

**New South Wales
Law Reform Commission**

**Report
91**

**Review of the Disability
Services Act 1993 (NSW)**

July 1999

New South Wales. Law Reform Commission.
Sydney 1999
ISSN 1030-0244 (Report)

National Library of Australia
Cataloguing-in-publication entry

New South Wales. Law Reform Commission.
Review of the Disability Services Act 1993 (NSW).

Bibliography
ISBN 0 7313 1030 6

1. New South Wales. Disability Services Act, 1993. 2. Handicapped –
Services for – New South Wales. 3. Handicapped – Legal status, laws, etc –
New South Wales. I. Title. (Series: New South Wales. Law Reform
Commission. Report ; 91).

344.9440324

New South Wales Law Reform Commission

To the Honourable Jeff Shaw QC MLC
Attorney General for New South Wales

Dear Attorney

Review of the Disability Services Act 1993 (NSW)

We make this final Report pursuant to the reference to this Commission dated
6 June 1998.




The Hon Justice Michael Adams
Chairperson



Professor Reg Graycar
Commissioner



Professor Neil Rees
Commissioner



Professor David Weisbrot
Commissioner

July 1999

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Attorney General, the Honourable Jeff Shaw QC MLC, referred the following matter to the Law Reform Commission:

The Law Reform Commission is to:

1. Review the *Disability Services Act 1993* (NSW) (the DSA) to determine whether the policy objectives of the DSA remain valid and whether the terms of the DSA remain appropriate for securing those objectives;
2. Review the *Disability Services Regulation 1993* to determine whether there is a need for a regulation and if so whether the policy objectives of the DSA Regulation remain valid and whether the terms of the DSA Regulation remain appropriate for securing those objectives;
3. Conduct the review, with consideration given to the resource or financial implications for the current legislation and regulation and any proposed legislative or regulatory amendments; and
4. Conduct the review having regard to the obligations arising under s 29 of the DSA and the provisions of the *Subordinate Legislation Act 1989* (NSW).

Participants

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairman of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

Mr Michael Adams QC
Professor Reg Graycar
Professor Neil Rees*
Professor David Weisbrot

(* denotes Commissioner-in-Charge)

Officers of the Commission

Executive Director

Mr Peter Hennessy

Legal Research and Writing

Kearney McKenzie and Associates

Librarian

Ms Aferdita Kryeziu

Desktop Publishing

Ms Rebecca Young

GLOSSARY

ACROD: Peak body representing service providers in the disability industry

ADD: Ageing and Disability Department

ADT: Administrative Decisions Tribunal

Care and Protection Act: *Children and Young Persons (Care and Protection) Act 1998* (NSW)

CAMA: *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW)

CEO: Chief Executive Officer

Commission: NSW Law Reform Commission

CROC: United Nations Convention on the Rights of the Child

CS Division: Community Services Division (of the ADT)

CSC and Audit Office Report: New South Wales, Community Services Commission and Audit Office, *Performance Audit Report: Large Residential Centres for People with a Disability in New South Wales* (1997)

CSC: Community Services Commission

CSDA: Commonwealth/State Disability Agreement

DisQAC: Disability Services Quality Assurance Council

DOCS: Department of Community Services

DSA: *Disability Services Act 1993* (NSW)

HACC: Home and Community Care

HREOC: Human Rights and Equal Opportunity Commission

IFP: Individual funding package

IP 15: New South Wales Law Reform Commission, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)* (Issues Paper 15, 1998)

IP 16: New South Wales Law Reform Commission, *Review of the Disability Services Act 1993 (NSW)* (Issues Paper 16, 1998)

NCAC: National Childcare Accreditation Council

NCOSS: New South Wales Council of Social Service

QIAS: Quality Improvement and Accreditation System

Regulation: *Disability Services Regulation 1993 (NSW)*

Report 90: New South Wales Law Reform Commission, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)* (Report 90, 1999)

RR 9: New South Wales Law Reform Commission, *Review of the Disability Services Act 1993 (NSW) and the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW): Consultations* (Research Report 9, 1999)

SES: Senior Executive Service

SNYPIC: New South Wales State Network of Young People in Care

Standards: Disability Services Standards

LIST OF RECOMMENDATIONS

RECOMMENDATION 1 (page 14)

The DSA should be amended to provide for a further review five years from the date on which this Report is tabled in Parliament. The purpose of the review would be to determine whether the objectives of the Act remain valid and the terms of the Act remain appropriate for securing those objectives. The Act should require that the Minister table a report of the review in both Houses of Parliament within a further 12 months.

RECOMMENDATION 2 (page 27)

Section 3(b)(i) of the DSA should be amended to replace the words “integration of persons with disabilities in the community” with the words “inclusion of persons with disabilities in community life”.

RECOMMENDATION 3 (page 28)

Section 3(b)(ii) and section 3(e) of the DSA and the applications of principles in Schedule 1 clause 2(a) should be amended to replace the words “integration in the community” with “inclusion in community life”.

RECOMMENDATION 4 (page 28)

The principles in Schedule 1 clause 1(c) should be amended to include the words “and goals” after the word “capacities”.

RECOMMENDATION 5 (page 28)

The applications of principles in Schedule 1 clause 2(b) should be amended to read “to contribute to ensuring that the conditions of the every day life of persons with disabilities are the same as, or as close as possible to, conditions which are valued in the community as a whole”.

RECOMMENDATION 6 (page 29)

Section 3(b) should be amended to include a new sub-paragraph (iv) to read “and that minimises the impact that increasing support needs may have on a person’s ability to control his or her own life”.

RECOMMENDATION 7 (page 32)

Section 3 should be amended to include a new object “to ensure that access to services is determined on a fair and equitable basis”.

RECOMMENDATION 8 (page 34)

Section 3(b) of the DSA should be amended to include a new sub-paragraph to ensure the provision of services that take account of cultural and linguistic diversity, and gender and sexual orientation.

RECOMMENDATION 9 (page 35)

The applications of principles in Schedule 1 clause 2(e) should be amended to read “to meet the needs of persons with disabilities whose experience reflects their gender, cultural or linguistic background, sexual orientation or Aboriginal or Torres Strait Islander identity”.

RECOMMENDATION 10 (page 39)

The applications of principles in Schedule 1 clause 2(m) should be amended to read “to support the relationships that persons with disabilities have with their families, carers and significant others”.

RECOMMENDATION 11 (page 50)

Section 3(f) of DSA should be repealed and replaced with a new object “to ensure that comprehensive forward plans for disability programs are developed, published and reviewed on a regular basis”.

RECOMMENDATION 12 (page 50)

The DSA should be amended to require the Minister to prepare and publish a four-year plan within six months of this amendment coming into effect. It should require the Minister to review, update and publish the plan every year. It should provide that in preparing the plan the Minister must:

- identify appropriate planning areas;
- collect the best available data on demand, supply and unmet need in these areas;
- consult with all relevant stakeholders;
- establish mechanisms for co-operating with generic and other relevant service providers, including agencies providing services and support for children;
- take into account the needs and views of people from non-English speaking backgrounds and Aboriginal and Torres Strait Islander people; and
- identify priorities for service provision by location and type of service.

The plan must identify the funds available, and set out how and when the funds are to be spent.

RECOMMENDATION 13 (page 68)

Section 9 of the DSA should apply to all government departments and agencies and, after a phasing-in period, to local government authorities.

RECOMMENDATION 14 (page 68)

Section 9 of the DSA should be amended to require every government department and agency to prepare and implement a plan that includes the following information:

- **the policies and programs the authority will establish to achieve compliance with the objects, principles and applications of principles in relation to all its core activities or areas of operation;**
 - **how its employees will be informed about these policies and programs;**
 - **how practices within the authority will be reviewed to identify any practices which do not comply with the objects, principles and applications of principles;**
 - **the goals and targets, where these may reasonably be determined, against which the success of the plan in achieving compliance with the objects, principles and applications may be assessed;**
 - **the other ways in which the authority will evaluate the programs and policies it plans to use to achieve compliance with the objects, principles and applications;**
 - **the timeframe within which the goals and targets are to be achieved;**
 - **how gender, sexual orientation, and cultural and linguistic diversity have been taken into account in preparing the plan; and**
 - **the person nominated by the authority to implement the plan.**
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RECOMMENDATION 15 (page 69)

Section 9 of the DSA should be amended to require:

- government departments and agencies to submit their plan to ADD every three years for review and to provide a written report on the extent to which the plan complies with the objects, principles and applications of principles;
 - government departments and agencies to include in their annual report to Parliament a report of their progress in implementing their section 9 plan;
 - government departments and agencies to submit their progress report to ADD, which must, in its annual report, report progress on implementation; and
 - the Minister to report annually to Parliament on the progress government departments and agencies have made in implementing their section 9 plans.
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RECOMMENDATION 16 (page 77)

Section 5 (1)(a) of the DSA should be amended to be consistent with the definition of disability in the *Anti-Discrimination Act 1977* (NSW). Sections 5(1)(b) and 5(1)(c) should remain.

RECOMMENDATION 17 (page 79)

The terms and conditions in section 12 of the DSA should make funding conditional upon participation in the quality assurance process and certification by DisQAC.

RECOMMENDATION 18 (page 95)

The DSA should continue to provide for a transition process to assist all services to meet the objects, principles and applications of principles.

RECOMMENDATION 19 (page 95)

The DSA should be amended to require the Minister to prepare and publish, within six months of this amendment coming into effect, a plan stating how all transition services will be funded to reach conformity. The DSA should require the plan to identify:

- the amount of transition funding required to enable all services to achieve conformity;
 - the date by which all transition funding will have been granted and all services will have achieved conformity; and
 - the date on which each service will receive transition funding and the date on which each service will have achieved conformity.
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RECOMMENDATION 20 (page 95)

The DSA should be amended to provide for a two-stage transition process: Stage 1 and Stage 2.

RECOMMENDATION 21 (page 96)

The Commission recommends that a Stage 1 transition service would be one scheduled to receive transition funding more than twelve months in the future. A Stage 1 transition service should be required to prepare a plan to show how the service is meeting, or intends to meet, certain identified basic criteria. Those criteria should be developed by DisQAC (see Recommendation 25) in consultation with industry and consumer groups, and peak bodies.

RECOMMENDATION 22 (page 96)

The Commission recommends that a Stage 2 transition service would be one scheduled to receive transition funding in, or sooner than, twelve months. A Stage 2 transition service should

be required to prepare a final and detailed transition plan outlining the steps to achieving full conformity, and the date on which this will occur.

RECOMMENDATION 23 (page 96)

The DSA should be amended to provide that Stage 1 and Stage 2 transition plans should be lodged with DisQAC, which would be responsible for assessing the plans and, if suitable, certifying the services. The development of criteria for assessing the suitability of the transition plans should involve input from the service industry, consumers and peak bodies. DisQAC should also monitor the implementation of the plans.

RECOMMENDATION 24 (page 97)

The DSA should be amended to provide that the Minister for Disability Services is empowered to fund or provide only those services which:

- comply fully with the objects, principles and applications of principles in the DSA;
 - have been certified by DisQAC as having suitable Stage 1 transition plans and which continue to meet those plans; or
 - have been certified by DisQAC as having suitable Stage 2 transition plans and, until those plans are implemented fully, continue to comply as closely as possible with the requirements of the DSA.
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RECOMMENDATION 25 (page 97)

The DSA should be amended to provide that, on achieving full conformity, a service must comply with the requirements of the quality assurance process applicable to all services (see Recommendations 26-28).

RECOMMENDATION 26 (page 114)

The DSA should establish a new quality assurance mechanism.

As part of the new mechanism, the DSA should require the Minister for Disability Services to establish DisQAC as an independent body to oversee and monitor the quality assurance process, and certify disability services. The membership of DisQAC should comprise representatives of consumers and the service industry with recognised knowledge and expertise.

RECOMMENDATION 27 (page 114)

The functions of DisQAC should be developed in consultation with consumer and industry groups, but should include:

- establishing the new quality assurance scheme;
 - assessing and certifying Stage 1 and Stage 2 transition services;
 - assessing and certifying new services as conforming with the DSA;
 - providing advice and support to services about quality service provision;
 - monitoring whether services meet targets set in Stage 1 and Stage 2 transition plans;
 - monitoring whether services are achieving continuous quality improvement;
 - identifying and registering services of “concern”, where closer monitoring may be necessary;
 - notifying the Minister if a service fails to comply with the requirements of the quality assurance process; and
 - recommending to the Minister that sanctions be imposed on services that fail to comply with the objects, principles and applications of principles, the revised Standards (see Recommendation 28), or their transition plans.
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RECOMMENDATION 28 (page 115)

The new quality assurance process should apply to all services funded or provided under the DSA, including DOCS services. The features of the new mechanism should be developed in consultation with consumer and industry groups, but should include:

- the introduction of a revised set of Standards, based more closely on the objects, principles and applications of principles in the DSA, which focus on the outcomes to be achieved for people with disabilities;
 - replacing the current self-assessment procedure with a more accountable system of peer review; and
 - independent monitoring and certification of services by DisQAC.
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RECOMMENDATION 29 (page 116)

The requirement for three yearly review under section 15 of the DSA should remain.

RECOMMENDATION 30 (page 132)

Section 4 of the DSA should be amended to clarify that the term “person with a disability” includes children, young persons and adults with a disability.

RECOMMENDATION 31 (page 132)

The DSA should be amended to include a special Part for children and young people with a disability. The new Part should include special additional principles and applications of principles for children and young people.

RECOMMENDATION 32 (page 132)

The principles for children and young people should mirror the principles in Schedule 1 to the DSA to state that children and young people with a disability have the same basic human and legal rights as other children and young people in Australian society. In addition, the principles should reflect the rights contained in the UN Convention on the Rights of the Child (“CROC”). These include the following:

- That children and young people with a disability should have the right to grow up in a family environment, in an atmosphere of happiness, love and understanding.
 - Children and young people with a disability have the right to a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate active participation in the community.
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RECOMMENDATION 33 (page 133)

The applications of principles in the new Part relating to children and young people should also reflect CROC and should include the following:

Programs and services shall recognise the special needs of children and young persons with a disability and shall be designed to ensure that the child or young person with a disability has effective access to, and receives, education, training, health care services, rehabilitation services, preparation for employment and recreational opportunities in a manner conducive to the child or young person achieving the fullest possible participation in community life and fullest possible individual development, including his or her cultural and spiritual development.

An adapted version of Application (m) should be included to reflect CROC:

Programs and services must be designed and administered so as to recognise the importance to children and young persons with a disability of supporting family relationships and the cultural and linguistic environments of children and young persons with a disability.

RECOMMENDATION 34 (page 134)

It should be a condition of funding that service comply with the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*.

RECOMMENDATION 35 (page 134)

The new Part of the DSA relating to children and young people should outline the following hierarchy of support and placement options:

- in-home support for the child or young person;**
 - in-home placement and support with other members of the child's or young person's extended family;**
 - support for the child or young person in a shared care arrangement between the child's or young person's parents and/or extended family and/or a foster carer;**
 - support for the child or young person in an adoption or long term foster care placement; and**
 - support for the child or young person in an intimate residential care environment with not more than three other children and young people, with consistent adult carers, and in close proximity to the child's or the young person's parents and extended family.**
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RECOMMENDATION 36 (page 139)

The DSA should be amended to enable the Minister to:

- vary the terms or conditions of funding of a service;
 - appoint an administrator to a service;
 - stop a service from admitting any more clients;
 - name a service in Parliament;
 - conduct more frequent monitoring; and
 - require a person receiving individual funding to seek help from a service to administer the funds.
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RECOMMENDATION 37 (page 141)

ADD should develop protocols with the police, the Community Services Commission and the Department of Community Services for handling incidents where a person with a disability is assaulted, abused or neglected or at serious risk of harm.

The protocols should provide, among other things, that:

- ADD and the CSC should be notified whenever police are called to a service;
 - the incident should be investigated by ADD or the CSC;
 - the service should be registered as a service of concern with DisQAC and be subject to close monitoring; and
 - emergency accommodation should be provided for persons with a disability who require it in these circumstances.
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RECOMMENDATION 38 (page 153)

Section 20 of the DSA and clause 6(1)(b) and (c) of the CAMA Regulation should be repealed and replaced by the following:

The DSA should be amended to include a section which provides that the following decisions are reviewable by the ADT:

-
- a decision by DisQAC:
 - to certify or refuse to certify a Stage 1 or Stage 2 transition service;
 - to certify or refuse to certify a new service as conforming with the objects, principles and applications of principles under the DSA; and
 - that a service has or has not complied with the requirements of the quality assurance process.
 - a decision by the Minister to:
 - vary the terms or conditions of funding;
 - appoint an administrator for a service;
 - stop a service from admitting any more clients; and
 - require a person receiving individual funding to seek help from a service to administer the funds.
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RECOMMENDATION 39 (page 161)

The DSA should be amended to provide that the Minister may, through the Regulation, exempt a service from compliance with the objects, principles and applications of principles of the DSA, but only if he or she is satisfied that the service or class of services to be exempted is subject to standards comparable with the objects, principles and applications of principles, and an effective quality assurance process.

RECOMMENDATION 40 (page 161)

The Regulation should continue to provide for services provided or funded under the *Home and Community Care Act 1985 (Cth)*, except those provided through the Home Care Service, to be excluded from the operation of the DSA.

1. Introduction

- Introduction
- Background to the Commission's inquiry
- Conduct of the review
- Links between DSA and CAMA
- History of the DSA
- The Disability Services Program
- Effective legislation requires adequate resources
- Further legislative review

INTRODUCTION

1.1 On 9 June 1998, the Attorney General, the Hon J W Shaw QC MLC, asked the Law Reform Commission (the “Commission”) to review the *Disability Services Act 1993* (NSW) (“DSA”) and the *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) (“CAMA”).¹ The aim of the review is to determine whether the policy objectives of the Acts and the Regulations made under those Acts remain valid and, if so, whether the legislative framework is appropriate for achieving those objectives. In conducting this review, the Commission has separately considered and reported on the DSA and CAMA.² The consultations on the CAMA review ran parallel with those on the review of the DSA.

BACKGROUND TO THE COMMISSION’S INQUIRY

1.2 Section 29 of the DSA provides that the Minister must review the Act to determine whether its policy objectives remain valid and whether its terms remain appropriate for securing those objectives. The DSA requires the review to be done as soon as possible after five years from the date of assent of the Act (8 April 1993). There is a similar provision in CAMA.³

CONDUCT OF THE REVIEW

Reference Group

1.3 Stakeholders in the disability sector played a major role in developing the DSA and CAMA. To ensure that they played a role in this review, the Commission convened a ten member Reference Group, with the assistance of the Disability Council of NSW, to provide advice on the conduct of the

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1. The name of this legislation was recently changed to the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW). However, to avoid confusion, this Report will refer to it as CAMA.
 2. New South Wales Law Reform Commission, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)* (Report 90, 1999) (“Report 90”).
 3. CAMA s 126.

reviews of CAMA and the DSA. The Reference Group was representative of consumers, service providers, advocates, families and carers. Members were also appointed to represent the views and interests of Aboriginal and Torres Strait Islander people and those from a non-English speaking background. A list of members of the Reference Group is provided at Appendix A. The Reference Group met on four occasions and provided comments on drafts of the Issues Paper and on this Report. The Commission is very grateful for the time members of the Reference Group gave to attend meetings and for their generosity in contributing their expertise.

Issues Paper

1.4 After receiving the reference in June 1998, the Commission wrote to a wide range of organisations with an interest in disability services and asked them to make preliminary submissions raising any issues they wanted the Commission to consider. The Commission also held meetings with key organisations, including the Ageing and Disability Department (“ADD”), the Department of Community Services (“DOCS”), ACROD,⁴ the Disability Council of NSW, the Institute for Family Advocacy and Leadership Development and the Association of Children’s Welfare Agencies. It also visited some of the large residential services.

1.5 In September 1998, the Commission published an issues paper which took into account the issues raised during the preliminary consultation.⁵ The paper examined the provisions of the DSA, raised issues identified in consultations and asked questions designed to elicit comment on whether the objects of the DSA remain valid and whether the terms of the DSA remain appropriate. The Issues Paper was distributed widely and in a number of alternative formats, such as large-print and spiral-bound, diskette, on the Commission’s website, a large-print summary, and a summary on audio tape. The review was also publicised in six newspapers for a variety of non-

4. ACROD is a peak group representing service providers in the disability industry.

5. New South Wales Law Reform Commission, *Review of the Disability Services Act 1993 (NSW)* (Issues Paper 16, 1998) (“IP 16”). The Commission also published an issues paper on the CAMA reference: New South Wales Law Reform Commission, *Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)* (Issues Paper 15, 1998) (“IP 15”).

English speaking populations, on SBS radio, community radio stations and 2DAY-FM radio.

Submissions

1.6 Submissions closed on 14 December 1998. However, the Commission continued to accept submissions during January and February 1999, receiving 96 in total.⁶ The submissions included those prepared by peak groups in the community services sector which had themselves conducted extensive consultations with their members for the purposes of drafting their submissions to the Commission. Staff of the Commission attended several of these consultations.

1.7 The submissions covered a very broad range of stakeholders with an interest in the DSA, including people with disabilities, their families, advocacy groups, peak consumer groups, people with an interest in community services, and non-government providers of services to people with disabilities or to children and young people. Submissions were also received from some government agencies, including the Local Government and Shires Association of NSW, the Ombudsman, the Community Services Commission (“CSC”) and the Community Services Appeals Tribunal, now called the Community Services Division (“CS Division”) of the Administrative Decisions Tribunal (“ADT”). A submission was received from the Minister for Community Services, the Hon Faye Lo Po MP, representing a “whole of government” response on behalf of government agencies.

Public seminars

1.8 The Commission conducted seven public seminars on the DSA and CAMA in Sydney and selected country areas over a three week period between 18 November and 2 December 1998. The issues raised in IP 15 and IP 16 formed the basis of the discussions. Participants were given an opportunity to raise topics that were not covered in the Issues Papers. These seminars were well-attended and provided dynamic forums in which issues could be discussed openly. Importantly, they also allowed the Commission to see how the DSA and CAMA were working in practice.

6. The list of submissions appears at Appendix B.

Sydney seminars

1.9 Seminars were held in Sydney with the following groups:

- service providers (18 November 1998);
- consumers of disability services (20 November 1998);
- advocacy groups, and families and carers of people with disabilities (30 November 1998); and
- children and young people's advocacy groups and service providers who provide services to children and young people (2 December 1998).

Regional seminars

1.10 Three public seminars were also held in regional areas of NSW for anyone with an interest in CAMA or the DSA. These were held at:

- Wagga Wagga (23 November 1998);
- Maitland (24 November 1998); and
- Ballina (26 November 1998).

Focus groups

1.11 In conducting a review of legislation that can have an important impact on the lives of consumers of community services, it is vital that the views of those consumers be heard. This sometimes does not happen. For example, a report by the Disability Council of NSW found that people with disabilities often feel that there is inadequate consultation with them on important policy issues.⁷

1.12 The Commission was aware that consumers of community services might be less likely than other people to make written submissions and attend the Commission's public seminars. The Commission was also aware that there could be additional cultural and language barriers for these people. It therefore commissioned three organisations to conduct small focus groups with consumers of community services, including Aboriginal and Torres Strait Islander people and people from non-English speaking backgrounds.

7. NSW, Disability Council of NSW, *Consultation and People with a Disability: Issues for Public Sector Managers in NSW* (1997) at vii.

Two of the organisations focused on consumers of disability services, and one on children and young people in care and formerly in care. The findings of these consultations have been published separately in a Research Report.⁸

Juliet London Research and Consultancy

1.13 Nine focus groups were conducted by Juliet London Research and Consultancy with people with intellectual, physical, sensory and psychiatric disabilities, autism and acquired brain injury. Twenty individual interviews were also conducted with people with intellectual, physical and sensory disabilities, acquired brain injury, and carers of people with intellectual disabilities. The research was conducted in the Sydney metropolitan area and in the Illawarra and Broken Hill regions. Fifteen Aboriginal and Torres Strait Islander people and people from a non-English speaking background were included in this project.

Moxon, Green and Associates

1.14 Two focus groups were conducted in Sydney by Moxon, Green and Associates. One was with children aged between 11 and 15 years with a physical disability, and the other was with people with an intellectual disability from non-English speaking backgrounds. An informal spontaneous discussion was also held with the parents of the children in the first focus group, facilitated by one of the parents.

State Network of Young People in Care

1.15 The NSW State Network of Young People in Care (“SNYPIC”) is the peak consumer group for young people in care. SNYPIC conducted four focus groups in Sydney with young people in care (in services in Sydney) and formerly in care.

Acknowledgement

1.16 This Report takes into account all of the views expressed in written and oral submissions, public seminars, consultations with individuals involved in areas related to DSA, the focus groups, and research literature.

8. New South Wales Law Reform Commission, *Review of the Disability Services Act 1993 (NSW) and the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW): Consultations* (Research Report 9, 1999) (“RR 9”).

The Commission thanks the individuals and organisations who gave time and resources to the review.

LINKS BETWEEN DSA AND CAMA

1.17 CAMA has strong links with the DSA. Community Visitors appointed under CAMA visit services funded under the DSA to monitor the rights and well-being of people with a disability. CAMA also established the CSC, which is an independent watchdog body responsible for, among other things, inquiring into matters affecting service providers and consumers, and monitoring and reviewing the delivery of disability (and other community) services.⁹ Furthermore, the CS Division of the ADT is able to review certain Ministerial decisions made under the DSA.

HISTORY OF THE DSA

Rationalisation of Commonwealth/State responsibilities

1.18 The DSA was enacted as a result of an agreement between the Commonwealth and State and Territory governments about how responsibility for disability services would be rationalised. In 1991, the Commonwealth/State Disability Agreement (“CSDA”) attempted to clarify the types of services that would be administered by the Commonwealth, and those that would be administered by the States and Territories. The Agreement provided broadly that services relating to vocation, training and employment of people with a disability were the responsibility of the Commonwealth government, leaving the administration of accommodation support, respite care, independent living training, recreation and information services, to the States and Territories.¹⁰ Under this agreement a number of services which had been administered by the Commonwealth were transferred to State and Territory administration.

9. CAMA s 83 and 11.

10. Advocacy services may be funded by the Commonwealth or the State and Territory governments, or by both jointly.

Concerns flowing from rationalisation

1.19 The transfer of Commonwealth funded services to the State was a matter of major concern to a number of organisations representing people with a disability. They feared that people with a disability using Commonwealth services would lose the benefit of the major philosophical and policy progress that had been made in service provision at Commonwealth level under the *Disability Services Act 1986* (Cth). This Act moved away from a “medical” or care model of service provision. It embraced a rights-based approach aimed at enabling people with a disability to overcome barriers to their participation in general community life.¹¹ Principles and objectives that service providers were required to follow in providing services were developed after widespread national consultation with people with a disability and their associates. The principles and objectives were gazetted with the *Disability Services Act 1986* (Cth).

