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Submission to the House of Representatives Standing Committee on Economics – Inquiry into the *Exposure Draft Australian Charities and Not-for-profits Commission Bill*

By the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

1 Who we are

- (a) Our organisation is the Anglican Church Diocese of Sydney (the Diocese).
- (b) This submission is made on behalf of the Standing Committee of the Synod of the Diocese and comes with the support of the General Synod of the Anglican Church of Australia.
- (c) Our contact details are –
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2 Preliminary comments

- (a) We note that significant changes have been made to the previous Exposure Draft for the ACNC Bill in response to submissions made by us and others. We appreciate the responsiveness of Treasury and Government in making these changes. The current Exposure Draft is a significantly improved document.
- (b) In particular we generally welcome the decision to defer implementing governance standards and financial reporting obligations under the legislation until 1 July 2013 pending further consultation with the sector, although we have some reservations about whether the use of regulations is appropriate for these purposes, as contemplated in the current Exposure Draft.
- (c) We also note and generally welcome the inclusion in the current Exposure Draft of provisions for “basic religious charities” which bring a greater sense of proportionality to the regulation of religious charities in view of the particular characteristics of this part of the sector. That said, we have some concerns about the workability of certain aspects of these provisions as currently drafted, which we address in this submission.
- (d) In view of the short time-frames available both to make submissions and for the Inquiry Committee to complete its work, we set out in **Attachment 1** the amendments we consider should be made to the ACNC Bill before it is introduced into Parliament. Set out in **Attachment 2** are the amendments we consider should be made to the ACNC (Consequential and Transitional) Bill.
- (e) We trust that these amendments are largely self-explanatory. However, since the presentation of the amendments corresponds to the sequence of provisions to be amended

in the Bills (rather than being grouped by subject), we provide some explanatory comments about related groups of amendments in the body of this submission.

- (f) We would be happy to attend any public hearings held by the Inquiry Committee to explain in more details the rationale for these amendments.

3 Simplification and streamlining of not-for-profit regulatory system

- (a) We submit that the ACNC Bill should be amended in accordance with **items 1, 2, 3 and 4 of Attachment 1.**

- (b) The rationale for establishing the ACNC was articulated by the Assistant Treasurer and the Minister for Human Services in Social Inclusion in a joint media release of 10 May 2011 *Making it Easier for Charities to Help Those Who Need it*. We set out in full the opening comments of the May 2011 media release –

The Government will provide \$53.6 million over four years to establish a one-stop-shop for the support and regulation of the NFP sector.

This is a reform that has been sought for many years by the sector, and recommended in reports dating as far back as the *Report of the Inquiry into the Definition of Charities and Related Organisations* in 2001.

The Australian Charities and Not-for-profits Commission (ACNC) will commence operations from 1 July 2012. It will initially be responsible for determining the legal status of groups seeking charitable, public benevolent institution, and other NFP benefits on behalf of all Commonwealth agencies.

The Commission will also implement a 'report-once use-often' reporting framework for charities, provide education and support to the sector on technical matters, and establish a public information portal by 1 July 2013. A Commissioner will be appointed to drive all the changes, who will be fully independent and report directly to parliament via the Assistant Treasurer.

Assistant Treasurer and Minister for Financial Services and Superannuation, Bill Shorten, said "the NFP sector provides vital services to many of our most disadvantaged and vulnerable citizens, but the ability of the sector to undertake this work has been impaired by complex regulatory arrangements and unnecessary red tape for far too long."

Minister for Human Services and Social Inclusion, Tanya Plibersek, said "I am delighted that the Gillard Government is delivering on this key reform for the sector, which has laboured under overly complex, duplicating regulatory requirements for too long"

"We will continue our negotiations with the states and territories on national regulation for the charitable sector, recognising that the greatest reduction in red tape can only be achieved with national coordination. But it is important for the Commonwealth to lead the way and get its own house in order."

The Government will set up an Implementation Taskforce from 1 July 2011. It will be responsible for ensuring the ACNC is ready for operation by 1 July 2012, and will also consult with the public, the NFP sector and government agencies on a new general reporting framework and public information portal.

