



**Comment**

**on the**

***Human Rights  
Commission  
Bill 2005***  
**and associated  
legislation**

**May  
2005**

**INTRODUCTION**

ACTCOSS acknowledges that modern day Canberra has been built on the traditional lands of the Ngunnawal people. We pay our respects to their elders and recognise the displacement and disadvantage they have suffered since European settlement. ACTCOSS celebrates the Ngunnawal's living culture and valuable contribution to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) is the peak representative body for not-for-profit community organisations, people living with disadvantage, and low-income citizens of the Territory. ACTCOSS is a member of the nationwide COSS network, made up of each of the state Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS's objectives are representation of people living with disadvantage, the promotion of equitable social policy, and the development of a professional, cohesive and effective community sector.

The membership of the Council includes the majority of community based service providers in the social welfare area, a range of community associations and networks, self-help and consumer groups and interested individuals.

ACTCOSS receives funding from the Community Services Program (CSP) which is funded by the ACT Government.

# ACTCOSS COMMENT

## ***on the Human Rights Commission Bill 2005 and the Human Rights Commission Legislation Amendment Bill 2005***

This paper is a short comment that raises a number of issues of concern regarding new human rights legislation currently before the Legislative Assembly. ACTCOSS would add that there are further systemic issues that have been raised around the establishment of the Commission, and in particular the lack of resources proposed for the new Commission. For the purposes of this comment, however, the discussion is limited to specific legislative issues.

### **TIME LIMITS**

The *Human Rights Commission Legislation Amendment Bill 2005* ('the consequential amendments') removes the current Part 8 of the *Discrimination Act 1991* (clause 1.6 of the consequential amendments), including section 81(3) of the *Discrimination Act*, which states that the commissioner must decide whether to dismiss the complaint within 60 days of the complaint being lodged. This requirement currently has the effect that complaints must be investigated quickly by the Commissioner, and that resources are dedicated to ensuring that the statutory time limit is met.

*The Report of the Review of Statutory oversight Agencies and Community Advocacy* conducted by the Foundation for Effective Markets and Governance ('the FEMAG Report') reports that this deadline has never been missed (p.48). The FEMAG Report noted that this meant "other of her [the Discrimination Commissioner's] functions must suffer, however diligent she and her staff are" (ibid.). However, the FEMAG Report did not recommend that the time limit be removed, and proposed that the necessary solution was additional resources to complement the Commissioner's "ridiculously few staff" (ibid.), in the form of a common support unit. The Government response to the FEMAG Report gave no mention of abolishing the time limit, so the abolition of the time limit proposed by the Bills comes as a surprise to ACTCOSS and the community sector.

In fact, the Government response to the FEMAG recommendation 19 stated that:

*"The legislation to establish the Human Rights and Service Review Commission will include timeframes for the investigation of complaints and for keeping complainants informed of the process and progress of the complaint"*

This commitment has not been kept in the proposed legislation.

To be an effective complaints body, the Commission needs to be able to assure prospective clients that their complaints will be dealt with quickly and detail the timeframe in which the process will occur with some certainty. The removal of the statutory time limit for dismissing complaints may lead to less priority given to progressing complaints through the system, and fewer resources dedicated to ensuring complaints are dealt with in a timely manner. This has important consequences for access to justice, and we understand that there is evidence that speedy resolution of these issues tend to produce better outcomes for both the complainant and the respondent.

ACTCOSS believes that any weakening of the timeliness element of discrimination law in the ACT may result in less confidence in the complaints handling system and fewer discrimination complaints lodged with the Commission.

The removal of the time limit for investigation of discrimination complaints is exacerbated by the proposed system for progressing complaints through the Commission. In particular, the *Human Rights Commission Bill 2005* ('the Bill') proposes a five-stage model of dealing with complaints, with the additional option of referral to the Discrimination Tribunal for discrimination complaints effectively making a sixth stage. Most of these stages (allocation, consideration, conciliation, closure, and reporting) require a decision to be made by the Commission, presumably by a meeting of the members of the Commission (the Commissioners and the President). Given that the members of the Commission need only meet once each month, it may be several weeks before a complaint made to the Commission is even allocated to a Commissioner, let alone any investigation commenced.