Complementary legislation

1.20 As a result of these concerns, the Commonwealth required all States and Territories to enact disability services legislation that was complementary to the Commonwealth legislation before the CSDA would take effect.¹² The DSA is New South Wales’ complementary legislation. It is the product of extensive consultation with people with a disability and others. At the time of its introduction, the DSA represented:

a sea change in disability policy and programs at State level, and is even a significant improvement on the Commonwealth Act. Its passage brought genuine and deeply felt hope and optimism to people with disability and their associates across NSW.¹³

11. The *Disability Services Act 1986* (Cth) has been reviewed by the Australian Law Reform Commission. See Australian Law Reform Commission, *Making Rights Count: Services for People with a Disability* (ALRC 79, 1996).

12. See *Disability Services Act 1991* (ACT); *Disability Services Act 1991* (Vic); *Disability Services Act 1992* (Qld); *Disability Services Act 1992* (Tas); *Disability Services Act 1993* (NT); *Disability Services Act 1993* (SA); and *Disability Services Act 1993* (WA).

13. People with Disabilities (NSW) Inc, *Submission* at 9.

Strong support for the DSA

1.21 The consultations conducted by the Commission demonstrated strong support for the general approach and terms of the DSA. There was no support for a major revision of the DSA and all sectors were adamant that there should be no weakening of its provisions. For example, the Intellectual Disability Rights Service stated:

It is our view that the *Disability Services Act 1993* (NSW) and CAMA has been the most effective of any of the State Disability Services Acts in Australia and we believe emphasis must be placed on maintaining its many strengths and on the modification of any weaknesses. We believe these [DSA and CAMA] Acts should not be changed radically in foundation or structure. In fact we strongly caution against wholly rewriting the two Acts, as this could result in a watering down of the many strengths and safeguards contained within them.¹⁴

THE DISABILITY SERVICES PROGRAM

1.22 The funding the NSW Government provides under the DSA for services to people with a disability is administered by ADD. That Department funds organisations to provide services under the DSA.¹⁵ It funds DOCS and a number of non-government organisations to provide services. Some non-government organisations contribute significant amounts of their own funds, or funds raised from other non-government sources, to the operation of their services. Some organisations that provide services for people with a disability are entirely self-funded. ADD provides funding for:

- accommodation support, which includes large residential services, hostels, group homes, attendant care (help with personal daily living tasks), in-home support and alternative family placement;
- community support, which includes early intervention, therapy, information and referral, advocacy, recreation and holiday programs, family and individual case management, mutual support and self-help groups;

14. Intellectual Disability Rights Service Inc, *Submission* at 6-7.

15. The Minister approves funding under s 10 of the DSA.

- community access, which includes independent living training, day programs and post-school options (support for transition from school to adult community living);
- respite, which includes own-home respite, centre-based respite and host family respite; and
- other support, which includes funding for peak bodies, research and development, service evaluation and training.

1.23 In the 1996-97 financial year, ADD distributed \$176.2 million to approximately 700 non-government community organisations to provide services. Of these funds, 62.7% was allocated to accommodation support, 9.5% to community support, 4.7% to community access and 0.4% to other support.¹⁶ ADD also provided approximately \$220.2 million to DOCS to provide accommodation and support services.¹⁷ People with a disability receiving accommodation support included approximately:

- 1,825 people living in 17 large government residential centres;
- 563 people living in 30 large non-government residential centres;
- 1,055 people living in 219 government group homes;
- 1,260 people living in 286 non-government group homes; and
- 201 children under 18 living in large residential centres.¹⁸

1.24 In 1996-97, 137 people with a disability received attendant care, and 290 people received individualised supported accommodation packages.¹⁹ Out of funding targeted at children, 804 children received early intervention services, 353 received respite care, 1,531 received therapy services, 159 received Outside School Hours support and 20 received intensive family support services.²⁰

16. NSW, ADD, *Annual Report 1996/97* at 33.

17. NSW, ADD, *Annual Report 1996/97* at 96.

18. NSW, CSC and The Audit Office, *Performance Audit Report: Large Residential Centres for People with a Disability in New South Wales* (1997) (“CSC and Audit Office Report”) at 2.

19. NSW, ADD, *Annual Report 1996-97* at 37-38.

20. NSW, ADD, *Annual Report 1996-97* at 21.

EFFECTIVE LEGISLATION REQUIRES ADEQUATE RESOURCES

Concern about adequate resources

1.25 In submissions and during consultations, organisations and individuals expressed concern that lack of resources is affecting the way the DSA is being implemented. It was a common theme that the major concerns of the disability services sector stem not from the provisions of the DSA, but from problems caused by insufficient funding to achieve the policy objectives of the Act.

The Commission's view

1.26 The Commission has not been asked to determine what may be an appropriate level of funding to secure the policy objectives of the DSA. It has been required, however, “to conduct the review with consideration given to the resources or financial implications for the current legislation and regulations and any proposed legislative or regulatory amendments”. There is a widespread view amongst the disability services sector that the policy objectives of the DSA are not being met in the following areas because of insufficient resources:

- Non-conforming services continue to be funded in breach of the DSA.²¹
- Many services that seek to comply with the DSA are unable to do so because they do not have the resources.²²
- Closing down or defunding services that are unwilling to comply with the DSA may not be an option because of the shortage of alternative services.²³
- Inequities in funding between services may partly be resolved through better planning, but ultimately can only be overcome by extra funding.

21. See para 5.11 and 6.3.

22. Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*; Dunrossil Challenge Foundation Ltd, *Submission*; NSW Council for Intellectual Disability, *Submission*.

23. The Northcott Society, *Submission*.

- An appropriately transparent funding program is difficult to achieve because there are not sufficient funds to meet need in areas identified as being under-served.
- Outcomes achieved from service provision cannot be properly linked to funding because they cannot be adequately monitored.

1.27 In this Report, the Commission makes recommendations designed to improve the DSA. If implemented, the Commission's recommendations would fine tune the objects, principles and applications of principles, and ensure that the terms of the Act are consistent with those objectives. However, the objectives of the DSA will be effective only if sufficient funds are made available to implement them.

1.28 Whatever amount of public money is allocated to disability services, the Government has a responsibility to ensure that it is spent in a transparent and accountable way. Services should be answerable to the Government and consumers for the public money spent and the outcomes sought and achieved. Legislation underpinning a funding program should facilitate these goals.

FURTHER LEGISLATIVE REVIEW

1.29 Throughout this Report, the Commission makes recommendations which, if implemented, would significantly affect the way in which disability services are provided and administered. For example, in Chapter 7, the Commission recommends changes to the transition process for services that do not comply fully with the objectives of the DSA, and, in Chapter 8, recommends the introduction of a new quality assurance mechanism. The Commission is of the view that the implementation and progress of these changes should be reviewed in the future.

1.30 However, even if the recommendations are not implemented, there are cogent reasons for a further review of the Act to be stipulated in the legislation. This Report highlights the significant impact the DSA has had on the quality of life enjoyed by people with disabilities who receive services funded under it. It also reports serious concerns, particularly with the process of ensuring that all services funded under the Act comply fully with its requirements and an effective mechanism to monitor quality in service provision. Accordingly, the Commission believes the DSA should be reviewed again within 5 years of the completion of this Report regardless of

whether or not the Government chooses to adopt the recommendations of this Report.

Recommendation 1

The DSA should be amended to provide for a further review five years from the date on which this Report is tabled in Parliament. The purpose of the review would be to determine whether the objectives of the Act remain valid and the terms of the Act remain appropriate for securing those objectives. The Act should require that the Minister table a report of the review in both Houses of Parliament within a further 12 months.

2. Objects, Principles and Applications of Principles

- Introduction
- Policy goals of the DSA
- “Normalisation”
- Changing values
- Including people with increasing support needs
- Should best interests be included as an object?
- Access to services
- Strengthening support for diversity
- Recognising families and carers
- Scope of the DSA
-

INTRODUCTION

2.1 This chapter examines the values underlying the DSA. These values are enshrined in the objects, principles and applications of principles contained in the Act. The Commission concludes that the objects, principles and applications of principles generally remain valid, but suggests minor changes to ensure that the DSA reflects the aspirations of people with a disability. The needs of people with increasing support needs are also considered. The Commission asks whether the “best interests” principle should be included as an object of the DSA and considers how to ensure that access to services is determined on a fair and equitable basis. It looks at strengthening support for diversity in the DSA and how the relationship that people with a disability have with their families and carers should be reflected in the legislation.

POLICY GOALS OF THE DSA

2.2 The DSA comprises a series of objects, principles and applications of principles which reflect the underlying philosophy of the Act. The objects set out the goals of the DSA. They are supported by the principles, which detail some of the rights held by people with a disability, and the applications of principles, which indicate how services should be provided to implement the principles. The objectives of the DSA are influenced by a number of international human rights instruments that recognise the rights of people with disabilities.¹

2.3 Many of the Act’s provisions rely on the objects, principles and applications of principles. For example, the Minister is under a duty to ensure that services provided or funded under the DSA conform to them.² Indeed, the Minister must not approve a grant of financial assistance under the DSA

1. See, for example, *United Nations Declaration on the Rights of Mentally Retarded Persons* (1971); *United Nations Declaration on the Rights of Disabled Persons* (1975); and *Standard Rules on the Equalisation of Opportunities for Persons with Disabilities* (1993).

2. DSA s 6.

unless he or she is satisfied that such assistance would conform to the objects, principles and applications of principles.³

Objects

2.4 The main policy objective of the DSA is to ensure that people with disabilities have the same basic human rights as other members of the community.⁴ The primary object is to:

ensure the provision of services necessary to enable people with a disability to achieve their maximum potential as members of the community.⁵

Other objects set out the outcomes that services funded or provided under the DSA should be seeking to achieve. The DSA aims to ensure the provision of services that:

- further the integration of people with a disability into the community and complement services available to such persons in the community;⁶
- enable persons with disabilities to achieve positive outcomes such as increased independence, employment opportunities and integration in the community;⁷ and
- are provided in ways that promote in the community a positive image of persons with disabilities and enhance their self-esteem.⁸

2.5 The DSA includes a further object to ensure that these goals are achieved. It provides that, in considering a grant of financial assistance to services, regard must be had to the outcomes achieved by people with a

3. DSA s 10. The terms and conditions on which financial assistance is provided must deal with the extent to which the service being funded must conform to the principles and applications of principles in providing the service or carrying out research and development: DSA s 12-13.

4. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1993, the Hon J Longley, MP, Minister for Community Services, Second Reading Speech at 769.

5. DSA s 3(a).

6. DSA s 3(b)(i).

7. DSA s 3(b)(ii).

8. DSA s 3(b)(iii).

disability as a result of receiving those services.⁹ Another object of the Act is to ensure that services funded or provided under the DSA are developed and reviewed on a periodic basis through the use of forward plans.¹⁰

2.6 Other objects of the DSA apply to services generally, not just those funded or provided under the Act. These objects are:

- to encourage innovation in the provision of services for persons with disabilities;¹¹ and
- to achieve positive outcomes, such as increased independence, employment opportunities and integration in the community, for persons with disabilities.¹²

Principles

2.7 The principles of the DSA provide that:

Persons with disabilities have the same basic human rights as other members of Australian society. They also have the rights needed to ensure that their specific needs are met. Their rights, which apply irrespective of the nature, origin, type or degree of disability, include the following:

- (a) persons with disabilities are individuals who have the inherent right to respect for their human worth and dignity,
- (b) persons with disabilities have the right to live in and be part of the community,
- (c) persons with disabilities have the right to realise their individual capacities for physical, social, emotional and intellectual development,
- (d) persons with disabilities have the same rights as other members of Australian society to services which will support their attaining a reasonable quality of life,

9. DSA s 3(c).

10. DSA s 3(f).

11. DSA s 3(d).

12. DSA s 3(e).

- (e) persons with disabilities have the right to choose their own lifestyle and to have access to information, provided in a manner appropriate to their disability and cultural background, necessary to allow informed choice,
- (f) persons with disabilities have the same right as other members of Australian society to participate in the decisions which affect their lives,
- (g) persons with disabilities receiving services have the same right as other members of Australian society to receive those services in a manner which results in the least restriction of their rights and opportunities,
- (h) persons with disabilities have the right to pursue any grievance in relation to services without fear of the services being discontinued or recrimination from service providers,
- (i) persons with disabilities have the right to protection from neglect, abuse and exploitation.¹³

Applications of principles

2.8 The applications of principles state that services and programs of services must apply the principles. In particular, services and programs must be designed and administered so as to:

- (a) have as their focus the achievement of positive outcomes for persons with disabilities, such as increased independence, employment opportunities and integration into the community,
- (b) contribute to ensuring that the conditions of the everyday life of persons with disabilities are the same as, or as close as possible to, norms and patterns which are valued in the general community,
- (c) form part of local co-ordinated service systems and other services generally available to members of the community, wherever possible,
- (d) meet the individual needs and goals of the persons with disabilities receiving services,

13. DSA Sch 1 cl 1.

- (e) meet the needs of persons with disabilities who experience an additional disadvantage as a result of their gender, ethnic origin or Aboriginality,
- (f) promote recognition of the competence of, and enhance the image of, persons with disabilities,
- (g) promote the participation of persons with disabilities in the life of the local community through maximum physical and social integration in that community,
- (h) ensure that no single organisation providing services exercises control over all or most aspects of the life of a person with disabilities,
- (i) ensure that organisations providing services (whether specifically to persons with disabilities or generally to members of the community) are accountable to persons with disabilities who use them, the advocates of those persons, the State and the community generally for the provision of information from which the quality of those services can be judged,
- (j) provide opportunities for persons with disabilities to reach goals and enjoy lifestyles which are valued by the community generally and are appropriate to their chronological age,
- (k) ensure that persons with disabilities participate in the decisions that affect their lives,
- (l) ensure that persons with disabilities have access to advocacy support where necessary to ensure adequate participation in decision-making about the services they receive,
- (m) recognise the importance of preserving the family relationships and the cultural and linguistic environments of persons with disabilities,
- (n) ensure that appropriate avenues exist for persons with disabilities to raise and have resolved any grievances about services, and to ensure that a person raising any such grievance does not suffer any reprisal,
- (o) provide persons with disabilities with, and encourage them to make use of, avenues for participating in the planning and operation of services and programs which they receive and to provide opportunities for consultation in relation to the development of major policy and program changes,

- (p) respect the rights of persons with disabilities to privacy and confidentiality.¹⁴

Policy goals supported

2.9 There was general agreement in submissions and during consultations that the objects of the DSA remain valid:¹⁵

The objectives are not only valid, they are an expression of the right of people with a disability to have the same opportunities and responsibilities as others in the community.¹⁶

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14. DSA Sch 1 cl 2.
15. Australian Quadriplegic Association Ltd (NSW), *Submission*; S McKenzie, *Submission*; Centacare Sydney, *Submission*; Ethnic Childcare, Family and Community Services Co-operative Ltd Ltd, *Submission*; D Newey, *Submission*; R McCredie, *Submission*; NCOSS, *Submission*; Community Visitors, *Submission*; Autism Association of NSW, *Submission*; NSW Council for Intellectual Disability, *Submission*; Deaf Society of NSW, *Submission*; Institute for Family Advocacy and Leadership Development Association Inc Association Inc, *Submission*; The Spastic Centre of NSW, *Submission*; *Confidential Submission 1*; and Disability Safeguards Coalition, *Submission*.
16. NSW Council for Intellectual Disability, *Submission* at 3.

Another submission considered that the objects are essential to drive the development and continued improvement of the disability sector.¹⁷ There was also strong support in submissions and during consultations for the principles and applications of principles.¹⁸ Some submissions suggested that the principles were the foundation of human rights for people with a disability.¹⁹ Others were of the view that the principles were fundamentally important in preserving and promoting the basic human rights of people with a disability, enhancing their rights as participating members of the community.²⁰ Submissions considered that the principles and applications of principles form an excellent basis for the philosophy and policies that should underpin the provision of services,²¹ and provide a clear framework for the funding of services that focus on the needs of people with a disability rather than the needs of service providers.²² Overall, the view was held in submissions that the objects, principles and applications of principles are vital to the successful implementation of the Act and should not be weakened.²³

17. *Confidential Submission 1*.

18. Australian Quadriplegic Association Ltd (NSW), *Submission*; Centre for Developmental Disability Studies, *Submission*; Disability Safeguards Coalition, *Submission*; Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*; The Northcott Society, *Submission*; Nepean Independent Living Committee Inc, *Submission*; Western Sydney Intellectual Disability Support Group Inc, *Submission*; Multicultural Disability Advocacy Association of NSW Inc, *Submission*; Physical Disability Council of NSW Inc, *Submission*; Institute for Family Advocacy and Leadership Development Association Inc, *Submission*; *Confidential Submission 1*; People with Disabilities (NSW) Inc, *Submission*; and Disability Council of NSW, *Submission*.

19. Disability Safeguards Coalition, *Submission*; and Intellectual Disability Rights Service Inc, *Submission*.

20. Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*.

21. Citizen Advocacy NSW, *Submission*; Manly Warringah Community Access Service, *Submission*; and The Spastic Centre of NSW, *Submission*.

22. Australian Quadriplegic Association Ltd (NSW), *Submission*.

23. Western Sydney Intellectual Disability Support Group Inc, *Submission*.

“NORMALISATION”

2.10 Whilst the objects, principles and applications of principles have been generally well-received, they do, however, reflect a period of thinking about disability in which “normalisation”²⁴ was seen as the goal for service provision. Some of the objects in the DSA and the applications of principles refer to the goal of the “integration” of people with a disability in the community.²⁵ The applications of principles also refer to the need to ensure that the everyday life of people with disabilities is subject to conditions which are the same as, or as close as possible to, the “norms and patterns” valued in the general community.²⁶ The term “integration” is susceptible to close association with “assimilation” and an approach to social change which requires minority groups to conform with the lifestyles and values of the majority. The reference to “norms and patterns” valued in the general community reflects a similar philosophy. This section considers whether these terms are consistent with the current thinking and aspirations of people with a disability who seek to have the same human rights as other members of the community.²⁷ The recent literature on people with disabilities places emphasis on “rights” and “citizenship” (rather than, for example, “needs”):

What political organisations of people with disabilities are demanding is not to have their needs defined by others but rather the right to appropriate services to meet their own *self-defined* needs. Service delivery in this model derives not from need and philanthropy but from equal citizenship as a means of self-determination.²⁸

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24. S C Hayes and R Hayes, *Mental Retardation: Law, Policy and Administration* (Law Book Co, Sydney, 1982) at 5.
 25. DSA s 3(b)(i), s 3(b)(ii), s 3(e) and Sch 1 cl 2(a).
 26. DSA Sch 1 cl 2(b).
 27. New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report 80, 1996) at 10-14.
 28. L Davis, “Rights Replacing Needs: A New Resolution of the Distributive Dilemma for People with Disabilities in Australia?” in M Hauritz, C Sampford and S Blencowe (ed), *Justice for People with Disabilities: Legal and Institutional Issues* (Federation Press, Sydney, 1998) at 20 (emphasis in original). See also G T Bellamy, “The Braid of Progress: People with Disabilities and Modern Societies” in M Hauritz, C Sampford and S Blencowe (ed), *Justice for People with Disabilities: Legal and Institutional Issues* (Federation Press, Sydney, 1998) at 8-12.

CHANGING VALUES

Values of able-bodied people imposed

2.11 Applying some of the principles and applications of principles require value judgements about what is “normal” or “desirable”. The values imposed are often those of the able-bodied majority. During consultations, the Commission heard that the emphasis on “integration” and “normality” has led to pressure on people with a disability to try to live in a way that conforms to the expectations of mainstream able-bodied people. For example, a trip to McDonalds may be regarded by the majority of able-bodied people as an acceptable form of integration, and would therefore be encouraged. Attending a gay and lesbian dance may not, however, be viewed by some as integration into the “normal” able-bodied community, and may therefore not be encouraged.²⁹

Importance of choice

2.12 The Commission was told during consultations that people with a disability do not want other people’s concepts of independence imposed on them. For many people with a disability, independence means having choices. A person with a disability may have his or her own priorities for achieving independence. He or she may, for example, choose to forgo some independence by having assistance with dressing and bathing in order to hold down a full-time job. For some people, being able to choose a life-style and having the right to make mistakes is the kind of independence they value.³⁰ Participants in focus groups clearly valued independence and choice. One woman wanted to increase her independence by learning to travel on buses so that she could do her shopping by herself.³¹ Another stated:

It’s about having the freedom. You can make your own mistakes. Before there were always people stopping you before you made the mistake. Everybody tries to protect you, to put you in cotton wool.³²

29. *Consultation* (Consumers, Sydney).

30. *Consultation* (Consumers, Sydney).

31. RR 9 at para 2.57.

32. RR 9 at para 1.96.

2.13 Since the introduction of the DSA, many of the focus group participants had moved from institutional accommodation to community settings. All of them considered their lives to have improved as a result:³³

It's better living on my own. No staff to boss me around. Asking me when I'm coming home. I'd had a gutful, so I just packed up and left. It's better now. I can come and go as I want. Do as I want. I haven't got people standing over me and bossing me. Or yelling at me.³⁴

I like my street – it is quiet and there are nice trees and it is close to the shops.³⁵

I like living in my house because I have two dogs that I love. They keep me company and I walk them every day. My dogs would be lost without me.³⁶

2.14 In consultations, people with a disability stated that they wanted to have choice about the people with whom they spend time, including the choice about whether or not to spend time with other people with a disability.³⁷ This emphasis on choice is also reflected in literature written by people with a disability:

[W]e use the word [independence] in a practical and common sense way to mean simply being able to achieve our goals. The point is that independent people have control over their lives, not that they perform every task themselves. Independence is not limited to the physical or intellectual capacity to care for oneself without assistance; independence is created by having assistance when and how one requires it, by being able to choose when and how care takes place.³⁸

33. RR 9 at para 1.99.

34. RR 9 at para 1.100.

35. RR 9 at para 2.55.

36. RR 9 at para 2.56.

37. RR 9 at para 1.113-1.115.

38. J Morris, *Pride Against Prejudice: Transforming Attitudes to Disability* (The Women's Press, London 1991) at 8.

Acceptance and participation

2.15 A number of submissions were of the view that there should be more emphasis in the DSA on participation and acceptance of difference in the community, rather than conformity with “normal” society on the part of a person with a disability:³⁹

Integration into the community sounds awful. Like they’re going to make you fit the community. Surely it should be the community that changes its perspective.⁴⁰

2.16 People with Disabilities (NSW) considered that the term “integration” has something of an anachronistic ring to it, but:

its underlying policy (the opportunity for people with a disability to live in and be part of the community) remains the most important need and aspiration of people with a disability and their associates that is given legislative force by the Act. In our view, “integration” has never been interpreted to mean “normalcy”. It denotes the need and aspiration of people with a disability to be part of ordinary community life in all its diversity.

It suggested that an alternative term to denote precisely the same policy objective might be “inclusion within community life”.⁴¹

The Commission’s view

2.17 It is a policy objective of the DSA to ensure that people with a disability have the same rights as other members of the community. Australian society is a pluralistic one and Australians have the right to live the way they choose as long as they do not infringe the law. Australians have a wide range of lifestyles and respect for diversity underpins government policy. Terminology that could be interpreted to mean that people with a disability should become part of the community by striving to emulate some “ideal” or a “normal” majority lifestyle should be removed. The objects, principles and applications of principles should support choice and diversity within the broad range available within the Australian community.

39. Association NSW, *Submission*; and Citizen Advocacy NSW, *Submission*.

40. RR 9 at para 1.116.

41. People with Disabilities (NSW) Inc, *Submission*.

2.18 Replacing the term “integration” with the term “inclusion” would remove the implicit assumption that people with a disability must adapt. “Inclusion” requires services to create conditions in which the community accepts difference and involves people with a disability in all their diversity in community life. Removing the words “norms and patterns” would also remove any suggestion of imposing, or requiring conformity with, majority values. The rights of people with a disability are best promoted where they have, as far as possible, the opportunity to set and realise their own individual goals for their own lives. Some extra support should be given to the importance of this by adding the word “goals” to Principle 1(c).

Recommendation 2

Section 3(b)(i) of the DSA should be amended to replace the words “integration of persons with disabilities in the community” with the words “inclusion of persons with disabilities in community life”.

Recommendation 3

Section 3(b)(ii) and section 3(e) of the DSA and the applications of principles in Schedule 1 clause 2(a) should be amended to replace the words “integration in the community” with “inclusion in community life”.

Recommendation 4

The principles in Schedule 1 clause 1(c) should be amended to include the words “and goals” after the word “capacities”.

Recommendation 5

The applications of principles in Schedule 1 clause 2(b) should be amended to read “to contribute to ensuring that the conditions of the every day life of persons with disabilities are the same as, or as close as possible to, conditions which are valued in the community as a whole”.

INCLUDING PEOPLE WITH INCREASING SUPPORT NEEDS

Developmental objects may not always be appropriate

2.19 Some people acquire a disability later in life. They may have lived independently in the community for many years. The developmental objects of the DSA, for example, achieving maximum potential,⁴² or increasing participation in the community, may be less relevant for this group of people, particularly where the person has a degenerative condition.

Views in submissions

2.20 Some submissions noted that the DSA does not sufficiently reflect the rights and needs of people with a degenerative condition such as Multiple Sclerosis, Parkinson’s Disease, Motor Neurone Disease and HIV/AIDS. People with disabilities such as these have support needs that increase over time. The Multiple Sclerosis Society of NSW commented that the aim of service delivery and support in these cases is not achieving independence and participation (because in most cases people had this until the onset of symptoms); rather it is on *maintaining* skills and receiving support to continue their way of life.⁴³

42. DSA s 3(a).

43. Multiple Sclerosis Society of NSW, *Submission*.

The Commission's view

2.21 The DSA should reflect the range of disabilities it seeks to support. There should be some change to the objectives to provide for people with increasing support needs.

Recommendation 6

Section 3(b) should be amended to include a new subparagraph (iv) to read “and that minimises the impact that increasing support needs may have on a person’s ability to control his or her own life”.

SHOULD BEST INTERESTS BE INCLUDED AS AN OBJECT?

Potential for conflict

2.22 The principles and applications of principles of the DSA provide the benchmarks for the provision of services to people with a disability. However, there is potential for conflict when they are applied to a particular case. For example, the principle that people with disabilities have the “right to choose their own lifestyle”⁴⁴ could potentially conflict with the application of principles which requires that “no single organisation providing services exercise control over all or most aspects of those people’s lives”.⁴⁵ Some people with disabilities may *want* to have all or most of their services provided by one organisation. The NSW Government in its submission asked whether the principle of the “best interests” of each person with a disability should be included as an object and used to resolve any conflicts between the objects, principles, and applications of principles.⁴⁶

44. DSA Sch 1 cl 1(e).

45. DSA Sch 1 cl 2(h).

46. NSW Government, *Submission* at 3.

The Commission's view

2.23 The Commission does not favour adding a “best interests” principle to the objects in the DSA. This principle is most commonly applied to conflicts or decisions involving children, or people needing the assistance of guardians to make decisions for them. It has implications of paternalism denoting outdated attitudes to people with a disability. Furthermore, the Commission doubts that a “best interests” approach would be of any assistance in resolving conflicts. This is best done on a case-by-case basis following consideration of all relevant facts and circumstances. The Commission considers that the objects, principles and applications of principles remain the best benchmarks for decision-making and service provision.