- (c) The rationale for establishing the ACNC in this announcement is to simplify and streamline regulation of the not-for-profit sector. There is nothing in this announcement about the need to maintain, protect and enhance public trust and confidence in the sector, despite this appearing in section 15-5(1) of the ACNC Bill as its first object.
- (d) Consistent with Government announcements such as the one quoted above, we submit that simplifying and streamlining the regulation of the not-for-profit sector must be included as a specific object of the ACNC Bill under section 15-5(1). Presently, this matter is dealt with incidentally under section 15-10 in terms of "proportionate regulation" and "minimising

procedural requirements and procedural duplication” as matters to be considered by the Commissioner in exercising his or her powers and functions.

- (e) Unless simplification and streamlining of regulation is included as a specific object of the ACNC Bill, a fundamental justification for establishing the ACNC will be missing.
- (f) We appreciate that an important (and possibly the most important) element of simplifying and streamlining regulation of the sector is obtaining the co-operation of the States, Territories and other Commonwealth agencies in achieving a national “report-once-use-often” framework. Accordingly, we submit that the ACNC Bill should also provide in section 15-5(2) that a means of achieving this outcome is by the ACNC co-operating with other Australian government agencies to establish and oversee a simplified and streamlined regulatory framework.

4 Group reporting, notification arrangements etc

We submit that the ACNC Bill should be amended in accordance with **items 11, 12, 13, 14, 15, 23 and 24 of Attachment 1**.

4.1 Representative entities for reporting groups

- (a) As presently drafted, the ACNC Bill makes provision for the establishment of reporting groups under section 60-95 but, in our view, provides inadequate machinery within the Bill to facilitate efficient interactions between the ACNC and each of the members of the reporting group
- (b) In our view the agency provisions under Subdivision 190-B are inadequate for these purposes.
- (c) We submit that a category of “representative entity” should be included in the ACNC Bill for the purpose of streamlining interactions between the ACNC and each of the members of a reporting group. The functions of a representative entity would be –
 - (i) to apply for a different accounting period on behalf of each of the members in the reporting group under an amended form of subsection 60-85(3),
 - (ii) to be responsible for the preparation and lodgement of information statements and financial reports in relation to the reporting group (see our proposed subsection 60-95(6)),
 - (iii) to apply for changes to the membership of the reporting group (see our proposed subsection 60-95(7)), and
 - (iv) to have the capacity to provide notifications to the ACNC about the matters in section 65-5(1) relating to the members of the reporting group (see our proposed subsection 65-5(1A)).

4.2 Registered entities which share a common constitution

- (a) Paragraph 7.12 of the Explanatory Materials provides that if a group of entities make changes to a common set of governing rules, it is sufficient that the ACNC Commissioner is notified by one of the entities of the changes affecting them all. Our concern is that we cannot see how this will be the case under the ACNC Bill.
- (b) Accordingly, we submit that a category of “common constituting entity” should be included in the ACNC Bill. A common constituting entity should be defined to be a registered entity which has the power to make changes to the governing rules of 2 or more registered entities, being governing rules which are common to those other entities.
- (c) The concept of a common constituting entity is not a theoretical possibility. There are many religious (and possibly non-religious) organisations such as the Anglican Church that constitute entities with a common set of governing rules. For example, the Synod of the Anglican Church in the Diocese of Sydney has constituted 270 parishes, each being a separate entity but with a common set of governing rules (under our Parish Administration

Ordinance 2008). If the Synod were to make a change to these governing rules, as it regularly does, the ACNC Bill, as currently drafted, would require that each of our 270 parishes separately notify the ACNC Commissioner about the change pursuant to section 65-5(1) of the Bill. This would appear to be the case despite the suggestion at paragraph 7.12 of the Explanatory Materials. Such an outcome would not only impose a significant collective burden on registered entities with a common set of governing rules, but would also impose an unnecessary workload for the ACNC in administering the receipt of such notifications.

