



Submission:

ACT Law Reform Advisory Council

Review of the Discrimination Act 1991 (ACT)

Community Consultation Paper –

Submitted by email to: lrac@anu.edu.au

By:

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ACT Mental Health Consumer Network Comments on Questions Raised in the ACT Law Reform Advisory Council's Community Consultation Paper

This submission has been prepared by the ACT Mental Health Consumer Network in response to the invitation from the ACT Law Reform Advisory Council's Community Consultation Paper. The Network thanks the Council for extending its deadline to enable us to consider the paper. We do note though that even the extended timeframe of four weeks is insufficient to enable us to fully consider the proposals and consult our members. We have therefore only addressed some of the Council's questions. If the Council truly wants to hear from those affected by its proposals in future reviews, we strongly suggest that it provide a longer timeframe for consultations.

The Network is the peak body for mental health consumers in the ACT. Run by consumers for consumers, our aim is to advocate for services and supports for mental health consumers which better enable them to live fuller, healthier and more valued lives in the community. We do this through advocacy, representation, lobbying and active involvement in new developments in the mental health sector, as well as in the wider health and community sectors.

General Comments

Many mental health consumers are among the most disadvantaged in our society, often without stable or safe accommodation and living on very low incomes. The Discrimination Act has an important part to play in addressing this. Stigma and discrimination can contribute significantly to the barriers that society presents to mental health consumers seeking to live a contributing life.

Network members have used the Discrimination Act to seek change in systemic discriminatory practices, as well as to seek to have individual discriminatory actions addressed. Some complaints have had positive outcomes, some have not, and some have been abandoned by our members as they found the process too difficult. Our experience is that while the ACT Human Rights Commission does seek to assist complainants, the complaints process still requires a significant amount of paperwork and organisation of material – both of which can be difficult for some mental health consumers.

So the Network supports proposals that will strengthen the protections afforded to vulnerable people so that discrimination as a barrier to economic and social participation is reduced.

Objects – Question 1

The Network considers that the Discrimination Act should clearly and expressly aim to promote equality for all. While the objects of eliminating sexual harassment and equality of men and women are important, we believe that the focus of the objects should be on equality for all.

We support amendment of the objects of the Discrimination Act to make clear that the Act is intended to promote the realisation of substantive equality and protect the rights of all. We support the approach in the paragraphs from the Commonwealth Exposure Draft quoted in the consultation paper. However, we think that it is desirable that the Act explicitly recognise the *right* to equality, so would vary paragraph a)(i) to refer to the right to equality set out in the *Human Rights Act 2004*.

Defining Discrimination – Question 2

The consultation paper accurately points out the confusion and complexity that may arise from the current distinction between direct and indirect discrimination. This appears to us to be a technical distinction that does not add value to the legislation. Rather, it provides a barrier to understanding and applying the Act, which can reduce its effectiveness.

The Network supports amendment to the Act to remove this artificial distinction. Making it clear that direct and indirect discrimination are not mutually exclusive would remove some technical arguments. In our view it would be more effective to remove the distinction altogether, following the approach

taken in New Zealand and Canada. In making such an amendment, it will be very important to ensure that the new definition does not narrow the protections afforded by the Act.

The paper also canvasses terminology used in other legislation, such as 'adverse action', 'unequal treatment' and 'unequal impact'. We do not support changing the terminology from 'discrimination'. Although the technical subtleties may not be well known except to lawyers and discrimination specialists, 'discrimination' is a well understood concept. Replacing it in the Act is likely to lead to confusion, and a perception that protections have been removed or reduced.

Question 3

Intersectional discrimination is a very real issue for many mental health consumers. The requirement to identify *an* attribute to which discrimination is ascribed places an additional hurdle in the way of seeking to address discriminatory conduct. The Network believes that there is no principled basis for continuing to artificially separate attributes and unrealistically require discrimination to be based on an individual attribute.

We consider that the definition of discrimination should be amended to include conduct on the basis of more than one attribute.

Duty to make reasonable adjustments – Questions 4, 5 and 6

We consider that the duty to make reasonable adjustments to accommodate the needs of a person with disability should be explicit in the Discrimination Act. While we understand that this duty can currently be inferred, making it explicit would make this clear and provide an opportunity to promote the value of taking reasonable steps to enable participation by people with disability.

The Network supports a consideration of all relevant facts and circumstances when determining reasonableness.

The Network also supports extending the duty to make reasonable adjustments to other attributes.

Other Prohibited Conduct – Question 7

It is an unpalatable fact of life that some mental health consumers are harassed and/or vilified because of their disability. The Network supports extending the protection from harassment and vilification to disability. While we generally support extending this protection to all grounds, we suggest that the details would need to be the subject of further consideration.

Positive Duties – Question 8

The Network supports the Discrimination Act imposing a positive duty to promote equality and to eliminate discrimination.

In our view, the minimum duty should be along the lines of the Victorian duty to take 'reasonable and proportionate measures'. This is consistent with the obligations on public authorities in the *Human Rights Act 2004 (ACT)*. However, we can see no reason in principle to limit the duty to public authorities. All entities to which the Discrimination Act applies should have a duty to promote equality and to take reasonable and proportionate measures to eliminate discrimination as far as possible.

