



Comment on
Consolidation of Commonwealth
Anti-Discrimination Laws

January 2012

About ACTCOSS

ACTCOSS acknowledges that 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 as a result of European settlement. We celebrate Aboriginal and Torres Strait Islander cultures and ongoing 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 and territory Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS' objectives are a community in which all people have the opportunities and resources needed to participate in and benefit from social and economic life and the development of a dynamic, collaborative and viable 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 ACT Government - Community Services Directorate.

ACTCOSS advises that this document may be publicly distributed, including by placing a copy on our website.

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Introduction

ACTCOSS welcomes the opportunity to provide comment on the issues raised in the Anti-Discrimination Law Consolidation discussion paper ('the Paper').

ACTCOSS is the peak representative body for people living with low incomes or disadvantage, and for not-for-profit community organisations in the Australian Capital Territory. As such, this submission will seek to comment upon the questions set out in the Paper which ACTCOSS believes bear most directly upon these groups.

ACTCOSS supports the consolidation of the four anti-discrimination acts and believes it is a good opportunity for any inconsistencies within the anti-discrimination legislation to be addressed. The issues which ACTCOSS believes are pertinent to the community sector and people living with disadvantage are explored in more detail below. ACTCOSS notes the submissions put forward by legal organisations, including the Discrimination Law Experts' Group, and for this reason will not seek to answer every question posed in the Paper, or to address the legal issues.

Human Rights

Human rights are basic rights and freedoms which are universal and inherent to all people. They are inter-related, interdependent and indivisible. Effective human rights legislation and the implementation of policies and processes in line with such principles can aid to create a just and equal society. Human rights instruments are an effective tool which can promote human dignity and address disadvantage.

Domestic human rights legislation and practices can be formally traced back to the ratification of a number of international human rights treaties. Australia has agreed to uphold human rights standards as set out in a number of treaties which include:

- the International Covenant on Civil and Political Rights (ICCPR);
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- the Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- the Convention on the Rights of the Child (CRC) and;
- the Convention on the Rights of Persons with Disabilities (CRPD)

However, as many of the current anti-discrimination acts were put in place before Australia became a party to some of these covenants, ACTCOSS believes the acts do not truly reflect the human rights culture which Australia

has since adopted. In addition, with no human rights enshrined in the Australian Constitution (other than freedom of religion), the treaties and covenants are legally non-binding, and can be overridden in a court of law. ACTCOSS is also concerned with the apparent ease in which the anti-discrimination acts are able to be suspended suspension, for example the suspension of the Racial Discrimination Act for the 2009 Northern Territory Intervention.

ACTCOSS believes by putting human rights at the forefront of this review, the outcome will be strengthened, and the new act will truly reflect a culture of human rights. The Commonwealth Government should lead the way in the development of a human rights culture through the prioritisation of human rights as a foundation of anti-discrimination legislation.¹

Voluntary workers

Question 13: How should the consolidation bill protect voluntary workers from discrimination and harassment?

The value of voluntary workers can be measured in the way volunteering facilitates a sense of social inclusion, which in turn plays an important role in addressing social disadvantage.² The ACT Government's *Volunteer Statement Information Paper* notes this in stating

Research indicates volunteering enhances social cohesion, strengthens communities and provides benefits to the volunteer themselves.³

Understanding the important role of volunteers to the fabric of our society should mean acknowledging volunteers should have the same rights as their paid colleagues. Australia has a rich tradition in people volunteering, particularly in the community sector. In 2008-09 organisations in the community services sector were assisted by more than 325,000 volunteers, providing on average 78.3 hours of voluntary services each.⁴

Whilst volunteers are afforded some protection in the workplace from discrimination, this protection is inconsistent across Australian jurisdictions, with some states and territories giving voluntary workers more protection than others. At a federal level voluntary workers are not protected from discrimination in the workplace by the Age Discrimination, Disability Discrimination and Sex Discrimination Acts however they can sometimes bring about a claim under a section of the Racial Discrimination Act.⁵

1 ACTCOSS, Submission to the National Human Rights Consultation, June 2009.

2 ACTCOSS, Comment on the Volunteer Statement Information Paper, September 2011.

3 ACT Government, *Volunteer Statement and Information Paper*, 2011, p.9.

4 Australian Institute of Health and Welfare 2011, Australia's Welfare 2011, Australia's welfare series no. 10, Cat. No. AUS 142. Canberra: AIHW, p. 319.

5 Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, Attorney-General's Department, Australia, September 2011, p.27.

ACTCOSS believes voluntary workers should be protected from discrimination and harassment in the same way paid workers are. Whilst concern has been raised that the protection of volunteer workers would place an unreasonable burden on organisations with a significant voluntary workforce,⁶ ACTCOSS believes the benefits afforded to individuals volunteer their time to help organisations far outweighs this concern. In addition, as noted in the Paper, extending protection may actually encourage people to volunteer, bringing significant economic benefits to the community.