- (d) The principal functions of a common constituting entity would be –
 - (i) to provide a single notification to the ACNC about any changes to the common governing rules of the entities for which it is responsible (see our proposed subsection 65-5(1B)), and
 - (ii) to apply for a different accounting period on behalf of each of the entities which share its common governing rules under an amended form of subsection 60-85(3).
- (e) In some, but not all, instances of 2 or more registered entities sharing common governing rules, it would be appropriate that these entities form a reporting group. In this case the common constituting entity should exercise the following further functions –
 - (i) to apply to the ACNC for the formation of such a reporting group under an amended form of subsection 60-95(3)), and
 - (ii) to be responsible for the preparation and lodgement of annual information statements and financial reports in relation to such a reporting group if approved (see our proposed subsection 60-95(6)), and
 - (iii) to apply for changes to the membership of such a reporting group (see our proposed subsection 65-95(7)), and
 - (iv) to have the capacity to provide notifications to the ACNC about the matters in section 65-5(1) relating to the members of such a reporting group (see our proposed subsection 65-5(1A)).

5 Basic religious entities

We submit that the ACNC Bill should be amended in accordance with **items 5, 6, 18, 19, 20, 21 and 22 of Attachment 1** and the ACNC (Consequential and Transitional) Bill should be amended in accordance with **items 1 and 2 of Attachment 2**.

5.1 Introductory comments

- (a) We generally welcome the inclusion of the concept of basic religious entity in the Bill and the exemptions that are proposed to be extended to such entities in respect of financial reporting and compliance with governance standards. However we have a number of concerns about the workability of the exemption as currently drafted.
- (b) We deal with each of these concerns below.

5.2 Deductible gift recipients

- (a) The definition of basic religious charity under section 205-35(3) excludes entities which are deductible gift recipients. We submit this exclusion is not workable in its current form.
- (b) We accept that entities which are, as a whole, endorsed as deductible gift recipients should not be eligible to be basic religious charities (eg PBI welfare agencies). However entities which are endorsed as a deductible gift recipient for the operation of a fund, authority or institution within its broader structure should not be disqualified from being treated as a basic religious charity.
- (c) We submit that basic religious charities which are endorsed as deductible gift recipients for the operation of a fund, authority or institution should be subject to financial reporting

requirements and governance standards in relation to the fund, authority or institution, as if the fund, authority or institution were a registered entity for the purposes of section 205-25 (small, medium and large entities).

5.3 Government grants

- (a) We note it is proposed that an entity cannot be a basic religious charity if it has received a government grant in a financial year or the previous 2 financial years.
- (b) We see no reason in principle why the receipt of government grants should preclude an entity from being treated as a basic religious charity since there are separate arrangements for acquittal and accountability for government grants which obviate the need to bring religious charities which receive such grants under the general financial reporting and governance requirements of the ACNC Bill.
- (c) We therefore submit that this exclusion in the definition of basic religious charity should be omitted.
- (d) In the event that the omission of this exclusion is not accepted, we submit, as an alternative, that a religious charity be entitled to receive grants up to the greater of \$100,000 or 10% of its annual revenue in a financial year before it ceases being a basic religious charity.
- (e) Regardless of whether the grant exclusion is removed or made subject to a minimum amount, we consider that as a matter of fairness, the transitional provisions should exclude consideration of grants received by entities before the commencement date of the ACNC Bill for the purposes of ascertaining their status as basic religious charities.

5.4 Registration (or entitlement to register) as another subtype of entity

- (a) We submit that the requirement for being a basic religious charity in paragraph 205-35(1)(c) (the entity is not entitled to be registered as any subtype of entity other than for the advancement of religion) is practically unworkable. The uncertainty arising from the need to determine whether an entity is entitled to be registered as any other subtype is inconsistent with what we believe should be an object of the Bill, namely to simplify the regulatory environment for charities.
- (b) We submit that this requirement needs to be expressed in terms of the entity not being registered as any other subtype of entity.
- (c) We consider that other restrictions on entities being treated as basic religious charities, in particular entities which are deductible gift recipients, should mitigate against any residual concerns that such an amendment would lead to inappropriate entities being treated as basic religious charities.