ACCESS TO SERVICES

DSA does not provide for access

2.24 There is no provision in the DSA stating the basis on which a person with a disability may or may not be entitled to a service. ADD, however, has addressed the issue in its Disability Services Standards. Standard 1.0 of the *Standards in Action* requires that “each service user seeking a service has access to that service on the basis of relative need and available resources”.⁴⁷

The Commission's view

2.25 Whether or not a person with a disability receives a service should not be at the whim of a service provider. A person applying for a service should know the basis on which he or she may be accepted. If rejected, he or she should be told why. A service should not be able to reject a person merely because he or she is likely to be more expensive than someone else. Within the parameters of the kind of service provided, services should use the funding they receive to provide services for people with the greatest need. Service providers should not be able to withdraw a service arbitrarily. To include a provision in the DSA about access would be a substantial change. Such a provision would improve the ability of ADD to plan and administer

47. NSW, ADD, *Standards in Action* (1998).

the Disability Services Program. If there is a group of people who have an unmet need, and ADD funds a service to meet this need, it must be able to ensure that the service does so. It must also be able to ensure that, as far as possible, services are provided to those with the greatest relative need. The Commission acknowledges that this may be difficult given the current level of unmet need.⁴⁸ However, a properly administered program should include provisions about access to services. As far as possible the process of admission to, and exit from, services should be fair and transparent.

Recommendation 7

Section 3 should be amended to include a new object “to ensure that access to services is determined on a fair and equitable basis”.

STRENGTHENING SUPPORT FOR DIVERSITY

2.26 While cultural and linguistic diversity are not addressed in the objects of the DSA, they are addressed in the principles and applications of principles. Principle 1(e) refers to the right of people with a disability to have information provided in a manner appropriate to their cultural background. Application 2(e) refers to the need for services and programs to assist people with disabilities who “experience an additional disadvantage as a result of their gender, ethnic origin or Aboriginality”. Application 2(m) refers to the need to recognise the importance of preserving “the cultural and linguistic environments of persons with disabilities”.

Comments in submissions

People of non-English speaking backgrounds

2.27 Consultations with people of non-English speaking backgrounds raised several issues. Loss of identity associated with being in a minority, language

48. The level of unmet need for disability services in Australia is discussed in Australian Institute of Health and Welfare, *Demand for Disability Support Services in Australia: Size, Cost and Growth* (1997).

barriers and lack of family and other support may add further difficulties for people with disabilities:

Where we come from, we were the majority. Here [in Australia] we're a minority. You lose your identity. You're not what you used to be.⁴⁹

2.28 Language difficulties may make a person with a disability more dependent on his or her family. Services may not take account of cultural differences. For example, in cultures where people traditionally live at home until they are married, encouraging an unmarried person to leave the family home and to live independently may be inappropriate.⁵⁰ In some cultures, a disability may be a source of shame. Participants in focus groups suggested culturally specific services should be provided within more general welfare organisations:

We need culturally specific self-help groups.⁵¹

2.29 Some of the people consulted regularly used the Multicultural Disability Advocacy Association, viewing it as their "safety net", linking them with the broader community and to the few services they are able to access. People considered that as the Multicultural Disability Advocacy Association is:

the only service that speaks to them in their own language, it is an understatement to say that it is an essential service.⁵²

Aboriginal and Torres Strait Islander people with a disability

2.30 Consultations with Aboriginal people with a disability raised a number of issues. Aboriginal people with a disability may be cared for by a range of people in the community, not just close relatives. These carers may find this care a strain but may have only limited access to respite care.⁵³ Some Aboriginal people stated that they had encountered discrimination when dealing with services. They preferred access to services with Aboriginal staff,

49. RR 9 at para 1.71.

50. RR 9 at para 1.69.

51. RR 9 at para 1.72.

52. RR 9 at para 2.84.

53. RR 9 at para 1.63.

or services which were at least known to be sensitive to Aboriginal culture, and which are already used by other Aboriginal people.⁵⁴

Sexual orientation

2.31 During consultations, the Commission was told that gay and lesbian people with a disability were sometimes denied the right to express their sexuality.⁵⁵

The Commission's view

2.32 Submissions and consultations showed support for including a reference to people of non-English speaking backgrounds and Aborigines and Torres Strait Islanders in the objectives of the DSA to help meet the unique cultural and social needs of people from these backgrounds.⁵⁶ There was also support for providing recognition and support in the DSA for sexual orientation.⁵⁷ The Commission agrees that people with a disability should have the same access to services and support as other Australians, irrespective of their background or sexual orientation. Providing for cultural and linguistic diversity, and gender and sexual orientation, should be an objective of the DSA.

Recommendation 8

Section 3(b) of the DSA should be amended to include a new sub-paragraph to ensure the provision of services that take account of cultural and linguistic diversity, and gender and sexual orientation.

54. RR 9 at para 1.63.

55. *Consultation* (Consumers, Sydney).

56. See, for example, Disability Council of NSW, *Submission at 2*; Association NSW, *Submission*; Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*; and NCOSS, *Submission*.

57. See, for example, Kingsgrove Community Access Service, *Submission*; The Spastic Centre of NSW, *Submission*; and Multicultural Disability Advocacy Association of NSW Inc, *Submission*.

Recommendation 9

The applications of principles in Schedule 1 clause 2(e) should be amended to read “to meet the needs of persons with disabilities whose experience reflects their gender, cultural or linguistic background, sexual orientation or Aboriginal or Torres Strait Islander identity”.

RECOGNISING FAMILIES AND CARERS

Provisions in the DSA

2.33 Families, carers and significant others play a very important role in supporting and advocating for people with a disability. Application 2(m) refers to the need for services and programs for services to “recognise the importance of preserving the family relationships” of people with disabilities. This provision does not recognise that people with disabilities may have other important relationships that should be recognised. Nor does the wording reflect the changing, dynamic nature of family relationships.

Families and carers play an important role

2.34 Submissions emphasised the important role that families and carers play in supporting and advocating for people with a disability:

The rights of the family to receive services to support the person with a disability, where that person is a child or chooses to remain with the family, are critical to meeting the needs of people with disabilities.⁵⁸

Carers NSW considered that the dominant focus of the legislation should be people with disabilities and their right to self-determination. However, it stated that:

58. NCOSS, *Submission* at 2.

the Act does not provide a good enough framework for protection and support for those people with disabilities who need a lot of support some or all of the time to make or communicate their decisions and who are therefore more vulnerable. This is especially so with people who have severe or profound disabilities ...⁵⁹

When the person with the disability needs a lot of support to make or communicate decisions, effective and real consultation with families by service providers becomes essential. Families who are the primary family/carers, must be seen as allies or partners in the provision of care. Their knowledge and understanding of the person with the disability is valuable and important.⁶⁰

2.35 Carers NSW outlined the specific goals that carers of people with a disability have, in addition to the goals that they share with the people they care for. Those goals are:

- sufficient and appropriately planned support services to enable carers to continue providing care;
- recognition and understanding of the role of family/carers, their knowledge and understanding of the person with the disability (whether or not the person lives with them); and
- the right of family and carers to an independent and fulfilling life for themselves.⁶¹

2.36 The Australian Federation of Carers expressed concern that there is no real consideration of carers' needs in the DSA:

The Carer of a high need patient is giving up their daily life and in a time of increasingly "user pays" are often prevented from preparing for their own self sufficiency as they age ... the Carer has to be on duty at least six days a week or they do not qualify for their Pension ... any support worker assisting the care of the Disabled, receives full and proper reward for their endeavours including sick leave, holiday pay, superannuation and Workers Compensation. The Carer receives none

59. Carers NSW Inc, *Submission* at 3.

60. Carers NSW Inc, *Submission* at 4.

61. Carers NSW Inc, *Submission* at 3-4.

of these. Their lives are on hold and in some cases they are “being disabled” themselves as a direct result of their caring role.⁶²

Some submissions supported giving greater recognition to families, carers and significant others in the DSA.⁶³

Focus should be on the rights and interests of people with disabilities

2.37 Nearly all submissions considered that the focus of the DSA and service provision should be on the rights and interests of the person with the disability.⁶⁴ Although many submissions recognised the fundamental role of the family in the lives of many people with a disability, there was some concern that giving increased emphasis to the role of families and carers might detract from this focus.

The Commission’s view

Family support is important

2.38 The role of the family in the life of people with disabilities appears to be most critical where the level of disability is very high and involves intellectual or communication impairment. It is also very important for the care and support of children. Families of people with a disability must have support to enable them to continue to care for the person with a disability adequately and to be able to have a reasonable life for themselves. In most cases (but not necessarily all) the principles and applications of principles

62. Australian Federation of Carers, *Submission* at 1.

63. Australian Federation of Carers, *Submission*; and Carers NSW Inc, *Submission*.

64. Australian Quadriplegic Association Ltd (NSW), *Submission*; Disability Safeguards Coalition, *Submission*; Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*; Disability Council of NSW, *Submission*; D Newey, *Submission*; NCOSS, *Submission*; Multicultural Disability Advocacy Association of NSW Inc, *Submission*; Nepean Independent Living Committee Inc, *Submission*; Western Sydney Intellectual Disability Support Group Inc, *Submission*; and NSW Council for Intellectual Disability, *Submission*.

will be best served in relation to the person with a disability if the family receives support and recognition, enabling them to have an ongoing role in the life that person. However, the lack of support for the families and carers of people with a disability is not a result of a defect in the DSA, but appears to stem from a lack of resources for disability services generally, and perhaps an inadequate quality assurance process.

Applications of principles should be strengthened

2.39 The Commission does not support shifting the balance or focus of the DSA away from the primary importance of people with a disability. There is concern that any major change may undermine the rights of people with a disability. The DSA gives recognition to the importance of family relationships in service provision.⁶⁵ In the Commission's view, this is the appropriate part of the DSA in which to give recognition to the family. However, it should be strengthened by requiring services to support family and other relationships, rather than simply recognise their importance. The word "preserve" does not recognise the dynamic nature of relationships and should be removed. The range of relationships that may be important to a person with a disability should be recognised.

65. DSA Sch 1 cl 2(m).

Recommendation 10

The applications of principles in Schedule 1 clause 2(m) should be amended to read “to support the relationships that persons with disabilities have with their families, carers and significant others”.

SCOPE OF THE DSA

Boarding houses are not covered

2.40 Approximately 2,000 people live in 126 boarding houses in NSW licensed under the *Youth and Community Services Act 1973* (NSW).⁶⁶ Most residents of licensed boarding houses have a disability with wide-ranging support needs.⁶⁷ Boarding houses are private-for-profit organisations and are not funded under the DSA. Therefore, they need not comply with the objects, principles and applications of principles. In fact, a number of reports in recent years have drawn attention to the poor physical condition of many boarding houses and residents’ lack of enforceable rights, in particular, their lack of tenancy rights.⁶⁸

2.41 In its 1997/98 Annual Report, ADD reported that the boarding house sector had been in crisis during the period under review.⁶⁹ It could be argued that the high percentage of boarding house residents with disabilities is indicative of the lack of suitable accommodation for people with disabilities

66. NSW, Minister for Community Services, *Boarding Houses-Fact Sheet* (1998). Boarding houses in which two or more people with a disability live must be licensed: *Youth and Community Services Act 1973* (NSW) s 11.

67. NSW, Minister for Community Services, *Boarding Houses-Fact Sheet* (1998) at 2; and NSW, Task Force on Private “For Profit” Hostels, *Report of the Task Force on Private “For Profit” Hostels* (1993) Vol 1 at i.

68. See, for example, Australia, Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with a Mental Illness* (1993) Ch 11; and Coalition for Approved Supported Accommodation for People with Disabilities, *Room to Move: A Position Paper on Licensed Boarding Houses* (Sydney, 1998).

69. NSW, ADD, *Annual Report 1996/97* at 47.

in NSW. As a result, a two-tier system of accommodation has developed: accommodation services funded under the DSA to which the objects, principles and applications of principles apply; and licensed boarding houses.

Views in submissions

2.42 In submissions, opinion was divided as to whether licensed boarding houses and other services not funded under the DSA should be regulated by that Act. A number of submissions noted that licensed boarding houses should be regulated under the DSA.⁷⁰ Others were of the view that all services providing support for people with a disability should come under the DSA.⁷¹ The Disability Safeguards Coalition suggested alternative ways of protecting people using non-DSA services, such as:

- improved licensing;
- accreditation;
- links with the CSC or the ADT;
- access to advocates; and
- access to Home and Community Care (“HACC”) services.⁷²

2.43 The Disability Safeguards Coalition emphasised the importance of protecting residents of boarding houses, given the likely increase in their numbers over time. The New South Wales Council of Social Service (“NCOSS”) suggested that boarding houses should be regulated under the *Residential Tenancies Act 1987* (NSW) and improved licensing⁷³ procedures should be included in the relevant authority’s section 9 plan.⁷³ The Local Government and Shires Association of NSW agreed that boarding houses residents should have tenancy rights and access to an independent complaints

70. See, for example, Disability Council of NSW, *Submission*; D Newey, *Submission*; NCOSS, *Submission*; Dunrossil Challenge Foundation Ltd, *Submission*; Multicultural Disability Advocacy Association of NSW Inc, *Submission*; and Physical Disability Council of NSW Inc, *Submission*.

71. The Northcott Society, *Submission*; and ACROD Ltd NSW Division, *Submission*.

72. Disability Safeguards Coalition, *Submission* at 5.

73. NCOSS, *Submission*. See Ch 4 for a discussion of section 9 plans.

mechanism.⁷⁴ Several submissions suggested that boarding houses should be regulated under CAMA.⁷⁵

2.44 A number of submissions considered the funding and other implications of expecting boarding houses to comply with the objects, principles and applications of principles under the DSA. One submission noted that it is unrealistic to expect boarding houses to comply with the DSA unless the Government is prepared to fund them.⁷⁶ Another argued against extending the DSA to private-for-profit services because it would make the Government responsible for subsidising them.⁷⁷ The NSW Government considered that it would be premature to extend the DSA to other services until all services that are currently funded under the Act conform to the fullest extent.⁷⁸ The Local Government and Shires Association of NSW argued that bringing boarding houses under the DSA would not improve standards. It was of the view that the poor standard of boarding houses was due to residents' high needs and a lack of resources to support them, rather than non-compliance with the DSA. It also noted that requiring compliance with the DSA may result in non-conforming boarding houses closing down.⁷⁹

The Commission's view

2.45 There is no immediate solution to the problems associated with licensed boarding houses. While there is a shortage of suitable housing support for people with a disability many will live in unsuitable accommodation. The Commission acknowledges that ADD is enforcing boarding house licensing provisions more vigorously than in the past, and that this has resulted in some closures.⁸⁰ It is also aware that the Government has announced that new funds will be allocated to the sector.⁸¹ In its review

74. Local Government and Shires Associations of NSW, *Submission*.

75. Local Government and Shires Associations of NSW, *Submission*; Coalition for Approved Supported Accommodation, *Submission*; and *Confidential Submission 1*.

76. New Horizons Enterprises Ltd, *Submission*.

77. NSW Council for Intellectual Disability, *Submission*.

78. NSW Government, *Submission*.

79. Local Government and Shires Associations of NSW, *Submission*.

80. C Ferguson, *Submission* at 15-17.

81. In October 1998, the Government announced a three-year \$66 million strategy to improve services for people with disabilities living in

of CAMA, the Commission has recommended that licensed boarding houses be included in the jurisdiction of the CSC.⁸² This will provide some protection for boarding house residents. The Commission does not recommend any changes to the DSA in relation to boarding houses.

licensed residential centres or “licensed boarding houses”: NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 15 October 1998, the Hon F Lo Po, MP, Minister for Community Services at 8445. However, it was reported that little of this money had actually been provided, and that licensed boarding houses were continuing to close down: A Horin, “Homes for the Disabled Shut up Shop” *Sydney Morning Herald* (6 May 1999) at 10.

82. Report 90 at para 3.146-3.150.

3. Planning

- Introduction
- Current planning
- Views expressed in submissions
- The Commission's view

INTRODUCTION

3.1 To ensure a fair and efficient distribution of resources, a funding program should have a planned approach. This chapter considers the provisions of the DSA that relate to planning disability services. The DSA provides that it is an object to:

ensure that designated services for persons with disabilities are developed and reviewed on a periodic basis through the use of forward plans.¹

Whilst regular review of service programs and appropriate planning is essential, this objective is too broad and vague to be of real use. It does not state the outcome sought from the development and review, nor is it clear what role forward plans play in reviewing disability service provision. The objective may also not go far enough in facilitating other goals of the DSA. For example, advancing the object in section 3(b)(i) to ensure that the services provided under the DSA complement other services available generally in the community, requires adequate planning. Data must be collected concerning the needs of people with a disability, and whether the services generally available meet (or are able to meet) those needs.

CURRENT PLANNING

3.2 In its most recent Annual Report, ADD described the activities of the local area planning groups in 16 planning areas in NSW. It also listed problems identified in the local area planning process. These included:

- the need for improved demographic data;
- the need for more accurate information on levels of service provision;
- the need for co-ordination between the Disability Services Program and HACC funding processes;
- a lack of skills in the planning groups in analysing and interpreting technical information;

1. DSA s 3(f).

- the inappropriateness of groups identifying new funding priorities in order of importance based on limited information;
- the need to co-ordinate consultations about planning with other government agencies;
- the need for reasonable time frames to undertake planning; and
- the need for a better mix of service providers and consumers within the local area planning groups.²

3.3 It was anticipated that population group planning and a regional planning framework (to be introduced in 1998-99) would help address some of those problems. The population group planning model would provide data on the supply and demand for services administered by ADD within areas, and the regional planning framework will build on that data through consultation. ADD will then produce plans for each of the six ADD regions, including data from the local area groups. The regional plans are expected to provide a clear picture of service provision within areas and include agreed targets for service provision at a local level.³

IEWS EXPRESSED IN SUBMISSIONS

Need for a planning framework

3.4 Submissions were concerned about the “gross inequities in the distribution and allocation of disability programs and services across the State”.⁴ The Commission was told at its public seminars that there are significant gaps in service provision in some areas and that planning is necessary to address these. For example, the number and range of services in rural areas is often limited.⁵ Most submissions which addressed this issue commented that the DSA should provide for planning.⁶ People with

2. NSW, ADD, *Annual Report 1997/98* at 26.

3. NSW, ADD, *Annual Report 1997/98* at 22-26.

4. See, for example, People with Disabilities (NSW) Inc, *Submission* at 21.

5. RR 9 at para 1.77.

6. Disability Information Service Inc, *Submission*; Nepean Independent Living Committee Inc, *Submission*; Western Sydney Intellectual Disability Support Group Inc, *Submission*; Autism Association of NSW, *Submission*; The Spastic Centre of NSW, *Submission*; and *Confidential Submission 1*.

Disabilities NSW Inc noted that the DSA ought to be amended to provide a statutory framework for planning.⁷ Submissions suggested that the framework should include the following requirements:

- relevant data should be collected and published;⁸
- people with a disability and their associates should be consulted;⁹
- detailed plans should be prepared, published, monitored and evaluated;¹⁰
- a plan should reflect local priorities;¹¹ and
- programs and services should be allocated equitably.¹²

3.5 In submissions and during consultations, people referred to the inconsistency in funding between services.¹³ The view was expressed that overcoming inconsistency would require detailed co-ordination arrangements between specialist and generic services at regional and State levels.¹⁴

Need for co-ordination

3.6 An important part of planning is co-ordination with existing services, agencies and Departments. Submissions and consultations emphasised the importance of co-ordination between agencies involved with people with a disability.¹⁵ Services delivered to people with a disability should be “seamless”, including services administered by different departments and

7. People with Disabilities (NSW) Inc, *Submission* at 36.

8. People with Disabilities (NSW) Inc, *Submission*.

9. See, for example, Autism Association of NSW, *Submission*.

10. See, for example, Disability Information Service Inc, *Submission*; and Western Sydney Intellectual Disability Support Group Inc, *Submission*.

11. Western Sydney Intellectual Disability Support Group Inc, *Submission*.

12. Nepean Independent Living Committee Inc, *Submission*; and People with Disabilities (NSW) Inc, *Submission*.

13. Dunrossil Challenge Foundation Ltd, *Submission*.

14. People with Disabilities (NSW) Inc, *Submission*.

15. D Newey, *Submission*; Autism Association of NSW, *Submission*; NSW Council for Intellectual Disability, *Submission*; Deaf Society of NSW, *Submission*; The Spastic Centre of NSW, *Submission*; and *Confidential Submission 1*.

provided under different legislation.¹⁶ Submissions argued that co-ordination is crucial because it:

- makes it easier for Aboriginal and Torres Strait Islander people with a disability and those from non-English speaking backgrounds to choose services that are appropriate in terms of language, culture and religion;¹⁷
- reduces problems involved in dealing with multiple agencies;¹⁸
- ensures privacy, trust and efficiency of assessment, and facilitates communication and referral.¹⁹

3.7 NCOSS argued that co-ordination can lead to collaborative service provision. Co-ordination is especially important for people with disabilities with high and complex needs, challenging behaviours, Aboriginal and Torres Strait Islander people, people from other cultural and linguistic backgrounds, people who live in remote or isolated areas and people who are financially disadvantaged. At present under the DSA, good co-ordination depends almost solely on the goodwill of individual workers. As a result, the DSA should refer to co-ordination as a required element of program implementation and service provision.²⁰

THE COMMISSION'S VIEW

Complexity of the disability services sector

3.8 The disability services sector in NSW is one of the most complex sectors in the community services area. Many service providers are charitable organisations which contribute a significant portion of their own funds. The amount services receive would appear to be based more on history than on the numbers or needs of those for whom they provide services. Service providers transferred from Commonwealth to State administration (about 25% of all services) have been funded, and continue to be funded, differently

16. ACROD Ltd NSW Division, *Submission*.

17. Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*.

18. DeafBlind Association NSW, *Submission*.

19. NCOSS, *Submission*.

20. NCOSS, *Submission* at 10.

from those that have always been administered by NSW. Services operated by DOCS are funded on yet another basis. Some areas of NSW and Sydney have greater access to services than others.

Planning is important

3.9 Good public policy requires that the process by which public money is distributed for public programs should be transparent. The funds should be equitably distributed on the basis of identified criteria. ADD recognises that current resources are distributed inequitably across the State.²¹ Where resources are scarce this may cause a number of difficulties. Consumers with equal levels of need may have to compete against each other for assistance. Those with the most vocal advocates may receive services while those with equal or even greater need do not receive support. Service providers operating from very different funding bases are required to comply with the same financial accountability and quality standards.²² In the context of this complexity and inequity, very detailed planning and co-ordination is needed to work towards achieving an equitable and well-administered funding program.

DSA should provide for planning

3.10 To underline the importance of planning, the DSA should require the Minister to prepare a four-year plan for the provision of disability services. It should also set out the process the Minister should follow in preparing the plan. The process should include:

- identifying appropriate planning areas;
- collecting the best available data on demand, supply and unmet need in these areas;
- consulting with all relevant stakeholders;

21. NSW, ADD, *Annual Report 1996/97* at 14.

22. *Consultation* (ACROD NSW Division, Sydney).

- establishing mechanisms for co-operating with mainstream service providers, including agencies providing services and support for children;
- taking into account the needs and views of people of non-English speaking backgrounds and Aborigines and Torres Strait Islanders; and
- identifying priorities for service provision by location and type of service.

3.11 These changes will support the Commission's earlier recommendation to include a new object "to ensure that access to services is determined on a fair and equitable basis".²³ They should also help to achieve the object in section 3(b)(i) by enabling ADD to identify better the specialist services needed to complement services generally available to people with disabilities in the community. To ensure transparency, the Minister should publish the four-year plan for service provision. The plan should identify the anticipated funds available, and set out how and when the funds are to be spent. The Minister should update the plan annually and publish the updated version each year. This would also help self-funded organisations to plan their service provision.

Recommendation 11

Section 3(f) of DSA should be repealed and replaced with a new object "to ensure that comprehensive forward plans for disability programs are developed, published and reviewed on a regular basis".

Recommendation 12

The DSA should be amended to require the Minister to prepare and publish a four-year plan within six months of this amendment coming into effect. It should require the Minister to review, update and publish the plan every year. It should provide that in preparing the plan the Minister must:

23. See Recommendation 7 at para 2.25.

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- **identify appropriate planning areas;**
 - **collect the best available data on demand, supply and unmet need in these areas;**
 - **consult with all relevant stakeholders;**
 - **establish mechanisms for co-operating with generic and other relevant service providers, including agencies providing services and support for children;**
 - **take into account the needs and views of people from non-English speaking backgrounds and Aboriginal and Torres Strait Islander people; and**
 - **identify priorities for service provision by location and type of service.**

The plan must identify the funds available, and set out how and when the funds are to be spent.

4. Access to Mainstream Services

- Introduction
- Requirements of section 9
- Other law and policy
- Limitations of section 9
- Views in submissions
- The Commission's views

INTRODUCTION

4.1 One of the objects of the DSA is to ensure the provision of services that:

further the integration of persons with disabilities in the community and complement services available generally to such persons in the community.¹

Section 9 aims to give effect to this object. It is designed to ensure that services available to the community as a whole are accessible by people with a disability. This chapter examines section 9 and other law and policy designed to ensure that services available to people in the community generally are also available to people with a disability. It considers the views expressed in consultations and submissions, and recommends that section 9 be strengthened.