The issue of timeliness is not restricted to discrimination complaints. A key component of concerns with the current Commissioner for Health Complaints is that complaints are not dealt with in a timely manner. Far from rectifying this issue, the current proposal appears to extend these problems to discrimination complaints.

**ACTCOSS recommends that:**

- **The Bills are amended to retain a statutory time limit for discrimination complaints for the initial investigation of whether the complaint can be dealt with under the Discrimination Act, or should otherwise be declined**
- **Consideration is given to amending the Bills to impose a time limit for initial investigations of health, disability and ageing services complaints in determining whether they can be dealt with by the Commission, or should otherwise be declined**

## **USE OF THE TERM 'CONSIDERATION'**

The Bill institutes a new common complaints system (Part 4) for all the relevant Acts. In the current Discrimination Act, the Discrimination Commissioner is required to "investigate" complaints. Similarly the current Commissioner for Health Complaints is able to "assess", "inquire into" and "investigate" complaints. However, the Bill proposes a new term for all these procedures: "consider". ACTCOSS is uneasy at the adoption of this term, as its meaning is unclear and may confuse complainants as to the role of Commissioners in "considering" a complaint.

The term consideration may be misunderstood in two different ways. Firstly, it may be misunderstood to be a passive assessment by the commissioner, rather than an active gathering of evidence and seeking responses from parties involved. From this viewpoint, "consideration" may appear to downgrade the role of the commissioners from being active investigators to passive observers. Alternatively, "consideration" may be seen to have quasi-judicial overtones, implying that commissioners will "consider" the evidence and make some determination of the legality of the alleged conduct and/or determine the appropriate penalties and/or remedies. Neither of these interpretations reflects the role of commissioners under the proposed Bill.

A further concern is that we understand that the term "consideration" is a new term that may introduce new legal uncertainty about how it is understood by a court or tribunal. Conversely, existing terms have established legal precedents in both the ACT and other Australian jurisdictions.

### **ACTCOSS recommends that:**

- **The Bill is amended to remove references to "consideration" of complaints and replace it with a less ambiguous term, such as "investigation".**

## **VICTIMISATION**

The Bill introduces a new offence of victimisation, attracting a maximum penalty of 50 penalty units or 6 months imprisonment (or both) for victimisation related to taking action under the Human Rights Commission Bill or rights Acts (although the term "rights Acts" is not defined) (section 98). However, while the consequential amendments also amend the Discrimination Act's clause on victimisation, it does not insert the same offence provisions for victimisation under the Discrimination Act (clause [1.5] of the consequential amendments).

**ACTCOSS recommends that:**

- **The Bills are amended so that protection from victimisation provisions are the same in both the *Human Rights Commission Bill 2005* and the *Discrimination Act 1991***
- **The victimisation clause in the Human Rights Commission Bill 2005 is amended to cover “related Acts” – a term that is defined in the dictionary.**

**AUTONOMY OF COMMISSIONERS**

ACTCOSS appreciates that the model proposed by the Bills is designed to promote a collegiate environment between commissioners; indeed, this is expressly set out in clause 13 of the *Human Rights Commission Bill 2005*. However, ACTCOSS is of the view that there is a danger in implementing this arrangement too severely, in that the autonomy, specialist knowledge, and ability to act independently may be compromised for individual commissioners.

The purpose of having separate commissioners fulfilling specialist roles is to develop high level-expertise and attention to those issues. However, if Commissioners are unable to fulfil those functions without the agreement of other Commissioners and/or the President this could compromise their autonomy and ability to pursue issues that require urgent attention. The Commission, particularly meetings of the members of the Commission, have the potential in the Bill as proposed to act as a “filtering” mechanism over the work of Commissioners, potentially diverting them from important issues or impeding their inquiries. ACTCOSS is concerned that decisions about the work of an individual Commissioner may be inappropriately directed by other Commissioners and the President, who may have no particular expertise in the specialist work of that individual Commissioner.

There are parallel clauses for each Commissioner in their functions that constrain them by decisions of the Commission: being sections 21(2), 23(3), 25(2) and 27(3). These sections subordinate the decisions of individual Commissioners to the collective decisions of the Commission. While it may be entirely appropriate for this to occur in administrative decisions of how the Commission is managed (as in the restriction of the President’s functions in section 19(2)), it is ACTCOSS’s view that this restriction is not appropriate for specialist policy decisions made by individual Commissioners.

