



21 December 2012

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

Exposure Draft of Human Rights and Anti-Discrimination Bill 2012

The *Bill* to consolidate the existing Commonwealth anti-discrimination legislation into a single Act is a *Bill* Catholic Health Australia (CHA) can support. We can offer this support because Catholic hospitals and aged care services do not discriminate against those who seek admission to hospital or aged care services; Catholic hospitals and aged care services will offer care to any person, regardless of *“gender identity, marital or relationship status, potential pregnancy, pregnancy, religion, or sexual orientation,”* where such a person seeks care to be provided to them in a way that is consistent with Catholic teaching.

CHA's support for the *Bill* is, however, conditional on resolution of the following challenges that the *Bill* as currently drafted would create for Catholic hospitals and in particular Catholic aged care services, being:

- The unclear application of section 22(2)(e) regarding provision of accommodation;
- The seemingly conflicted drafting of section 33 regarding religious exemptions;
- Sections 52 and 53 that would impact information gathering and publication;
- Compliance costs arising from section 124 that would change the burden of proof.

Detailed below is an exploration of these four separate propositions. In addition, CHA as part of the broader Catholic Church in Australia associates itself with the submission of the Australian Catholic Bishops Conference. Accordingly, this submission of CHA addresses only those matters considered relevant to the 75 Catholic hospitals and 550 Catholic aged care services that operate across Australia.

.../2



Section 22(2)(e): Accommodation

Division 3 outlines that discrimination is unlawful if the discrimination is connected with any area of public life. Section 22(2)(e) lists “*provision of accommodation*” as one of these. CHA interprets section 22(2)(e) as *not* capturing:

- Admission to a public or private hospital, in that a person when admitted to a hospital is there to receive medical and nursing care, and that the hospital’s main purpose is not the “*provision of accommodation*.” The uncertainty of this section is possibly rendered moot by way of section 22(2)(c) which stipulates provision of “*services*” as captured by the *Bill*.
- The sale of retirement living accommodation, in that when a sale of retirement living accommodation occurs the accommodation becomes that of the consumer and is not in fact “*provided*” by a supplier.

There is further uncertainty as to if “*provision of accommodation*” would also *not* include residency in an aged care service. The primary purpose of an aged care service, not unlike a hospital, is the provision of care as opposed to the provision of accommodation. However, this uncertainty is possibly rendered moot by way of section 33(3) which specifically includes Commonwealth regulated aged care services within the scope of the proposed *Bill*.

Ideally, the legislative drafters would review the intent of section 22(2)(e) to ensure legislative clarity as to the intent of the meaning of “*provision of accommodation*.”

Section 33: Religious Exemptions

Parts 2-2 and 2-3 of the *Bill* make discrimination and certain other conduct unlawful if it is based on people’s protected attributes. Religious exemptions as a result of section 33(2) apply in relation to those six attributes prescribed at section 33(1), but not in relation to the provision of Commonwealth aged care services funded under the *Aged Care Act 1997* as a result of section 33(3).

Catholic hospitals and aged care services today care for any person of any faith or none, race, gender, or sexual orientation who seeks services to be provided to them in a way that is consistent with Catholic teaching. Catholic hospitals and aged care services in this regard do not discriminate against anyone, and do not need protection of blanket exceptions from discrimination laws. That said, Catholic hospitals and aged care services do not provide services that are inconsistent with Catholic teaching. To not provide a service on grounds of Catholic teaching is not to discriminate, rather it is a simple limiting of services that Catholic organisations chose to offer as fulfillment of their religious belief. The current drafting of the *Bill* does not allow for this distinction.

The inclusion of the section 33(2) exemption for religious organisations provides recognition that such organisations are entitled, by way of Australia being signatory to both the *Universal Declaration of Human Rights* and *International Covenant on Civil and Political Rights*, to the exercise of their religious beliefs within, at least, the confines of their organisations. The *Bill*, by way of section 33(3) proposes to treat aged care services differently. Two challenges arise as a result of section 33(3).

