



**Submission to the Department of
Disability, Housing and Community
Services Discussion Paper on**

**A Disability and
Community Services
Commissioner for the ACT**



July 2005

About ACTCOSS

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' 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.

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Abbreviations

ACT	Australian Capital Territory
ACTCOSS	ACT Council of Social Service, Inc.
DHCS	Department of Disability, Housing and Community Services
FEMAG	Foundation for Effective Markets and Governance
HREOC	Human Rights and Equal Opportunity Commission
HRC	Human Rights Commission
JACS	Department of Justice and Community Safety

Oversight Agencies – A Work in Progress

Throughout its first term, the Stanhope Labor Government released a number of reports that questioned the arrangements in relation to the ACT's system of statutory oversight agencies. These include the *Final Report of the Board of Inquiry into Disability Services* (The Gallop Report), *The Report of the Review of Statutory Oversight Agencies and Community Advocacy* (The FEMAG Report) and *The Territory as Parent: Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management* (The Vardon Report). Together, the reports identified a number of gaps in the system of statutory oversight, as well as possible means of improving consumer access and resource sharing.

The Government's major response to these issues is contained in the strategic document *The Right System for Rights Protection*. The central policy change identified by the report is the establishment of a Human Rights and Service Delivery Commission, since truncated to the Human Rights Commission (HRC). The Commission is to be loosely based on the Australian Government's Human Rights and Equal Opportunity Commission (HREOC), it that it is proposed to have a number of specialist Commissioners and a Commission President in a "collegiate" model that would share resources.

The Government has now tabled a number of pieces of legislation to give effect to the policy objectives outlined in *The Right System for Rights Protection*. These are:

- The ***Human Rights Commission Bill 2005***, which sets out the structure of the Human Rights Commission; details the responsibilities of the Human Rights Commissioner, the Discrimination Commissioner, the Health Services Commissioner, and the Disability and Community Services Commissioner
- The ***Human Rights Commission Legislation Amendment Bill 2005***, which makes consequential amendments to a number of other Acts, including the *Discrimination Act 1991*, the *Human Rights Act 2004*, and repeals the *Community and Health Services Complaints Act 1993*
- The ***Human Rights Commission (Children and Young People Commissioner) Amendment Bill 2005***, which sets out the creation and responsibilities of the Children and Young People Commissioner
- The ***Public Advocate Bill 2005***, which renames the existing Community Advocate, and gives that position additional responsibilities including under the *Guardianship and Management of Property Act 1991*

None of these Bills have yet passed through the Legislative Assembly. ACTCOSS understands that the Government intends to debate the Bills in August.

Thus, it is apparent that the creation of the HRC is still a work in progress, with a number of legislative, procedural and administrative issues yet to be finalised. ACTCOSS understands that it is intended for the HRC to 'start-up' on 1 January 2006.

The release of "*A Disability and Community Services Commissioner for the ACT: Discussion Paper*" (*the Discussion Paper*) by the Department of Disability, Housing and Community Services in this environment poses its own challenges. The Discussion Paper covers issues that need to be considered in light of the legislation that has been tabled; however, this may or may not be subject to some revision in its passage through the Assembly. In addition, it is clear to ACTCOSS that the detail of the proposals contained in *The Right System for Rights Protection* and the subsequent legislation are not well understood by community organisations, making some of the detail in the discussion paper difficult to clarify.

Furthermore, ACTCOSS submits that the Discussion Paper itself is difficult to understand, often does not contain adequate background information, and asks a number of highly specific and overlapping questions. Of particular concern was that some stakeholders understood from Discussion Paper that the proposed Community Services Commissioner would be highly interventionist, antagonistic to community organisations and perform the function of a regulator rather than an oversight agency. ACTCOSS would state that this is neither our understanding of the role proposed by *The Right System for Rights Protection* nor the role advocated by ACTCOSS in our previous submissions. This submission will include discussion of these issues in greater detail.