5.5 Transitional registration as subtype for the purposes of religion

- (a) We note that the Explanatory Memorandum, at paragraph 14-10, states that registration of a subtype under the Bill is not automatic, but if an entity meets the requirements, it can register as one or more subtype at a later date.
- (b) For administrative efficiency and for certainty for religious charities, it is important to ensure that appropriate religious entities are automatically registered as the subtype of charity for the advancement of religion under transitional provisions.
- (c) To this end, we submit that such registration as a subtype should occur if "Religion" is shown as an area of main charitable purpose or activity for the entity in the records held by the Commissioner of Taxation. This enquiry corresponds to information provided by each entity when applying for TCC (previously ITEC) endorsement with the Commissioner of Taxation. In our view, it would provide a convenient and principled way of identifying suitable entities to be registered as the religious charities subtype on a transitional basis. The registration of an entity as such a subtype under transition can, if necessary, be reviewed by the ACNC Commissioner in due course.

6 Additional reporting obligations

- (a) We submit that the ACNC Bill should be amended in accordance with **items 8, 9 and 10 of Attachment 1**.
- (b) Consistent with comments made in the Explanatory Materials at paragraphs 1.66 and 6.64, we submit it is appropriate to ensure that the ACNC has reason to believe that a registered entity has contravened the Act before imposing additional reporting obligations on an entity in particular cases under section 60-75.
- (c) We submit that the power of the ACNC Commissioner in section 60-80 to require additional reporting from a class of entities should be omitted altogether on the basis that the power is unqualified and the provisions in section 60-80 are inconsistent with the object of the Subdivision, namely to obtain further information in particular cases.

7 Definition of small, medium and large registered entities

- (a) We submit that the ACNC Bill should be amended in accordance with **items 16 and 17 of Attachment 1**.
- (b) We remain concerned that the revenue thresholds used to determine whether a registered entity is small, medium or large remain unhelpfully low.
- (c) The thresholds currently proposed are based on those used by States and Territories under incorporated associations legislation and also under the Corporations Act for companies limited by guarantee. We understand it is convenient for these thresholds to be retained, particularly to ensure that there is minimum impediment for State and Territory agencies agreeing to report to the ACNC as a one-stop shop. However, beyond convenience, there is no obvious basis why these thresholds should be adopted for the whole sector and, in our view, good reason to doubt their suitability as thresholds for the whole sector under the ACNC Bill.
- (d) If one of the objects of the ACNC Bill should be to simplify and streamline the regulatory arrangements for the not-for-profit sector, we submit that raising the thresholds for the purposes of defining small, medium and large registered charities would be appropriate.

8 Correction of errors by small registered charities

- (a) We submit that the ACNC Bill should be amended in accordance with **item 7 of Attachment 1**.
- (b) We submit that the period given to small registered entities to correct errors under section 60-65 of the Bill should be extended from 28 to 60 days. This is consistent with the period given to small registered entities for notifying most matters under section 65-5.

20 July 2012

Proposed amendments to the Australian Charities and Not-for-profits Commission Bill 2011

Preamble

1. Insert as a new penultimate paragraph in the Preamble the following –

“It is also important that a national regulatory system simplifies and streamlines the regulation of the not-for-profit sector to minimise compliance costs and maximise the resources that are available for the sector to pursue its charitable and other purposes directly.”

Part 1-2 Objects of this Act

2. Insert the word “Australian” before the word “government” in the penultimate paragraph in the Guide in section 10-5.

[To ensure appropriate use of defined terms in the Act.]

3. Insert a new paragraph 15-5(1)(b) as follows (with consequential re-lettering of existing paragraph 15-5(1)(b)) –

“(b) to simplify and streamline the regulatory framework of the not-for-profit sector; and”

4. Omit the matter “.” at the end of subparagraph 15-5(2)(b)(iii) and insert instead the following –

“; and

(iv) cooperate with other Australian government agencies to establish and oversee a simplified and streamlined regulatory framework for not-for-profit entities.”

[Consistent with Government announcements and the EM (for example paragraph 1.46), the amendments in items 1 – 4 make the reduction of red-tape an object of the Act, rather than leaving it as an incidental matter under section 15-10.]

Part 3-1 Governance standards and external conduct standards

5. Insert a new subsection 45-10(6) as follows –

“(6) However, the regulations may require a basic religious charity to do a thing in relation to any fund, authority or institution for which the basic religious charity is endorsed as a deductible gift recipient to operate under section 30-120(b) of the *Income Tax Assessment Act 1997*, as if the fund, authority or institution were a registered entity for the purposes of section 205-25 (small, medium and large reporting entities).”