The first challenge is one of principle. Catholic aged care organisations are part of the Catholic Church in Australia. They are foremost religious organisations, who happen to practise their religion by way of providing care to older people. They provide their services in accordance with Church teaching, which is expressed in the *CHA Code of Ethical Standards for Catholic health and aged care services*. Circumstances very rarely arise where a Catholic aged care service might be asked to provide a specific service where to do so would contravene the *Code of Ethical Standards for Catholic health and aged care services*. Such a contravention would erode the Catholic identity of the organisation. On grounds of principle, the *Bill* should be amended to ensure that whereas no aged care service need discriminate against a person for the reasons stipulated in section 33(1), nor should it be unlawful for the service to decline to provide a specific service where to do so would contravene religious beliefs. Such a contravention of religious beliefs within Catholic aged care services or any other faith-based services should not be compelled by way of the *Bill*, for to do so risks the *Bill* breaching the *Universal Declaration of Human Rights* and *International Covenant on Civil and Political Rights*, and leaving the *Bill* open to subsequent judicial qualification.

The second challenge is the heterogeneous nature of aged care services. No service is the same. Services differ according to the makeup of their residents at any given time. This resident composition is subject to regular change, such that a service one month might comprise very different residents in another month. Administrators of aged care services are currently able to make decisions as to future admissions based on assessment of an individual's personal care needs, the availability of a place within a service that can meet the individual's personal care needs, the culture and makeup of the broader resident population, and the religious practices observed within the service itself. Section 33(3) would possibly curtail the very practical decisions that aged care administrators now make in the interests of applicants and current care recipients within their services. To the extent that section 33(3) removes the ability for local decisions to be made on assessment of local circumstances, the *Bill* should be amended to enable greater scope for decisions to be made by aged care administrators in response to their own organisation's circumstances.

By way of recommendation to resolve the challenges likely to arise from section 33(3), it is proposed that the section be amended to state that it not apply when a decision of an aged care provider was made "*reasonably and in good faith*."

Sections 52 and 53: information gathering and publication

The *Bill* proposes that information not be gathered that might inform a decision that could ultimately be found to be discriminatory. Human services regularly, with consent, gather information that risks otherwise being captured by the extended scope of section 52. Ideally section 52 would be amended to justify the gathering of information in "*reasonable circumstances of good faith*."

Section 53 proposes to limit publication of material that could ultimately be found to be discriminatory. Publication by a Catholic human service organisation of how faith is practised within the organisation risks being captured by the provision. Ideally, section 52 would be amended to ensure the freedom for publication of religious material.

Section 124: Compliance Costs

Section 124 would have the effect of placing the onus of proof in defending claims of discrimination on hospitals and aged care services. This risks giving rise to new costs in managing risk in relation to this changed burden of proof, costs that would ultimately have to be borne by all service consumers.

Aged care providers will need to document reasons when a person is declined access to services. Currently providers determine admission to their services based on the clinical needs of the care recipient, the clinical capability of their aged care services, their staffing levels and skills mix and their current client profile. At present when consumers are not admitted there is no need to document the reasons taken. The *Bill* will require a hospital or aged care service to be able to answer an allegation of discrimination, which in turn gives rise to the need for new risk management arrangements.

Division 4 of the draft *Bill* covers investigation and conciliation of complaints. It's not clear how the Australian Human Rights Commission will determine its acceptance of complaints, nor how it would go about its investigation processes. With "protected attributes" being proposed to include items such as medical history, this increases the prospect of those declined admission to services alleging unlawful discrimination and thus prompting investigation by the Australian Human Rights Commission. Consumer and service provider education on the meaning of "protected attributes" is essential, although we note this is not a matter necessarily relevant to this current review of legislative drafting.

Summary

The broad intent of the *Bill* to consolidate all Commonwealth discrimination laws in one place is worthwhile.

Catholic hospitals and aged care services do not discriminate against those who seek admission to hospital or aged care services; Catholic hospitals and aged care services will offer care to any person, regardless of "*gender identity, marital or relationship status, potential pregnancy, pregnancy, religion, or sexual orientation,*" where such a person seeks care to be provided to them in a way that is consistent with Catholic teaching.

Not being opposed to strengthened protections for vulnerable people proposed in the *Bill*, the likely effect of sections 22, 33, 52, 53, and 124 warrant review. In particular, CHA recommends amendment of section 33(3) to have it operate within a "*reasonable and good faith*" framework.

Catholic hospitals and aged care services do and will continue to care for people of regardless of gender identity, marital or relationship status, faith, or sexual orientation, but should not be newly compelled to provide the very small number of specific services that might be inconsistent with Catholic religious beliefs.

Yours sincerely

Martin Lavery
Chief Executive Officer