ACTCOSS Consultation

ACTCOSS conducted its own consultation in the form of a Roundtable Discussion, held on Monday, 4th July. A list of participating organisation appears in Appendix A. The roundtable discussed the broader context of the HRC and discussed the themes presented in some detail.

The Human Rights Commission

Before addressing the detail of the discussion paper, this submission will address some of ACTCOSS' continuing concerns with the proposed structure and resourcing of the HRC, as this introduces some important qualifications in our responses to the questions raised it.

Firstly, it is not optimal that the HRC continues to be formulated in stages, with various pieces of legislation being moved at present to 'add-on' new parts of the Commission's functions. Presumably, this is intended to be the outcome of this consultation paper, with additional functions added to the Disability and Community Services Commissioner at some future date. This piecemeal approach to the constitution of the HRC makes it difficult for stakeholders and the public to understand the final composition of the HRC, and the extent of its role in oversight.

Furthermore, the new management structure of the HRC is still not well understood, particularly with regard as to how the Commission will allocate its resources. It is still not understood whether Commissioners will have specifically allocated staff working for them, and the extent to which staff and other resources will be shared between Commissioners. This is of particular concern, as in order to carry out the possibly numerous areas of coverage, the Commissioner will need a range of specialist expertise that cannot be accommodated by generalist staff.

It is also unclear as to how great a role the President will have in making resource allocation decisions. In addition, it has not been articulated in any detail how the 'collegiate' model will operate, including what criteria will be used to allocate complaints between Commissioners, and under what circumstances the Commission will undertake joint investigations.

ACTCOSS raises a similar concern in relation to the introduction of the 'single entry point' model. ACTCOSS has always supported a single entry point for complaints, and we understand that the Commission has been given the additional responsibility in the Human Rights Commission Bill 2005 to provide "reasonable assistance to ... put the complaint in writing". ACTCOSS would argue that both of these responsibilities mean that highly skilled and specialised staff will be required in addition to the current human resources to fulfil these additional tasks effectively.

Finally, ACTCOSS would reiterate comments it has made elsewhere:

- That the budget for the HRC is not adequate for the Commission to fulfil its expanded roles effectively
- That the creation of a single complaints handling process in legislation has diminished the effectiveness of discrimination complaints in particular, and especially with regard to deleting the statutory timeframes in relation to responding to complaints [ACTCOSS (2005)]
- That the HRC should not be used "*as an opportunity to attempt to cut or contain costs by 'streamlining' different functions together*" [ACTCOSS (2004), p.4]

Why a Community Services Commissioner?

ACTCOSS has strongly and consistently supported the establishment of a Community Services Commissioner. This is based on a fundamental principle of equity, in that access to statutory oversight agencies should not be arbitrarily restricted on the basis of the type of service provided. If some arrangement for the general coverage of human services is not introduced, the consumer faces the prospect of being able to access the Commission to address problems with a narrow selection of services, but if the nature of the service falls outside this definition, they have no means of redress. This is unfair, if not discriminatory.

The Discussion Paper failed to mention this proposition, and simply stated that the Government had committed to introduce a Commissioner. This omission meant that the questions were asked in a vacuum, without first explaining the reasoning behind creating the position, and the intended nature of the Human Rights Commission. In particular, the most basic premise of providing a mechanism for service improvement was absent. ACTCOSS would comment that this does not provide a good basis for dialogue, as the first step in consultation should be some exposition of the intentions of the proposal. It is very hard to answer the 'who?' and the 'how?' if we do not first understand the 'why?'

A Disability and Community Services Commissioner

In *The Right System for Rights Protection*, the ACT Government proposed that there would be separate positions created of the Disability Services Commissioner and the Community Services Commissioner. The Discussion Paper states that "*The ACT Government has since decided that there will be a combined Disability and Community Services Commissioner*". No explanation has ever been given for this change in policy.

