

I would be happy to answer any questions you may have. I can be contacted via Mr Jeremy Stuparich, Public Policy Director at the ACBC [REDACTED]

Yours faithfully

Rev Dr Stephen Hackett
General Secretary