Broadly speaking, volunteers in the ACT have a reasonable level of protection against sexual harassment and discrimination in the workplace. This is due in part to the Human Rights Act 2004 which ensures there is a basic level of human rights protection for everyone in the ACT. Voluntary workers are also specifically covered through the new Work Health and Safety Act 2011.⁷ ACTCOSS recommends the new consolidated bill seek to learn from the ACT and similar jurisdictions, and ensure there is a cohesive and collective national principle which affords voluntary workers the same level of protection from discrimination as paid workers and the same means of redress when this does not happen.

Member-based associations

Question 15: What is the best approach to coverage of clubs and member-based associations?

The community sector is made up of a variety of organisations, many of which are member-based associations. Although these associations are prohibited from discriminating against the general public, the provisions of each Commonwealth anti-discrimination law are complex due to the exceptions and inconsistent coverage between each Act.⁸

In addition, the current anti-discrimination acts have different definitions of what constitutes a club or association, and differing terminology for these groups, with the terms 'clubs', 'voluntary bodies' and 'associations' being used at different points across the four acts.

ACTCOSS would recommend a streamlined, cohesive definition of the terms 'clubs', 'voluntary bodies', and 'association' to avoid confusion and inconsistencies across the different acts.

It is also important to note the recent reforms of the Not For Profit (NFP) sector being led by the Australian Charities and Not-For-Profit Commission (ACNC) which will determine the legal status for groups seeking charitable, public benevolent institution, and other NFP benefits on behalf of all Commonwealth

6 Ibid.

7 Work Safe ACT, Canberra, 2011, accessed on 11 January 2012, <http://www.worksafe.act.gov.au/page/view/1252>

8 Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, Attorney-General's Department, Australia, September 2011, p.29.

agencies. The ACNC is also being funded to codify the definition of charity and to develop new guidance for the NFP sector, implement system changes, and re-assess the charitable status of entities on the basis of the new statutory definition.⁹ ACTCOSS recommends the Government ensure the definitions of the NFP sector, including 'clubs', 'associations' and 'voluntary bodies' are consistent and clear across the NFP reforms and anti-discrimination law consolidation project.

Representative action

Currently a complaint can be lodged with the Australian Human Rights Commission by a person, representative body or trade union on behalf of one or more other persons who are aggrieved by an alleged act of unlawful discrimination.¹⁰ However if the matter is not resolved at conciliation, only the alleged victim is able to take the next step, which is to file a complaint with the Federal Magistrates Court or the Federal Court.

For some individuals, taking an action to court can be a difficult ordeal, and may present a barrier to having their grievances reconciled. In particular, for people living with disadvantage, the costs associated with court may be too great to pursue their complaint. For other individuals, they may not be able to advocate on behalf of themselves. In addition, the complexities of the court system may prove too hard for people to navigate by themselves.

At this point, advocacy groups such as the ACT Disability, Aged and Carer Advocacy Service (ADACAS) can only support people with their anti-discrimination case, but are not able to take action on their behalf. Consultations with such organisations have indicated at times they have clients who feel they have been discriminated against and wish to launch an action, but are unable to do so themselves due to limited capacity in areas such as speech and communication. ACTCOSS recommends representative bodies such as advocacy groups be able to bring action in the federal court on behalf of someone who is unable to do so themselves. It is important to note ACTCOSS is aware of the complications which may arise from this, including potential conflict of interests, and so would recommend experts in the area be more thoroughly engaged.

Currently the AHRC, and each jurisdiction's own Commission, are able to investigate claims of discrimination, act as conciliators for such claims, and provide legal advice to assist courts in cases which involve human rights,¹¹ but lack the power to take the matter further on behalf of an individual or group should conciliation fail. Another recommendation from ACTCOSS would be to give the Australian Human Rights Commission and the Commission in each state or territory more assertive powers in relation to anti-discrimination, particularly in relation to self-referral.

9 For more information go to <http://www.notforprofit.gov.au/news/budget-2011-12-not-profit-reform>

10 Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, Attorney-General's Department, Australia, September 2011, p.48.

11 Australian Human Rights Commission, Australia, 2011, accessed 12 January 2012, <http://www.hreoc.gov.au/about/index.html>

Protected Attributes

The current attributes covered by the four core Commonwealth anti-discrimination laws are:

- race (including attributes such as colour, descent and national or ethnic origin)
- a person is or has been an immigrant
- sex
- marital status
- pregnancy or potential pregnancy
- breastfeeding
- family responsibilities
- disability (including carers and associates), and
- age.¹²

ACTCOSS welcomes the opportunity the consolidation of the anti-discrimination acts presents in reflecting on the list of protected attributes, and believes there are other attributes which should be considered. In particular, ACTCOSS believes there is a need to include on the list attributes traditionally associated with 'social status' including experiences of homelessness; experiences with drug and other alcohol addiction; and experiences of incarceration or previous criminal record.