ACTCOSS has previously supported the concept of a single body to deal with both disability and community services complaints. In its response to the FEMAG Report, ACTCOSS stated that "*the best outcome for the complaints and advocacy system would be to provide the consumers of all community services with access to external complaints-handling, by establishing a comprehensive, independent commission/er for community services (including disability services).*"

However, note that the primary emphasis around this proposal was that community services and disability services should not be handled by separate bodies in response to "*our concern that the creation of a Disability Commissioner separate from the complaints body handling other community services complaints would lead to a system that is complicated and inefficient*". In the proposed structure of the HRC, having separate Commissioners for Community Services and Disability Services would not traverse this principle.

In our consultations with member organisations, concern was expressed the dual roles of the Disability and Community Services Commissioner may cause difficulties. In particular, there was concern that the one role may dominate the other, leading to insufficient focus on an area of need. This is a more pertinent point if the Commissioner is under-resourced in carrying out their functions, and requires a range of specialist staff to ensure adequate coverage of their responsibilities.

Community Advocacy

ACTCOSS would also use this opportunity to re-state its position on the provision of community advocacy. Despite the FEMAG report examining both statutory oversight and community advocacy, it seems that only the first half of the report has been responded to in any significant manner in *The Right System for Rights Protection*. In its response to the FEMAG Report, ACTCOSS stated that:

ACTCOSS' own research consistently finds that there are shortfalls in the advocacy services available in the ACT. For example, the interviews undertaken by ACTCOSS as part of the Government's Addressing Disadvantage project identified the lack of advocacy services as one of the most pronounced and damaging unmet needs. This report also found that "many consumer advocacy and representative organisations are unable to provide an adequate level of advocacy at both an individual and systemic level due to a lack of resources." ... ACTCOSS believes that the Government's response to the current review will be gravely inadequate if it does not include a commitment to expand the provision of community-based advocacy services.

[ACTCOSS (2004), pp.14-15]

Advocacy services are as essential to any system to protect human rights as the oversight and complaints bodies. The essential distinguishing element of advocacy agencies is that they are partisan in providing assistance and seek to assist, guide and speak on behalf of consumers, without having an adjudicative or conciliatory role. The ACT Government needs to resource community advocacy services appropriately in order to achieve systemic protection of human rights and improvements in service delivery.

The Role of a Community Services Commissioner

ACTCOSS believes that the Discussion Paper did not adequately represent the previously articulated roles of a Community Services Commissioner for the ACT.

Firstly, it is important to place the operation of a Commissioner within the ideas already expressed in the legislation before the Assembly. The *Human Rights Commission Bill 2005* states as part of objective (e):

"[to provide] a process to encourage and assist users and providers ... to make improvements in the provision of services, particularly by encouraging and assisting users and providers to contribute to the review and improvement of service quality"

Similarly, *The Right System for Rights Protection* states that the role of the Community Services Commissioner is to include *"identifying and inquiring into issues relating to the quality and safety of community services"* (p.25).

The FEMAG Report did not specifically recommend the creation of a Community Services Commissioner. However, it did make a number of comments about the oversight of the internal complaints mechanisms of public agencies, including that *"it is important that the oversight bodies play an active role in the monitoring of agencies' complaint handling system through the provision of advice and occasional 'own motion' reviews"*.

All these previous articulations of the oversight role include references to roles of identifying important issues, and providing encouragement, assistance and advice. ACTCOSS would hope that this educative role would be prominent among the duties of any Community Services Commissioner.

However, in ACTCOSS' opinion, the Discussion Paper focuses too narrowly on other areas. In particular, a great deal of emphasis is placed on complaints handling processes, monitoring, reporting, benchmarking, quality measures and the powers of the Commissioner. The prominence of these issues in the paper has painted a very different picture of what may be envisaged for the role of the Community Services Commissioner, and this has not always met with a positive reaction from community sector organisations.

