CATHOLIC HEALTH
Australia

Level 1, 10 Thesiger Court
DEAKIN ACT 2600

PO BOX 330
DEAKIN WEST ACT 2600

Ph +61 2 6203 2777

Fax +61 2 6260 5486

www.cha.org.au

May 1, 2014

Dr Kathleen Dermody
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody

Inquiry into the *Australian Charities and Not-for-profits Commission (Repeal) (No. 1) Bill 2014*

Thank you for your letter of April 1, 2014 inviting Catholic Health Australia (CHA) to make a submission to the Inquiry considering the repeal of the Australian Charities and Not-for-profits Commission's (ACNC) enabling legislation.

CHA has argued since early 2012, when the ACNC was first mooted, that charitable hospitals and aged care services were already subject to significant mandatory financial, governance, quality and safety reporting requirements such that the ACNC would do nothing to enhance "public trust and confidence" in charitable hospital and aged care service provision. Having experienced the ACNC in operation, CHA's consistently expressed concern that the ACNC would do nothing in relation to charitable hospitals and aged care services other than create duplicate reporting has proven correct.

With CHA's hypothesis that the ACNC would not enhance charitable hospital and aged care service "public trust and confidence" validated, CHA in this submission endorses the repeal *Bill* that is the subject of this Inquiry.

The highly regulated hospital and aged care environment

Members of the Senate Economics Legislation Committee will be aware that the Catholic hospital network operates services that on any given day care for one in 10 Australians in a public or private hospital bed. The Catholic aged care network similarly operates services that on any given day care for one in 10 older Australians in a residential aged care bed, and thousands of other older Australians who receive care services in their own homes. The public and private hospital services operated within the CHA network, and the residential aged care and home care services, are highly regulated and subject to multiple reporting and transparency measures. This historical high level of regulation and transparency is deemed necessary by governments and consumers alike to ensure protection for older Australians and those suffering illness and injury. With these regulatory and transparency measures in place, CHA has argued since the conception of the ACNC that sufficient

…/2

regulatory and transparency measures for charitable hospitals and aged care services were already in place, and that any additional ACNC requirements imposed on charitable hospital and aged care services would be no more than a duplication in regulatory and reporting burdens, which would deliver no tangible extra protection to service users of charitable hospitals and aged care services.

Rationale for CHA's support of the ACNC's dissolution

It is because charitable hospitals and aged care services were already highly regulated and publicly supervised before the conception of the ACNC that CHA has consistently opposed the design of the ACNC, and now supports the repeal of the ACNC enabling legislation. The **principal reason for CHA's criticism of the ACNC design and support for the repeal *Bill* is that hospital and aged care regulation provides sufficient consumer protections that the ACNC adds nothing to.** In addition, three ancillary reasons have also informed CHA's criticism of the ACNC design:

- **The ACNC has caused double reporting:** The ACNC has doubled charitable registration requirements, with no subsequent enhancement of "public trust and confidence" in charitable registration. In relation to most charitable associations, annual reporting requirements have also been doubled, again with no subsequent enhancement of "public trust and confidence" in charitable annual reporting.

- **The ACNC has created legal uncertainty**: The passing of the *Australian Charities and Not-for-profits Commission Act 2012* has created uncertainty as to the operation of charitable law in Australia and has also created a set of excessive Commissioner's powers that are yet to be tested and defined by the judicial process. This legal uncertainty has not enhanced "public trust and confidence" in charity law; by creating legal uncertainty, it has in fact undermined "public trust and confidence."

- **"Report once, use often" may not suit hospital and aged care services:** The aspiration of achieving a "Charities Passport" in relation to charitable hospital and aged care services has neither been achieved – nor indeed commenced. Many of the aspirations for the ACNC to reduce "Red Tape" and enable a "report once, use often" environment have not been achieved. With the Government seeking to wind back the ACNC, these aspirations will not be given priority even if the *Bill* that is subject to this Inquiry is not passed by the Senate.