REQUIREMENTS OF SECTION 9

4.2 Section 9 requires government departments and agencies “to prepare, and make provision for the implementation of, a plan” that encourages the department or agency to provide services in a way that “furthers the principles and applications of principles”. The effect of section 9 is to extend the principles and applications of principles to most government bodies,² and to *all* services provided by those bodies, whether or not they are provided specifically for people with a disability.³ Departments and agencies were given until April 1995 to prepare their plans under section 9.⁴ The plans, and any amendments, must be made available to the public.⁵ They must also provide for periodic reports of the progress of the department or agency in

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1. DSA s 3(a)(i).
 2. Section 9 imposes the requirement on a “public authority”. This means a government department, administrative office or declared authority specified in Sch 1, 2 or 3 to the *Public Sector Management Act 1988* (NSW), and includes an authority prescribed as a public authority by the Regulation: DSA s 9(7).
 3. DSA s 9(5).
 4. DSA s 9(3); and NSW, Social Policy Directorate and Office of the Director of Equal Opportunity in Public Employment, *NSW Government Disability Strategic Plan: Joint Agency Statement* (1994) at 1.
 5. DSA s 9(4).

implementing the plan.⁶ Departments and agencies must include in their annual reports a statement setting out the progress during the reporting year in implementing the disability plan.⁷

OTHER LAW AND POLICY

Disability Discrimination Act 1992 (Cth)

Discrimination is unlawful

4.3 The *Disability Discrimination Act 1992* (Cth) makes it unlawful for a person who provides goods or services, or makes facilities available (whether for payment or not), to discriminate against someone on the ground of his or her disability, or the disability of an associate:

- by refusing to provide the goods or services, or to make the facilities available;
- in the terms or conditions on which the goods or services are provided, or the facilities made available; or
- in the manner in which the goods or services are provided, or the facilities made available.⁸

4.4 Discrimination is not unlawful if providing the goods or services, or making the facilities available, would impose unjustifiable hardship on the person providing the goods or services, or making the facilities available.⁹ In deciding what is “unjustifiable hardship”, all the relevant circumstances of the particular case must be taken into account.¹⁰ A person who has been discriminated against can make a complaint to the Human Rights and Equal Opportunity Commission (“HREOC”), which may investigate the complaint.

6. DSA s 9(2).

7. *Annual Reports (Departments) Regulation 1995* (NSW) cl 9 and Sch 1; and *Annual Reports (Statutory Bodies) Regulation 1995* (NSW) cl 15 and Sch 1.

8. *Disability Discrimination Act 1992* (Cth) s 24(1).

9. *Disability Discrimination Act 1992* (Cth) s 24(2).

10. *Disability Discrimination Act 1992* (Cth) s 11.

Action plans

4.5 The *Disability Discrimination Act 1992* (Cth) states that service providers may prepare and implement an action plan.¹¹ The action plans must contain provisions relating to:

- devising policies and programs to achieve the objects of the Act;
- the communication of policies to employees and other people;
- the review of practices to identify any areas of discrimination;
- setting goals and targets against which the plan's success can be assessed;
- other means of evaluating policies and programs; and
- appointing people within the organisation to implement the plan.¹²

Action plans may be lodged with HREOC.¹³ HREOC may sell the plans to the public for a prescribed fee.¹⁴

Anti-Discrimination Act 1977 (NSW)

4.6 The *Anti-Discrimination Act 1977* (NSW) prohibits, among other things, discrimination on the ground of disability in the provision of goods and services (whether for payment or not). It is unlawful for a person who provides goods or services to discriminate either:

- by refusing to provide the person with those goods or services; or
- in the terms on which he or she provides the person with the goods or services.¹⁵

As in the *Disability Discrimination Act 1992* (Cth), discrimination on the ground of disability is not unlawful if providing the goods or services would impose “unjustifiable hardship” on the person providing them.¹⁶

11. *Disability Discrimination Act 1992* (Cth) s 60.

12. *Disability Discrimination Act 1992* (Cth) s 61.

13. *Disability Discrimination Act 1992* (Cth) s 64.

14. *Disability Discrimination Act 1992* (Cth) s 65.

15. *Anti-Discrimination Act 1977* (NSW) s 49M(1).

16. *Anti-Discrimination Act 1977* (NSW) s 49M(2).

4.7 Part 9A of the *Anti-Discrimination Act 1977* (NSW) requires all NSW public sector agencies¹⁷ to develop an equal opportunity management plan. The plan should include policies and programs designed to eliminate discrimination¹⁸ and to promote equal opportunity for women, members of racial minorities and physically handicapped persons.¹⁹ Agencies must give a copy of their management plan to the Director of Equal Opportunity in Public Employment and must submit annual reports to the Director on the progress the agency has made in the implementation of the plan.²⁰

Disability Direction: Tomorrow's Blueprint

4.8 In November 1994, the NSW Government published a set of guidelines called *Disability Direction: Tomorrow's Blueprint* to direct public authorities in the preparation of their section 9 plans.²¹ Three Key Result Areas were identified: access, employment and disability-specific services.²² As noted above,²³ plans were due by April 1995. Most public authorities submitted plans of some form as required.

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17. Part 9A specifically applies to public employers. This includes all departments specified in certain schedules to the *Public Sector Management Act 1988* (NSW), all declared authorities under the *Public Sector Management Act 1988* (NSW) and the Police Service. In addition, s 122B(1)(d) allows for extending coverage by proclamation. It is by the use of this proclamation provision that universities and health service bodies are now covered.
 18. Note: only on the grounds of race, sex, marital status and physical impairment.
 19. Section 122J of the *Anti-Discrimination Act 1977* (NSW) provides some guidance on matters that should be included in such a plan. The objects of Part 9A are contained in s 122C of the Act.
 20. *Anti-Discrimination Act 1977* (NSW) s 122L.
 21. NSW, Office on Disability, Social Policy Directorate, *Disability Direction: Tomorrow's Blueprint – The New South Wales Government Disability Strategic Plan* (1994).
 22. NSW, Office on Disability, Social Policy Directorate, *Disability Direction: Tomorrow's Blueprint – The New South Wales Government Disability Strategic Plan* (1994) at 23-31.
 23. See para 4.2.

Disability Policy Framework and Guidelines

Framework

4.9 After consultation, the NSW Government released its Disability Policy Framework and Guidelines in December 1998. The Disability Policy Framework provides revised and more detailed direction to departments and agencies on how to develop their section 9 plans. As with the plans developed under the Commonwealth Disability Discrimination Act,²⁴ this document refers to section 9 plans as “Disability Action Plans”.

4.10 The Disability Policy Framework comprises principles, a goal, objectives and strategies. The goal is:

a society in which individuals with disabilities and their carers live as full citizens with optimum quality of life, independence and participation.²⁵

24. *Disability Discrimination Act 1992* (Cth) s 61. See para 4.3-4.5.

25. NSW, ADD and NSW Health, *NSW Government Disability Policy Framework* (1998) at 5.

4.11 There are three objectives:

- the achievement of a planned, co-ordinated and flexible approach to policy and service provision in NSW for and with people with disabilities and their carers;
- the creation and promotion of opportunities, services and facilities which enable people with disabilities and their carers to participate in the wider community and to attain a better quality of life; and
- providing ways for State Government service providers to measure and report on their progress in increasing access for people with disabilities.²⁶

Guidelines

4.12 The Disability Policy Guidelines are designed to help departments and agencies, and participating local councils,²⁷ to develop their section 9 plans. They outline the disabilities that should be covered by the plans, what plans should include and the priority areas for government departments and agencies. They include model formats for section 9 plans and annual reports. Section 9 plans developed in accordance with the Disability Policy Framework and Guidelines are taken to comply with both the DSA and the *Disability Discrimination Act 1992* (Cth).²⁸

4.13 The Disability Policy Guidelines state that government departments and agencies must:

- change the priorities of their existing programs and re-allocate their resources more appropriately to meet the needs of people with disabilities;
- submit to ADD a Disability Action Plan drawn up according to the Guidelines, in December of every third year (beginning in 1999);
- submit to ADD each year (beginning in 1999) the part of their annual report that demonstrates progress in achieving the goals contained in their Disability Action Plan; and

26. NSW, ADD and NSW Health, *NSW Government Disability Policy Framework* (1998) at 5.

27. Local councils may, but need not, prepare s 9 plans.

28. NSW, ADD and NSW Health, *NSW Government Disability Policy Framework* (1998) Guidelines at 2.

- include performance measures aimed at increasing the accessibility of services for people with disabilities which are tied to the performance agreements of Chief Executive Officers (“CEOs”) and Senior Executive Service (“SES”) members.²⁹

4.14 ADD must prepare an annual report for the Minister for Disability Services and the Minister for Health to be presented to the Social Justice Committee of Cabinet and to Parliament. The report must detail the progress made by agencies in achieving the commitments set out in their plans.³⁰

LIMITATIONS OF SECTION 9

4.15 Section 9 imposes on government departments and agencies an obligation to prepare a plan and to make provision for implementation. It also imposes an obligation on agencies to provide periodic reports outlining the progress made in implementing the plan, and to note that progress in each agency’s annual report. It is not clear, however, whether section 9 imposes on departments and agencies an obligation to *implement* the plan, since it appears that no consequences flow from the failure to implement. Until the adoption of the Disability Policy Framework and Guidelines, there was no agency with responsibility for monitoring plans or their implementation. Furthermore, section 9 does not impose obligations on all government agencies. For example, the New South Wales Police Service and local government authorities are not required to prepare plans. Consequently, section 9 may not be as effective as it could be in ensuring that government departments and agencies provide services in a way that furthers the principles and applications of principles.

4.16 This is in contrast to Western Australia, where the *Disability Services Act 1993* (WA) provides that each public authority must prepare *and implement* a disability service plan.³¹ Authorities which are required to table an annual report must include in it an update on the implementation of the

29. NSW, ADD and NSW Health, *NSW Government Disability Policy Framework* (1998) Guidelines at 3.

30. NSW, ADD and NSW Health, *NSW Government Disability Policy Framework* (1998) Guidelines at 5.

31. *Disability Services Act 1993* (WA) s 28.

plan. Other agencies must report on implementation of the plans to the Disability Services Commission before September each year.³²

VIEWS IN SUBMISSIONS

Barriers still exist

4.17 The Commission's consultations and focus groups suggested that participation by people with disabilities in the community was still considerably impeded because of the failure of public authorities to address the issue of barriers to access. For young people, access to mainstream schools was a major concern:

If there were more kids with disabilities at school we wouldn't be seen as so different. The teachers and the kids need to know more about disabilities. It should be taught at school. At the moment nobody knows anything about disability.³³

4.18 Access to public transport also proved to be a significant problem, restricting young people from participating in mainstream activities out of school hours. Participants in focus groups noted that greater access to public transport would improve their independence:

I won't be able to drive but I would like to use the bus. I could travel independently if the bus was accessible.³⁴

I can't use stairs and there are too many stairs at my station. I want to use the train but I can't.³⁵

Lack of commitment to section 9

4.19 Consultations and some submissions noted a lack of commitment on the part of Government in implementing section 9 plans. One submission

32. *Disability Services Act 1993* (WA) s 29.

33. RR 9 at para 2.42.

34. RR 9 at para 2.42.

35. RR 9 at para 2.71.

argued that the Government paid “lip service” to section 9.³⁶ Another considered that section 9 plans had the capacity to remove physical barriers and change attitudes, but suggested that there was a lack of political will and commitment to implement the plans.³⁷

Section 9 should be strengthened

4.20 Most submissions that addressed this issue were of the view that section 9 should be strengthened, as it offered the “strongest possibilities of making a real difference in people’s lives”.³⁸ Submissions also suggested improvements to section 9. The main focus in submissions was the need to ensure accountability on the part of government departments and agencies for implementing section 9 plans. This concern was also raised by the Disability Council in their report on consultation with people with a disability.³⁹ Responsibility for the plans and their implementation should be at the highest level. Some submissions considered that the CEO of each department or agency should be responsible for developing a plan, and the Minister should be responsible for approving, monitoring and reporting on its implementation.⁴⁰

36. NSW Council for Intellectual Disability, *Submission*.

37. Australian Quadriplegic Association Ltd (NSW), *Submission*.

38. Multicultural Disability Advocacy Association of NSW Inc, *Submission* at 7.

39. NSW, Disability Council of NSW, *Consultation and People with a Disability: Issues for Public Sector Managers in NSW* (1997) at 51.

40. Disability Safeguards Coalition, *Submission*; and Institute for Family Advocacy and Leadership Development Association Inc, *Submission*.

4.21 Other submissions suggested the following:

- Clear objectives and performance indicators should be built into each department's and agency's strategic plan, and reported against in the annual report.⁴¹
- The development and implementation of section 9 plans should be included in the performance agreements signed by CEOs and SES staff.⁴²
- Plans should be monitored by an external body.⁴³ The CSC (or the ADT) should be able to hear complaints against the Minister's approval of plans.⁴⁴
- There should be a range of enforcement measures to ensure agencies produce and implement plans within a specified time-frame.⁴⁵

4.22 Participants in consultations also noted the failure of public authorities to take into account cultural and linguistic diversity when preparing their section 9 plans, and in providing services for, and consulting with, people of non-English speaking background and Aboriginal and Torres Strait Islander people.⁴⁶

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41. Australian Quadriplegic Association Ltd (NSW), *Submission*; and Citizen Advocacy NSW, *Submission*.
 42. Western Sydney Intellectual Disability Support Group Inc, *Submission*; and Physical Disability Council of NSW Inc, *Submission*.
 43. Australian Quadriplegic Association Ltd (NSW), *Submission*; D Newey, *Submission*; Citizen Advocacy NSW, *Submission*; Western Sydney Intellectual Disability Support Group Inc, *Submission*; and Multicultural Disability Advocacy Association of NSW Inc, *Submission*.
 44. Disability Safeguards Coalition, *Submission*; NCOSS, *Submission*; NSW Council for Intellectual Disability, *Submission*; Institute for Family Advocacy and Leadership Development Association Inc, *Submission*; and H Seares, *Submission*.
 45. NSW Statewide Disability Coalition, *Submission*; Disability Safeguards Coalition, *Submission*; D Newey, *Submission*; Western Sydney Intellectual Disability Support Group Inc, *Submission*; and Institute for Family Advocacy and Leadership Development Association Inc, *Submission*.
 46. Disability Council of NSW, *Submission*.

All government departments and agencies should be covered

4.23 Many submissions argued that all government departments and agencies, including local councils,⁴⁷ should be required to prepare and implement section 9 plans.⁴⁸ The Local Government and Shires Associations pointed out that many councils are in the process of preparing, with some having submitted, action plans under the *Disability Discrimination Act 1992* (Cth).⁴⁹ It noted that ADD has raised the possibility of local governments being included in section 9 of the DSA, but is concerned about resources and the possible overlap with plans prepared under the *Disability Discrimination Act 1992* (Cth).⁵⁰ Other submissions stated that all agencies providing a service to people with a disability should be required to have and implement a plan.⁵¹

THE COMMISSION'S VIEWS

4.24 The Commission considers that people with a disability should have the same right as others in the community to use services provided by State and local governments. Section 9 plans, like action plans under the *Disability Discrimination Act 1992* (Cth), play a very important role in identifying systemic problems and generating institutional change. They can help change attitudes about disability held by the organisation preparing the plan, and by the community generally. A section 9 plan which has been properly developed puts the onus on decision-makers within organisations to identify and remove discriminatory practices, and to overcome barriers people with a disability face in gaining access to services. A review of the *Disability Services Act 1993* (WA) reported that the development of plans has created

47. Australian Quadriplegic Association Ltd (NSW), *Submission*; D Newey, *Submission*; Physical Disability Council of NSW Inc, *Submission*; and H Seares, *Submission*.

48. Disability Safeguards Coalition, *Submission*; Paraquad NSW, *Submission*; NCOSS, *Submission*; Multicultural Disability Advocacy Association of NSW Inc *Submission*; ACROD Ltd NSW Division, *Submission*; NSW Council for Intellectual Disability, *Submission*; Deaf Society of NSW, *Submission*; H Seares, *Submission*; and *Confidential Submission 1*.

49. *Disability Discrimination Act 1992* (Cth) s 61.

50. Local Government and Shires Associations of NSW, *Submission* at 5.

51. NSW Statewide Disability Coalition, *Submission*; *Confidential Submission 1*.

more awareness about issues for people with disabilities than any other strategy, and has been a catalyst for systemic change.⁵²

4.25 The ultimate goal of section 9 is to ensure that all services provided by government agencies and available to the community as a whole are accessible to people with a disability wherever possible. However, from the Commission's consultations it appears that this has not occurred, and that the section 9 process has largely failed to achieve its aims and produce real change. The Commission acknowledges that a number of the issues raised in submissions have been addressed by the Disability Policy Framework and Guidelines. They do not, however, have the force of law and may therefore lack the necessary power to generate substantial change.

Extend the scope of section 9

4.26 In the Commission's view, section 9 should apply to all government departments and agencies. The Commission notes that many municipal and shire councils have prepared, or are in the process of preparing, action plans under the *Disability Discrimination Act 1992* (Cth). Some councils are also voluntarily preparing section 9 plans in compliance with the Disability Policy Framework and Guidelines. The Commission acknowledges the resource implications of extending section 9 to include local government agencies. Nevertheless, the Commission considers that section 9 should apply to local government authorities after a period of transition, during which the problems associated with compliance may be addressed.

Improve section 9 plans

4.27 The Commission is of the view that the quality of section 9 plans could be improved in the following key areas:

- content;
- appointment of co-ordinators;

52. Western Australia, Minister for Disability Services, *Review of the Disability Services Act 1993 (WA): Ministerial Report to Parliament in Accordance with Section 57(5) of the Act* (1998).

- integration into corporate planning;
- inclusion in performance agreements of CEOs and SES officers;
- consultation; and
- monitoring and reporting obligations.

Content of section 9 plans

4.28 From the Commission's consultations, it appeared that the overall standard of section 9 plans completed in 1995 was poor. Although some plans were of a high standard, generally they failed to:

- address the organisation's core business;
- outline specific strategies and performance indicators, or timelines for their implementation;
- address the inclusion of the proposed strategies into the organisation's corporate business plan or budget; and
- demonstrate an awareness of the need for cross-portfolio planning.

4.29 The importance of a number of these issues (such as the need to address the core business of the organisation, and develop performance indicators and timeframes) is acknowledged in the Disability Policy Guidelines.⁵³ However, further guidance should be provided in the DSA on the specific information to be provided in section 9 plans. This includes:

- the policies and programs to be established in relation to all the organisation's core activities;
- how staff will be informed of those programs;
- how current practices will be reviewed;
- goals and targets;
- other ways of evaluating the policies and program;
- timeframes for implementation;
- the way in which issues of gender, sexual orientation, and cultural and linguistic diversity have been addressed; and
- the nominee in the organisation responsible for implementing the plan.

53. NSW, ADD and NSW Health, *NSW Government Disability Policy Framework* (1998) Guidelines at 3.

4.30 In developing plans, organisations should also address cross-portfolio issues. Whilst it is unnecessary to include such matters in the legislation, it would be beneficial for the Disability Policy Guidelines to address this topic. This is an area which ADD should consider in reviewing section 9 plans.

Appointment of section 9 plan co-ordinators

4.31 From consultations conducted by the Commission, it appeared that an important factor in the development of a high-quality section 9 plan was the appointment of a co-ordinator within the designated organisation to take responsibility for the plan and liaise with ADD. This is required currently under the Disability Policy Guidelines,⁵⁴ and is supported by the Commission. It is also important that co-ordinators have expertise in disability issues and clear support from senior levels within their organisation. In addition, ADD should provide training for co-ordinators and executives of public authorities on disability issues and section 9 planning.

Integration of section 9 plans into corporate planning

4.32 The Commission endorses the recommendation made by the Disability Council of NSW in their report on consultation with people with a disability, that section 9 plans should be integrated into each organisation's corporate planning processes and cycles.⁵⁵ It is only then that section 9 plans will be translated into action.

Performance agreements with CEOs and SES officers

4.33 As discussed above,⁵⁶ the Disability Policy Guidelines require that all government departments and agencies must include in their performance agreements with CEOs and SES officers performance measures related to increasing the accessibility of services for people with disabilities. This was recommended by the Disability Council of NSW in their report on consultation.⁵⁷ The Commission agrees that this is an important requirement.

54. NSW, ADD and NSW Health, *NSW Government Disability Policy Framework* (1998) Guidelines at 3.

55. NSW, Disability Council of NSW, *Consultation and People with a Disability: Issues for Public Sector Managers in NSW* (1997) at 51.

56. See para 4.12-4.14.

57. NSW, Disability Council of NSW, *Consultation and People with a Disability: Issues for Public Sector Managers in NSW* (1997) at 51 and 61.

Broad consultation required

4.34 The Commission was told that high-quality section 9 plans typically were developed after broad consultation both within and outside the agency. It is particularly important that people with disabilities and groups representing their interests be included in this consultation process. The Disability Council of NSW recommended in their report on consultation that section 9 plans include a quality assurance procedure for consultation with people with disabilities and a plan for its implementation.⁵⁸ The Commission supports this recommendation.

58. NSW, Disability Council of NSW, *Consultation and People with a Disability: Issues for Public Sector Managers in NSW* (1997) at 60-61.

Reporting and monitoring obligations

4.35 In the Commission's view, section 9 should include provisions to ensure that the progress of departments and agencies in implementing their plans is reported and monitored. Departments and agencies should be required to submit a plan to ADD for review every three years. They should also be required to submit to ADD their progress report each year. Each department and agency should be required to include a report of their progress in its Annual Report, and ADD should also continue to be required to report the progress of each agency in its annual report. These provisions mirror those in the annual reporting legislation,⁵⁹ but would have greater application by pertaining to those agencies not currently covered by those Acts. In addition, the Minister for Ageing and Disability should be required to report to Parliament each year on the progress all departments and agencies have made in implementing their section 9 plans.

4.36 For these reporting requirements to have substance, it is important that two other issues are addressed. First, agencies must provide detailed information on their progress towards implementing their section 9 plans against the specific performance measures and timelines outlined in their plans. This is currently a requirement under the Disability Policy Guidelines,⁶⁰ which the Commission supports. The Commission's consultations indicated that past practice in providing information in annual reports has varied considerably. For example, while some organisations have set out clearly their strategies, achievements and outcome measures in their annual report, others have made only brief mention of their section 9 plans in the context of reporting on Equal Employment Opportunity issues. It is also important that the annual reports outline not only the organisations' positive achievements in implementing their section 9 plans, but the areas in which the plans have not been implemented or in which the organisations have experienced problems. This will facilitate a much more accurate assessment of the implementation and impact of plans in practice.

4.37 Another key issue is the need for ADD to take a strong monitoring role in relation to section 9 plans. The Commission was told in consultations that there had been little feedback provided to organisations about their section 9 plans and their strengths and weaknesses. Under the Disability Policy Guidelines, ADD has responsibility for monitoring section 9 plans. It is

59. *Annual Reports (Departments) Regulation 1995* (NSW) cl 9 and Sch 1; *Annual Reports (Statutory Bodies) Regulation 1995* (NSW) cl 15 and Sch 1.

60. NSW, ADD and NSW Health, *NSW Government Disability Policy Framework* (1998) Guidelines at 3.

required to “receive *and respond to*” section 9 plans, and “offer advice and assistance” on their development and implementation.⁶¹ To strengthen this, the legislation should require ADD to review all section 9 plans and provide written reports to departments and agencies on the extent to which their plans comply with the principles and applications of principles of the DSA.

Recommendation 13

Section 9 of the DSA should apply to all government departments and agencies and, after a phasing-in period, to local government authorities.

Recommendation 14

Section 9 of the DSA should be amended to require every government department and agency to prepare and implement a plan that includes the following information:

- **the policies and programs the authority will establish to achieve compliance with the objects, principles and applications of principles in relation to all its core activities or areas of operation;**
- **how its employees will be informed about these policies and programs;**
- **how practices within the authority will be reviewed to identify any practices which do not comply with the objects, principles and applications of principles;**
- **the goals and targets, where these may reasonably be determined, against which the success of the plan in achieving compliance with**

61. NSW, ADD and NSW Health, *NSW Government Disability Policy Framework* (1998) Guidelines at 5 (emphasis added).

the objects, principles and applications may be assessed;

- **the other ways in which the authority will evaluate the programs and policies it plans to use to achieve compliance with the objects, principles and applications;**
 - **the timeframe within which the goals and targets are to be achieved;**
 - **how gender, sexual orientation, and cultural and linguistic diversity have been taken into account in preparing the plan; and**
 - **the person nominated by the authority to implement the plan.**
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Recommendation 15

Section 9 of the DSA should be amended to require:

- **government departments and agencies to submit their plan to ADD every three years for review and to provide a written report on the extent to which the plan complies with the objects, principles and applications of principles;**
- **government departments and agencies to include in their annual report to Parliament a report of their progress in implementing their section 9 plan;**
- **government departments and agencies to submit their progress report to ADD, which must, in its annual report, report progress on implementation; and**
- **the Minister to report annually to Parliament on the progress government departments and**

agencies have made in implementing their section 9 plans.

5. Funding

- Introduction
- Types of funding
- Who may receive funding?
- Terms and conditions of funding
- Funding innovative support models

INTRODUCTION

5.1 One of the objects of the DSA is:

to ensure that the outcomes achieved by persons with disabilities by the provision of services for them are taken into account in the granting of financial assistance for the provision of such services.¹

The provisions of the DSA concerning funding should ensure that the resources allocated for disability services assist people to have equitable access to, and receive satisfactory outcomes from, those services. This chapter examines whether the funding provisions of the DSA are appropriate for securing the Act's objects.

TYPES OF FUNDING

5.2 In practice, the main types of funding available to disability services are capital, recurrent and transition funding. Capital funding is provided for the purpose of purchasing land, or purchasing, building, repairing and upgrading service premises and equipment. Recurrent funding is the regular, ongoing financial support that all services receive to cover daily operational costs. In Chapter 6, the Commission discusses the transition process. Briefly, the process involves ensuring that all disability services comply with the objects, principles and applications of principles in the DSA. Transition funding is provided to some services, generally the older services that existed before the DSA was enacted, to assist with the extra costs associated with improving the type and quality of support they provide in order to meet the policy objectives of the DSA. The DSA does not distinguish between the various types of funding, but refers generally to "financial assistance". In this chapter, the Commission also uses the term "funding" in a general sense to include any type of financial assistance provided to disability services by ADD. Specific issues concerning transition funding are raised in Chapter 6.

1. DSA s 3(c).

WHO MAY RECEIVE FUNDING?

5.3 The DSA is the legal basis for funding services for people with a disability. The Minister may approve the granting of financial assistance (out of funds appropriated by Parliament for the purpose)² to:

- a person in the target group,³ or a person providing direct care or support to a person in the target group, to enable the person in the target group to be provided with designated services;⁴
- an eligible organisation⁵ providing (or proposing to provide) designated services to people in the target group, to enable the organisation to provide the services; or
- a person or eligible organisation conducting (or proposing to conduct) an approved research or development activity to enable the person or organisation to conduct the activity.⁶

The Minister for Ageing and Disability may also agree to provide funds to the Minister for Health to enable that Minister to fund eligible organisations to provide services to persons in the target group whose disabilities are attributable to a psychiatric impairment.⁷

2. DSA s 19(1).

3. See para 5.4-5.5.

4. Services provided or funded under the *Home and Community Care Act 1985* (Cth) are not designated services, except those co-funded services provided or funded through the Home Care Service. All other services provided or funded by the Minister for Ageing and Disability are designated services: DSA s 4; and *Disability Services Regulation 1993* (NSW) cl 3 and Sch 1. This is discussed further in Ch 10.

