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Setting the pace of being left behind?

# **Contracting out in Community Services**

April 1996

a paper by Anita Tang

**Background Paper for Workshop:**  
**Contracting Out in Community Services**

**1. Introduction**

In the area of community services, current reforms have seen the state government move away from direct service delivery. The non-government and private sectors are increasingly taking on the role of service provider, even to those consumer groups who are the statutory responsibility of the state. In the context of this forum, the question which must be addressed is - how well can the current system of administrative law protect the interests of individuals who use community services which are not provided by the state ?

The Community Services Commission is a statutory 'watchdog' body over community services in NSW. The functions of the commission include handling complaints, conducting reviews of people in care, and monitoring community service issues. Our role is one of consumer protection, and so we are pleased to have the opportunity to contribute to this important debate.

Our experience suggests that the development of administrative law and other consumer protection mechanisms has not kept pace with the reforms in community services.<sup>1</sup> Consumers are in an extremely vulnerable position, with access to redress or review being determined by nature of the relationship between their provider and the government. We believe that the issue is not whether the reforms should occur, but that if government services are contracted out, there must not be a reduction in the safeguards available to consumers of community services. This would be particularly ironic when many of the reforms in community services are ostensibly driven by a desire to increase external accountability and monitoring (via funder/provider split).

While the reforms in community services in part reflect the push towards so-called 'competition policy' that is occurring in other sectors, there are also a number of independent initiatives in the community services area that have

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<sup>1</sup> The comments which follow reflect the observations of the commission in our first 2 years of operation. It should be noted that these observations are drawn from our work in handling complaints, conducting reviews of individuals in care and our other monitoring functions. The issues raised here about the possible impacts of the reforms are presented for the purposes of discussion, and to provide directions for further development of safeguards for consumers.

contributed to the move away from direct government service provision. These include:

- The so-called Usher reforms in substitute care, where responsibility for provision of substitute care services (residential and foster care) has moved from the Department of Community Services to contracted non-government agencies;
- The implementation of the CSDA which gave state governments funding responsibility for an array of accommodation support and other services for people with disabilities; and
- The increasing use of non-government services for people with disabilities who would previously have lived in government institutions. This last category includes both funded services and private-for-profit boarding houses as alternatives to institutional care.

For the purposes of this workshop, I would like to outline for you:

- the importance of administrative review, and consumer protection and accountability mechanisms in the context of community services
- some of the major issues and concerns about the reforms in community services, in terms of impact on consumers and their access to administrative review or other safeguards
- options for protection of consumers and accountability of services
- the current state of the field in terms of access to administrative review and other safeguards for consumers of community services in NSW, focusing on those mechanisms provided through the *NSW Community Services (Complaints, Appeals and Monitoring) Act 1993*
- our conclusions as to the issue of administrative review, consumer protection and accountability in light of the community services reforms

## **2. Administrative review, consumer protection and accountability in the context of community services**

It is probably not an exaggeration to suggest that community services have been something of a backwater in administrative review. There may be a number of reasons for this including:

- the nature of the client group,
- the amorphous nature of decisions and actions involved in community services (as opposed to say the granting of income support or immigration applications),
- the dominance of enabling rather than entitlement legislation, and
- that community services fall into state rather than commonwealth jurisdictions.

Until recently, the only specialist avenue of administrative review available to people in community services was the Community Welfare Appeals Tribunal (with very restricted jurisdiction). Other options were available through generic channels such as the Administrative Law Division of the Supreme Court, the Ombudsman and FOI. However, for many users of community services, such generic mechanisms are extremely difficult to access. Restrictions in access include:

- cost,
- difficulties in using a legal or formal system,

- the lack of ability of consumers (due to age, capacity or circumstances) to bring forward a complaint or appeal in their own right.

Additionally, these avenues tend to focus on procedural matters rather than those which have substantive impact on the lives of consumers.

These issues are critical in the context of community services. Broadly speaking 'community services' are those required by people who need support to function independently within the community. Such services include:

- child protection,
- substitute care of children who have been removed from their families,
- support for families who are in crisis or who have been deemed to have difficulties in caring for their children,
- accommodation and other services for people with disabilities and their families,
- home support services for people who are aged and frail, and
- services for homeless people, or other forms of crisis care

The people who use such services share at least some of the following features which make them extremely vulnerable (individually and as a group) to the impact of decisions and actions of service providers:

- the involuntary nature of most community services i.e. in some cases people do not choose to use community services, but may be forced into it due to need or circumstance
- nature of community services places consumers in a position of dependence because of the whole-of-life context, and lack of alternatives should they be dissatisfied. This also means that consumers are vulnerable to, and fearful of, the retribution that may result from complaining
- age and capacity of consumers, particularly children, elderly people and people with disabilities, may limit their capacity to effectively advocate for themselves or to form effective consumer lobby groups
- life circumstances of consumers may make it difficult to deal with more than their own immediate needs, particularly homeless people, parents in crisis
- previous negative experiences with the justice and welfare system can contribute to a reluctance or cynicism about seeking redress
- consumers low sense of entitlement or lack of knowledge about their rights
- many consumers have few supportive personal relationships, resulting in social isolation and a lack of advocacy and support

These features result in an acute imbalance of power, information and status between consumers of community services and the service providers, whether they are departmental, community based or private. This imbalance is exacerbated in an environment of scarce resources and high demand, as is the case in community services.