Part 3-2 Record keeping and reporting

6. Substitute subsection 60-60(2) with the following –

“(2) However, this Subdivision applies to a basic religious charity in relation to:

- (a) 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; and
- (b) any fund, authority or institution for which the basic religious charity is endorsed as a deductible gift recipient to operate under section 30-120(b) of

the *Income Tax Assessment Act 1997*, as if the fund, authority or institution were a registered entity for the purposes of section 205-25 (small, medium and large registered entities).”

7. In subsection 60-65(2) insert after the word “Commissioner” the following –

“:

- (a) in the case of a small registered entity, within 60 days after the registered entity identifies the error, and
- (b) in any other case,”

[To bring this reporting obligation in line with the 60 day timeframe for small registered entities in notifying most matters under section 65-5.]

8. In section 60-70 –

- (a) after the word “cases” insert the following –
“where the Commissioner has reason to believe that a registered entity has contravened this Act”, and
- (b) omit the Example.

9. In subsection 60-75(1) –

- (a) insert after the words “Commissioner may” the following –
“, if he or she has reason to believe that a registered entity has contravened this Act”, and
- (b) substitute the words “a particular” where they appear in paragraphs 60-75(1)(a) and (b) with the words “the particular”.

[Consistent with comments in paragraph 6.64 of the EM, the amendments in items 8 and 9 set appropriate boundaries around the circumstances in which the Commissioner may impose additional reporting requirements in particular cases.]

10. Omit section 60-80.

[On the basis that section 60-80, as currently drafted, is inconsistent with the object of the Subdivision which allows for further information in particular cases. Retention of this section would effectively give the Commissioner power to extend the general reporting obligations under the Act for classes of entities.]

11. Substitute subsection 60-85(3) with the following –

- “(3) An application for a registered entity to adopt such an accounting period may be made, in the approved form, to the Commissioner for the Commissioner to make a decision under subsection (1):
 - (a) where there is a representative entity for the registered entity, by the representative entity; and
 - (b) where there is a common constituting entity for the registered entity, by the common constituting entity; and
 - (c) in any other case, by the registered entity seeking to adopt the accounting period.”

12. Substitute subsection 60-95(3) with the following –

“Application to form a reporting group

- (3) An application to form a reporting group may be made, in the approved form, to the Commissioner for the Commissioner to make a decision under subsection (1) or (2):
 - (a) where there is a common constituting entity for the registered entities seeking to form the reporting group, by the common constituting entity; and

- (b) in any other case, by the registered entities seeking to form the reporting group.”

13. Insert new a subsection 60-95(4) (with consequential renumbering of existing subsection 60-95(4)) –

“Representative entity

- (4) In an application made under paragraph (3)(b), the registered entities are to nominate one of their number as the representative entity for each of the members of the reporting group.”

14. Insert new subsections 60-95(6) and (7) as follows –

“Reporting obligations

- (6) If the Commissioner allows 2 or more registered entities to form a reporting group, the entity responsible for the preparation and lodgement of information statements and financial reports in relation to the reporting group is:
 - (a) in the case of a reporting group formed as a result of an application made under paragraph (3)(a), the common constituting entity making the application, and
 - (b) in the case of a reporting group formed as a result of an application made under paragraph (3)(b), the representative entity for each of the members of the reporting group.

Changes in membership

- (7) An application to change the membership of a reporting group may be made, in the approved form, to the Commissioner:
 - (a) in the case of a reporting group formed as a result of an application made under paragraph (3)(a), by the common constituting entity making the application, and
 - (b) in the case of a reporting group formed as a result of an application made under paragraph (3)(b), by the representative entity for each of the members of the reporting group,and the Commissioner, in deciding whether to allow a change in such membership, must consider the matters in subsection (5).”

Part 3-3 Duty to notify

15. Insert new subsection 65-5(1A) and (1B) as follows –

“(1A) For the purposes of subsection (1), a notification in relation to a registered entity which is a member of a reporting group may be made:

- (a) where there is a common constituting entity for the registered entities of the reporting group, by the common constituting entity; and
- (b) where there is a representative entity for each of the members of the reporting group, by the representative entity,

on behalf of the registered entity.