5. Eligible organisation means: a body corporate; a local authority; a tertiary institution; the Commonwealth Government; a Minister or authority of the State (or someone exercising powers on his or her behalf); and any society, association or body prescribed by the regulations, or belonging to a class prescribed by the regulations: DSA s 4.

6. DSA s 10(1).

7. DSA s 12A.

Target group

5.4 Services may be provided or funded under the DSA for people in the target group. A person is in the target group if the person has a disability (however arising and whether or not of a chronic episodic nature):

- (a) that is attributable to an intellectual, psychiatric, sensory, physical or like impairment or to a combination of such impairments, and
- (b) that is permanent or is likely to be permanent, and
- (c) that results in:
 - (i) a significantly reduced capacity in one or more major life activities, such as communication, learning, mobility, decision-making or self-care, and
 - (ii) the need for support, whether or not of an ongoing nature.⁸

5.5 The target group also includes the following people,⁹ but only if the services provided for them are not inconsistent with the objects and relevant requirements of the *Mental Health Act 1990* (NSW):

- (a) a temporary patient, continued treatment patient or forensic patient, or
- (b) a person subject to a community treatment order, or
- (c) a person under detention in a hospital.¹⁰

Views in submissions

5.6 A small number of submissions considered whether the target group outlined in the DSA was appropriate. Some favoured no change.¹¹ One argued that there was a need to limit the target group, given the limited funding available, so that people with the greatest need had a better chance of receiving the support they require.¹² Most submissions were of the view that

8. DSA s 5(1).

9. Within the meaning of the *Mental Health Act 1990* (NSW): DSA s 5(2).

10. DSA s 5(2).

11. Disability Safeguards Coalition, *Submission*; Paraquad NSW, *Submission*; Nepean Independent Living Committee Inc, *Submission*; and NSW Government, *Submission*.

12. Nepean Independent Living Committee Inc, *Submission*.

the DSA should cover all people with a disability who need support. Some submissions suggested that the definition should be consistent with the *Disability Discrimination Act 1992* (Cth) definition to include all people with a disability.¹³

The Commission's view

5.7 The concept of defining disability, and the ramifications that flow from this, has been the subject of some critical discussion.¹⁴ As the Commission has noted, the DSA currently does not contain a broad definition of disability, but defines the target group of potential consumers who may be eligible to receive services under the Act. Submissions suggested adopting a broader approach in the DSA, and argued that the definition in the *Disability Discrimination Act 1992* (Cth) may be an appropriate model. A similar definition is included in the *Anti-Discrimination Act 1977* (NSW) which is consistent with Commonwealth legislation and simpler. Under that Act, disability means:

- (a) total or partial loss of a person's bodily or mental functions or a part of a person's body, or
- (b) the presence in a person's body of organisms causing or capable of causing disease or illness, or
- (c) the malfunction, malformation or disfigurement of a part of a person's body, or
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
- (e) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.¹⁵

13. Multicultural Disability Advocacy Association of NSW Inc, *Submission*; Physical Disability Council of NSW Inc, *Submission*; NCOSS, *Submission*; and Dare to Care, *Submission*.

14. See, for example, R Banks and R Kayess, "Disability Advocacy: Too Much Talk and Not Enough Action" in M Hauritz, C Sampford and S Blencowe (ed), *Justice for People with Disabilities: Legal and Institutional Issues* (Federation Press, Sydney, 1998) at 156-158.

15. *Anti-Discrimination Act 1977* (NSW) s 4.

5.8 These definitions are broader in scope than the target group in the DSA. For example, they include people with learning disabilities and people living with HIV/AIDS. Consequently, if the DSA were to include a definition of disability based on the suggested models, people who are not currently eligible to receive services funded under the Act (because they have a disability that falls outside the narrower definition of “target group”), would be brought within the scope of the DSA. The Commission considers this to be a positive step, since people with a disability should not be excluded from the operation of the DSA solely on the basis of their disability type.

5.9 Including a definition of disability in the DSA would not, however, result in a greater number of people *actually* receiving services funded under the Act.¹⁶ The Australian Law Reform Commission emphasised this point in making a similar recommendation regarding the *Disability Services Act 1986* (Cth).¹⁷ Many people who fall within the broad definition may not require services of the type provided under the DSA, either because their disabilities may be mild, or because other forms of support may be more appropriate. Potential consumers of DSA services would, as is the case currently, have to demonstrate a need for those services.

5.10 Consequently, the Commission recommends that the definition of disability in the *Anti-Discrimination Act 1977* (NSW) should be included in the DSA to replace section 5(1)(a). However, discrimination is a different concept from service provision, and the definition needs to be qualified to reflect that difference. While all people with a disability should be protected against unlawful discrimination, not all people with a disability need DSA-funded services. Accordingly, the qualifications currently contained in sections 5(1)(b) and 5(1)(c) of the DSA, namely, the requirements that the disability be permanent, reduce the person’s capacity in some areas and give rise to the need for support,¹⁸ should remain.

Recommendation 16

Section 5 (1)(a) of the DSA should be amended to be consistent with the definition of disability in the *Anti-*

16. Unless, of course, additional funding was provided.

17. ALRC 79 at para 5.10-5.12.

18. See para 5.4.

Discrimination Act 1977 (NSW). Sections 5(1)(b) and 5(1)(c) should remain.

TERMS AND CONDITIONS OF FUNDING

Minister's duty

5.11 The DSA imposes a duty on the Minister for Ageing and Disability to ensure that services are provided and funded under the DSA in conformity with the objects, principles and applications of principles.¹⁹ This is modified for services making the transition from non-conforming to conforming services, during which period services need only conform “as closely as possible”.²⁰ The DSA also provides that the Minister may not approve funding unless he or she is satisfied on reasonable grounds that providing the assistance would comply with the objects, principles and applications of principles.²¹ Before receiving any funding, the recipient must agree to the terms and conditions on which the funding was approved by the Minister.²²

5.12 The DSA provides that the terms and conditions must deal with:

- the extent to which the organisation must conform to the principles and applications of principles;
- the purposes for which the funds may be applied;
- the amounts to be applied for those purposes;
- the outcomes to be achieved for people in the target group as a result of receiving services, and the rights of those people in relation to the services they receive; and

19. DSA s 6.

20. This is discussed in Ch 6.

21. DSA s 10(2).

22. DSA s 17(1).

- the performance indicators to be used in measuring the outcomes achieved for people in the target groups as a result of their receiving the services.²³

5.13 In addition, the DSA states that the terms and conditions of funding may deal with:

- the agreements between the service provider and the recipients of the services;
- the furnishing of information;
- certifying compliance with terms and conditions;
- repaying funding;
- giving security for compliance with terms and conditions; and
- the use and disposal of, and recovery of the Government's interest in, land, buildings and equipment acquired, erected, altered, extended or installed using Government funding.²⁴

The Commission's view

5.14 The Commission recommends in Chapter 7 that a new and independent quality assurance body be established to certify that a service complies with the objects, principles and applications of principles.²⁵ The Minister would be empowered to fund only those services which have been certified. It is envisaged that section 12 would need to be amended to reflect these new arrangements. In particular, the terms and conditions should make funding conditional upon participation in the quality assurance process and certification by DisQAC.

23. DSA s 12(1). Funding for approved research or development activity must also be subject to similar terms and conditions: DSA s 13(1).

24. DSA s 12(2). Funding for approved research or development activity may also be subject to similar terms and conditions: DSA s 13(2).

25. See Recommendations 26-27 at para 7.27. This body would also certify a transition plan that has prepared a satisfactory transition plan.

Recommendation 17

The terms and conditions in section 12 of the DSA should make funding conditional upon participation in the quality assurance process and certification by DisQAC.

FUNDING INNOVATIVE SUPPORT MODELS

Funding models

5.16 One of the objects of the DSA is:

to encourage innovation in the provision of services for persons with disabilities.²⁶

A recent ADD initiative is the 300 Supported Accommodation Program. It provides for 300 individual funding packages (“IFPs”) which, although paid to a service provider, are allocated to services for the support of an identified individual. Where possible, the funds may be transferred to another service or another area if this is what the individual wishes.²⁷ The DSA currently permits funding of an individual, subject to the general terms and conditions applicable to all types of funding.²⁸ In IP 16, the Commission asked if the DSA should provide specifically for a number of funding models with specialised funding and terms and conditions attached.²⁹

26. DSA s 3(d).

27. NSW, ADD, *Annual Report 1997/98* at 36.

28. DSA s 10(1)(a).

29. IP 16 at para 2.48-4.50.

Views in submissions

5.17 Submissions that addressed the issue did not support the inclusion of specific funding models in the legislation.³⁰ The NSW Government stated that prescribing different funding models could limit rather than encourage flexibility and innovation.³¹ This view was supported by other submissions which argued that the DSA should encourage new approaches to support people with a disability, and should allow for a flexible set of options for supported living.³² In particular, the DSA must recognise the need for flexibility in services assisting people with high support needs and multiple disabilities.³³ According to one submission, the diversity of service delivery is shrinking and there is less experimentation and innovation now than there has been in the past.³⁴

5.18 Of the submissions which discussed the issue of funding individuals directly, some suggested that the DSA should clearly state all matters necessary for the provision of funding to individuals.³⁵ Another submission approved of individual funding, but warned against the development of a two-tier system of funding.³⁶ NCOSS outlined reasons why IFPs were desirable, and discussed the barriers to their implementation. It concluded that it was more important to develop adequate and effective support systems for people with a disability rather than relying only on IFPs.³⁷ The Disability Council of New South Wales reported positive feedback on the potential for individual funding from the participants at its consultations. It reported that, for many people with disabilities, IFPs represented “true” independence from welfare subsistence. In its consultations, people with physical disabilities viewed individual funding as empowering, while people with intellectual

30. See, for example, DeafBlind Association NSW, *Submission*; NSW Government, *Submission*; Autism Association of NSW, *Submission*; and NSW Council for Intellectual Disability, *Submission*.

31. NSW Government, *Submission*.

32. Centre for Developmental Disability Studies, *Submission*; and The Spastic Centre of NSW, *Submission*.

33. Paraquad NSW, *Submission*.

34. ACROD Ltd NSW Division, *Submission*.

35. Disability Safeguards Coalition, *Submission*; and DeafBlind Association NSW, *Submission*.

36. NSW Council for Intellectual Disability, *Submission*.

37. NCOSS, *Submission*.

disabilities were apprehensive about the day-to-day management of the funding allocation.³⁸

The Commission's view

5.19 The funding provisions of the DSA attempt to ensure that services provided as a result of financial assistance from the Minister comply with the Act's objects, principles and applications of principles. The DSA makes no attempt to control or fetter the exercise of the Minister's discretion when determining which services should be funded. The DSA does not inhibit the funding of any particular type of service or organisation, and permits the funding of individuals if this is deemed appropriate. The Commission therefore agrees with submissions that the DSA should not prescribe particular funding models.

38. Disability Council of New South Wales, *Submission*.

6. Transition

- Introduction
- Transition funding provisions
- Transition process
- Views in submissions
- The Commission's view

INTRODUCTION

6.1 The introduction of the DSA heralded a new era in the provision of disability services, with an emphasis on integration and independence for people with disabilities. Services that commenced operation after the DSA was enacted were expected to comply with the Act's new philosophy (as embodied in its objects, principles and applications of principles). However, most, if not all, of the older services that existed before the commencement of the DSA did not comply with the policy objectives of the Act. To overcome this, the DSA established a process of transition, whereby those older services would develop a transition plan outlining the manner in which they would achieve conformity with the objects, principles and applications of principles.¹ Services required to prepare transition plans are commonly known as transition services. It was envisaged in the DSA that transition services would achieve conformity with the goals of the DSA within three years of the Act's commencement.²

6.2 Funding has been made available which will eventually assist all transition services to achieve conformity.³ The Commission refers to that type of funding as transition funding. To date, only some transition services have received transition funding. Consequently, there are currently three categories of disability services:

1. those which comply with the objects, principles and applications of principles in the DSA;
2. those transition services which are receiving transition funding to assist them to comply with the objects, principles and applications of principles in the DSA; and
3. those transition services which are not yet receiving transition funding.

-
1. DSA s 7.
 2. The three-year period proved to be somewhat unrealistic, with many services remaining in transition today.
 3. The total transition funding pool of \$39.4 million has been allocated over four funding rounds. \$18.45 million was made available on a recurrent basis and \$20.95 million was available as non-recurrent funds. Of the 572 services that requested funding, 451 services (79%) received full or partial transition funds: NSW, ADD, *Annual Report 1997/98* at 42-43. In 1998, ADD estimated the cost of full implementation of transition plans for DOCS large residential services to be \$72.96 million: Information provided by DOCS (2 November 1998).

This chapter discusses the provisions of the DSA designed to ensure that transition services⁴ achieve conformity with the objects, principles and applications of principles. It describes the transition process to date and considers whether the transition provisions are appropriate for achieving the goals of the DSA.

TRANSITION FUNDING PROVISIONS

Transition plans

6.3 The DSA imposes a duty on the Minister to ensure that disability services are provided and funded in conformity with the Act's objects, principles and applications of principles.⁵ In relation to transition services, however, this duty was suspended for three years beyond the date when the Minister determined that the service should prepare a transition plan.⁶ During this three-year period, the Minister's duty was to ensure that these services were provided or funded *as closely as possible in conformity* with the objects, principles and applications of principles.⁷ That duty continues to apply even though the three-year period has elapsed.

4. In this chapter, transition services are taken to mean those services described in items 2 and 3 in para 6.2.

5. DSA s 6(1).

6. The decision that a service must prepare a transition plan was to be made within two months after the commencement of the Act: DSA s 6(2) and 6(3).

7. DSA s 6(4) emphasis added.

6.4 The DSA requires that transition plans must:

- ensure that the service concerned be provided or funded as closely as possible in conformity with the objects, principles and applications of principles; and
- indicate the date (being the earliest date practicable) by which the service will reach full conformity.⁸

The Minister may, by order published in the *Government Gazette*, adopt a transition plan, which comes into effect on the date published.⁹ Before adopting the transition plan, the Minister must be satisfied that the people to whom the service is being provided and their families, carers and advocates have, as far as practicable, been consulted about the plan.¹⁰

TRANSITION PROCESS

Assessment

6.5 ADD uses the Disability Services Standards (“the Standards”) to assess whether services conform to the objects, principles and applications of principles.¹¹ In its 1996/97 Annual Report, ADD reported that approximately 1,100 disability services in NSW have self-assessed against the Standards. Of that number, 278 services conformed to the DSA, while 813 had some non-conforming practices and were required to prepare transition plans.¹² Data collected by ADD on the 1998 self-assessments from 1,005 non-government service providers, showed that 390 (39%) had transition plans. Of those, 25 (7%) had been completed, 216 (56%) had commenced working towards achieving the goals in their plans, 85 (22%) were waiting on transition plan funding and the status of 57 (15%) was unknown.¹³ The 1998 self-assessments from DOCS service providers showed that, of the 556 DOCS services, 92% (509) had transition

8. DSA s 7(4).

9. DSA s 7(5) and 7(6).

10. DSA s 7(8).

11. See Chapter 7 for a discussion of the Standards.

12. NSW, ADD, *Annual Report 1996/97* at 22.

13. NSW, ADD, *Non-Government Service Providers’ Self-Assessment Package: Feedback Report to the Director General* (1998) at 177 and 179.

plans. Of these, 27 (5%) had been completed, 357 (71%) had been commenced and 124 (24%) were waiting for transition plan funding.¹⁴ In some cases, considerable funding is required, especially where buildings need to be re-configured and people integrated into the community.¹⁵

Duty to conform as closely as possible

6.6 As the Commission noted earlier, the three-year time limit, whereby all services were to reach full conformity with the legislative requirements of the DSA, has expired. However, at least 30% of non-government and 86% of DOCS disability services do not conform fully to the objects, principles and applications of principles.

6.7 In 1997, an audit report of large residential disability services in NSW stated that there was no definition of “conforming as closely as possible”. Nor are there any criteria against which conformity could be measured, or which establish the basic requirements for resident safety and protection from abuse.¹⁶ The report found that some non-conforming (transition) services did not meet even basic safety and protection standards. The report recommended that the Government consider having a policy that no more people be placed in non-conforming institutions, even on a respite or crisis basis. Further, it recommended that a decision to place a person in a non-conforming service should only be made by the Guardianship Board,¹⁷ in the case of adults, and by the Minister for Community Services,¹⁸ in the case of children. The report suggested that any necessary legislative amendments should be made to achieve this.¹⁹

14. NSW, ADD, *Self-Assessment Package: Feedback Report to the Director General: Department of Community Services* (1998) at 107 and 109.

15. Since 1995, the Government has allocated funds that have enabled over 651 people to leave institutions and receive the support they need to live in the community. As a result, 13 institutions have been closed. NSW Government, *Submission* at 10.

16. CSC and Audit Office Report at iv.

17. As an independent substitute decision-maker.

18. The report argued that this decision-making authority should not be delegated: CSC and Audit Office Report at xii.

19. CSC and Audit Office Report at xii.

6.8 ADD has implemented the recommendations of the report by producing a *Standards in Action* manual,²⁰ which sets minimum standards for all services for people with a disability. ADD is also developing a standards manual (adapted from *Standards in Action*) which specifically targets large government and non-government disability residential centres.

IEWS IN SUBMISSIONS

Transition provisions supported

6.9 Submissions and consultations indicated strong support for a process to ensure that services reach full conformity with the DSA's objects, principles and applications of principles. Submissions argued that the problems with the transition process arose not from the provisions in the DSA, but from their implementation. Submissions identified a number of reasons why the transition provisions have failed to meet the objectives of the DSA.

Lack of funding

6.10 A major concern expressed in submissions and consultations was that insufficient transition funding has been allocated to enable non-conforming services to reach full conformity with the objects, principles and applications of principles.²¹ This has had a number of consequences, according to submissions. For example, many people with a disability are being denied the kind of life to which they are entitled as members of the community. Lack of transition funding has led to inefficiency because services are required to prepare transition plans which they do not have the resources to implement. The plans consequently become out of date, leaving the service and its users

20. NSW, ADD, *Standards in Action* (1998).

21. See, for example ACROD Ltd NSW Division, *Submission*; Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*; Crossroads Christian Fellowship With Disabled Persons in NSW Inc, *Submission*; Citizen Advocacy NSW, *Submission*; NCOSS, *Submission*; and Disability Information Service Inc, *Submission*.

in an uncertain position.²²
A letter to the CSC highlights the effect of this uncertainty:

The fact that [a large residential centre] *may* be devolved at *some unspecified time in the future* is, I am sure, a major factor in the inability of the Centre to attract permanent staff and in the low morale among existing staff. It is also a matter of great concern to the parents of the present residents of the Centre.²³

Standards are inadequate to measure conformity

6.11 Service users and providers with whom the Commission consulted were of the view that the Standards are not an appropriate mechanism for measuring whether or not a service conforms to the objects, principles and applications of principles in the DSA. This issue is discussed further in Chapter 7.

Inadequate assessment and approval process for transition plans

6.12 Another concern expressed in submissions and consultations was the process used by ADD to approve transition plans. In most cases, services assess themselves to identify whether they comply with the objects, principles and applications of principles. Each service prepares and submits a transition plan, which is assessed by an independent consultant. The Minister then approves the plan if he or she considers it to be appropriate. There have been a number of appeals against the Minister's decision to approve transition plans. The Community Services Appeals Tribunal (as it then was) criticised certain transition plans initially approved by the Minister on the grounds that:

- the plans did not identify how they were to achieve full conformity by a specified date;

22. Consultation (Service providers, Sydney).

23. NSW, CSC, *The Lachlan Inquiry 1998: An Assessment of the Standard of Care at the Lachlan Residential Centre and of Progress Since the 1995 Investigation* (1998) at Appendix 3 (emphasis in original).

- the plans did not adequately record specific outcomes the service was planning to achieve, and the strategies, performance indicators and time-frame that would be used to achieve these outcomes; and
- the plans would not result in the service achieving conformity with the objects, principles and applications of principles.²⁴

Failure to monitor conformity as closely as possible

6.13 A number of submissions were concerned that services with transition plans, including DOCS services, had not been monitored adequately to assess whether they were conforming as closely as possible with the objects and principles and applications. The CSC has also expressed concern about this in a number of inquiries it has conducted.²⁵

THE COMMISSION'S VIEW

Transition process should remain

6.14 The Minister should continue to have a duty to ensure that services are provided and funded in conformity with the objects, principles and applications of principles. The reality is, however, that there are still a number of transition services that do not conform with the objectives of the DSA. As many transition services are large institutions which house people with a disability and meet most, if not all, of their support needs, closing these services for non-conformity is often not a viable alternative. The DSA should, therefore, continue to provide recurrent funding to enable these

24. *People with Disabilities (NSW) Inc and the NSW Council on Intellectual Disability v Minister's decision to adopt the transition plan for Dunrossil Challenge Foundation Ltd* (NSW, Community Services Appeals Tribunal, Appeal No 061 and 195, 12 February 1998, unreported); and *People with Disabilities (NSW) Inc and the NSW Council on Intellectual Disability v Minister's decision to adopt the transition plan for Disability Enterprises Leura, trading as Greystanes Children's Home* (NSW, Community Services Appeals Tribunal, Appeal Number 0167 and 194, 17 March 1998, unreported).

25. See for example, NSW, CSC, *Suffer the Children: The Hall for Children Report* (1997) at 2 and 55; CSC and Audit Office Report at 80.

services to operate, as well as transition funding to assist them to reach conformity with the objects, principles and applications of principles.

6.15 The Commission considers that the current transition process needs to be streamlined and clarified. At present, the amount of transition funding available is insufficient to assist all transition services to achieve full conformity with the DSA. As a result, all transition services must prepare a transition plan ensuring that they conform as closely as possible with the DSA and detailing how they will achieve full conformity, even though only some services are receiving the funding to implement the plan. Those services not in receipt of transition funding are therefore in an uncertain position, unaware of when their transition plans may be implemented. As there is no system in place to update or revise the plans, they may be out of date or inappropriate by the time the transition funding is made available.

A two-stage transition process

6.16 In October 1998, the Minister announced a 12-year plan to devolve the larger centres.²⁶ Given the impact on the rights and living conditions of the residents of these centres, the Commission considers that 12 years is too long. The critical issue, however, is that the Government allocates funds and sets a final date by which full conformity must be achieved. Providing time-frames in the DSA for the allocation of transition funding and for reaching conformity with the Act has proved not to be realistic. Instead, the DSA should provide for a transition process whereby the Minister gives each service notice of when it will receive transition funding and the final date on which it is expected to reach conformity. The Commission is of the view that the transition process should comprise two stages as follows.

Stage 1 transition

6.17 Stage 1 involves a transition service (referred to here as a “Stage 1 transition service”) that is more than 12 months away from receiving transition funding. Rather than prepare a transition plan outlining the steps to full conformity with the DSA, a Stage 1 transition service should be required to prepare a different plan, referred to here as a “Stage 1 transition plan”. A Stage 1 transition plan must show how the service is meeting, or intends to meet, certain identified basic criteria. This would replace the current vague

26. The Hon F Lo Po MP, untitled paper presented at the NCOSS Conference (8 October 1998) at 7.

requirement to show that a service is conforming “as closely as possible” with the objectives of the DSA. In its submission, the CSC suggested the development of basic criteria, such as occupational health and safety standards and human rights issues, below which no service should be allowed to operate.²⁷ In Chapter 7, the Commission recommends the establishment of DisQAC to monitor quality in all services funded under the DSA.²⁸ The Commission considers that the basic criteria for Stage 1 transition plans should be developed by DisQAC in consultation with industry and consumer groups, and peak bodies. Stage 1 transition plans must be lodged with DisQAC.

Stage 2 transition

6.18 Stage 2 concerns a service (referred to here as a “Stage 2 transition service”) that is scheduled to receive transition funding in, or sooner than, twelve months. At that point, the service should be required to prepare a final and detailed transition plan (referred to here as a “Stage 2 transition plan”) outlining how full conformity will be achieved, and the date on which this will occur. The Commission considers that Stage 2 transition plans should only have to be prepared once the receipt of transition funding is imminent so that the plans remain current. The 12 month period should be sufficient time for a service to prepare a plan, lodge it with DisQAC, and have the latter assess and approve it, and recommend any necessary changes.

Assessment and monitoring

Assessment, certification and monitoring of Stage 1 transition services

6.19 Stage 1 transition services should submit their plans to DisQAC, which would assess their adequacy. DisQAC may, if satisfied that a plan would result in the service meeting the basic criteria for service provision, approve the plan and certify the service as complying with the minimum requirements for receiving any form of funding under the DSA. Compliance with the plan would also be monitored by DisQAC through the annual self-assessment process which all services are required to complete.²⁹ To ensure maximum compliance, Stage 1 transition plans should be linked to funding. The DSA should provide that the Minister only has the power to fund or provide

27. CSC, *Submission*.

28. See para 7.20-7.22 and Recommendations 26-27.

29. See para 7.24-7.25.

Stage 1 transition services, which have been certified by DisQAC as meeting the basic criteria in the Stage 1 transition plans.

Assessment, certification and monitoring of Stage 2 transition services

6.20 The process for assessing Stage 2 transition services should involve input from all sectors, including service providers, consumers and peak groups. It should focus on the rights and needs of people with a disability, and avoid the possibility of a conflict of interest. Stage 2 transition plans should be scrutinised by DisQAC to assess whether they comply with the objects, principles and applications of principles in the DSA. This would remove some of the factors which precipitated the appeals against the decisions of the Minister to adopt certain transition plans. DisQAC would certify a Stage 2 transition service if it were satisfied that implementation of its plan would assist the service to achieve conformity with the objects, principles and applications of principles. Until its plan has been implemented fully, a Stage 2 transition service would be expected to comply as closely as possible with the requirements of the DSA. DisQAC would monitor Stage 2 transition services to ensure that their plans are implemented within the nominated time-frame, and that a sufficient degree of compliance with the DSA is being achieved in the intervening period. The DSA should state that the Minister for Disability Services may only fund Stage 2 transition services that have been certified by DisQAC.

Measuring outcomes

6.21 Submissions did not view the Standards as an effective means of measuring a service's conformity with the objects, principles and applications of principles. It was considered that they are too prescriptive and focus on process rather than outcomes. The Commission discusses this issue in the context of a new quality assurance system in Chapter 7. DisQAC should develop new methods to assess whether Stage 1 and 2 transition plans are appropriate. The methods adopted by DisQAC should, as far as possible, focus on the outcomes sought for people with a disability, and have criteria against which the achievement of those outcomes may be assessed.

Recommendation 18

The DSA should continue to provide for a transition process to assist all services to meet the objects, principles and applications of principles.

Recommendation 19

The DSA should be amended to require the Minister to prepare and publish, within six months of this amendment coming into effect, a plan stating how all transition services will be funded to reach conformity. The DSA should require the plan to identify:

- **the amount of transition funding required to enable all services to achieve conformity;**
 - **the date by which all transition funding will have been granted and all services will have achieved conformity; and**
 - **the date on which each service will receive transition funding and the date on which each service will have achieved conformity.**
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Recommendation 20

The DSA should be amended to provide for a two-stage transition process: Stage 1 and Stage 2.