An additional factor contributing to the need for accountability mechanisms in community services is the all too apparent gulf between what governments say they will do and provide, and the reality i.e. the gap

between policy and practice in service provision. The commission believes that consumer safeguards and accountability mechanisms (including administrative law) are key ways of making the public administration accountable to their own rhetoric.

It is also important to recognise that government often has a statutory or traditional responsibility to the users of community services. In the case of children this may involve a court order making the Minister legal guardian or placing a child in the temporary care of the Director General. In the case of people with disabilities, the government has had a traditional role in providing accommodation support for such people, and had a guardianship role in some cases (until the later part of the 1980s). When the state has transferred its role of direct service provision and care, there remains an ongoing public responsibility for the well-being of some consumers of community services. There must be appropriate accountability mechanisms to match such responsibility.

### **3. Impact of reforms**

Regardless of the rationale for the various reforms that have resulted in a shift of service provision to the non-government and private sectors, they all make general claims to increased benefits in efficiency and/or effectiveness. There is however, a danger that in some instances process measures, such as efficiency, may have displaced substantive goals, such as family support and the well-being of children.

The result is that there is now an almost bewildering array of modes of service delivery and financing in community services, each with varying levels of accountability, and differing levels of access to existing administrative review mechanisms.

The following are some of the financing and delivery options, together with the possible accountability and consumer protection mechanisms<sup>2</sup> -

- **Fully government financed and direct public delivery** - these services are accountable to the government and Parliament, and subject to public sector accountability mechanisms such as Guarantees of Service, Annual Reports, Customer Councils, Ombudsman, FOI legislation.<sup>3</sup>
- **Fully government financed, community delivered** - funding agreements for these services may include requirements for accountability, quality assurance and consumer safeguards e.g. requirement for the development of complaints handling mechanisms, standards of service

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<sup>2</sup> Adapted from NCOSS "The Magic Answers - including privatisation, contracting out and all that!" 1994, pgs 20-22

<sup>3</sup> It is worth noting however, that in the area of community services, it can be argued that where the Department of Community Services has a monopoly on the care, guardianship or custody of children and people with disabilities, such consumers are likely to have less access to redress and consumer protection because of the 'in-house' nature of the decisions and actions taken. See ACWA "Accountable for Care - a comment on the implementation of the 1992 reform of substitute care" 1996

delivery. Should also provide for accountability to users or their representatives through management systems

- **Partly government financed, part user pays or community financed, community delivered** - accountability dependent on proportion and conditions of public funding, and method of management
- **User pays, private delivery** - only accountability mechanisms might be through legislation such as licensing or accreditation, the effectiveness of which is dependent on the quality of the legislation/licensing and monitoring of these requirements
- **Independent community contribution only, community delivered** - little accountability unless subject to broad legislation or licensing requirements. May or may not have mechanisms for accountability to consumers, or any consumer protection mechanisms

Understanding this current state of service provision is far from being merely an academic or administrative exercise. The reality for consumers that results from this is that access to consumer safeguards or redress depends largely on the source of financing for the service provider you happen to use.

The commission believes this is an unsatisfactory situation, leaving many consumers vulnerable to the vagaries of 'placement' decisions and the actions and determinations of service providers that fall outside the scope of existing complaints and appeals mechanisms.

The commission believes there are a number of other potential risks for consumers in the move to contracting out of community services -

- the resultant competitiveness within the sector and between government (as funder) and the non-government sector (as provider), which may work against collaboration and co-operation for individuals or the development and provision of services generally;
- need for balance between government maintaining its responsibility for groups such as state wards, once the responsibility for service provision has been delegated
- tendency for contracted services to select consumers for whom it is easier to provide, and therefore produce outcomes at lower cost. This obviously disadvantages those consumers with very high and/or complex support needs
- monopoly of service provision by those larger non-government agencies with appropriate infrastructure to compete for tenders and/or absorb additional costs. The long term impact of this trend would be a reduction in consumer and state choice regarding service providers
- increasing distance between policy and practice with funder/provider split and possible loss of expertise by government body concerned

#### 4. Options for consumer safeguards and accountability

The current anomalies in access to consumer safeguards and accountability mechanisms between the government and non-government and private sectors is clearly cause for concern. There are at least two underlying ideologies which may have contributed to this situation. The first is the notion of a divide between public and private powers and laws; and second is the assumption that 'competition' and market forces can provide efficiency and accountability. It is worth looking a little more closely at these, before considering what safeguards are required by consumers in all community services.