The basis on which CHA supports the repeal of the ACNC's enabling legislation has twice before been put to Parliamentary Inquiries – first on July 16, 2012 in CHA's submission to the House of Representatives Standing Committee on Economics Inquiry into the ACNC exposure draft *Bill* and secondly on August 30, 2012 in CHA's submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the ACNC *Bill.* Central to our criticism of the exposure draft *Bill,* and the subsequent *Bill* that was eventually enacted, was the ACNC's design flaw that failed to recognise the already highly regulated environment in which charitable hospitals and aged care services operated. This criticism remains the failure of the ACNC today, and to actively seek to retain the ACNC as the charitable regulator of hospitals and aged care services would be to actively insist on continuing a duplication of reporting and regulatory obligations in a context of not delivering any enhancement in "public trust and confidence."

Further detail about the principal and three ancillary grounds on which CHA supports the repeal of the ACNC's enabling legislation is detailed below, as are CHA's views on proposals for the ACNC successor arrangements.

…/3

Principal reason: Hospital and aged care regulation provides sufficient consumer protections

Charitable hospitals and aged care services are already highly regulated. They provide consumer safety details, financial reports, funding acquittals, quality reports and service planning reports to a range of state, territory, and Commonwealth government agencies. While suggesting there exists opportunity for these varying obligations to be streamlined, CHA endorses the need for charitable hospital and aged care services to be required to transparently report on their safety and quality given the care they offer to older Australians, the sick and the injured. Supporting the need for a safety and quality regime for charitable hospitals and aged care services, the rigorous extent of this specifically targeted safety and quality regime as outlined below establishes the imposition of the very generalised additional ACNC requirements would never have been able to make any extra contribution towards promoting "public trust and confidence" in charitable hospital and aged care service delivery.

Charitable public hospitals are closely scrutinised by their state or territory government funders. All charitable public hospitals operate within strict contractual conditions agreed to with state or territory health departments, which are annually reviewed in a process resulting in a signed "Statement of Priorities". The appointment of a charitable public hospital chief executive usually requires the approval of the relevant health minister or departmental head. Any charitable hospital funding and performance contract with a state or territory government is subject to scrutiny of the relevant Parliament or jurisdiction's auditor general. Charitable hospital service users have recourse to state and territory bodies able to investigate health care complaints arising from care in a charitable hospital. Charitable public hospital performance is publicly scrutinised by way of publication of performance data on the publicly accessible *MyHospitals* website, and provision of performance data to the Australian Bureau of Statistics, the Department of Health, the National Hospital Pricing Authority and National Health Performance Authority all result in regular publication of data reports detailing the cost and quality performance of all public hospitals in Australia. It is reports from these bodies that result in regular media scrutiny of public hospital performance, particularly in relation to average elective surgery waiting time and average emergency department waiting times. Finally, charitable public hospitals are subject to accreditation and independent benchmarking to ensure quality and safety of patient admissions.

Charitable private hospitals are also subject to a similarly rigorous regulatory environment. To operate, a private hospital must first be licensed by the relevant state or territory body. To be viable, charitable private hospitals must enter into agreements with private health insurers to enable reimbursement for patient care. The level of regulation overseeing the interaction of health insurers and private hospital providers is significant – the most publicly obvious of which is the annual setting of private health insurance premiums by the Commonwealth health minister, which in turn sets the pricing framework within which private hospitals operate. Hospital accreditation is required to assure patient safety and quality, as is provision of performance data to the Australian Bureau of Statistics, the Department of Health, the Private Health Insurance Administration Council and voluntarily to the National Health Performance Authority, which in turn is managing a process of voluntary publication of charitable private hospital performance data on the *MyHospitals* website. Charitable private hospital service users also have recourse to state and territory bodies able to investigate health care complaints arising from care in a charitable private hospital.

