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Abstract

There is great disillusionment with the "rights" spelt out in the NSW Government's Statement of Principles for People with Disabilities and their Families, and little people can do to enforce these rights. Consultation with consumer groups indicates that consumer enforceability should be an essential part of proposed legislation. This paper was prepared in order to inform the community of the proposed NSW Disability Services Act and why consumer enforceability is very important. It discusses consumer remedies which are needed and what is happening in NSW at the moment where the current system of governmental rights protection bodies is inadequate. **Keyword: Government**

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Consumer Enforceability and the Proposed NSW Disability Services Act

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*Position Paper Prepared for the
Disability Council of NSW*

This position paper has been endorsed by the Disability Council of NSW and the NSW Disability Safeguards Coalition. The paper is being distributed widely for community information. Any comments on it can be made to Jim Simpson, 32 Isabella Street, Bondi Junction 2022. Telephone (02)3875494. Comments should be made by 29 February, 1992.

Illustrations of Rights Problems

- None of the residents of a hostel are allowed out on their own because staff feel that some of the residents could not safely cross roads by themselves. Staff call the residents "kids" although they are all adults.
- A local council opens a new library. There is no wheelchair access.
- A resident of a group home alleges she has been sexually assaulted by a staff member. The staff member denies this. The police are called. The police say they believe the resident but that there is not enough evidence to prosecute in court. Management say that there is nothing further that they can do about the matter.
- Residents of a boarding house complain that their personal mail is opened by the manager. They are also not allowed access to their personal files held by management.
- Two residents of a house become close friends and begin to talk of marriage. Management move one of them to a different house and restrict their access to each other.
- The Department of Transport purchase new rolling stock for the Sydney rail system. They choose stock which is not wheelchair accessible.
- A non-government organisation runs a large hostel with one wing for men and one wing for women. The accommodation is provided in dormitories, there are no doors on the toilets. There is no grievance procedure. There is no consumer participation in management. The organisation is paying lip service to the need to address these issues but in fact doing nothing substantial about them. The organisation's funding is renewed.
- There are four incidents in which a young man damages property at the house in which he lives, including breaking a radio and tearing some curtains. His parents are simply told that the service cannot handle him and he will have to leave.
- A respite care service is closed because of financial problems. This occurs without any warning or consultation with consumers. ■■■▶

- A resident of a group home is told that she will have to move out unless she attends a particular living skills program.

Importance of Consumer Enforceability

Consultation with consumer groups indicates that consumer enforceability is widely seen as an essential part of the proposed legislation. This arises from a number of factors:

- Central to the Federal Disability Services Act is a requirement that service providers show a commitment to the rights statement in the Principles of the Act. The Minister may only fund services which do this. However, there is little that people with disabilities and their advocates can do if these obligations are breached. This gives rise to disillusionment and cynicism about the Act.
- Likewise, there is great disillusionment with the "rights" spelt out in the New South Wales Government's Statement of Principles for People with Disabilities and their Families. People feel deceived when they find there is little they can do to enforce these "rights".
- People with disabilities are vulnerable to having their rights infringed and often lack the confidence or ability to pursue redress. It is therefore important that a range of strategies is in place to protect the rights of people with disabilities.
- In recent years, there has been a general shift towards accountability of governmental decision-makers and towards consumer rights. This can be seen in both the public and private sectors. Note, for example, the establishment of the Community Welfare Appeal Tribunal, the Department of Health Complaints Unit, The Banking Ombudsman and tribunals to deal with consumer grievances

against insurance companies.

- Consumer enforceability would help allay community concerns about DOCS having the dual roles of service provider and service funder.
- Consumer enforceability may appropriately remove some sensitive decisions from the political domain.

What Consumer Remedies Are Needed?

Administrative review of major administrative decisions of the Minister and Departments of Community Services and Health. ("Administrative review" is a process in which a court or tribunal deals with challenges to the legality of decisions made by ministers and government departments.) In particular, this should include decisions to fund services and approve new service types. Ancillary to this, there would need to be a reasonably open process in relation to such decisions so that consumers and their advocates could have input to decisions and be aware of decisions and the basis for them.