Recommendation 21

The Commission recommends that a Stage 1 transition service would be one scheduled to receive transition funding more than twelve months in the future. A Stage 1 transition service should be required to prepare a plan to show how the service is meeting, or intends to meet, certain identified basic criteria. Those criteria should be developed by DisQAC (see

Recommendation 25) in consultation with industry and consumer groups, and peak bodies.

Recommendation 22

The Commission recommends that a Stage 2 transition service would be one scheduled to receive transition funding in, or sooner than, twelve months. A Stage 2 transition service should be required to prepare a final and detailed transition plan outlining the steps to achieving full conformity, and the date on which this will occur.

Recommendation 23

The DSA should be amended to provide that Stage 1 and Stage 2 transition plans should be lodged with DisQAC, which would be responsible for assessing the plans and, if suitable, certifying the services. The development of criteria for assessing the suitability of the transition plans should involve input from the service industry, consumers and peak bodies. DisQAC should also monitor the implementation of the plans.

Recommendation 24

The DSA should be amended to provide that the Minister for Disability Services is empowered to fund or provide only those services which:

- comply fully with the objects, principles and applications of principles in the DSA;
 - have been certified by DisQAC as having suitable Stage 1 transition plans and which continue to meet those plans; or
 - have been certified by DisQAC as having suitable Stage 2 transition plans and, until those plans are implemented fully, continue to comply as closely as possible with the requirements of the DSA.
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Recommendation 25

The DSA should be amended to provide that, on achieving full conformity, a service must comply with the requirements of the quality assurance process applicable to all services (see Recommendations 26-28).

7. Improving Quality

- Introduction
- Current quality assurance process
- Submissions critical of quality assessment process
- The Commission's view

INTRODUCTION

7.1 An object of the DSA is to ensure the provision of services that:

1. further the integration of persons with disabilities in the community and complement services available generally to such persons in the community,
2. enable persons with disabilities to achieve positive outcomes, such as increased independence, employment opportunities and integration in the community, and
3. are provided in ways that promote in the community a positive image of persons with disabilities and enhance their self-esteem.¹

Ensuring that the outcomes achieved by people with a disability are taken into account in granting financial assistance to services is also an object of the DSA.² These provisions aim to ensure quality services for people with a disability. This chapter considers the extent to which these objects are being achieved and whether quality in service provision could be improved by strengthening the terms of the DSA.

CURRENT QUALITY ASSURANCE PROCESS

7.2 The principles in Schedule 1 to the DSA set out the rights and expectations people with a disability have in relation to services, and how those rights should be applied to disability services and programs.³ Every three years at least, the Minister must ensure that a review is conducted of the extent to which:

- each eligible organisation that has received financial assistance to provide services has complied with the terms and conditions on which the assistance was given; and
- the outcomes required by those terms and conditions have been achieved by people receiving the services.⁴

1. DSA s 3(b).
2. DSA s 3(c).
3. See Ch 2.
4. DSA s 15.

Disability Services Standards

7.3 The Standards have been formulated by ADD to monitor compliance by services with the provisions of the DSA. They do not have the force of law, however, adherence to the Standards is a condition of service funding. They are intended as a guide to assist service providers to meet the objects, principles and applications of principles. The Standards comprise the following ten principles:

1. Each service user seeking a service has access to that service on the basis of relative need and available resources.
2. Each person with a disability receives a service which is designed to meet his or her individual needs in the least restrictive way.
3. Each person with a disability has the opportunity to participate as fully as possible in making decisions about the events and activities of his or her daily life in relation to the services he or she receives.
4. Each service user's right to privacy, dignity and confidentiality in all aspects of his or her life is recognised and respected.
5. Each person with a disability is supported and encouraged to participate and be involved in the life of the community.
6. Each person with a disability has the opportunity to develop and maintain the skills required to participate in activities that enable him or her to achieve valued roles in the community.
7. Each service user is free to raise, and have resolved, any complaints and disputes he or she may have regarding the agency or the service.
8. Each agency adopts sound management practices which maximise outcomes for service users.
9. Each person with a disability receives a service which recognises the importance of preserving family relationships, informal social networks and is sensitive to cultural and linguistic environments.
10. Each agency ensures that the legal and human rights of people with a disability are upheld in relation to the prevention of sexual, physical and emotional abuse within the service.

7.4 All services must comply with the Standards as a condition of funding. The Standards have been recently supplemented by *Standards in Action*, which detail the practical steps that services should undertake to meet each Standard at a minimum and an enhanced level. *Standards in Action* also contains examples of good and bad service practice in relation to each Standard. ADD regards compliance with the Standards as constituting compliance with the objects, principles and applications of principles in the DSA.⁵

Self-assessment and surveys

7.5 The primary method used by ADD to monitor compliance with the Standards is annual self-assessment by services. The purpose of self-assessment is to ensure that services are achieving the outcomes detailed in their performance agreements (which are attached to their funding agreement) or their transition plans. Self-assessment is also intended to foster continuous quality improvement by evaluating a conforming service's ongoing performance against the Standards. After completing the self-assessment, services are required to identify steps to improve the quality of their service.

7.6 ADD also surveys service users, who return their responses directly to ADD. If the surveys identify critical issues, such as health and safety breaches or allegations of abuse, ADD will contact the service provider immediately and monitor the service to ensure that appropriate action is

5. Until recently, ADD had a detailed policy, in addition to the Standards, detailing what constitutes acceptable supported accommodation. The *Accommodation Support Program – Policy and Guidelines* (1996) provided that transition plans for supported accommodation must provide for community-based accommodation support services which:

- are based on use of a single family dwelling, or other regular community dwelling that is, a facility having the smallest residential grouping possible, with no more than six residents (maximum) in any one dwelling; and
- do not cluster or co-locate a number of houses, flats or units in the same street or in close proximity with one another.

The Minister revoked this policy on 8 October 1998.

taken. Other major issues identified in the surveys by service users must be included in the service's action plan.⁶

Monitoring

7.7 ADD does not have a regular or systematic process for checking the accuracy of self-assessments prepared by services. Review of a service generally occurs only when ADD receives a complaint,⁷ or where specific issues of concern regarding a service have been identified. The Service Review and Support program within ADD investigates services where there are identified issues of concern. Where these concerns are significant, the service will be registered. A service under investigation will be required to implement an action plan that addresses deficiencies in service quality, and will be monitored until all outcomes in the action plan have been achieved. ADD is still developing these mechanisms. As ADD has limited resources for this program, it is targeted at non-government services, and does not apply to DOCS services.⁸ In addition, ADD proposes to have 45 Service Support and Development Officers each make scheduled visits to between 40 and 60 services over a 12 month period. Community Visitors attached to the CSC also visit services to monitor the well-being of service users.⁹

SUBMISSIONS CRITICAL OF QUALITY ASSESSMENT PROCESS

Standards are weaker than legislative requirements

7.8 Consultations conducted by the Disability Council of NSW revealed that the Standards, which were originally intended as a guide for

6. See para 4.5 for a discussion of action plans.

7. A complaint may originate from a number of sources, for example, the Independent Commission Against Corruption, Community Visitors, service users, their families or advocates, ADD officers or the CSC.

8. NSW, CSC, *The Lachlan Inquiry 1998: An Assessment of the Standard of Care at the Lachlan Residential Centre and of Progress Since the 1995 Investigation* (1998) at Appendix III.

9. See Report 90 at Ch 4.

implementing the objects, principles and applications of principles, have replaced them as the benchmarks for service provision.¹⁰ In submissions and consultations, people indicated concern that such a reliance on the Standards may not be appropriate, as they are not necessarily an accurate measure of compliance with the DSA, or indicative of quality service provision.¹¹ NCOSS reported widespread dissatisfaction with the Standards.¹² Submissions stated that the Standards did not reflect the principles and applications of principles,¹³ and were not clearly drawn from the DSA itself.¹⁴ It was argued that the Standards were weaker than the principles and applications of principles,¹⁵ with too much emphasis placed on written policies and procedures and not enough on the implementation of the principles.¹⁶ As a result, submissions considered that compliance with the Standards does not equate with achieving the outcomes sought by the objects, principles and applications of principles under the DSA.¹⁷

Standards reduce flexibility in service provision

7.9 Service providers argued that the Standards were too inflexible and only relevant to particular types of services,¹⁸ and particular kinds of needs.¹⁹ It was also considered that the Standards may conflict with occupational health and safety requirements.²⁰ Service providers were particularly concerned that the increasingly prescriptive Standards and *Standards in Action* had resulted in less diversity in service provision. It was argued that:

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10. See Disability Council of NSW, *Submission* at 9.
 11. DeafBlind Association NSW, *Submission*.
 12. NCOSS, *Submission*.
 13. See, for example, NCOSS, *Submission*; NSW Council for Intellectual Disability, *Submission*; and People with Disabilities (NSW) Inc, *Submission*.
 14. Intellectual Disability Rights Service Inc, *Submission*.
 15. See, for example, Deaf Blind Association, *Submission*; Institute for Family Advocacy and Leadership Development Association Inc, *Submission*; and Citizen Advocacy NSW, *Submission*.
 16. Disability Council of NSW, *Submission*; and NCOSS, *Submission*.
 17. The Spastic Centre of NSW, *Submission*.
 18. NCOSS, *Submission*; and Kurrajong-Waratah Industries, *Submission*.
 19. Centacare Sydney, *Submission*.
 20. Paraquad NSW, *Submission*; and ACROD Ltd NSW Division, *Submission* at 5.

[the sector was] less diverse than it was, that it has fewer “different” models and there is less experimentation and preparedness to try out other options than there was in the 1980s ... [O]rganisations wanted to be able to try out ideas, to be able to submit applications for funding to trial pilot programmes and to be able to connect with like-minded organisations to work on cross-organisational approaches. The current environment mitigates against this, and there was a general despair about anything really changing.²¹

Standards that are more and more prescriptive weaken the intent of the legislation by failing to recognise the different types of disability and different models of services delivery. This creates a mindset in the bureaucracy of what people with a disability are ... and what community living is (ie, group home) which is then perpetuated through policy and planning decisions.²²

7.10 The Government has revoked its six-person accommodation policy²³ because, among other reasons, it was too rigid and limited the capacity to respond to people’s needs and circumstances as they age. Instead, the Government has indicated that it will be guided by the provisions of the DSA in deciding what services are acceptable, focussing on outcomes and the kinds of accommodation that will help deliver those outcomes.²⁴

Self-assessment criticised

7.11 Submissions were critical of the assessment process used to monitor quality in service provision. They argued that a self-assessment process that involves ticking boxes is not an effective way to ensure that services meet the Standards or protect the rights of people with a disability.²⁵ Service providers noted that self-assessment was increasingly prescriptive and intrusive.²⁶

21. ACROD Ltd NSW Division, *Submission* at 4.

22. Paraquad NSW, *Submission*.

23. See the discussion of this policy at footnote to para 7.4.

24. NSW Government, *Submission* at 8.

25. NCOSS, *Submission*; Disability Safeguards Coalition, *Submission*; Physical Disability Council of NSW Inc, *Submission*; Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*; CSC, *Submission*; and People with Disabilities (NSW) Inc, *Submission*.

26. ACROD Ltd NSW Division, *Submission* at 3.

Monitoring and enforcement inadequate

7.12 The CSC stated that it had “consistently found that inadequate external monitoring and review mechanisms are a key contributing factor where services have failed to provide appropriate, or even safe services to people with a disability”.

It expressed concern that:

- performance agreements used by DOCS and ADD have not provided an adequate basis for imposing duties on service providers;
- powers of the funding body to take action when there are concerns about service quality are not satisfactory;
- service providers have been able to breach funding agreements without the funding body identifying or acting to correct the breach;
- there is no system for ADD to monitor performance and quality of disability services provided by DOCS; and
- valuable information about service quality is not collected or used by the funding body.²⁷

Submissions supported a new approach

7.13 Consultations revealed extensive support for a new approach to achieve compliance with the objects, principles and applications of principles. Submissions, and people consulted by the Disability Council of NSW, advocated a return to the objects, principles and applications of principles as the benchmark for measuring quality and assessing whether transition plans and new services conform with the DSA.²⁸ It was argued that the approach must be less prescriptive and more flexible.²⁹

Suggested features of a new process

7.14 Service providers were of the view that industry expertise and knowledge, including experience in specialist service provision, is not

27. CSC, *Submission* at 7-8.

28. See, for example, Disability Council of NSW, *Submission* at 9; Multicultural Disability Advocacy Association of NSW Inc, *Submission*; and Autism Association of NSW, *Submission*.

29. Paraquad NSW, *Submission*.

valued. Service providers argued that they could contribute to discussions about what constitutes quality service provision, suggesting that the industry should develop its own measures of quality outcomes to feed into a quality assurance and accreditation process.³⁰ There was support for a process that includes peer assessment³¹ which dealt with issues of particular concern to service providers, such as liability, duty of care and occupational health and safety.³²

7.15 Submissions argued that there should be regular, active and independent monitoring of services to ensure compliance with the objects, principles and applications of principles.³³ That monitoring should have clear time frames and be transparent.³⁴ Submissions expressed the view that there should be a process of accreditation and continuous improvement,³⁵ which should also cover services operated by DOCS.³⁶

7.16 The CSC recommended that there should be base-line criteria below which no service should be funded or allowed to operate. The CSC was concerned that some non-conforming services, and in particular large institutions, were allowed to operate without any measures in place to protect even the basic safety and human rights of consumers. The CSC was of the view that the vagueness of the concept of “conforming as closely as possible” was a contributing factor in this.³⁷

THE COMMISSION’S VIEW

7.17 There is widespread community dissatisfaction with the Standards as a measure of quality. In contrast, there is consensus amongst individuals,

30. *Consultation* (Service providers, Sydney).

31. NCOSS, *Submission*.

32. The Spastic Centre of NSW, *Submission* at 8.

33. A Goges, *Submission*; CSC, *Submission*; B and D Dixon, *Submission*; People with Disabilities (NSW) Inc, *Submission*; Australian Quadriplegic Association Ltd (NSW), *Submission*; and NSW Statewide Disability Coalition, *Submission*.

34. Multicultural Disability Advocacy Association of NSW Inc, *Submission*.

35. CSC, *Submission*.

36. CSC, *Submission* at 8; Paraquad NSW, *Submission* at 2; and ACROD Ltd NSW Division, *Submission*.

37. CSC, *Submission*. The Commission makes recommendations concerning non-conforming services and base-line criteria at para 6.16-6.20.

consumer groups and service providers that the objects, principles and applications of principles remain valid and have a role to play in assessing service quality. Concerns were also expressed in submissions and consultations about the effectiveness of self-assessment by services against the Standards, and the need for independent review of service compliance with quality indicators, rather than review by ADD. The Commission considers many of these concerns to be valid, and recommends the establishment of a new independent mechanism to assess and monitor service quality.

A new quality assurance process

7.18 The key features of a new quality assurance process should be:

- the development of a revised set of Standards, based more closely on the objects, principles and applications of principles in the DSA, which focus on the outcomes to be achieved for people with disabilities;
- the establishment of an independent body to oversee and monitor the quality assurance process; and
- replacing the current self-assessment procedure with a more accountable system of peer review.

7.19 The Commission does not propose to make detailed recommendations concerning the mechanics of the new process. This should be developed through community consultation with all relevant stakeholders. A useful model, however, is the Quality Improvement and Accreditation System (“QIAS”), which operates in relation to Commonwealth funded long day child care centres. Under the QIAS, long day care centres must register with an independent monitoring and review body, called the National Childcare Accreditation Council (“NCAC”), and comply with 52 Principles of quality care. Compliance with the Principles is examined within each service by an Accreditation Committee comprising parents, staff and management. Experienced child care workers conduct external reviews of each centre’s internal assessment against the Principles. Following that review, a panel of child care experts recommends to the NCAC whether or not a centre should be accredited. A centre may be accredited for a period of between 12 months and three years, depending on the level of compliance with each Principle. Only centres that are registered with and accredited by

the NCAC, or are making satisfactory progress towards accreditation, are eligible to claim Childcare Assistance funding.³⁸

Establishment of a new quality assurance body

7.20 The current self-assessment process, and the quality monitoring by ADD, does not have the confidence of the disability services sector. The Commission is of the view that community support is essential if effective quality assurance is to be achieved. A more effective way of securing industry and consumer support is to develop a new quality assurance process with extensive input from all stakeholders in the disability sector. Greater confidence will also be achieved if quality monitoring is conducted independently of the service under review and the ADD. The Commission recommends the establishment of a new and independent body, based on the NCAC, to administer the quality assurance process, and to monitor quality. The Commission has referred to that body throughout this Report as the Disability Services Quality Assurance Council (“DisQAC”).

7.21 The functions of DisQAC should be developed in consultation with all stakeholders in the disability sector, including ADD. As a general guide, the functions could include:

- establishing the quality assurance scheme;
- assessing and certifying Stage 1 and Stage 2 transition services;³⁹
- assessing and certifying new services as conforming with the DSA;
- providing advice and support to services about quality service provision;
- monitoring whether services meet targets set in Stage 1 and Stage 2 transition plans;
- monitoring whether services are achieving continuous quality improvement;
- identifying and registering services of “concern”, where closer monitoring may be necessary;⁴⁰

38. See NCAC, “How the Quality Improvement and Accreditation System (QIAS) Works” (as at 29 June 1999) [<http://www.NCAC.gov.au/howqias.htm>]; NCAC, “The 52 Principles of Quality Care” (as at 29 June 1999) [<http://www.NCAC.gov.au/52.htm>].

39. See para 6.16-6.20.

40. See para 9.13 and Recommendation 37.

- notifying the Minister if a service fails to comply with the requirements of the quality assurance process; and
- recommending to the Minister that sanctions be imposed on services that fail to comply with the objects, principles and applications of principles.

7.22 The Commission notes the resource implications of establishing a new body. Some of the cost could be offset, however, by diverting the resources currently used for quality assessment into the new mechanism.

Standards should be redeveloped

7.23 In their current form, the Standards detail the manner in which the objects, principles and applications of principles should be implemented. The Commission is of the view that this may reduce flexibility and may stifle innovation. New standards are needed that focus on the outcomes for people with disabilities rather than the methodology used to achieve those outcomes. An effective quality assurance mechanism should take into account the fact that outcomes can, and should, be met in a number of different ways depending on the needs and wishes of the consumers and the type of service being provided. The new Standards should be developed by DisQAC in consultation with industry and consumer groups, and should reflect the spirit of the objects, principles and applications of principles more accurately than the current Standards.

Consumer involvement and peer review in assessing quality

7.24 As the Commission noted earlier, the major criticism during consultations and in submissions concerned the lack of independence and expertise in the quality assessment process. It was considered that internal assessment by the service and review by ADD was not sufficient to ensure quality service provision. The Commission is of the view that the self-assessment process should be made more accountable. While services should be required to demonstrate that they have achieved outcomes for consumers, those outcomes should be examined by an independent panel of consumers and service providers. Consumer and service provider input is vital if the assessment process is to involve “grass roots” expertise. Involving service providers in this type of peer review would also promote support for, and compliance with, the quality assessment process amongst service providers.

7.25 The panel would assess service outcomes against the revised Standards and the objects, principles and applications of principles, to determine whether the requisite level of quality was being achieved. If satisfied that a service was fulfilling its quality requirements, the panel would recommend to DisQAC that the service should be, or should continue to be, certified. DisQAC would assess the recommendation and make a decision as to certification.

Linking certification to funding

7.26 The Commission considers that the most effective way to enhance quality service provision is to link it to the recurrent and transition funding that services receive. The DSA should make this link clear by providing that the Minister may not approve funding to a disability service under the Act unless that service has been certified by DisQAC as meeting the necessary quality standards.⁴¹ This provision should apply to all services funded under the DSA, including DOCS services.

Period of certification

7.27 The NCAC may certify long day care centres for a period of one, two or three years, depending on the level of quality they are achieving. Services with the highest levels of quality provision are certified for three years, whilst those services which do not comply to the fullest extent with the Standards are assessed and certified every year or two. The Commission considers that such a system would be appropriate for disability services. DisQAC may choose to certify fully conforming services for longer periods than transition services. The details of the period for which services may be certified should be developed by DisQAC in consultation with industry and consumer groups.

41. See Recommendation 24.

Recommendation 26

The DSA should establish a new quality assurance mechanism.

As part of the new mechanism, the DSA should require the Minister for Disability Services to establish DisQAC as an independent body to oversee and monitor the quality assurance process, and certify disability services. The membership of DisQAC should comprise representatives of consumers and the service industry with recognised knowledge and expertise.

Recommendation 27

The functions of DisQAC should be developed in consultation with consumer and industry groups, but should include:

- establishing the new quality assurance scheme;
- assessing and certifying Stage 1 and Stage 2 transition services;
- assessing and certifying new services as conforming with the DSA;
- providing advice and support to services about quality service provision;
- monitoring whether services meet targets set in Stage 1 and Stage 2 transition plans;
- monitoring whether services are achieving continuous quality improvement;
- identifying and registering services of “concern”, where closer monitoring may be necessary;
- notifying the Minister if a service fails to comply with the requirements of the quality assurance process; and

- **recommending to the Minister that sanctions be imposed on services that fail to comply with the objects, principles and applications of principles, the revised Standards (see Recommendation 28), or their transition plans.**
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Recommendation 28

The new quality assurance process should apply to all services funded or provided under the DSA, including DOCS services. The features of the new mechanism should be developed in consultation with consumer and industry groups, but should include:

- **the introduction of a revised set of Standards, based more closely on the objects, principles and applications of principles in the DSA, which focus on the outcomes to be achieved for people with disabilities;**
 - **replacing the current self-assessment procedure with a more accountable system of peer review; and**
 - **independent monitoring and certification of services by DisQAC.**
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Section 15 review

7.28 The DSA requires the Minister for Disability Services to review organisations funded under the Act at least every three years.⁴² The Commission is of the view that this requirement should remain. It should be additional to, and separate from, the quality assurance process. This provides ADD with the opportunity to review all aspects of the organisation's operation. For example, it can consider financial issues, such as service viability, as well as service quality.

42. DSA s 15.

Recommendation 29

The requirement for three yearly review under section 15 of the DSA should remain.

8 ● Children and Young People

- Introduction
- Human rights and children
- Legislative protection for children and young people
- Findings of the CSC
- Suggested changes to the DSA
- The Commission's view

INTRODUCTION

8.1 This chapter discusses whether the objects of the DSA are met in relation to children with a disability. It proposes strengthening the DSA provisions to ensure that they meet the objects of the Act more effectively so far as children are concerned.

HUMAN RIGHTS AND CHILDREN

Children require special protection

8.2 Human rights provisions recognise that children require special protection and treatment. The United Nations Convention on the Rights of the Child (“CROC”), to which Australia is a signatory, provides that:

the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection ...¹

It recognises that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.²

8.3 Other recognised rights for children include the right:

- to be known and cared for by his or her parents;³
- when separated from one or both parents, to maintain personal relations and direct contact with both parents on a regular basis;⁴
- of a child who is capable of forming his or her own view, to express those views freely in all matters affecting the child, and the right for those views to be given due weight in accordance with the age and maturity of the child;⁵

1. CROC, Preamble.

2. CROC, Preamble.

3. CROC, Art 7.1.

4. CROC, Art 9.3.

5. CROC, Art 12.1.

- to the highest attainable standard of health;⁶
- when placed for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided, and all other circumstances relevant to his or her placement;⁷ and
- to participate fully in cultural and artistic life and to have equal opportunities for cultural, artistic, recreational and leisure activities.⁸

8.4 A child temporarily or permanently deprived of his or her family environment, or who, in his or her own best interests cannot be allowed to remain in that environment, is entitled to special protection and assistance provided by the State.⁹ When considering solutions, due regard must be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.¹⁰ CROC requires signatories to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment and exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child.¹¹

Children with a disability

8.5 CROC has provisions concerning children with a disability. It states that a child with a disability should:

enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.¹²

Signatories to CROC recognise the right of a child with a disability to special care, and shall encourage and ensure the extension of appropriate assistance

6. CROC, Art 24.1.
7. CROC, Art 25.
8. CROC, Art 31.2.
9. CROC, Art 20.1.
10. CROC, Art 20.3.
11. CROC, Art 19.1.
12. CROC, Art 23.1.

to the child and those responsible for his or her care.¹³ Such assistance shall be designed:

to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.¹⁴

LEGISLATIVE PROTECTION FOR CHILDREN AND YOUNG PEOPLE

No specific DSA services for children

8.6 There are approximately 200 children under the age of 18 living in large residential centres in New South Wales.¹⁵ In addition, ADD funds respite care, early intervention services, therapy services, Outside School Hours Support and intensive family support services for children with a disability. However, there are no specific provisions in the DSA about children.¹⁶ The principles and applications of principles do not specifically mention children. They do not address the issue of the participation of children and their parents as consumers of services. There are no special standards for organisations that provide accommodation or other support for children with a disability.

New child welfare legislation

8.7 The *Children and Young Persons (Care and Protection) Act 1998* (NSW) ("Care and Protection Act") will begin operation in or after January

13. CROC, Art 23.2.

14. CROC, Art 23.3.

15. CSC and Audit Office Report at 7.

16. ADD is developing guidelines for children with a disability receiving services.

2000.¹⁷ It will replace the *Children (Care and Protection) Act 1987* (NSW). The new Act will strengthen the protection of children and young people in a number of areas of particular relevance to children with a disability, particularly those in voluntary out-of-home care, or at risk of being in out-of-home care for a long period.

Principles underpinning care and protection legislation

8.8 The Care and Protection Act will apply in situations where children and young people are in need of care and protection, for example, because their families are unable to care for them or because they are subject to abuse. The Care and Protection Act sets out the principles that should be followed in administering the Act, which reflect the principles contained in CROC. The Act states that:

in all actions and decisions made under this Act ... concerning a particular child or young person, the safety, welfare and well-being of the child or young person must be the paramount consideration.¹⁸

8.9 Other principles require:

- the child or young person to be able to express his or her views and due weight to be given to them;
- consideration to be given to the culture, disability, language, religion and sexuality of the child or young person in actions and decisions under the Act;
- taking the least intrusive intervention in the life and family of the child or young person consistent with his or her protection; and
- special protection from the State, preservation of name, identity, language, cultural and religious ties, and maintenance of close relationships with people significant to the child or young person,

17. The commencement date is based on information supplied by DOCS (29 March 1999).

18. Care and Protection Act s 9(1).

should the child or young person be removed from his or her family environment.¹⁹

The Care and Protection Act also provides for principles governing the placement of Aboriginal and Torres Strait Islander children in out-of-home care.²⁰

Voluntary out-of-home care arrangements

8.10 Out-of-home care means residential care and control (whether paid or not) at a place other than the child's usual home by a person, other than a parent or relative, for a period of more than 28 days (consecutive, or aggregate in a 12 month period).²¹ This is of particular importance to children with a disability because they are more likely than other children to live in voluntary care arrangements. The Care and Protection Act sets out a framework for out-of-home care, which:

- provides that out-of-home carers must be authorised;²² and
- sets time limits on the amount of time a child may be in voluntary out-of-home care without intervention by a designated agency²³ and notification to the Children's Guardian.²⁴

19. Care and Protection Act s 9.

20. Care and Protection Act s 13.

21. Care and Protection Act s 135. This does not include daily care and control by a licensed provider of children's services.

