MAKING RIGHTS COUNT

new disability services legislation for the commonwealth

How can the Commonwealth improve its provision of services to people with a disability? *Making rights count* (ALRC 79), a report released on 15 October 1996, recommends new federal Disability Services Legislation to ensure that funding decisions for services recognise the rights and interests of people with a disability. **Donna Hayward** and **Anne Marie Farrugia** report.

Donna Hayward and Anne Marie Farrugia were Team Leader and Law Reform Officer respectively on the reference.

Making Rights Count: Services for people with a disability (ALRC 79) makes recommendations designed to transform the nature of disability service delivery in this country. It is the culmination of years' worth of groundswell discontent about an Act which is perceived to focus in only a minor way on the rights and needs of people with a disability.

The Commission examined the provisions and effect of the *Disability Services Act 1986* (Cth) over a two year period. Although the Act is only ten years old, the Commission considers its report to be timely given the changes in attitude regarding the provision of disability support services and the national framework for delivering those services. The Commission investigated, consulted nationally and received 630 written and oral responses on the issue of whether the 1986 Act is adequate to guide the direction of disability support services into the next century.

The main theme of the report is that in order to provide more effective and efficient services to people with a disability, the perspective of the present Disability Program and existing legislation must be altered so that it focuses directly on people with a disability, rather than on the parameters of Federal, State and Territory jurisdictions, on bureaucratic division of resources and responsibility and on the financial relations between the Department and service providers.

The Commission wants the new legislation to look beyond the existing structure of service provision to attend more directly to the needs and demands of people with a disability. A new structure of service provision, markedly different from that which we have at the moment, may well evolve from this process — a structure which is designed specifically to meet the needs of those it professes to service.

Background to the Disability Services Act

When it was enacted, the *Disability Services Act 1986* (Cth) marked a turning point in the regulation of disability services. Until that time, the law was largely driven by a welfare attitude — government and service providers felt they knew what was best for people with a disability. The 1986 Act changed that attitude by assisting people with a disability to take their place in the community, overcome disadvantages and achieve increased independence, employment opportunities and self esteem.

Shortcomings of the Act

One of the major problems with the 1986 Act is that it lives up to its title too literally. It is about funding services rather than providing effective support to the people who use them. It provides that the Commonwealth (through the Minister for Health and Family Services) may approve funding to eligible organisations or to States and Territories to provide services for people with a disability. Consultations overwhelmingly supported the view that this emphasis on funding has not worked.

The Act is also notable for what it omits. It does not contain provisions which give legal effect to the principles of equality and integration on which it is based, neither does it direct itself to the full community of people with a disability but is restricted to a target group based on the type and cause of disability. There is no provision for funding to be distributed on the basis of a national planning model that is open to legal challenge and takes into account the needs of people with a disability and the principles and objectives of the Act. The 1986 Act also lacks mechanisms that provide sufficient redress for complaints people may have about services, or adequate administrative review of decisions made under the Act.

The environment in which the Act operates also works against the interests of the people who should be its major focus. Although the Act states that the Commonwealth may provide a range of disability services, an agreement between the Commonwealth and the States and Territories splits responsibility for funding and administering disability services.

Under the agreement, the Commonwealth primarily provides employment services, either directly through the Commonwealth Rehabilitation Service or indirectly by funding other providers. States and Territories are responsible for providing accommodation support, respite and recreation advocacy services. States and Territories also provide transport facilities and aids and appliances for people with a disability.

The problems created by the split between Commonwealth and State services are compounded by the fact that there is little consistency in the policies that underpin the provision of disability services throughout Australia or in the way those services are funded and provided by various bureaucratic regimes.

At the Commonwealth level, different departments and agencies are responsible for administering different aspects of support for people with a disability. For example, the Department of Social Security looks after income support, the Department of Health and Family Services deals with funding and administering certain services to improve the employment and independent living prospects of people with a disability and the Commonwealth Rehabilitation Service also offers programs to assist people with a disability to achieve vocational and independent living goals. The Disability Discrimination Commissioner in the Human Rights and Equal Opportunity Commission is responsible for ensuring people with a disability are not discriminated against.

The Commission heard that this bureaucratic maze creates difficulties when people with a disability try to get access to services funded by different agencies. Each agency or department has its own eligibility criteria and assessment procedures. Some people have been unable to get access to Commonwealth funded employment services because there is no accommodation support available in the area or no appropriate transport. People felt that the compartmentalisation of disability services for the sake of administrative convenience further handicaps an already vulnerable consumer group.

Almost everybody felt that there should be a more seamless approach to disability services and greater integration of policies and service delivery between Commonwealth agencies and between the Commonwealth and the States and Territories. It was said that people don't live their lives in accordance with administrative boxes and want the new legislation to reflect a more whole of life approach. The great majority of people also felt that there should be more accountability on the part of Commonwealth and State and Territory governments and service providers.

International law and the concept of rights

The need for reform of the 1986 Act has been underlined by a growing recognition that Australia's international obligations require a fundamental renovation of the legislation so as to focus it on the rights of people with a disability.

The law in Australia is not isolated from the effects of international law. Its impact, in particular with regard to human rights, is evident in the framing, implementation and interpretation of domestic law. Australia is a party to a number of international agreements and treaties that require it to protect and uphold the basic human rights of all Australians. These rights include the right to respect for human dignity and freedom, equality before the law, privacy and equal opportunity and treatment in employment.

There is no multilateral treaty or covenant dedicated to the protection and promotion of the rights of people with a disability. However, the rights of people with a disability are impliedly recognised. The preambles to the Universal Declaration of Human Rights and the two legally binding covenants which grew from the Universal Declaration — the International Covenant on Economic Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) — refer to the inherent dignity and equal rights of all people as the foundation of freedom, justice and peace.