A process for resolution of grievances about government or service providers. Relevant grievances would at least primarily relate to breaches of the "Principles and Applications" in the Act and other obligations arising under the Act and the Commonwealth/State Disability Agreement. (It is proposed that the NSW Act should have "Principles and Applications" similar to the "Principles and Objectives" in the Federal Act.) Where practicable, grievances should of course be resolved at a local level. However, failing this, there needs to be a governmental body with the power to investigate and conciliate grievances. Failing conciliation, the body should uphold or dismiss the complaint and make appropriate recommendations for action by relevant minister, departments or services. Preferably, a

tribunal should have the further power to require that action be taken to remedy the grievance. This might include:

- Requiring a service provider to make changes to bring the service into line with the Act.
- Requiring a service provider to accept a consumer who has been unfairly excluded.

Individual contracts between service providers and service consumers with resultant actions being available through mainstream courts and tribunals to enforce breaches of contract. If individual contracts are to be provided for in the legislation, a number of issues need to be worked out. These include:

- To what degree should the Minister be able to prescribe the contents of individual contracts?
- Should contracts be offered to all clients of all services or only in certain defined circumstances of major contact between service and consumer?
- How, if at all, would the contracts apply to the very considerable number of people with disabilities who would lack the understanding to sign the contract?
- In relation to residents of accommodation services, there are inconsistencies with the Boarding Houses and Lodging Houses Bill.
- Procedures are needed for monitoring compliance of service providers' obligation to offer contracts.

What Is Needed As Well As Consumer Remedies?

- Advice and advocacy support for people with grievances, from community based advocacy services.
- Education and education resources about rights, for people with disabili-

ties, families, advocates, service providers and the community generally.

- Monitoring of service standards and respect for the right of people with disabilities. This is particularly important since people with disabilities are vulnerable to rights abuses and often lack the knowledge and confidence to pursue redress.
- Systems advocacy, that is advocacy for reform of law and service systems so that the rights of people with disabilities are better respected and protected.

The Current NSW Situation

New South Wales has a significant number of community based advocacy services with a rights protection focus. These provide advice, advocacy support, rights education, monitoring and systems advocacy.

These things are done in varying ways by specialist rights bodies, namely the Intellectual Disability Rights Service and the Disability Complaints Service, and by other more general advocacy bodies including citizen advocacy, Disabled Peoples' International, the Mental Health Co-ordinating Council and New South Wales Council for Intellectual Disability. What community advocacy bodies inevitably lack is the higher powers and clout that more official bodies can have.

New South Wales is poorly serviced in relation to administrative review, government complaints bodies and official mechanisms for independent monitoring of standards and systems advocacy. (There is a striking dis-similarity with Victoria with its Office of the Public Advocate, Community Visitor System and Intellectual Disability Review Panel.)

The only administrative review currently available in NSW is through the Supreme Court. (There is a striking dis-similarity with children's services ■■■)

where the Community Welfare Appeals Tribunal has jurisdiction.)

There are various existing governmental complaints bodies. However, they either do not cover many relevant complaints (for example, the Ombudsman and the Department of Health Complaints Unit) or they lack the clout or resolve to adequately deal with individual grievances (for example, the DOCS Client Liaison Unit and the licensing system).

This lack of clout or resolve flows from one or more of the following factors:

- Lack of powers needed to obtain the co-operation of the person complained about and to encourage resolution of the complaint.
- Lack of will to use such powers as are available.
- Lack of independence from service providers and government departments.
- Lack of adequate or adequately senior staffing.
- Narrow role or narrow view of role.
- Lack of understanding of disability issues or insensitivity to people with disabilities.

People with developmental disabilities have suffered from the transfer from the Department of Health to DOCS through losing access to the Department of Health Complaints Unit and, prior to that, losing access to the official visitor system in mental hospitals. The official visitors to mental hospitals are the only ones currently relevant to people with disabilities.

Governmental bodies doing some standard monitoring and systems advocacy are the Disability Council and the proposed Area Committees.

Conclusion

Whilst very serious gaps exist in relation to community advocacy services, a higher priority is improvement in the situation in relation to governmental rights protection bodies. This is partly because the current situation with them is so poor and partly because they can have greater status and clout than community based bodies.

Necessary Characteristics for Governmental Rights Protection Bodies

- Expertise in disability and sensitivity to people with disabilities.
- Independence from departments responsible for service provision and service funding.
- Capacity to report to parliament and to the community.
- In the case of tribunals:
 - Wide standing provisions ("Standing" means having sufficient involvement in a problem to be allowed to take it to a court or tribunal. Wide standing provisions are needed because consumers of a particular service will often lack the capacity, information base or confidence to bring forward cases. Also, there is the public interest in seeing that the Act is properly administered and that disability services are properly run.)
 - Informal and conciliatory approach;
 - Legal representation not being the norm. →

What Government Rights Protection Bodies Are Needed?