We note, however, that such a duty will be of little value if it is not enforceable. To make a difference, the inclusion of a positive duty will need to be accompanied by additional resourcing and powers to the ACT Human Rights Commission. The Commission would need to promote the duty and to be able to investigate and take action where there appear to be serious breaches, or breaches that affect a group or class of people.

Areas of Discrimination – Question 9

Discrimination law should be as clear and intelligible to those it seeks to protect as possible. The Discrimination Act currently stipulates specific areas of public life and, as the consultation paper notes, this can be unclear and some areas of public life may not be covered.

Protection from discrimination should not depend on artificial distinctions between areas of public life and types of activities. It should not depend on whether or not the term ‘services’ can be stretched to cover a particular activity.

The Network supports amendment to the Act to prohibit discrimination in all areas of life, with an exception for private conduct.

Protected Attributes - Questions 11 and 13

The Network supports the removal of artificial distinctions in the Act wherever possible, so that it provides robust protection for those most vulnerable. We support amendment to the definition of disability to provide broad protection for people with disability regardless of its cause. We support incorporation of disorders or malfunctions resulting in a person learning differently.

We can see no reason in principle for continuing to except discrimination on the basis of ‘past attributes’. We are confident that other provisions, such as the exception where a person is unable to carry out the inherent duties of the position, are sufficient.

Questions 16 and 17

People with mental illness are over-represented in the criminal justice system. The protection from discrimination on the basis of a spent conviction is an important protection, but is quite limited. Mental health consumers may still be discriminated against because of old or irrelevant convictions.

We support amendments along the lines of the Northern Territory and Tasmania, so that discrimination on the basis of an irrelevant conviction is prohibited.

We also recognise that the ACT has important legislation to protect vulnerable people, the *Working with Vulnerable People (Background Checking) Act 2011 (ACT)*. This includes checking of relevant criminal history. The interaction between the two Acts will need to be carefully considered. In our view, it should not be unlawful under the Discrimination Act to discriminate based on a person not having the required clearance under the Working with Vulnerable People Act.

Question 18

The Network is not aware of the language of ‘status as a parent or carer’ having caused difficulties. However, we agree that this is very narrow language. In practice it is the responsibilities that flow from having the role, rather than the status of having the role, that give rise to discrimination. We agree, therefore, that referring to responsibilities rather than status would be a more appropriate protection.

We also agree that referring only to ‘parent or carer’ is too narrow, and does not recognise the diversity of caring and familial relationships and responsibilities. We also support amendment to refer to family and caring responsibilities.

New Attributes – Questions 25 and 26

There are many circumstances in which people who are homeless are discriminated against. Consumers report that it can be extremely difficult to access government and other services, because many require a postal address that is not a post office box. It can also be difficult to prove residence in the absence of things such as utility bills. The addition of homelessness as a protected attribute would provide a means of encouraging organisations to find better ways of interacting with people who are homeless. It would also provide a very useful impetus to promote the rights of homeless

people to be treated with dignity and respect, which would be of significant benefit to mental health consumers who find themselves without a permanent home.

Enforcement and Compliance – Questions 50 - 54

As the Council's paper sets out, the Discrimination Act primarily relies on individuals taking action to make a complaint about discrimination they have experienced. We believe this places too high a responsibility on vulnerable individuals who may not have the resources to pursue a complaint.

The introduction of a positive duty would, in our view, improve this somewhat, by placing a stronger onus on government and other organisations to promote non-discriminatory conduct and practices. However, it is not sufficient to address the power imbalance in individual complaints. We support a greater role for the ACT Human Rights Commission in systemic issues, including by enabling the ACT Human Rights Commission to take a matter to the ACAT.

We accept the principles of confidentiality of conciliation processes, but agree that the Commission's investigatory powers are less valuable than they might be because documents obtained under the Commission's statutory powers may not be used in subsequent proceedings. We support enabling documents or information obtained by the Commission using its statutory powers being able to be used in proceedings under the Discrimination Act.

We are also concerned at the lack of useful enforcement mechanisms in the Act as it stands. We support giving the Commission the power to pursue civil penalties for failure to comply with its recommendations.

Public Accountability – Questions 55 – 58

As the paper states, there is very little public guidance on how the Discrimination Act should be applied or interpreted. The Network believes that publication of reasons for decision is critical to an accountable and intelligible system. We support the ACAT being required to publish reasons in every discrimination matter that it considers.

We also support the proposal to reverse the onus of proof, and suggest that the model in the Commonwealth Exposure Draft is appropriate. This removes the difficult hurdle for complainants of seeking to prove something (the reasons for action) that is within the knowledge of the respondent but not the complainant.

The Network is interested in seeing systemic change, and so supports the view that remedies should be available where systemic discrimination is identified. Enabling the ACAT to make orders to require changes to policy and practice, or to make systemic changes, and the ACT Human Rights Commission to monitor compliance, would assist in addressing systemic issues. This would make the Act a more useful vehicle for change in the ACT.