The rights of people with a disability are expressly covered in the UN Declarations on the Rights of Mentally Retarded Persons 1971 and on the Rights of Disabled Persons 1975. These declarations are not enforceable at international law. However, the Legal Department of the United Nations has said that there is a strong expectation that members of the international community will abide by them.

There are also Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, adopted in 1993. These rules do not comprise a convention on rights of people with a disability. However it is argued that, in time, and through their observance, they will become 'international customary rules'. The Rules, addressed to all UN member States, require appropriate action to ensure that all people with a disability may exercise the same rights and obligations as others in their society. The rules set preconditions for equal participation in society in such areas as education; employment; income maintenance and social security; family life and personal integrity; culture; recreation, sports and religion.

The basis for the protection and promotion of the rights of people with a disability plainly exists in international law and has done so for over 20 years. Australia has an obligation to ensure that these rights are recognised, respected and complied with in domestic law. The basis of every human rights and social justice doctrine is that all citizens are considered to be equal before the law. The notion of equality lies at the heart of Australian society and of our system of government.. Rights and rights rhetoric are part of our vocabulary and are accepted as the necessary basis for social policy. When the Government uses the rhetoric of rights, it is perfectly appropriate for those rights to be given concrete meaning through the development of legislation and policy. Any legislation based on human rights doctrines should, therefore, attempt to achieve equality for all Australian citizens.

What do we mean by rights-based law?

Far from recognising the rights of people with a disability, the current legislation, seems to presume that government and service providers know what is in the best interests of people with a disability and will necessarily act accordingly.

In recommending a shift towards rights-based legislation, the Commission does not suggest that people should be guaranteed a right to receive support services regardless of cost. It is outside the Commission's terms of reference to recommend this and would be impractical given the budget restrictions placed on the provision of disability services. What the Commission does recommend is a people-centred law that provides mechanisms to ensure that people with a disability are afforded equality of treatment and opportunity and that fair process is observed by the Commonwealth and by service providers.

The Commission recognises that service provision must be adequately and efficiently regulated, but to place that goal ahead of the rights and needs of the people for whom the services are provided distorts the Act's declared aim. In order for services to be delivered effectively and efficiently, the first priority in any legislative regime must be given to consideration of the requirements of people with a disability.

The Commission's recommendations are aimed at providing a legislative base to allow for funding to be channelled through services to achieve fair, equitable, efficient and effective service provision for people with a disability. Under the new legislation people with a disability should have the right to fair treatment, equal opportunity and to have their grievances about services addressed. This change of focus should be achieved by

- having as the primary objective of the legislation respect for the right of people with a disability to fair and equal treatment in the provision of services and
- including a statement of principles in the legislation, and an explanation of how those principles should be applied, to ensure (regardless of type, cause or severity of disability) there is:

- — equal access to services
- — fair assessment of need
- — the right to be consulted about planning issues and matters that affect people as service users
- — the right to privacy
- — the right to complain about services.

Some of the particular changes the Commission has recommended in drafting the new legislation include: broadening the definition of disability to remove the risk of excluding people from services purely on the basis of type or cause of disability; streamlining the ways in which people can access services; developing internal and external complaints mechanisms so that consumers can air their grievances and achieve some resolution; and, the establishment of a body to be called the Office of the Equal Status of People with a Disability.

Office of the Equal Status of People with a Disability

The Commission has recommended that an Office on the Equal Status of People with a Disability be established within the Department of the Prime Minister and Cabinet to drive policy development and coordinate national policy and service delivery across Commonwealth agencies and between States and Territories. Currently, disability strategies and initiatives are developed by the Office of Disability, which is within the Department Health and Family Services. That office has a significant role in promoting and developing broad disability policy across Commonwealth portfolios and various levels of government.

However, if disability is to be seen as a nationally important mainstream issue, a national agency needs to be located in a central office rather than being a small part of a Department which is itself on the fringe of the core set of policy departments in Canberra. Such an office could work along the lines of the Office on the Status of Women. It would be involved in high level strategy formulation for the advancement of the interests of people with a disability generally, not just in relation to the provision of services administered by the Department of Health and Family Services. The role of the Office should be to

- develop disability services policy at a national level in consultation with relevant Commonwealth, State, Territory, local government and community organisations
- coordinate disability policy nationally with relevant Commonwealth, State, Territory, local government and community organisations
- be instrumental in developing Commonwealth planning policy and assessing the impact of planning proposals on the community
- monitor and report to Commonwealth Parliament on the implementation of the principles and objectives of the new legislation across Australia
- identify and report to Commonwealth Parliament on areas of duplication or gaps in service delivery across Australia
- receive, coordinate and disseminate relevant information on disability services, policy and law from each Commonwealth, State and Territory agency.

Conclusion

After ten years, the strengths and weaknesses of the 1986 Act have become apparent. Its strengths include its principles and objectives which paved the way for greater independence and integration into the community of people with a disability as well as marking a turning point in the way they were viewed by governments. However the weaknesses of the Act as described above make change necessary. These lie in its lack of focus and cohesion and its failure to regulate disability services in a nationally coordinated way.

The Commission believes that governments, the disability sector and the general community should seize the opportunity presently at hand to learn from past inadequacies. New disability services legislation for the next ten years and beyond should create a national framework for integrated policy and service provision based on the rights of people with a disability.

Making Rights Count: Services for people with a disability (ALRC 79) is available from the Australian Law Reform Commission at a cost of $15 (plus $5 postage)