A Disability Commissioner

A Disability Commissioner would be established by statute and would have three main functions:

- Dealing with grievances of people with disabilities and their advocates about government and disability services. The Commissioner would investigate and seek to conciliate grievances. Failing that, the Commissioner would recommend action as appropriate to remedy the problem. As a general rule, the Commissioner would only deal with grievances which could not be resolved at a more local level.
- Monitoring of service standards and related systems advocacy.
- Co-ordination of a community visitors scheme for disability services.
- Conducting inquiries into major issues about service standards and the rights of people with disabilities.

The Commissioner should be an independent statutory official, but have a consumer advisory committee (as does the Department of Health complaints Unit).

The role of the proposed Disability Commissioner is in some ways analogous to the existing Tenancy Commissioner.

The writer has considered whether any existing body could be appropriately extended to take on the role of the Disability commissioner but can identify none. Some of these are discussed in the Appendix.

Another matter that would need to be addressed is demarcation issues with the Anti-discrimination Board. The basic distinction is that the Disability Commissioner would be dealing primarily with grievances arising under the

Disability Services Act whereas the ADB deals with complaints of discrimination under its Act.

It is important for the Disability Commissioner to have a broad monitoring role since people with disabilities often lack the ability or confidence to bring forward their complaints. Also, the implementation of the Commonwealth/State Disability Agreement will leave DOCS as both the biggest service provider and the main funder of disability services in New South Wales. This gives rise to a need for an authoritative and independent watchdog.

The Disability Commissioner's other roles will make him or her well qualified to identify systemic problems and suggest systemic changes to meet those problems. If the Disability Commissioner did not have this systemic advocacy role it would be a great waste of the considerable information about problems in service systems that would be flowing through his or her office.

A Community Visitor Scheme

It is inconsistent that there is an official visitor scheme for DOCS children's facilities and for mental hospitals but none for other disability services. However, for a community visitor scheme to have necessary credibility, it needs to be independent from service provider departments. It therefore needs to be attached to an independent body such as the proposed Disability Commissioner and have the capacity to report to Parliament and the public. The community visitor scheme in Victoria has these characteristics.

Tribunals with Teeth

Ideally, a new Disability Appeals and Complaints Tribunal would be established and be closely linked to the proposed Disability Commissioner. The Tribunal would have the administrative review and final complaints resolution powers referred to above (that is, the power to make binding decisions about administrative review and major

unresolved complaints). It might also be given power to deal with grievances flowing from individual contracts between consumers and service providers. An alternative though less attractive solution would be to allocate the proposed functions to existing tribunals.

In relation to enforcement of individual contracts, the existing jurisdictions of the Consumer Claims Tribunal and the Residential Tenancies Tribunal may be adequate at least in relation to claims within their monitory jurisdictional limits. Larger claims for compensation may need to go through the mainstream courts system. It might be necessary to seek some refinement of the procedures of the Consumer Claims Tribunal and Residential Tenancies Tribunal and the injection of some greater experience and expertise in relation to disability issues.

In relation to administrative review and dealing with complaints, both the Guardianship Board and the Community Welfare Appeals Tribunal have pros and cons. The big argument in favour of CWAT is that it already does analogous administrative review work, including the power to make decisions which are binding on the Minister and Department. However:

- CWAT appears to currently lack disability expertise. Such expertise is extremely important, in particular in view of the fairly general nature of the proposed Act's "Principals and Applications" that will need to be interpreted in many cases.
- CWAT seems to be closely linked with DOCS. So far as the writer is aware it does not have its own staffing.
- CWAT is also currently confined purely to reviewing decisions made by the Minister or Director General of Community Services. It does not currently have a role in relation to the Department of Health or other Government departments.

Arguments in favour of the Guardianship Board:

- Its existing disability expertise and experience.
- Its philosophy as revealed in its recent two year report.
- The analogy between the new roles being proposed and the existing peripheral role of the Guardianship Board in seeking to improve service provision for people who come before it.

Arguments against the Guardianship Board include:

- In one sense, it is a body that takes away people's rights.
- It has no existing application to children.
- The adverse connotations of "guardianship" for people with physical disabilities.
- It is attached to the Department of Community Services.

With appropriate structural changes and resources, it might be that either of these tribunals could adequately fulfil the roles sought. If the predominant new role for a tribunal is to be administrative review, then the arguments in favour of CWAT are probably very strong. If a tribunal was to be given a large role in resolving other grievances, then the arguments for the Guardianship Board may be stronger.