Charitable aged care services are required to be approved by the Department of Social Services prior to being eligible to receive payments under the *Aged Care Act 1997*. Separately, they must also satisfy safety and quality accreditation, which is then formally reassessed every three years and is

subject to unannounced visits to confirm continuing compliance. Any established breach of aged care accreditation standards results in a publication of a compliance action, including the imposition of a "sanction," which in turn requires the aged care provider to remedy the breach or face possible loss of approved provider status. Charitable aged care services are subject to review and public sanction by the Commonwealth Government's Aged Care Complaints Scheme. Charitable aged care providers must also on an annual basis provide a general purpose financial return to the Department of Social Services and comply with and report annually on prudential management requirements for the investment of resident's Refundable Accommodation Deposits (RADs). In more recent times, details of a charitable aged care provider are published on the publicly accessible *MyAgedCare* website, where from May 2014 aged care providers will be required to publish pricing details under the supervision of the newly appointed Aged Care Pricing Commissioner. In the near future, the website will also enable publication of quality indicator compliance. State and territory building codes also oversee design requirements for residential aged care services – building codes that the Commonwealth has announced an intention to harmonise. Charitable aged care providers also have requirements for police checks every three years for all staff; notification to the Department of Social Services of changes in key personnel; compulsory reporting of missing persons and suspicions or allegations of physical or sexual abuse; and the regulation of the number, type and distribution of care services.

The designers of the ACNC were advised by CHA of the charitable hospital and aged care regulatory environment. The August 2012 House of Representatives Standing Committee on Economics *"Report on the Exposure Draft of the ACNC Bills 2012"* at 2.46 on page 44 said:

> In evidence before the committee, Catholic Health Australia highlighted the existing regulatory burden facing the health care sector:
>
> *"At the moment, a hospital, if it is established under the Corporations Act, needs to report to ASIC; it also needs to report to its state government; and it perhaps has to report to the Private Health Insurance Administration Council. An aged-care organisation needs to report to Accreditation and Standards in the Department of Health and Ageing. We think the opportunity to reduce those reporting obligations is immense, but we do not yet have the confidence that the know-how to do all of that is actually in place."*

This detail on the regulatory requirements and website publication details of charitable hospitals and aged care services is provided here to demonstrate that all hospital and aged care services – be they government-owned, privately owned or charitable-owned – are subject to multiple quality, safety, financial and governance oversight. The invention of the ACNC has provided no new promotion of "public trust and confidence" in charitable hospital and aged care service provision; indeed, the designers of the ACNC were advised of the regulatory requirements of charitable hospitals and aged care services but did not design the ACNC in recognition of these requirements. In the absence of the ACNC enhancing "public trust and confidence" in charitable hospital and aged care service provision, CHA's support for the continued operation of the ACNC is not possible.

Ancillary reason 1: The ACNC has caused double reporting

Most charitable associations, as a consequence of the *Australian Charities and Not-for-profits Commission Act 2012*, are required to report on their annual activities to two different regulators, whereas prior to the *Act* they reported to only one. No charitable organisation, regardless of its corporate form, should be required to establish itself with and subsequently report on its affairs to

two different regulators, as is the case at present for establishment of both charitable associations and charitable companies. The continued requirement for most associations to report to either their state or territory government and the ACNC must end. If the states and territories are not willing to hand over their long-held regulatory power, the Australian Government should put an end to reporting duplication.

Similarly, establishing a charitable company with the Australian Securities and Investment Commission (ASIC) and then being required to list it with the Australian Charities and Not-for-profits Commission is a duplication that should be removed. Charitable companies are required to report some regular matters of operation to the ACNC, such as annual activity reports, and other operational details to ASIC, such as changes to auditor details. Administration of a charitable company was clear and straightforward when ASIC was the single regulator; it is today unclear ast to which regulator obligations exist. In the absence of the ACNC itself being able to address these design faults, few alternatives other than the repeal of the *Australian Charities and Not-for-profits Commission Act 2012* appear feasible.

Ancillary reason 2: The ACNC has created legal uncertainty

The *Australian Charities and Not-for-profits Commission Act 2012* is premised on the assumption of a series of "turn offs" to provisions of the *Corporations Act 2001*. The consequence of existing law simply being turned off to be replaced with yet-to-be-tested regulatory powers has left charity law in Australia unreasonably vague. Corporation's law should govern not-for-profit corporations, association's law should govern not-for-profits associations, and the common, criminal and law of trusts should apply where otherwise relevant. The new ACNC Commissioner's powers were not needed to safeguard the public; the law as it stood prior to the ACNC's creation provided that safeguard in relation to charitable hospitals and aged care services. The pre-ACNC body of law did not have deficiencies warranting a new body of law, which is today vague and will not be defined until tested. This new vague and uncertain body of law should be wound back, and once again few alternatives other than the repeal of the *Australian Charities and Not-for-profits Commission Act 2012* appear likely to remedy the uncertain legal environment within which charitable organisations now operate.