Homelessness

People experiencing homelessness often face stigmatisation and discrimination in a range of different contexts. Some of the situations in which discrimination arises include access to health care and other services, access to education, and employment opportunities.¹³ Discrimination against people experiencing homelessness also occurs in situations where certain laws operate in a manner which disadvantages them, compared to other people in society.¹⁴ Such laws include those which criminalise the doing of certain activities in public space which are considered legal when undertaken in the privacy of one's own home, for example the consumption of alcohol.

A study conducted in 2007 explored how people experiencing homelessness in Canada experienced "welcomeness" and "unwelcomeness" in encounters with

12 Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, Attorney-General's Department, Australia, September 2011, p.21.

13 Human Rights & Equal Opportunity Commission, *Homelessness is a Human Rights Issue*, Australian Human Rights Commission, Australia, 2008, viewed 12 January 2012, http://www.hreoc.gov.au/human_rights/housing/homelessness_2008.html#6_7

14 Ibid.

health care providers.¹⁵ The results found most participants perceived their experiences of 'unwelcomeness' as acts of discrimination, and believed their state of homelessness and low social class formed the basis for discriminatory treatment. Many participants reported intense emotional responses to unwelcoming experiences, which negatively influenced their desire to seek health care in the future. For many of those interviewed, perceived discrimination in health care settings was understood to be part of a widespread societal pattern of discrimination against people experiencing homelessness.

For the past few years the Homeless Persons' Legal Clinic (HPLC) at the Public Interest Law Clearing House in Victoria has been calling for a reformation of the *Equal Opportunity Act 1995 (Vic)* to make it unlawful to discriminate a person on the basis of 'social status', including his or her status as a person experiencing homelessness. In their 2002 submission titled *Promoting Equality: Homeless Persons and Discrimination*,¹⁶ the HPLC argued evidence from the community sector pointed to widespread discrimination of people with these attributes, in particular in the areas of accommodation and the provision of goods and services. The HPLC also argued legislative change is required for Australia to fulfil relevant obligations under international human rights laws.

ACTCOSS believes reform is needed to enable people experiencing homelessness to enjoy the same freedom from unwarranted discrimination as people with homes, jobs and means, and so to be afforded equality before and under the law. Including the term 'social status' as a protected attribute in the new consolidated bill would be a step towards achieving this goal.

Lived experience of incarceration/criminal record

Discrimination on the grounds of known criminal record or previous incarceration is a pervasive issue across Australia. As the Public Interest Law Clearinghouse notes:

Criminal record discrimination can systematically exclude people from access to goods, services, housing, health care, employment and other things which can result in homelessness, unemployment and recidivism. Such discrimination also frustrates attempts at social inclusion and participation in civil, political, social, cultural and economic life.¹⁷

Of particular concern is the discrimination people who have been incarcerated, or who have a criminal record, can face in terms of employment. For a person who has been in prison and released, employment plays a strong role in their reintegration into the community, and can have a positive impact on other areas of their life, such as access to affordable and suitable accommodation. In addition, for people with a criminal record or previous incarceration,

15 CK Wen, PL Hudak and SW Hwang, 'Homeless People's Perceptions of Welcomeness and Unwelcomeness in Healthcare Encounters', *J Gen Intern Med*, volume 22(7), 2007, pp 1011-1017.

16 B Stagoll and P Lynch, Public Interest Law Clearing House, Homeless Person's Legal Clinic, *Promoting Equality: Homeless Persons and Discrimination*, September 2002.

17 Public Interest Law Clearinghouse, Australia, 2011, accessed 16 January 2012, <http://www.pilch.org.au/Page.aspx?ID=394>

employment can facilitate self-respect, confidence and skills-building.¹⁸ Yet it is in the area of employment that people with a criminal record face the most discrimination. The Australian Human Rights Commission ('the Commission') notes 40% of all complaints received by the Commission under the AHRC Act from July 2008-June 2009 were on the basis of criminal record discrimination.¹⁹

Currently criminal record discrimination is not unlawful under federal law. At the State level, Tasmania and the Northern Territory have laws which make criminal record discrimination unlawful but in other states and territories, criminal record discrimination is not specifically prohibited by law. However, the Commission may investigate complaints of discrimination in employment on the basis of criminal record and, where appropriate, try to resolve them by conciliation.²⁰

ACTCOSS recommends the inclusion of 'irrelevant criminal record' under 'social status' as a protected attribute in the new consolidated bill, and notes this view has been supported by other organisations including the Human Rights Law Centre and Equality Rights Alliance.²¹