22. Care and Protection Act s 136.

23. A child or young person must not remain in voluntary out-of-home care (otherwise than under a temporary care arrangement) for a period in excess of 21 days, unless the designated agency with supervisory responsibility for that child or young person is satisfied, following appropriate assessment, that the child or young person is unable to remain with his or her parent or parents: Care and Protection Act s 155.

24. The office of Children's Guardian has been established by the Care and Protection Act s 178. The functions are:

- to exercise, subject to any direction of the Minister, the parental responsibilities of the Minister for a child or young person for his or her benefit;
- to promote the best interests of all children and young persons in out-of-home care;

8.11 Where a child or young person has been in voluntary out-of-home care for longer than 21 days, the designated agency must, within seven days of the expiry of the 21 day period, prepare either a plan to restore the child to his or her family, or a care plan in relation to the child or young person. The Children's Guardian must also be notified of the care arrangements.²⁵ Where the out-of-home care period has exceeded three months in any 12 month period, a case conference must be arranged.²⁶

Requirement to notify where a child is at risk of harm

8.12 The Care and Protection Act requires a person delivering or managing an organisation that provides health care, welfare, education, children's services, residential services, or law enforcement, who has reasonable grounds to suspect that a child is at risk of harm, to report the name of the child and other details to the Director General of DOCS.²⁷ A child or young person is at risk of harm if there are concerns for his or her safety, welfare or well-being due to:

- basic unmet psychological or physical needs (or a risk that they will not be met);
- the failure or inability of a parent or other carer to arrange necessary medical care;
- the child or young person suffering, or at risk of suffering, physical or sexual abuse or ill-treatment;
- domestic violence in the household; or

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- to ensure that the rights of all children and young persons in out-of-home care are safeguarded and promoted;
 - to examine a copy of the case plan for each child or young person in out-of-home care and a copy of each report made following the regular review of the case plan; and
 - to accredit designated agencies and to monitor their responsibilities under the Care and Protection Act and regulations.

25. Care and Protection Act s 155.

26. Care and Protection Act s 156.

27. Care and Protection Act s 27.

- the child suffering, or being at risk of suffering, serious psychological harm.²⁸

FINDINGS OF THE CSC

DSA provisions are inadequate

8.13 The CSC informed the Commission that its inquiries have revealed that the DSA has failed “to recognise, let alone protect or promote, the rights and needs of children with disabilities”. Particular problems faced by children with disabilities identified by the CSC include:

- services not addressing universal childhood needs, including developmental needs, and relationships with family members;
- lack of services which promote and protect the ability of families to remain primary carers of children with disabilities;
- service providers not recognising the role of parents and guardians in decision-making for children with disabilities;
- gaps in the system which currently allow children with disabilities to be placed (and left) in residential care without any external safeguards; and
- inadequate recognition or application of care and protection principles and procedures by service providers and other professionals.²⁹

Children with a disability in residential care

8.14 The CSC noted that many children with a disability are placed in residential care, by arrangement with the parents, outside of any processes that normally apply to out-of-home care placements:

This situation is exacerbated by the failure of DOCS and service providers to identify that these children may be in need of care even

28. Care and Protection Act s 23.

29. CSC, *Submission* at 2.

where there has been no significant contact between the child and the parents over a period of time following placement in residential care.³⁰

Inquiries by the CSC into some residential services for children showed that, in some instances, children in these services were at risk of abuse and neglect, and did not have their developmental needs met.³¹

SUGGESTED CHANGES TO THE DSA

Specific recognition needed

8.15 The CSC suggested that there is a need for the DSA to recognise the particular needs of children with disabilities, and to ensure that these needs are addressed through appropriate service models and practices.³² There was support in other submissions and during consultations for this view.³³

8.16 A number of submissions suggested that the DSA should specifically state that people with a disability include children. Some argued that this could be achieved by inserting a clause (possibly in the definitions section) noting that a reference to “persons with disabilities” throughout the DSA includes children with disabilities.³⁴ Others suggested that the phrase “persons with disabilities” in the DSA should be replaced with “children and adults with disabilities”.³⁵ This suggestion was opposed in some consultations on the grounds that it would be too cumbersome, and was reminiscent of past attitudes in which all people with a disability were regarded as being like children.

8.17 A number of submissions stated that the DSA should include specific provisions regarding children with disabilities, such as:

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30. CSC, *Submission* at 3.
 31. CSC, *Submission* at 3.
 32. CSC, *Submission* at 2.
 33. See, for example, Western Sydney Intellectual Disability Support Group Inc, *Submission*; Paraquad NSW, *Submission*; The Northcott Society, *Submission*; NCOSS, *Submission*; and Disability Information Service Inc, *Submission*.
 34. Disability Safeguards Coalition, *Submission*; The Northcott Society, *Submission*; CSC, *Submission*; and Institute for Family Advocacy and Leadership Development Association Inc, *Submission*.
 35. CSC, *Submission*; and People with Disabilities (NSW) Inc, *Submission*.

- the rights that children with disabilities have are the same as those held by other children;³⁶
- the right of children to live with their families or in a family-like environment;³⁷
- the right of a child with a disability to “a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community”;³⁸
- the importance of a developmental and protective approach to service delivery;³⁹
- recognition of the role of guardianship and parents in the lives of children (and adults) with disabilities, particularly concerning decision-making and consent;⁴⁰
- the need for cultural sensitivity, especially for Aboriginal and Torres Strait Islander children and children from non-English speaking backgrounds;⁴¹ and
- the addition of a “placement principle” for children and young people with a disability.⁴²

8.18 One submission was of the view that disability programs and services should:

recognise the special needs of children and young people with a disability and shall be designed to ensure that the child or young

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36. The Northcott Society, *Submission*; and Multicultural Disability Advocacy Association of NSW Inc, *Submission*.
37. DeafBlind Association NSW, *Submission*; Physical Disability Council of NSW Inc, *Submission*; D Newey, *Submission*; NCOSS, *Submission*; Citizen Advocacy NSW, *Submission*; The Northcott Society, *Submission*; Western Sydney Intellectual Disability Support Group Inc, *Submission*; ACROD Ltd NSW Division, *Submission*; H Seares, *Submission*; People with Disabilities (NSW) Inc, *Submission*; Disability Safeguards Coalition, *Submission*; and Institute for Family Advocacy and Leadership Development Association Inc, *Submission*.
38. People with Disabilities (NSW) Inc, *Submission* at 34.
39. CSC, *Submission*.
40. CSC, *Submission*.
41. Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*; and NCOSS, *Submission*.
42. People with Disabilities (NSW) Inc, *Submission*.

person has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreational opportunities in a manner conducive to the child or young person achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.⁴³

Linking the DSA with child protection measures

8.19 There was support in submissions for linking the DSA to child protection legislation.⁴⁴ The CSC considered that children with a disability would benefit from any amendments to the DSA which clearly identified the service provider's obligations under care and protection legislation. Submissions stated that services providing accommodation support to children and young people with a disability should comply with standards applying to out-of-home accommodation provided under the Care and Protection Act.⁴⁵

8.20 Other submissions suggested linking the DSA with:

- the new Commissioner for Children and Young People and Children's Guardian;⁴⁶
- CROC;⁴⁷ and
- the *Community Welfare Act 1987* (NSW).⁴⁸

43. People with Disabilities (NSW) Inc, *Submission* at 34.

44. Disability Safeguards Coalition, *Submission*; Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*; DeafBlind Association NSW, *Submission*; Kurrajong-Waratah Industries, *Submission*; D Newey, *Submission*; M Bowles, *Submission*; NCOSS, *Submission*; Citizen Advocacy NSW, *Submission*; Crossroads Christian Fellowship with Disabled Persons in NSW Inc, *Submission*; The Northcott Society, *Submission*; Community Visitors, *Submission*; ACROD Ltd NSW Division, *Submission*; Multicultural Disability Advocacy Association of NSW Inc, *Submission*; Physical Disability Council of NSW Inc, *Submission*; NSW Council for Intellectual Disability, *Submission*; The Spastic Centre of NSW, *Submission*; People with Disabilities (NSW) Inc, *Submission*; and Institute for Family Advocacy and Leadership Development Association Inc, *Submission*.

45. Physical Disability Council of NSW Inc, *Submission*; and Multicultural Disability Advocacy Association of NSW Inc, *Submission*.

46. CSC, *Submission*; and People with Disabilities (NSW) Inc, *Submission*.

47. NCOSS, *Submission*; and ACROD Ltd NSW Division, *Submission*.

THE COMMISSION'S VIEW

Special provisions for children

8.21 CROC recognises that children generally require special safeguards and care, including appropriate legal protection. Within this framework, it recognises that children with a disability require special care. Making explicit reference to children and their special rights and needs in the DSA gives greater prominence to the provisions of CROC. It would help to ensure that service providers and the Government give greater priority and attention to the rights and needs of children receiving disability services and, in particular, those in large residential services.

8.22 The Commission does not favour amending the DSA to replace “persons with a disability” with “children and adults with a disability”. However, to emphasise that the DSA applies to children with a disability, the definition of “person with a disability” should be amended specifically to include children, young persons and adults with a disability. The Commission is of the view that a special part of the DSA should be devoted to children and young people. The new part should include special principles and applications of principles, together with provisions linking the DSA with other relevant child protection measures.

Principles

8.23 The principles for children should mirror the general principles in Schedule 1 to the DSA to state that children and young people with a disability have the same basic human and legal rights as other children and young people in Australian society. In addition, the principles should reflect the rights contained in CROC:

That children and young people with a disability should have the right to grow up in a family environment, in an atmosphere of happiness, love and understanding.

Children and young people with a disability have the right to a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

48. People with Disabilities (NSW) Inc, *Submission*.

Applications of principles

8.24 The applications of principles⁴⁹ should also be amended to reflect CROC, and should include the following:

Programs and services shall recognise the special needs of children and young people with a disability and shall be designed to ensure that the child or young person with a disability has effective access to, and receives, education, training, health care services, rehabilitation services, preparation for employment and recreational opportunities in a manner conducive to the child or young person achieving the fullest possible participation in community life and fullest possible individual development, including his or her cultural and spiritual development.⁵⁰

Programs and services must be designed and administered so as to recognise the importance to children and young persons with a disability of supporting family relationships and the cultural and linguistic environments of children and young persons with a disability.⁵¹

Links with child protection provisions

8.25 All service providers, particularly those providing accommodation for children and young people, should be aware of the provisions of the Care and Protection Act. Special attention should be given to:

- principles governing decisions and action in relation to children and young people at risk of harm;
- reporting provisions where a child or young person is at risk of harm;
- out-of-home care provisions;
- Aboriginal and Torres Strait Islander placement principles; and
- standards applying to children and young persons placed in out-of-home care.

49. In particular, the application contained in DSA Sch 1 cl 2(m).

50. People with Disabilities (NSW) Inc, *Submission* at 34. This proposal is based on the Preamble and Art 23 of CROC.

51. This proposal is based on the Preamble and Art 20.3 and 30 of CROC.

It should be a condition of funding that service providers comply with the new Care and Protection Act,⁵² and ensure that the children and young people for whom they provide services receive the benefit of that legislation.

Hierarchy of support

8.26 As noted in paragraph 8.2 above, the DSA should recognise the principle contained in CROC that children have the right to grow up in a family environment. The new part in the DSA for children should include a hierarchy of preferred support and placement options for children with a disability. This should be:

- in-home support for the child or young person;
- in-home placement and support with other members of the child's or young person's extended family;
- support for the child or young person in a shared care arrangement between the child's or young person's parents and/or extended family and a foster carer;
- support for the child or young person in an adoption or long-term foster care placement; and
- support for the child or young person in an intimate residential care environment, with not more than three other children or young people, with consistent adult carers, and in close proximity to the child's or young person's parents and extended family.

8.27 Placing a child in a large institutional residential setting appears to be inconsistent with CROC. The Government should give the highest priority to providing funds for transitional services for children with a disability to enable them to reach full conformity with the requirements of the principles and applications of principles in the DSA. Target dates set for reaching conformity should be as short as possible and strictly enforced. In Chapter 6, the Commission recommends that the Minister for Disability Services should be required to prepare a plan stating how and when all transition services will be funded to reach full conformity.⁵³ The Commission considers that the plan

52. When it becomes operational. Otherwise, the condition should apply to the *Children (Care and Protection) Act 1987* (NSW).

53. See Recommendation 19.

should provide for all children's services to reach conformity within two years of the date the plan comes into effect.

Recommendation 30

Section 4 of the DSA should be amended to clarify that the term "person with a disability" includes children, young persons and adults with a disability.

Recommendation 31

The DSA should be amended to include a special Part for children and young people with a disability. The new Part should include special additional principles and applications of principles for children and young people.

Recommendation 32

The principles for children and young people should mirror the principles in Schedule 1 to the DSA to state that children and young people with a disability have the same basic human and legal rights as other children and young people in Australian society. In addition, the principles should reflect the rights contained in the UN Convention on the Rights of the Child ("CROC"). These include the following:

- That children and young people with a disability should have the right to grow up in a family environment, in an atmosphere of happiness, love and understanding.**
 - Children and young people with a disability have the right to a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate active participation in the community.**
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Recommendation 33

The applications of principles in the new Part relating to children and young people should also reflect CROC and should include the following:

Programs and services shall recognise the special needs of children and young persons with a disability and shall be designed to ensure that the child or young person with a disability has effective access to, and receives, education, training, health care services, rehabilitation services, preparation for employment and recreational opportunities in a manner conducive to the child or young person achieving the fullest possible participation in community life and fullest possible individual development, including his or her cultural and spiritual development.

An adapted version of Application(m) should be included to reflect CROC:

Programs and services must be designed and administered so as to recognise the importance to children and young persons with a disability of supporting family relationships and the cultural and linguistic environments of children and young persons with a disability.

Recommendation 34

It should be a condition of funding that service comply with the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*.

Recommendation 35

The new Part of the DSA relating to children and young people should outline the following hierarchy of support and placement options:

- **in-home support for the child or young person;**
 - **in-home placement and support with other members of the child's or young person's extended family;**
 - **support for the child or young person in a shared care arrangement between the child's or young person's parents and/or extended family and/or a foster carer;**
 - **support for the child or young person in an adoption or long term foster care placement; and**
 - **support for the child or young person in an intimate residential care environment with not more than three other children and young people, with consistent adult carers, and in close proximity to the child's or the young person's parents and extended family.**
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9. Enforcement

- Sanctions for non-compliance with the DSA
- Action in an emergency
- Merits review of decisions made under the DSA

9.1 This chapter examines the sanctions available to the Minister for Disability Services should a service fail to comply with the legislative requirements of the DSA. It also examines those sections which provide a right to seek a review of certain decisions made by the Minister under the DSA. In particular, this chapter considers whether the sanctions and review provisions are adequate and appropriate to enable the objectives of the DSA to be achieved.

SANCTIONS FOR NON-COMPLIANCE WITH THE DSA

9.2 The only sanction currently available in the DSA for non-compliance is the withdrawal of funding to a service. Under section 16(1), the Minister may, at any time, suspend the payment of future instalments of funding for up to 28 days or may terminate payments completely. Before the Minister terminates future instalments, he or she must notify the person or organisation receiving the assistance of the proposed termination and the reasons for it. That person or organisation must be given a reasonable opportunity to make submissions to the Minister which must be taken into account before the Minister decides to terminate financial assistance.¹

9.3 The Minister is unlikely to take either of these steps, even when a service fails to comply with the objects, principles and applications of principles, because such action would cause a decline in the standard of service or closure of the service. Closure of a residential disability service, in particular, would significantly disrupt the lives of service users, who, given the lack of available disability services, may be unable to find alternative accommodation. Consequently, these provisions have a limited role as a means of enforcing the provisions of the DSA.

Views in submissions

9.4 The CSC submitted that a service may not comply with the legislative requirements of the DSA for many reasons, including:

- the inability of a service to manage its resources to provide progressive improvements;

1. DSA s 16(2).

- lack of knowledge and skills to implement the necessary changes; or
- a service may disagree with the framework of the DSA.²

9.5 Submissions generally supported the view that the DSA should provide for a broader range of sanctions that the Minister may impose if a service does not comply with the Act. These sanctions were canvassed in IP 16.³ They include empowering the Minister to:

- vary the terms or conditions of funding;
- appoint an administrator for a service;
- stop a service from admitting any more clients;
- name a service in Parliament;
- conduct more frequent monitoring; and
- require a person receiving individual funding to seek help from a service to administer the funds.⁴

The Commission's view

9.6 The current provision for the temporary suspension or complete withdrawal of funding for non-compliance with the provisions of the DSA is inadequate. In most cases, such action will be a disproportionate response resulting in a worse outcome for service users. More appropriate sanctions are required in order to facilitate the achievement of the objects, principles and applications of principles under the DSA.

9.7 In the Commission's view, the Minister must have the power to impose a range of sanctions if a service does not comply with the DSA, or with the terms and conditions on which funding is granted. This range of sanctions should be diverse in both nature and severity. Suspending or

2. CSC, *Submission*.

3. IP 16 at para 2.57.

4. Disability Safeguards Coalition, *Submission*; C Latham, *Submission*; DeafBlind Association of NSW, *Submission*; Multicultural Disability Advocacy Association of NSW Inc, *Submission*; Physical Disability Council of NSW Inc, *Submission*; NSW Council for Intellectual Disability, *Submission*; Institute for Family Advocacy and Leadership Development Association Inc, *Submission*; and *Confidential Submission 1*.

terminating funding would be at the most severe end of the spectrum, and given the likely detrimental consequences for service users, should be considered a last resort. The range of sanctions should also provide for the possibility that, at some time in the future, persons with a disability may receive individual funding packages to purchase their own services directly. The Commission recommends that the DSA be amended to provide a range of sanctions, as outlined above. The Minister should, where appropriate, be able to take one or more of these measures, after considering the circumstances of the service or individual in question.

9.8 The power to impose sanctions is a substantive power, provision for which should be made in the DSA rather than in the terms and conditions of a funding agreement. Locating this power in the DSA also has the advantage of enabling external merits review of Ministerial decisions to impose sanctions.⁵

5. See para 9.33-9.34.

Recommendation 36

The DSA should be amended to enable the Minister to:

- **vary the terms or conditions of funding of a service;**
 - **appoint an administrator to a service;**
 - **stop a service from admitting any more clients;**
 - **name a service in Parliament;**
 - **conduct more frequent monitoring; and**
 - **require a person receiving individual funding to seek help from a service to administer the funds.**
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ACTION IN AN EMERGENCY

9.9 Concern was expressed in submissions and during consultations that the DSA does not adequately protect people with a disability who are at serious risk of harm. The CSC noted:

People with disabilities continue to be subject to abuse, neglect and other forms of harm whilst in the care of services, despite the introduction of the DSA, and its associated service standards, a formal guardianship system, the work of the CAMA bodies, and continued work of active and vigilant advocacy groups and individual advocates. For adults with disabilities in particular, there is an absence of an appropriate framework for protection from abuse.⁶

This is a particularly acute problem where a service user is harmed by, or at risk of harm from, another service user. In instances where the abuse is perpetrated by a staff member or other person coming into contact with the service user, action for criminal assault can be taken. However, recourse to the criminal law may not be appropriate in instances where one service user harms or threatens to harm another service user.

9.10 Several submissions argued that there should be a legislative framework for reporting, and responding to, abuse of people with a disability

6. CSC, *Submission* at 3.

which would be similar to the care and protection framework available to children. There was a suggestion that the ADT should have jurisdiction to make protective orders where a person with a disability is being subjected to harm or abuse due to a service provider's failure to comply with the objects, principles or applications of principles.⁷ NCOSS suggested the adoption of an approach similar to that used by ADD in developing Elder Abuse Protocols.⁸ On the other hand, it was submitted that the power to remove a person where there is immediate harm could be misused. One submission argued that it may be better to develop good practice protocols in situations where removal is being considered to ensure that the rights of all parties are taken into account.⁹ Another submission suggested that the necessary powers should be given to the police.¹⁰

The Commission's view

9.11 Effective measures are required to handle situations where a person with a disability is at serious risk of harm in a service. However, the Commission does not believe that the ADT is the appropriate body to respond to such situations. The Commission discusses this issue in its report on the review of CAMA. It concludes that the ADT, which is a review body not having original jurisdiction in community service matters, is not an appropriate body to exercise the injunctive powers suggested.¹¹

9.12 Where a person has been assaulted, abused or neglected, the police have powers to take action to protect the victim and take action against any person who has committed an offence. In the Commission's view, the police should be called when a person with a disability using a service is assaulted, abused or neglected or at serious risk of harm while using a service, regardless of who the perpetrator may be. However, ADD should develop protocols with the police, the CSC and DOCS for handling such situations,

7. Disability Safeguards Coalition, *Submission*; CSC, *Submission*; Citizen Advocacy NSW, *Submission*; Institute for Family Advocacy and Leadership Development Association Inc, *Submission*; H Seares, *Submission*; and People with Disabilities (NSW) Inc, *Submission*.

8. NCOSS, *Submission* at 18.

9. Western Sydney Intellectual Disability Support Group Inc, *Submission*.

10. The Spastic Centre of NSW, *Submission*.

11. Report 90 at para 5.121-5.122.

particularly where a person with a disability has been harmed, or is threatened, by another person with a disability. An integral part of such protocols should be the provision, by ADD, of emergency accommodation for people with a disability who require it in these circumstances.

9.13 Further, the protocols should provide that where police have been called because a person with a disability has been assaulted, abused or neglected, the police must notify ADD and the CSC. One or both of the agencies should carry out an investigation into the incident. The service should also be registered as a service of concern with DisQAC and be subject to close monitoring. In the Commission's view, resources should be allocated to enable the development of appropriate policies and protocols, the training of staff and for monitoring activities to be performed.

Recommendation 37

ADD should develop protocols with the police, the Community Services Commission and the Department of Community Services for handling incidents where a person with a disability is assaulted, abused or neglected or at serious risk of harm.

The protocols should provide, among other things, that:

- **ADD and the CSC should be notified whenever police are called to a service;**
 - **the incident should be investigated by ADD or the CSC;**
 - **the service should be registered as a service of concern with DisQAC and be subject to close monitoring; and**
 - **emergency accommodation should be provided for persons with a disability who require it in these circumstances.**
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MERITS REVIEW OF DECISIONS MADE UNDER THE DSA

Merits review

9.14 Merits review of an administrative decision is the process whereby the facts, law and policy aspects of the original decision are considered afresh by a merits review tribunal and a new decision is made which either affirms, varies or sets aside the original decision.¹² The merits review tribunal may substitute the original decision with a new decision which it considers to be the correct and preferable decision or may remit the matter back to the original decision-maker for reconsideration. The establishment of the ADT is the first step towards a comprehensive system of merits review of administrative decisions in NSW.¹³

9.15 Administrative decisions may also be reviewed by a court to determine whether the decisions were made lawfully. This process is known as judicial review. The legality of an administrative decision is generally determined by the application of two broad common law doctrines. The first is whether the decision-maker acted beyond his or her powers and the second relates to whether the process of decision-making was fair.¹⁴ A court exercising judicial review may not generally consider the merits of the decision and generally cannot, like a merits review tribunal, substitute what it considers to be the correct and preferable decision for the decision under review. It may, instead, quash the original decision or refer it back to the decision-maker for reconsideration.¹⁵

12. M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990) Ch 7 generally; and Australia, Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (Report No 39, 1995) at para 2.2-2.3. See also Report 90 at para 5.4.

13. See Report 90 at para 5.5.

14. M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990) at 161 and Ch 5 and 6 generally on the principles of judicial review.

15. See, for example, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 16(1). However, the line between the legality and the merits of a decision is not always distinct: see M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990) at 162-163.

Principles for merits review of decisions

9.16 In its report on CAMA, the Commission outlines the basis on which administrative decisions should or should not be subject to merits review. The Commission concludes that decisions are appropriate for merits review if they are made under an enactment, are administrative in nature and are likely to affect the interests of a person.¹⁶ Such decisions should be reviewable even where they are made by a non-government service provider as long as the decision would have been reviewable if it were made by a government department or agency.¹⁷

9.17 In guidelines developed by the Attorney General's Department to assist in the establishment of the general jurisdiction of the ADT, decisions of an administrative nature may include:

- decisions to grant or refuse to grant a licence, authority or approval;
- decisions to suspend, terminate, revoke or cancel a licence, authority or approval;
- determinations of an entitlement; and
- decisions relating to the protection of vulnerable persons.¹⁸

9.18 Decisions the Commission considers inappropriate for review include decisions that are: not final; law enforcement decisions; decisions with significant political content; decisions involving extensive inquiry processes; and "polycentric" funding decisions.¹⁹ Polycentric decisions are decisions that are multi-centred. As one commentator explains: "a pull at any one point changes the entire set of interlocking relationships".²⁰ Decisions to allocate funds from a limited pool to service providers fall within this category. The Administrative Review Council has consistently argued that these decisions are inappropriate for merits review because a successful challenge by one

16. Report 90 at para 5.51.

17. Report 90 at para 5.66.

18. NSW, Attorney General's Department, *Guidelines to Assist in the Establishment of the General Jurisdiction of the Administrative Decisions Tribunal* at 1-2. See also NSW, *Parliamentary Debates (Hansard)* Legislative Council, 27 June 1997, the Hon JW Shaw QC MLC, Attorney General, Second Reading Speech at 11279; and Report 90 at para 5.51.

19. Report 90 at para 5.52.

20. M Allars, *Introduction to Australian Administrative Law* (Butterworths, Sydney, 1990) at 27.

funding applicant may (unfairly) affect the allocation to another applicant.²¹ The Commission agrees that funding decisions are generally unlikely to be appropriate for merits review.²²

9.19 The DSA should continue to include a section which sets out the decisions that are reviewable by the ADT. The issues for the Commission in this chapter are whether the decisions currently reviewable are appropriate for merits review and whether there are other decisions made pursuant to the DSA which should be, but are not currently, reviewable by the ADT. The Commission's recommendations in relation to the transition process, the quality assurance system and the range of sanctions for non-compliance will have an impact on these issues.