In particular, some the ideas in the paper go well beyond the role of an oversight agency, and begin to more closely resemble those of a regulator. These include a role for the Commissioner in setting benchmarks and imposing reporting requirements on community organisations. ACTCOSS strenuously opposes such a role for the Commissioner, particularly as most community organisations already have a plethora of reporting requirements and quality standards. ACTCOSS contends that the role of monitoring and receiving reports should primarily be the responsibility of those funding agencies that resource community organisations, and these should not be duplicated by the Commissioner.

There is a difference between a watchdog and a policeman.

Monitoring and Quality Standards

As mentioned above, there appears to be some divergence between ACTCOSS' previous understanding of 'monitoring', and the directions pursued in the Discussion Paper. ACTCOSS has previously alluded to a monitoring role for the Commissioner, specifically with regard to internal complaints. However, the Discussion Paper extends the concept to a program of regular surveys, audits and possibly some type of reporting arrangement. It also suggests that such monitoring "could occur annually, biannually or on a rolling three or five year program". Unsurprisingly, our consultations produced a clearly hostile reaction to such a proposal.

ACTCOSS would posit that 'monitoring', in the context of an oversight agency, is a more fluid and more diverse arrangement than a tightly fixed program of audits and reporting requirements, which is more the hallmark of a regulator. In the first instance, monitoring would require the Commissioner to examine the nature of complaints they received, and observe any pattern or particular areas that appeared to require greater scrutiny. In addition, regular dialogue with stakeholders, including consumers, funding managers, advocacy agencies and the community organisations themselves, would help elicit any areas of concern.

Apart from anything else, there are quite substantial resource implications for some of the suggestions made in the Discussion Paper. A program of auditing hundreds, if not thousands of ACT community organisations would likely cost in the order of millions of dollars each year. ACTCOSS raises considerable doubts about whether this level of resources is likely to be forthcoming, and even if it were, the are far better uses to which a Commissioner could put them.

A similar comment can be made about measuring service quality. The Community Sector is diverse, and it is necessarily the case that judgements about the relevant standards will need to be made on a case by case basis. Some services will have a multiplicity of standards that they are already burdened with, others will have fewer. The relevant standards will be different in different areas, and the task of locating and considering the extent of these may be among the Commissioner's initial tasks. It may be worthwhile to remark that there is perhaps scope to examine the existing standards, and the extent to which they overlap and/or contradict one another.

Most centrally, any monitoring or measurement of service standards should not place additional administrative strain on a sector that is, in many cases, already overburdened. It would be perverse to place additional strain on organisations so that they are forced to reduce their service quality as a result.

Complaints

Generally, ACTCOSS notes that the Commission's proposed community services complaints handling role is still subject to uncertainty within the sector. While generally supported, particularly from a consumer perspective, organisations have little information about how this role will impact upon their services, or how the complaints handling process will operate. This is particularly the case for organisations that do not currently operate under the current Health and Community Services Commissioner.

Moreover, concerns were raised about the previous difficulties with the Health and Community Services Commissioner's ability to handle disability complaints, and whether these may transfer to the new Commissioner. It is certainly hoped that this will not be the case, but the Commissioner should be aware of and examine the past problems in adjusting to their new role.

Equally, there are ongoing concerns with the complaints process, including the timeframes as previously mentioned. In addition, ACTCOSS member organisations have noted that while certain aspects of conciliation and complaints activities need to be kept confidential, the Gallop review showed that this could lead to problems in properly identifying problems.

Finally, there continue to be problems with confining complaints to specific services. The possibility has been raised that while a consumer may not have an explicit complaint about an individual service, they may nonetheless have legitimate concerns about the suite of services that are available to them, or the lack thereof. A complaints mechanism that could include these types of complaints would be preferable to a more narrow system that relied on attaching the complaint to an individual service.