Ancillary reason 3: "Report once, use often" may not suit hospital and aged care services

A key aspiration of the *Australian Charities and Not-for-profits Commission Act 2012* was to allow charitable organisations to be able to provide certain details to the Australian Government once, and for those details to in turn be used often across different Australian Government departments. It was hoped details for eligibility for grants and contracts, once provided to the ACNC, would not in turn need to be provided a second or subsequent time to individual departments. In relation to charitable hospitals and aged care services, no effort has yet gone into determining if a system can be designed to enable a "report once, use often" system. Given the detail of charitable hospital and aged care service provision, it is likely that no system can be developed and, if it could, it would probably be better suited to being managed by the specialised Department of Health and Department of Social Services respectively rather than the general in nature ACNC. In the absence of any effort having been directed to this task and in circumstances where the task is unlikely to be achieved at a time when the current Government seeks the abolition of the ACNC, CHA believes the aspiration should be abandoned.

ACNC successor arrangements

With CHA having concluded that the ACNC delivers no benefit to charitable hospital and aged care services, and that it is in fact a duplicator of effort required to manage charitable hospital and aged care services, CHA does however recognise that if the ACNC is abolished, consideration is required to be given to future administrative arrangements. CHA's views on these various aspects are as follows:

- **Gateway to tax concessions:** A modestly sized service of government is required to assess a not-for-profit organisation's status to access Australian Government tax concessions and to grant unique charity identifier details. The Australian Tax Office today still manages much of this function and it could do so again. Consideration should, however, be given to the possibility of those government agencies to which an organisation relates being tasked with this function. The Department of Health might administer charitable hospital reporting to avoid double reporting; the Department of Social Services might administer charitable aged care reporting to also avoid duplication.

- **Centre for Excellence:** There is need for a centre of best practice or excellence in not-for-profit governance and management to be fostered, in order to promote capacity building by dissemination of information, and by leading a research agenda that might translate evidence into better governance practice. It may be that the university or not-for-profit sector itself is better to be funded to deliver such a service than for Government itself to deliver such a centre. Such a centre could also take on an advocacy role to Government about the benefits of building a strong and efficient not-for-profit sector in the years ahead. Any such centre should recognise diversity within charitable and not-for-profit organisations. A key design flaw of the ACNC is its generalist approach, which ignores the reality that a large charitable hospital with thousands of employees may have little in common with a small voluntary sporting club.

- **Advisor to government:** Recent government advisory boards or consultations focused on the charitable and not-for-profit sector have not been overly successful in seeing reform aimed at fostering non-government capabilities to deliver services to the charitable and not-for-profit sector's millions of beneficiaries. The not-for-profit sector Compact was stymied, the Social Inclusion Board lacked authority and the ACNC Advisory Board, despite having members of genuine experience and capability, has not developed a public voice. There is a role for an advisory group with a clear public voice to speak to government on behalf of the not-for-profit sector. If the ACNC is dismantled, in its place should come a method of enabling dialogue with the charitable and not-for-profit sector that learns from the disappointments of the recent past in maturing the government and non-government relationship.

A part of the Catholic Church

In concluding, CHA associates itself with the submission to the Inquiry of Fr Brian Lucas, the General Secretary of the Australian Catholic Bishops Conference. The details CHA has provided above seek to demonstrate that charitable hospitals and aged care services were already highly regulated and subject to public scrutiny prior to the establishment of the ACNC, and that it is because of this existing hospital and aged care regulatory environment that the ACNC serves no extra purpose in relation to these charitable services. The submission of the Australian Catholic Bishops Conference

addresses broader matters from different perspectives in relation to the Catholic Church, arguments that CHA proudly associates itself with.

Again, thank you for the invitation to provide this submission to the Inquiry. I would be happy to make myself available to provide testimony in support of the details CHA has provided in this submission.

Yours sincerely

Martin Laverty
Chief Executive Officer