**ACTCOSS recommends that:**

- **The Bill be amended to remove sections 21(2), 23(3), 25(2) and 27(3), or alternatively, amend them so that the exercise of the Commissioners functions is only “subject to any decision of the commission about the management of its administrative affairs” [as in s.19(2)]**

## **INDEPENDENT REPORTING**

An essential element of a Commissioner's work is to draw the Government's attention to an issue within their area of expertise. This is most commonly done by submitting a report to the Minister, which is usually then tabled in the Legislative Assembly.

The proposed Bill removes the ability for Commissioners to report to the Minister directly. Instead, they may only report indirectly, via a report of the Commission. ACTCOSS views this as a possible serious reduction in the independence of Commissioners, and may potentially hamper their ability to draw attention to important public issues.

### **ACTCOSS recommends that:**

- **Commissioners are authorised to make independent reports to the Minister about matters of public importance (as in the Commission's power in s87)**

## **REFERRING CASES FOR CONCILIATION**

It is unclear why some decisions in the handling of complaints are not able to be made by individual Commissioners, as is currently the case. While there is a reasonable case that allocation of complaints should be made collectively, in particular to allow for joint investigations or resolving any doubt about the appropriate Commissioner to deal with the complaint, the same logic does not hold for other steps in the process.

It seems unnecessary for the Commission to decide whether to send a complaint to conciliation. Complaints will usually be investigated by an individual Commissioner, who will develop a familiarity with the particular circumstances of the case and have specialist knowledge in that field. It seems reasonable that the individual Commissioner is best placed to determine whether the complaint should be referred for conciliation. It is of additional concern that under the current proposal the decision will be made by a number of other Commissioners who may have little knowledge of the individual case (and presumably are entirely reliant on the investigating Commissioner for that information anyway). It is also proposed that the President will be involved in deciding whether to refer a case to her/himself for conciliation (with both a deliberative and casting vote). This seems to be an inappropriate decision for the Commission to make and consideration should be given to retaining to power of individual Commissioners to refer complaints for conciliation.

In addition, by requiring referrals for conciliation to be decided by the Commission, the process introduces possible further delay in progressing the complaint, as it appears that the decision will have to wait until a meeting is called. It is also noted that the current proposal allows the President to end conciliation using her/his individual judgement, but in contrast, referral of complaints requires collective agreement.

**ACTCOSS recommends that:**

- **The Bill be amended to give individual Commissioners the ability to refer a complaint that they are investigating for conciliation (s51)**

**CHANGES TO THE *HUMAN RIGHTS ACT 2004***

The consequential amendments alter the Human Rights Act and the role of the Human Rights Commissioner. While some of the changes simply move some of the roles of the Human Rights Commissioner from the *Human Rights Act 2004* to the *Human Rights Commission Bill 2005*, others transfer the roles from the Commissioner to the Commission.

There are two substantive changes of this sort in the Bill. Firstly, the Supreme Court is now required to notify the human rights commission, not the commissioner, of any intention to make a declaration of incompatibility in a proceeding. Given that there is no proposal to change section 36 of the Act (Human Rights Commissioner may intervene), it seems odd that while the Human Rights Commissioner may intervene in case with the courts leave, the court does not have to notify the commissioner of any intention to make a statement of incompatibility.

Secondly, the Bill proposes to transfer responsibility for reviewing and reporting on territory laws from the Commissioner to the Commission. While the Commission will likely delegate this task to the Commissioner under section 27(1) (a) of the Bill, it again appears to remove the independence of the Commissioner to review and report on human rights, and instead filters this role through meetings of the Commission. ACTCOSS sees no justification for this change, and believes that the Human Rights Commissioner should have the autonomy to raise issues without first having to receive approval from the Commission.

**ACTCOSS recommends that:**

- **Section 34 of the *Human Rights Act 2004* remains unchanged**
- **The Human Rights Commissioner should retain the functions of reviewing Territory laws and reporting to the Attorney-General, not have them transferred to the Commission**