



## **Comment**

**on the Department of  
Justice and Community  
Safety's Discussion  
Paper on**

## **The Recognition of Same-Sex Relationships in the ACT**

**August  
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 Department of Justice and Community Safety's Discussion Paper on The Recognition of Same-Sex Relationships in the ACT.

## **Foreword**

ACTCOSS makes this submission in its role as the ACT's peak representative body for people living with disadvantage. ACTCOSS notes that gay, lesbian, bisexual, transgender and intersex (GLBTI) Canberrans continue to experiencing discrimination and exclusion in their everyday lives, and supports increased government action and resources to combat homophobia.

ACTCOSS also acknowledges that GLBTI communities are not homogenous and comprise a diversity of human experience. Implicit in this is recognising that GLBTI individuals may have differing opinions on the appropriateness of Government regulation of their interpersonal relationships. A diversity of views is universal throughout all disadvantaged communities, and this should not prevent governments from taking action to address disadvantage. However, it is important to formulate reforms to ensure that individuals retain choice and control over their lives, personal privacy, and the extent that government should intrude into their lives.

## **Consumer Involvement**

ACTCOSS strongly supports the involvement of consumers and consumer representatives in formulating the scope and detail of government reforms. As such, ACTCOSS strongly encourages the Government to consult directly with GLBTI individuals and their representative organisations in determining the shape and direction of any reform proposal.

## **Relationship Reform**

The ACT has frequently been at the forefront of efforts so that human relationships are appropriately recognised by governments. ACTCOSS notes that there is increasing diversity in the living arrangements and family forms of Australians, and governments need to ensure that their legislative arrangements are sufficiently broad to encapsulate this heterogeneity.

ACTCOSS applauds the ACT Governments previous reforms aimed at improving the recognition of diverse relationships, including the landmark introduction of the *Domestic Relationships Act 1996*, as well as the subsequent changes in the *Legislation (Gay, Lesbian and Transgender) Amendment Act 2003*, the *Parentage Act 2004*, and the *Sexuality Discrimination Legislation Amendment Act 2004* under the present Government.

ACTCOSS supports to the current policy intention to provide formal (“de jure”) recognition of a wider range of relationships than is currently available under existing mechanisms.

### **The Breadth of Interpersonal Relationships**

ACTCOSS notes that similar proposed changes in Tasmania look at a broader scope of relationships than solely the status of same-sex couples. The Tasmanian *Relationships Act 2003* sets out variety of human relationships, including significant relationships, caring relationships, family relationships, and includes indigenous kinship ties. The Tasmanian approach of looking at interpersonal relationships across the spectrum has much to commend it.

In particular, ACTCOSS would note that some of these aspects have not been included in the present investigation. For example, the Tasmanian registration scheme includes provisions for people in non-conjugal relationships to register a “caring relationship”. While the use of these provisions has been very low in Tasmania, casting some doubt on their usefulness, the current investigation presents an opportunity for the Government to consult with carers, indigenous groups, etc. to ascertain whether existing laws are adequate in recognising their personal relationships.

### **Issues with Existing Legislation**

The current legislative framework for recognition of various interpersonal relationships remains confusing and overlapping. In particular, the distinction between domestic relationship and domestic partnership can be perplexing, and there is little plain English information available to explain these difficulties. The situation is further complicated by the overlap between the definitions and changes in the definitions for specific Acts.

For example, a married couple is considered to be in *domestic partnership* but not a *domestic relationship*, while “de facto relationships” are considered to be in both a *domestic relationship* and a *domestic partnership*. In contrast, a people in a caring relationship are considered to be in *domestic relationship*, but not a *domestic partnership*, however, they are considered to be *partners* for some specific legislation, such as the *Rates and Land Rent (Relief) Act 1970*. These definitions are counter-intuitive, and mean that it becomes difficult for individuals to understand exactly what their relationship status is, and what benefits will flow from this. This complexity has been created by successive waves of reform that use different terminology, and not least by the use of similar sounding descriptions to express different types of relationships.