(1B) For the purposes of paragraph (1)(d), a notification in relation to a change made by a common constituting entity to the common governing rules of 2 or more registered entities is to be made by the common constituting entity on behalf of those entities.”

Chapter 8 – Interpretation

16. In subsection 205-25(1) substitute the matter “\$250,000” with the matter “\$500,000”.

17. In subsection 205-25(2) substitute the matter “\$1,000,000” with the matter “\$2,000,000”.
18. In paragraph 205-35(1)(c) omit the words “entitled to be”.
19. Substitute subsection 205-35(3) with the following –
- “(3) An entity is also not a **basic religious charity** if it is endorsed as a deductible gift recipient under section 30-120(a) of the *Income Tax Assessment Act 1997*.”

20. Insert after subsection 205-35(3) the following note –

“Note: An entity is not precluded from being a **basic religious charity** if it is endorsed as a deductible gift recipient only for the operation of a fund, authority or institution under section 30-120(b) of the *Income Tax Assessment Act 1997*. However a basic religious charity which is endorsed as a deductible gift recipient for the operation of such a fund, authority or institution is required to comply with applicable governance standards and, depending on the annual revenue of the fund, authority or institution, may be required to provide financial reports in relation to the fund, authority or institution. See subsections 45-10(6) and 60-60(2).”

21. Omit subsection 205-35(5).

[As a matter of principle it is difficult to see why receipt of Government grants, which have separate arrangements for acquittal and accountability, should preclude an entity from being treated as a basic religious entity.]

22. Substitute subsection 205-35(5) with the following –

- “(5) An entity is also not a **basic religious charity** at a time if it has received a grant or grants (however described) by one or more Australian government agencies which, in any of the following financial years –
- (a) the financial year in which the time occurs;
 - (b) the previous 2 financial years,
- exceed the greater of –
- (i) \$100,000, or any other amount prescribed by the regulations for the purposes of this subsection, and
 - (ii) 10% of the revenue of the entity for any of those financial years.”

[This is an alternative to the amendment in item 21 above.]

23. Insert after the definition of “Commissioner” in section 900-5 the following –

“**common constituting entity** is a registered entity which has the power to make changes to the governing rules of 2 or more other registered entities, being governing rules which are common to those other entities.”

24. Insert after the definition of “recognised assessment activity” in section 900-5 the following –

“**representative entity** is a registered entity which is the member of a reporting group nominated as the representative entity for each of the members of the reporting group under subsection 60-95(4).”

Proposed amendments to Schedule 1 of Australian Charities and Not-for-profits Commission (Consequential and Transitional) Bill 2012

Part 2 – Registration

1. Insert a new item 2A as follows –

“2A Religious charities

Where the Commissioner is treated as having registered an entity under item 2, the Commissioner is also treated as having registered the entity on the commencement day under Division 30 of the ACNC Act as the subtype of entity mentioned in column 2 of item 3 of the table in subsection 25-5(5) of that Act (entity with a purpose that is the advancement of religion) if ‘Religion’ is shown as an area of main charitable purpose or activity for the entity in records held by the Commissioner of Taxation.”

[Presently the Explanatory Memorandum (at 14-10) indicates that registration of a subtype under the Bill is not automatic, but if an entity meets the requirements, it can register as one or more subtype at a later date. This amendment enables existing religious charities to be automatically registered as the subtype of charity for the advancement of religion. This means that such entities are not precluded from being automatically covered by the basic religious charity exemption from the commencement of the ACNC Act.]

New Part 8 – Interpretation

2. Insert a new Part 8 as follows –

“Part 8 - Interpretation

14. Basic religious charity

- (1) Paragraph 205-35(1)(c) does not apply to any entity which is registered pursuant to item 2A of this Schedule.
- (2) Subsection 205-35(5) does not apply to any grant by an Australian government agency received by an entity before the commencement date.”

[Subsection (1) suspends the requirements of paragraph 205-35(1)(c) of the ACNC Act in respect of entities which are registered as a subtype for the advancement of religion under the proposed item 2A above.]

Subsection (2) prevents an entity being precluded from being treated as a basic religious charity if it has received any grant from an Australian government agency prior to the commencement date of the ACNC Act. The subsection will not be necessary if the Bill is amended in accordance with item 21 in Attachment 1.]