Current review provisions

9.20 The following decisions are reviewable on their merits by the ADT:²³

- a decision approving the grant of funding where that approval should not have been given under section 10(2) because the funding would not conform with the objects, principles and applications of principles;²⁴
- a decision to provide funding to an eligible service provider where the terms and conditions on which the funding is provided do not comply with section 12;²⁵

21. Australia, Administrative Review Council, *Twenty-second Annual Report 1997/98* at para 4.62-4.63.

22. For a more detailed discussion, see Report 90 at para 5.54-5.60.

23. DSA s 20.

24. Section 10(2) provides that the Minister may not approve the grant of financial assistance unless the Minister is satisfied that providing the financial assistance would conform with the objects, principles and applications of principles under the DSA.

25. Section 12 provides that the terms and conditions of a funding agreement must deal with a number of matters including the extent to which the service must conform with the legislative requirements of the DSA, the purposes for which the funding may be used, the amounts to be applied for those purposes, the outcomes that are to be achieved for persons with a disability using the service and their rights in relation to the service and the performance indicators that are to be used in evaluating the outcomes achieved.

- a decision to provide funding to a person or eligible organisation in relation to the conduct of an approved research or development activity if the terms and conditions on which the funding is provided do not comply with section 13;²⁶
- a decision not to conduct a review under section 15 or to conduct a review that does not accord with the requirements of that section;²⁷
- a decision to terminate future instalments of approved financial assistance if those instalments have been terminated otherwise than in accordance with section 16;²⁸ and
- a decision belonging to such class of decisions as may be prescribed by the regulations.

The following decisions are also reviewable by the ADT pursuant to the *Community Services (Complaints, Appeals and Monitoring) Regulation 1996* (NSW):

- a decision made by the Minister or the Director General to provide, or to continue to provide, a service which does not conform with the objects, principles or applications of principles under the DSA;²⁹ and
- a decision made by the Minister to adopt or amend a transition plan, or to refuse to adopt or amend a transition plan, within the meaning of section 7 of the DSA.³⁰

26. Section 13 outlines the matters that must be dealt with in the terms and conditions of a funding agreement for the provision of financial assistance to an organisation for approved research or development activity.

27. Section 15 provides that the Minister must ensure that services are reviewed at least every 3 years to determine the extent to which they comply with the terms and conditions of the funding agreement and to determine whether they are achieving the agreed outcomes. See also para 7.28.

28. Section 16 provides that before terminating funding altogether, the Minister must notify the service of the proposed intention and give the service a reasonable opportunity to make submissions which must be taken into account before a final decision is made.

29. CAMA Regulation cl 6(1)(b).

30. CAMA Regulation cl 6(1)(c).

Are the current review provisions appropriate?

9.21 When the DSA was drafted, the disability sector was particularly concerned to ensure that any breach of the objects, principles and applications of principles would be subject to scrutiny by an independent body.³¹ As the Act does not create any statutorily enforceable rights for breach of the objects, principles and applications of principles,³² another way of promoting adherence with the goals of the DSA is to make the provision of financial assistance conditional on conformity with the legislative requirements of the Act. Thus, as noted above, the DSA allows certain decisions, alleged to be made in contravention of the objects, principles and applications of principles, to be challenged on their merits.³³

Submissions

9.22 The capacity to review, on their merits, funding decisions and decisions to approve transition plans where there is no transition funding allocated, is a matter of some controversy. The NSW Government has submitted that section 20 appeals are not appropriate for merits review for two reasons. First, it is argued that they relate to funding decisions with significant polycentric elements which are properly a function of the Executive and as such, are subject to parliamentary scrutiny.³⁴ In contrast, other submissions argued that section 20 appeals (and appeals against decisions to approve transition plans) should continue to be available as they are essentially the only means to ensure that the legislative requirements of the DSA are met.³⁵ Some submissions argued that decisions which may be reviewed under section 20 are not decisions relating to the actual allocation of funding, which are generally considered inappropriate for merits review.³⁶ Rather, they are decisions relating to the eligibility of a service to receive funding and should therefore continue to be reviewable.³⁷

31. NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 11 March 1993 at 767-768.

32. DSA 25(1) provides that a breach of the objects, principles and applications of principles does not give rise to any cause of action under the Act.

33. See para 9.20.

34. NSW Government, *Submission* at 1-2.

35. CSAT, *Submission* at 16-17; People With Disabilities (NSW) Inc, *Submission* at 27; Disability Safeguards Coalition, *Submission* at 11; and Burnside, *Submission* at 5.

36. See para 9.18 and Report 90 at para 5.54-5.60.

37. People With Disabilities (NSW) Inc, *Submission* at 27.

9.23 Secondly, the Government argued that such decisions should not be reviewable on their merits because of the absence of appropriate remedies. It submitted:

it is not in anyone's interest for the [Tribunal] to decide that a service does not comply with the Act's requirements when there is realistically nothing the service can do to bring itself into conformity or to provide better alternative arrangements.³⁸

According to the Administrative Review Council, an administrative decision that should prima facie be reviewable may nevertheless be inappropriate for merits review if there is no suitable remedy available to the review body.³⁹ In the case of appeals under section 20 and appeals against transition plans, a successful challenge to the Minister's decision may result in the withdrawal of funding, thus forcing the closure of the particular service. As noted earlier, this is an extreme measure which is likely to be wholly inappropriate in the vast majority of cases.⁴⁰ Consequently, the Tribunal will rarely make a decision the effect of which is to remove authority to provide funding to a service.

The Commission's view

9.24 The current review provisions are unusual in that they provide for the merits review of decisions on grounds that are ordinarily associated with judicial review.⁴¹ In other words, they allow decisions to be challenged on the ground that the Minister (or Director General as the case may be) had no power to make the decisions under the DSA. Section 10(2), for example, provides that the Minister may not approve the provision of financial assistance unless satisfied that providing the assistance would conform with the objects, principles and applications of principles under the Act. A decision of the Minister to approve funding to a service in contravention of this section would normally give rise to an action for judicial review, on the ground of want of power, yet it is reviewable on its merits under section 20(1)(a).

9.25 The decisions set out in section 20(b)-(e) also appear to provide for review in circumstances where the Minister has acted contrary to the provisions of the DSA. Sections 12 and 13 require the terms and conditions

38. NSW Government, *Submission* at 1.

39. See Report 90 at para 5.52.

40. See para 9.3.

41. See para 9.15.

on which financial assistance is provided to deal with certain specified matters.⁴² Review of a decision to provide financial assistance under section 20(b) and (c) therefore involves considering whether the terms and conditions under which financial assistance has been provided deal with the matters specified. The question is whether the decision has been made according to law and is once again normally a matter for judicial, rather than merits, review. Similarly, review of a decision under section 20(d) is concerned with whether the Minister has ensured that a review under section 15 has been conducted and whether it was conducted in accordance with the requirements of that provision.

9.26 A review under section 20(e) is concerned with whether future instalments of funding have been terminated in accordance with the procedures set out in section 16.⁴³ This is another classic ground for judicial review, namely, whether the process of decision-making was fair. Reviewable decisions under the CAMA Regulation also relate to decisions made by the Minister or his or her delegate which were decisions beyond their powers under the Act.

9.27 The Commission appreciates that the intention of section 20 and the associated provisions in the CAMA Regulation were to ensure compliance with the objects, principles and applications of principles under the DSA. However, it is evident that the current review provisions are contrary to general principle. If implemented, the Commission's recommendations regarding the transition process, the quality assurance process and the

42. These matters include:

- the extent to which the organisation must conform with the principles and applications of principles in connection with the provision of those services;
- the purposes for which the financial assistance may be applied;
- the amounts to be applied for these purposes;
- the outcomes to be achieved for persons in the target group as a result of the provision to them by the eligible organisation of designated services, and their rights in relation to the provision of designated services or otherwise; and
- the performance indicators to be used in measuring the outcomes achieved for persons in the target group.

43. Section 16 requires the Minister to notify the person or organisation receiving the assistance and give reasons for the proposed termination and the person or the organisation must be given the chance to make a submission before the Minister decides to terminate funding.

Minister's power to fund services, will address the concerns with the current review provisions.

Impact of the Commission's recommendations

Disability Services Quality Assurance Council (DisQAC)

9.28 In Chapter 7, the Commission recommends that an independent quality assurance process be established.⁴⁴ Under the proposed arrangements, all services will be assessed against a set of revised Standards by an independent panel of service providers and consumers. Services which meet the requisite level of quality service provision will be certified by DisQAC for periods of one, two or three years. Under the new arrangements, the Minister will be empowered to fund only those services that are certified by DisQAC.

44. See para 7.17-7.28 and Recommendations 26-28.

9.29 New services will have to conform fully with the objects, principles and applications of principles under the DSA in order to qualify for certification by DisQAC. Those non-conforming services which were in existence at the time the DSA came into force will continue to be in transition. However, the Commission recommends the adoption of a two-stage process to replace the current transition process.⁴⁵ Under this new system, the Minister will be required to give each service notice of when it will receive transition funding and when it is expected to reach full conformity.

9.30 Stage 1 services, those whose transition funding is not imminent, will be required to prepare a plan demonstrating how the service is meeting identified basic criteria.⁴⁶ Stage 2 services, whose transition funding is scheduled to be received within 12 months, will be required to prepare a final transition plan outlining how and when they will achieve full conformity with the DSA.⁴⁷ Both Stage 1 and Stage 2 transition plans must be lodged and assessed by DisQAC. If satisfied that a Stage 1 transition plan meets the identified minimum standards, DisQAC may certify a Stage 1 service. A Stage 2 service will be certified if DisQAC is satisfied that the final transition plan will assist the service to reach full conformity and that, until fully implemented, the Stage 2 service is complying as closely as possible with the requirements of the DSA. Certification means the service is eligible to receive funding.⁴⁸

9.31 A decision to certify or refuse to certify a service is an administrative decision made pursuant to the Act which is likely to affect the interests of persons involved in the service, given the direct link to funding. Consequently, if these recommendations are implemented, the Commission believes that a decision of DisQAC to certify or refuse to certify a new service or a Stage 1 or Stage 2 transition service should be reviewable by the ADT. A decision that a service has or has not complied with the requirements of the quality assurance process should also be reviewable given the implications that such a decision may have on the funding of a service.

45. See para 6.16-6.18 and Recommendations 18-23.

46. See para 6.19.

47. See para 6.20.

48. Note: the Commission recommends that the DSA be amended to provide that the Minister be empowered to fund only those services that have been certified by DisQAC. See para 6.20 and Recommendation 24.

9.32 The effect of these arrangements is to transfer responsibility for determining a service's eligibility to receive funding from the Minister to an independent body. This has the advantage of separating the eligibility decision from the actual funding decision while simultaneously ensuring that services must conform with the requirements of the DSA in order to be eligible to receive funding. The decisions of DisQAC should replace the current review provisions in section 20 of the DSA and the CAMA Regulation. If the Minister decides to provide financial assistance to a service that is not certified by DisQAC, in contravention of the DSA, an application may be made for judicial review in the Supreme Court on the ground that the Minister has acted beyond his or her powers.

Decisions to impose sanctions

9.33 The Commission has also recommended that the Minister should be given power to impose a broader range of sanctions against non-conforming services.⁴⁹ If these recommendations are implemented, the Minister will be empowered to make decisions which appear to be appropriate for merits review. A decision to impose a sanction is administrative in nature, made under an enactment and is likely to affect the interests of persons concerned with the service. Subject to two exceptions, the Commission believes that the Minister's decision to impose any of the sanctions recommended should be reviewable by the ADT.

9.34 A decision to name a service in Parliament or a decision to order more frequent monitoring of a service are, in the Commission's view, inappropriate for merits review. These are less severe sanctions which are likely to be imposed as interim measures on those services which are not in substantial breach of the DSA. Persistent non-compliance or more serious breaches of the Act will in all probability attract a sanction which will have a greater impact on the service and on the interests of persons involved with the service.

Recommendation 38

Section 20 of the DSA and clause 6(1)(b) and (c) of the CAMA Regulation should be repealed and replaced by the following:

49. See para 9.6-9.8 and Recommendation 36.

The DSA should be amended to include a section which provides that the following decisions are reviewable by the ADT:

- **a decision by DisQAC:**
 - **to certify or refuse to certify a Stage 1 or Stage 2 transition service;**
 - **to certify or refuse to certify a new service as conforming with the objects, principles and applications of principles under the DSA; and**
 - **that a service has or has not complied with the requirements of the quality assurance process.**
 - **a decision by the Minister to:**
 - **vary the terms or conditions of funding;**
 - **appoint an administrator for a service;**
 - **stop a service from admitting any more clients; and**
 - **require a person receiving individual funding to seek help from a service to administer the funds.**
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10. Disability Services Regulation

- Introduction
- Relationship between the DSA and the Regulation
- Provisions of the Regulation
- Views in submissions
- The Commission's view

INTRODUCTION

10.1 The Commission’s terms of reference require it to:

Review the *Disability Services Regulation 1993* (NSW) to determine whether there is a need for a regulation and, if so, whether the policy objectives of the DSA Regulation remain valid and whether the terms of the DSA Regulation remain appropriate for securing those objectives.

This chapter examines the *Disability Services Regulation 1993* (NSW) (“Regulation”). It considers the power the Minister has under the Regulation to exclude services he or she provides or funds from the operation of the DSA.

RELATIONSHIP BETWEEN THE DSA AND THE REGULATION

10.2 The DSA refers to the Regulation on three occasions:

1. The Governor is empowered to make regulations “not inconsistent with [the] Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to [the] Act”.¹
2. The DSA is a funding mechanism for the provision of designated services. A “designated service” is defined to mean “a service that is provided or funded by the Minister and that is prescribed by the regulations, or that belongs to a class of services so prescribed ...”.²
3. A “designated service” may be provided by an “eligible organisation”. The definition of “eligible organisation” includes “any society, association or body that is prescribed by the regulations, or that belongs to a class of societies, associations or bodies so prescribed ...”.³

1. DSA s 26.
2. DSA s 4.
3. DSA s 4.

PROVISIONS OF THE REGULATION

10.3 The Regulation contains two substantive clauses. Clause 3 relates to the definition of “designated service”. Clause 5 provides for the payment of fees for services provided under the DSA, and is uncontroversial. There is no clause relating to the definition of “eligible organisation”.

Designated services

10.4 Under the DSA, the Minister may approve the provision of financial assistance to an individual to enable a person with a disability to receive a “designated service”, or to an organisation providing “designated services” to people with a disability. As noted in paragraph 10.2 above, a “designated service” is one prescribed by, or belonging to a class prescribed by, the Regulation. The Regulation provides that “*all* services provided or funded by the Minister” are prescribed as designated services.⁴ It also provides, however, that the prescribed services do not include services referred to in Schedule 1. Schedule 1 lists services provided or funded under the *Home and Community Care Act 1985* (Cth), except those provided through the Home Care Service. This means that HACC services are exempted from the requirements of the DSA.

10.5 In 1998, the Regulation was amended to exclude services provided at Lidcombe by the Multiple Sclerosis Society of NSW from the operation of the DSA.⁵ The Regulation also provided for that exclusion to be revoked from 1 September 1998.⁶ Excluding services from the operation of the DSA potentially has significant ramifications for the consumers of the service. Despite this significance, however, the power to make such an exemption is included in the Regulation itself rather than the DSA. Regulations do not necessarily receive the same degree of parliamentary scrutiny as legislation does, since they do not have to be passed by both Houses of Parliament.⁷

4. Emphasis added.

5. *Disability Services Amendment (MS Society) Regulation 1998* (NSW) Sch 1.

6. *Disability Services Amendment (MS Society) Regulation 1998* (NSW) Sch 2.

7. Regulations are subject to some parliamentary scrutiny. Written notice of a regulation must be given to both Houses of Parliament within 14 sitting days of it coming into effect (being the date of publication in the *Government Gazette*): *Interpretation Act 1987* (NSW) s 40. Parliament may disallow a regulation at any time before receiving such written notice, or within 15

Furthermore, the DSA does not offer any guidance on the criteria the Minister should have to take into account in making the decision to exempt a service from the Act. Consequently, there is potential for such power to be exercised arbitrarily, which would undermine the effect of the objects, principles and applications of principles in the DSA.

VIEWS IN SUBMISSIONS

Exempting services from the operation of the DSA by regulation

10.6 Submissions overwhelmingly considered that the Minister should not have the power to exclude services funded under the DSA from the requirements of the Act's principles and applications of principles.⁸ They argued that if the power were to be retained, the basis on which it should be exercised should be clearly set out in the legislation and only used as a last resort.⁹ Other submissions approved of the power, provided it was subject to certain safeguards: namely, that there should be clearer guidelines for exercising the discretion;¹⁰ and that it should be done very cautiously to avoid a two-tier system of services.¹¹ The NSW Government was of the view that the Regulation was an effective way of excluding services from the operation of the DSA, but suggested another option of excluding services by Ministerial order (with appropriate accountability mechanisms).¹²

sitting days after written notice has been given: *Interpretation Act 1987* (NSW) s 41(1).

8. Australian Quadriplegic Association Ltd (NSW), *Submission*; Disability Safeguards Coalition, *Submission*; DeafBlind Association NSW, *Submission*; Dare to Care, *Submission*; DNewey, *Submission*; NCOSS, *Submission*; Western Sydney Intellectual Disability Support Group Inc, *Submission*; Multicultural Disability Advocacy Association of NSW Inc, *Submission*; Autism Association of NSW, *Submission*; NSW Council for Intellectual Disability, *Submission*; and Institute for Family Advocacy and Leadership Development Association Inc, *Submission*.
9. The Spastic Centre of NSW, *Submission*; and *Confidential Submission 1*.
10. The Spastic Centre of NSW, *Submission*.
11. *Confidential Submission 1*.
12. NSW Government, *Submission* at 6.

Exempting HACC from the operation of the DSA

10.7 Submissions were divided as to whether HACC services should or should not be exempted from the operation of the DSA. Some submissions considered that they should not be exempted¹³ as they provide essential support to people with a disability,¹⁴ and that HACC consumers should have the protection afforded by the DSA.¹⁵ Other submissions noted that HACC services should not be governed by the DSA,¹⁶ but should be monitored,¹⁷ and subject to comparable standards.¹⁸ In the view of the Local Government and Shires Associations of NSW, HACC services should have to comply with only one set of standards.¹⁹

THE COMMISSION'S VIEW

Unnecessary duplication should be avoided

10.8 The only valid reason for excluding a service providing support to people with a disability from the requirements of the principles and applications of principles, and the quality assurance mechanism associated with the DSA, would be that the service is already subject to its own comparable standards and quality assurance measures. The purpose of the exemption would be to avoid duplicating these processes. Services should not have to waste scarce resources on duplicating accountability requirements. For example, HACC services are subject to Commonwealth standards and standards monitoring. So long as there are appropriate Commonwealth

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13. See, for example, Australian Quadriplegic Association Ltd (NSW), *Submission*; Ethnic Childcare, Family and Community Services Co-operative Ltd, *Submission*; Paraquad NSW, *Submission*; DeafBlind Association NSW, *Submission*; Disability Information Service Inc, *Submission*; Crossroads Christian Fellowship with Disabled Persons in NSW Inc, *Submission*; and Physical Disability Council of NSW Inc, *Submission*.
 14. Australian Quadriplegic Association Ltd (NSW), *Submission*.
 15. Paraquad NSW, *Submission*.
 16. See, for example, Disability Safeguards Coalition, *Submission*; Multicultural Disability Advocacy Association of NSW Inc, *Submission*; and Institute for Family Advocacy and Leadership Development Association Inc, *Submission*.
 17. Disability Safeguards Coalition, *Submission*.
 18. Nepean Independent Living Committee Inc, *Submission*.
 19. Local Government and Shires Associations of NSW, *Submission*.

standards, HACC services should continue to be excluded from the operation of the DSA.

Power should be subject to greater scrutiny

10.9 Exempting services from the operation of the DSA is a serious matter. The consequences are that the Minister may provide or fund services that do not comply with the objects, principles and applications of principles in the DSA. Services outside the scope of the DSA are also not subject to the Act's quality assessment process or review procedures. The Minister should have the power to exempt a service from the operation of the DSA only if he or she is satisfied that the service or class of services to be exempted is subject to standards comparable with the objects, principles and applications of principles, and an effective quality assurance process. In order to achieve greater accountability, this power should be transparent and located in the DSA itself, not in the Regulation.

Recommendation 39

The DSA should be amended to provide that the Minister may, through the Regulation, exempt a service from compliance with the objects, principles and applications of principles of the DSA, but only if he or she is satisfied that the service or class of services to be exempted is subject to standards comparable with the objects, principles and applications of principles, and an effective quality assurance process.

Recommendation 40

The Regulation should continue to provide for services provided or funded under the *Home and Community Care Act 1985* (Cth), except those

provided through the Home Care Service, to be excluded from the operation of the DSA.

Appendix A REFERENCE GROUP MEMBERS

Mr Lester Bostok, Aboriginal Disabilities Service

Ms Jane Eales, Carers NSW Inc

Ms Belinda Epstein-Frisch, Institute for Family Advocacy and Leadership Development

Ms Jane Frazer, Action for Citizens with Disabilities

Mr Glenn Gardner, The Northcott Society

Ms Rosemary Kayess, Disability Council of NSW

Ms Bronwyn Moye, People With Disabilities (NSW) Inc

Ms Diana Qian, Multicultural Disability Advocacy Association

Mr Robert Strike, Self Advocacy Sydney Inc

Ms Robin Way, ACROD

Appendix B SUBMISSIONS

ACROD Ltd NSW Division, 17 December 1998

Action for Citizens with Disabilities, 13 December 1998

Australian Federation of Carers, 12 December 1998

Australian Quadriplegic Association Ltd (NSW), 14 December 1998

Autism Association of NSW, 23 December 1998

Barnardos Australia, 14 December 1998

Baulkham Hills Shire Council, 3 December 1998

Baxter Mr S, 20 November 1998

Birnie, Ms M, 24 December 1998

Blind Citizens Australia, Sydney Branch, 25 January 1999

Bowles, Miss M, 10 December 1998

Burnside, 10 December 1998

Carers NSW Inc, 14 December 1998

Carers of Protected Persons Association, 7 December 1998

Caringa Enterprises, 26 November 1998

Centacare Sydney, 11 December 1998

Centre for Developmental Disability Studies, University of Sydney, 11 December 1998

Citizen Advocacy NSW, 20 December 1998

Clifton, K and J, 15 December 1998

Coalition for Approved Supported Accommodation, 17 January 1999

Comfrey Cottage, 21 January 1999

Community Services Appeals Tribunal, 14 December 1998

Community Visitors, *CAMA Submission*, 23 December 1998;
DSA Submission, 24 December 1998

Confidential 1, 28 October 1998

Confidential 2, 6 January 1999

Confidential 3, 10 January 1999

Confidential 4, 28 January 1999

Confidential 5, 5 February 1999

Crossroads Christian Fellowship with Disabled Persons in NSW Inc, 21 December 1998

Community Services Commission, *CAMA Submission 1*,
24 December 1998; *CAMA Submission 2*, 4 January 1998;
DSA Submission, 19 January 1998

Dare to Care, 18 December 1998

Deaf Society of NSW, 21 December 1998

Deafblind Association NSW, 18 December 1998

Disability Assistance for Shoalhaven Inc, 10 December 1998

Disability Council of NSW, *Submission 1*, 15 October 1998; Disability
Council of NSW; *Submission 2*, 16 December 1998

Disability Information Service Inc, 11 November 1998

Disability Safeguards Coalition, *DSA Submission*, 11 December 1998; *CAMA
Submission 1*, 11 December 1998; *CAMA Submission 2*, 5 March 1999; *CAMA
Submission 3*, 16 March 1999

Dixon, B and D, 2 December 1998

Dunrossil Challenge Foundation Ltd, 21 December 1998

Ethnic Child Care, Family and Community Services Co-operative Ltd, 14 December 1998

Ferguson, Ms C, 15 November 1998

Goges, A, 29 December 1998

Greystanes Children's Home, 7 December 1998

Hunter Region Disabled Lobby Group, 8 December 1998

Hutten, Mr P, *CAMA Submission*, 7 December 1998;
DSA Submission, 28 February 1999

Institute for Family Advocacy and Leadership Development Association Inc,
24 December 1998

Intellectual Disability Rights Service Inc, 21 December 1998

Intellectual Disability Rights Service Inc, 2 February 1999

Kingsgrove Community Access Service, 10 December 1998

Kurrajong-Waratah Industries, 14 December 1998

Latham, Ms C, 14 December 1998

Local Government and Shires Associations of NSW, 15 December 1998

Manly Warringah Community Access Service, 14 December 1998

McCredie, Ms R, 10 December 1998

McKenzie, Ms S, 8 December 1998

Moffit, Ms L, 1 December 1998

Morgan Key Training Resources, 4 December 1998

Morris, Mrs L, 19 November 1998

Multicultural Disability Advocacy Association of NSW Inc,
16 December 1998

Multiple Sclerosis Society of NSW, 14 December 1998

NCOSS, *DSA Submission*, 22 December 1998; *CAMA Submission*, 22
December 1998

Nepean Independent Living Committee Inc, 18 December 1998

New Horizons Enterprises Ltd, 9 December 1998

Newey, Ms D, 14 December 1998

NSW Council for Intellectual Disability, *DSA Submission*,
24 December 1998; *CAMA Submission*, 15 January 1999

NSW Government, The Hon F Lo Po MP, Minister for Community Services
and Minister for Disability Services, *DSA Submission*,
5 January 1999; *CAMA Submission*, 5 January 1999

NSW Ombudsman, 7 December 1998

NSW Statewide Disability Coalition, *CAMA Submission*,
14 December 1998; *DSA Submission*, 14 December 1998

Paraquad NSW, 14 December 1998

People With Disabilities (NSW) Inc, *CAMA Submission*,
27 January 1999; *DSA Submission*, 2 February 1999

Physical Disability Council of NSW Inc, 15 December 1998

Price, The Hon J C, MP, Member for Waratah, Legislative Assembly, 24
November 1998

Prince, Mr L, 17 December 1998

Seares, Ms H, on behalf of G Curnick, 18 January 1999

Semmler, Mr B, 30 December 1998

Spark, Ms L, 14 December 1998

Sticotti, Ms S, 18 December 1998

Stockton Hospital Welfare Association Inc, 28 October 1998

The Northcott Society, 21 December 1998

The Spastic Centre of NSW, *DSA Submission*, 7 January 1999; *CAMA
Submission*, 7 January 1999

Review of DSA

Western Sydney Intellectual Disability Support Group Inc, *DSA Submission*,
16 December 1998; *CAMA Submission*, 16 December 1998

Wilson, Ms M, 11 January 1999

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Child Care Act 1972	1.21
Disability Discrimination Act 1992	4.3, 4.5, 4.6, 4.9, 4.12, 4.23, 4.24, 4.26, 5.6, 5.7
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s 65.....	4.5
Disability Services Act 1986	1.19, 5.9
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Community Services (Complaints, Reviews and Monitoring) Regulation	9.26,
9.27, 9.32	
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