Monitoring Internal Complaints

The FEMAG report presented a constructive view of internal complaints mechanisms:

“Internal complaint handling is often described as presenting the organisation with a ‘gift’ – an opportunity to receive a values critique of what is going wrong or how something might be handled better. In is not only an occasion to resolve discontent and make amends for mistakes or, indeed, to improve the quality of service delivery, but also to challenge ‘orthodox’ practices and seek better, or best practice models for undertaking one’s tasks. By taking ownership of these opportunities, an organization not only contributes to continual development of its own staff with improve outcomes for its clients, but it also escapes the glare of unwanted external criticism”

[FEMAG (2003), p.70]

However, feedback from community organisations also raises the issue of how organisations are resourced to provide appropriate internal complaints mechanisms. Oversight of these systems is a useful adjunct to improve feedback mechanisms, and ACTCOSS has supported this previously. But oversight alone will not produce any great improvement, and will tend to simply pick up the worst cases. To make serious headway in this area, organisations need to capacity to develop and their systems and train their staff. This is particularly true of small organisations that may have no extant complaints mechanism.

It should also be emphasised that seeking redress to the Commission is an important, but not the only method to deal with problems in service delivery. Outside services, such as the Conflict Resolution Service, may also play a useful role, and the Commission should be mindful that there may be valuable alternatives to its own functions.

As expressed above, the comments relating to the meaning of ‘monitoring’ also apply in this area.

Definitions and Coverage

The Discussion Paper gives a great deal of attention to possible definitions of what should constitute a community service for the purposes of the Commissioner. Understandably, the concept of a “community service” can be very broad in every day parlance.

However, it needs to be kept in mind that the definition needs to focus the attention of the Commission, and not be so broad that the Commissioner becomes overwhelmed by the scope of the task. In an ideal world, with unlimited resources, it would be useful to have as broad a definition as possible. However, with the reality of resource constraints, the definition should be somewhat narrower to ensure that the Commissioner concentrates on those most in need.

The Discussion Paper presents 3 broad options for the purpose of definition: based on a target group, based on the activities of an organisation, and based on the composition of the organisation (e.g. incorporated associations).

ACTCOSS would particularly object to the last of these, for two reasons. Firstly, the tasks of incorporated associations are diverse and are not necessarily of high importance for oversight – it would seem odd for the Commission to be involving itself in the operation of birdwatchers or rail history enthusiasts. Secondly, it restricts the definition to the not-for-profit sector. This is of concern as there are both public and private operators of community services, and these should be equally included. ACTCOSS would return to the original intention for the Commissioner, which is consumer protection. This means that service providers should be covered by the definition regardless of their organisational structure.

There is an additional concern raised by stakeholders that if a Commissioner is highly intrusive into community organisations, the formation of those groups themselves may be impeded. Community groups are frequently formed without any resources among people with a common viewpoint or the need to fill the gaps in service provision in their own lives. There is a legitimate question about how far the Government should intrude into gatherings of people (including the right to freedom of assembly in the Human Rights Act). This needs to be carefully considered against the need to protect consumers and prevent systemic failure of service provision.

A similar comment could be made about the inclusion of sport, recreational services, arts and cultural services, etc. While there may be some marginal benefit in covering these sectors completely, a question has to again be asked about whether this is an effective use of resources. It should also be noted that there will be limited coverage of these areas anyway, for example, sporting programs for people with a disability are covered by the definition of disability service, and questions of discrimination in the provision of cultural services would be covered by the Discrimination Commissioner.

It is also instructive to examine the definitions proposed in the existing Bills. These describe the coverage by referring to a service provided to a particular population group, and then give further examples to ensure coverage of particular services. In light of this, an SA-type definition seems appropriate, with the addition of a list of examples to ensure that any additional services are included to remove any doubt.

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APPENDIX A

Organisations Participating in ACTCOSS Roundtable Discussion

ADACAS
Australian Red Cross
Belconnen Community Service
Carers ACT
Centacare
Conflict Resolution Service
Health Care Consumer's Association
Human Rights Office
Northside Community Service
Youth Coalition of the ACT