Government will need to assess the possibilities for streamlining these definitions to make them more accessible. For example, one possibility is the creation of a distinct category for interpersonal relationships that are not *domestic partnerships*, using some readily identifiable description (such as “caring relationship” or “interdependent relationship”), and then apply this consistently throughout legislation. Alternatively, the Government might consider producing educational material to assist the public in discerning the differences between different classifications, which may be particularly useful if the government pursues a scheme to more formally recognise relationships as it has proposed.

### **The Benefits of Further Relationship Recognition**

Currently, the ACT only recognises one form of “de jure” or formally registered relationship: marriage under the Australian Governments Marriage Act 1961. In addition, it recognises “de facto” relationships on equal terms to marriage for almost all purposes. However, “de facto” relationships are not formally recorded by government in documentary form. Instead they rely on presumptive recognition, that is, where an agency or court agrees that two people have a sufficiently close relationship to warrant their treatment as “domestic partners”. Presumptive recognition is important, as while partners may not have decided to formalise their relationship status, they should not be treated as if the relationship does not exist, particularly in cases of death or emergencies, or during relationship breakdown or domestic violence.

However, presumptive relationship recognition has its limitations. Firstly, it relies, in some circumstances, on one or both members of a couple being able to “prove” that their relationship exists, which might be quite a lengthy process, requiring documentation of co-habitation, shared financial arrangements, or statutory declarations as to the nature of their relationship. This is of particular concern where a relationship needs to be recognised relatively quickly, such as during emergency medical treatment, or when there is some dispute over whether the relationship existed, for example, following the death of a partner, or during a relationship breakdown.

A second shortcoming is that there may be instances where people who believe that they are in a partnership might be in the “grey area” of the law, where it is uncertain that if the matter was ever contested the relationship would be recognised. This is particularly the case when a relationship is relatively recent, or where for reasons such as employment, for example, the couple is not able to live together.

These factors point out the limitations of presumptive relationship recognition alone in recognising interpersonal relationships. A “de jure” scheme to accompany such provisions would assist in providing certainty to couple to ensure their relationship will be recognised.

### **The Structure of a Relationship Recognition Scheme**

ACTCOSS would reiterate the necessity of consulting with those who are most likely to make use of a relationship scheme in determining its structure. However, ACTCOSS would comment that the following elements would appear to be appropriate:

- **Conclusive evidence of relationship**  
Since the function of a registration scheme is to overcome the shortcomings of presumptive recognition, a “registration certificate” (however described) should be conclusive proof of the existence of a relationship without requiring further evidence.
- **Available regardless of gender**  
Any such scheme should be available to couples regardless of their gender. By restricting a scheme to same-sex couples alone, the scheme may become discriminatory in itself, and possibly be in breach of the *Human Rights Act 2004*.
- **Retain presumptive relationship recognition**  
A relationship recognition scheme should be in addition to, not instead of, presumptive recognition of relationships. Presumptive recognition continues to provide a number of safeguards, and should not be dismantled in favour of more formal arrangements.
- **Same rights and responsibilities**  
Any scheme should attempt to avoid creating a hierarchy of relationships, and thus have the same rights and responsibilities as the existing “de jure” model of relationship recognition, to the extent possible under Territory laws.

- **No residency requirement**

Again, given some of the problems with the presumptive model, any ACT scheme should not require a residency test, particularly to ensure that cross-border residency or the posting of a partner to another jurisdiction does not prevent registration.

- **Transferability**

While the issue of transferability cannot be completely resolved by the ACT Government alone, some elements can be included. In particular, the ACT should be able to recognise relationships registered in some other jurisdiction. In addition, if the scheme proceeds, the Government should approach other jurisdictions determine whether the ACT Scheme might be recognised there.

ACTCOSS notes that this is not an exhaustive list of considerations, and there may be additional elements that should be incorporated.

### **Community Education and Information**

ACTCOSS would state that legislative change, while important, cannot eliminate discrimination alone. In addition, if the changes are now widely and well understood, any changes to relationship recognition may not be utilised to their full extent.

ACTCOSS would advise the ACT Government to commence a wide-ranging education campaign informing the community about the changes if they occur, in addition to the previous reforms. In addition to those affected by the reforms, information could also be targeted at appropriate professionals, including the legal fraternity, medical practitioners, financial professionals, employers, and police.