Lived experience with alcohol and other drugs use

Discrimination against people on the basis of presumed or actual drug use histories is commonplace, and can sometimes extend to people with associations with those who are believed or known to have engaged in drug use. Whilst the term 'drug use' covers a wide range of illicit substances, and the misuse of legal drugs, it is the injecting drug user community, or those on opiates, which are most often discriminated against. In 2011 the Australian Injecting and Illicit Drug Users League (AIVL) wrote a report on the stigma and discrimination the injecting drug user community faces, which research found to be 'both institutionalised and pervasive.'²²

The AIVL report found that perceptions of members of the general public they interviewed reflected those of the wider community – that is that drug users are not innocent victims of their behaviour but inflictors of harm on themselves; that they are a drain on public taxpayers; and that they are all criminals.²³ Whilst these views are not necessarily held by the Government, they are

18 C Povey and M Peacock, *Submission to the Standing Committee of Attorneys-General: Draft Model Spent Convictions Bill*, Victoria, Australia, 2009, p. 6-7.

19 Australian Human Rights Commission, Australia, 2011, accessed 12 January 2012, http://www.hreoc.gov.au/human_rights/criminalrecord/

20 Ibid.

21 See <http://www.ag.gov.au/antidiscrimination> for a list of submissions to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper, Attorney-General's Department, Australia, September 2011

22 Australian Injecting and Illicit Drug Users League (AIVL) 2011, 'Why wouldn't I discriminate against all of them?', A report on stigma and discrimination towards the injecting drug user community, Canberra, Australia. The Australian Injecting and Illicit Drug Users League (AIVL), p.vii.

23 Ibid. p.48

reflected in the legislation which does not seek to protect drug users from discrimination and harassment.

It is important to note the point is not about where the Government, or the public, stands on illicit drug as a moral issue which matters, but the fact that people face discrimination based on this which can have serious consequences. These include serious impacts on the health care a person can access or feels they can access, and impacts on a person's employment.

Currently discrimination on the basis of a person being, or having been, an illicit drug user does not constitute grounds for bringing a discrimination case under any of the acts. Whilst the negative effects of drug use on a person's physical or mental being can be covered under the Disability Discrimination Act (DDA), substance use itself is not considered a disability for the purposes of the DDA.²⁴ There is also some confusion in the terminology used in the DDA over drug use, addiction and drug dependency. ACTCOSS recommends the Government seek to clarify correct terminology through consultations with bodies such as the Alcohol Tobacco and Other Drugs Association (ATODA), and to ensure this terminology is consistent in the new consolidated anti-discrimination act.

In their Submission to the Inquiry by the Senate Legal and Constitutional References Committee into the Disability Discrimination Amendment Bill 2003, the Disability Discrimination Legal Service (Victoria) explored the issues of including drug dependency as a disability for the purpose of anti-discrimination law, and recommended the Government recognise dependency is not simply a matter of individual choice but that it stems from various societal and environmental factors such as ill health, poverty, poor education and social exclusion.²⁵

ACTCOSS believes drug use and addiction should be placed in a health care and broader social context, taking into consideration the many reasons people become drug dependent. ACTCOSS also believes there is a real need for experience of drug use to be included as a protected attribute, under the term 'social status', in the new consolidated anti-discrimination act.

Sexual orientation and gender identity

Question 7: How should sexual orientation and gender identity be defined?

The Australian Human Rights Commission has done extensive work on the rights of people who identify as gay, lesbian, bisexual, trans and/or intersex, and conducted a consultation in 2010 to canvas the experiences and views of people who may have been discriminated against on the basis of their sexual orientation and sex and/or gender identity. The findings of this were developed into a paper known as the Sex Files, and included results of the consultations

²⁴ http://www.hreoc.gov.au/disability_rights/faq/who_is_protected_/who_is_protected_.html#drug

²⁵ http://www.communitylaw.org.au/clc_ddls/cb_pages/images/DDAAB_Submission.pdf

into how individuals would like to be defined in regards to their gender identity or sexual orientation.²⁶

ACTCOSS supports the Commission's acknowledgment of the significance of terminology, and the impact appropriate or inappropriate terminology can have on individuals and communities. In particular, the gay, lesbian, bisexual, trans and/or intersex communities can often be adversely affected, including facing discrimination, by the use of incorrect terminology.²⁷

ACTCOSS supports an inclusive definition of sexual orientation which makes room for circumstances which may fall outside the prescribed terms. ACTCOSS is also supportive of a definition of gender identity which acknowledges this is a complex concept and individuals may identify in different ways. ACTCOSS recommends thorough consultation with the gay, lesbian, bisexual, trans and/or intersex communities, and organisations which support these communities, to ensure the appropriate terminology is used where possible.

²⁶ Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records*, Australia, 2009, accessed 17 January 2012, http://www.hreoc.gov.au/genderdiversity/sex_files2009.html#Heading180

²⁷ Ibid.

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