The writer does not favour a tribunal being involved in areas in which it does not have the power to make binding decisions. If, for example, a tribunal was only to be given the power to make binding decisions in the sphere of administrative review, the writer would not favour the tribunal being involved with other kinds of grievances. The main advantage of a tribunal over a

governmental complaints body is that a tribunal usually has the power to make binding decisions. If it does not have this power, then one is better off with the likely greater accessibility and quicker response of a complaints body such as the proposed Disability Commissioner. Such a complaints body can also take a more pro-active investigative role and more readily take up on general issues identified through dealing with individual grievances.

If it is agreed in principle that a tribunal should have the power to make binding decisions in relation to some kinds of grievances, the detail of which grievances will need to be worked through. Relevant issues are:

- The identity of the subject of the complaint, for example the Department of Community Services, the Department of Health, a non-Government service funded by one of these Departments, other government departments and other non-government services.
- The nature of the complaint. For example, in the case of the Department of Community Services, the complaint could be about one of the Department's own services or about the Department's administration of the Disability Services Programme.
- The seriousness of the complaint.

There are some clear examples where it is probably not realistic to seek the power to make binding decisions. These would include many complaints with major budgetary implications for a government department, for example a complaint about lack of wheelchair accessibility to New South Wales railway stations. It should be noted, however, that the recent Americans With Disabilities Act provides a major international precedent for legislation requiring government departments to make their services accessible to people with disabilities.

Other Legislative Reform

The issue of protection of the rights of people with disabilities does not only arise in the context of the proposed Disability Services Act. It also arises in the context of the impending reviews of the guardianship legislation and of the licensing system, and in the sphere of the Mental Health Act Implementation Committee.

However, there is no reason why the issues raised in this paper should not be resolved in the Disability Services Act. Indeed, it is vital that they are resolved in that Act if it is to have the support of people with disabilities and their families and advocates. The improved rights protection scheme that would then have been created could be taken into account and built on in the other spheres.

Appendix: Bodies Considered Un-suitable To Take On The Role Of Disability Commissioner

Disability Complaints Service or Intellectual Disability Rights Service
These bodies have important roles to play as community based and controlled organisations. This causes consumers to approach them when otherwise they would lack the confidence to act on a problem. These bodies would inevitably become more removed from the community if they took on the kind of statutory roles proposed. They are also unashamedly on the side of people with disabilities whereas a complaints body has to be impartial when dealing with individual grievances. These bodies would have important continuing roles in:

- Advice and referral in relation to protection of rights, including, where appropriate, referring people to the Disability Commissioner or a tribunal.
- Advocacy support for people with disabilities with rights problems. ■■■▶

- Education about rights and systems advocacy from a consumer perspective.

DOCS Client Liaison Unit

This body lacks independence from the Department. It also acknowledges that it has "a limited investigatory role and therefore relies on the reports of local and regional staff to resolve disputes". Its existing role is also confined to services within DocS. It does not cover non-Government services or the activities of other departments. Its existing draft brochure states "the prime responsibility of the Department is the care and protection of children and support of the family unit". The lack of mention of people with disabilities in this statement is of some concern.

Department of Health, Housing and Community Services Disability Complaints Unit

This is a Commonwealth body currently confined to dealing with complaints about Commonwealth funded disability services. It has not gained consumer confidence at this stage. It lacks clear powers and it lacks independence. This unit might not be needed if there was a Disability Commissioner and agreement with the Commonwealth that the Disability commissioner take over the role of the unit.

New South Wales Ombudsman

Disability work would be in danger of being a small, low-profile fish in a very big pond. Also, the existing Ombudsman's role is confined to complaints

about Government and to dealing with individual complaints. The proposed Disability Ombudsman would also deal with complaints about non-Government service providers and take on a systemic role.

Protective Commissioner/Public Guardian

These organisations have grown out of the old Master of Lunacy of the Supreme Court. The Protective Office has been perceived as being remote from people with disabilities and being a very traditional, inflexible bureaucracy. Trends in recent years have indicated a commitment to addressing these perceptions. However, there is still much to be done before this process will be complete. Both bodies are also expanding rapidly with the difficulties of management of such change that inevitably occur. In the meantime, further extension of the role of these bodies would be unlikely to be supported by the disability community. There is also the problem that giving these bodies major additional functions would mean placing a high proportion of rights protection functions in the one organisation. Finally, these organisations are themselves service providers to a large number of people with disabilities.

Department of Health Complaints Unit

Disability work would be a small fish in a big pond. There would also be the unfortunate perceptions involved in being part of a "health" body. ♦