#### **4.1 Public and private law:**

While administrative law has traditionally concerned itself with the decisions and actions of public administrators, there is clearly a need to examine the scope for administrative law in those areas where government has delegated its responsibilities to the non-government or private sectors. The Administrative Review Council has recently proposed that there should be a right to appeal (through merits review) those decisions where the interests of a person will be or are likely to be affected. The ARC also suggested that where a funded agency makes decisions or delivers services that might otherwise be provided directly by government, they could also be subject to similar accountability requirements.<sup>4</sup>

An argument against the extension of administrative law into the non-government area might be that this is more correctly the jurisdiction of 'private law'. In this sphere, contract law, tort, or other laws which control relationships between individuals, or between individuals and private organisations can provide redress and protection for consumers. However, the commission rejects the proposition that so-called private law can provide sufficient protection for consumers of community services. Consumers of community services are rarely free agents for the purposes of entering into or terminating a contract for the services they receive (particularly those which are involuntary such as child protection, and residential institutionalisation). It is also not easy for them to take legal action against breach of contract, or initiate tort action.

Further, the commission argues that given the particular relationship between the state and consumers of community services (such as state wards) means that any decisions/actions which impact on their well-being and interests are still within the public sphere. Even when the state is not the direct provider, public administrators still have (or should have) responsibility for decisions that have profound impact on both the consumers and providers of community services. Examples of these include the decisions made by the state as to where state wards will live, which organisations will provide services to particular people with disabilities or children in care, decisions about custody of a child in foster care. The capacity of non-government organisations to provide appropriate services to consumers is also the responsibility of government, and such arrangements should be subject to public scrutiny and accountability.

#### **4.2 Market forces and competition:**

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<sup>4</sup> Administrative Review Council "Administrative Review and Funding Programs (A Case Study of Community Services Programs)" Report No 37, 1994

The notion that market forces and competition will enhance accountability and quality in the area of community services is a dubious claim at best. The commission suggests the following factors work against the notion of market competitiveness as a safeguard in community services -

- community services consumers rarely exercise choice - either because there is no choice to be made (in the case of involuntary use of community services and where services are so scarce that 'you take what you can get') or because consumers are unable or unwilling to exercise that choice (because of lack of capacity to choose or the risks and burdens involved in changing providers, particularly in the area of supported accommodation)
- in the area of community services, demand far exceeds supply, so that if a market analogy were applied, it would clearly be a market which favoured the providers rather than the consumers
- most community service providers are not business oriented organisations, and there are obvious dangers in making community services a market driven commodity
- in the non-government sector which is publicly or community funded, there is a lack of market incentives or profit motives making the 'marketisation' of the sector somewhat problematic
- where there is a profit motive, there is significant risk that the drive to produce a profit will work against the interests of the consumers. This has been seen most clearly in the private-for-profit boarding house industry

Any reforms based on notions of competitive markets are also problematic for a range of other reasons, including:

- conflict between the ideology of competitiveness and the values of the community services sector
- tension between government demands for efficiency and consumer demands for accountability
- development of different type of relationship between government and provider based on competitive tendering, compared to collaborative relationships of shared responsibility<sup>5</sup>

#### **4.3 Uniform consumer safeguards:**

If private law and market forces are not sufficient safeguards for consumers of community services, then it is imperative that the issue of accessible and comprehensive consumer protection mechanisms is addressed.

The commission suggests that safeguards should include, but not be limited to, those commonly thought of as within the scope of administrative law. We would suggest that a total package of safeguards for consumers would include the following:

- service standards which have a legislative base, and monitoring mechanisms which includes both external and consumer participation

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<sup>5</sup> CACOM also explores likely problems in the implementation of a market model of community service provision - see "Reforming Australia's Community Services"

- and where strategies for addressing any needed improvements are incorporated into the financing or licensing agreements
- statements of consumers rights, and the obligations of providers to inform consumers of these and promote and protect these rights in all their activities
  - consumer advocacy and participation mechanisms to ensure consumer input into policy decisions of the provider and opportunities for consumers to have their say in matters which affect them
  - complaints and review mechanisms (both internal and external), and
  - framework for disclosure of information including provision of reasons for decisions<sup>6</sup>

The package of consumer safeguards should take into account the various delivery and financing modes within the community services sector, and ensure that there is equitable access to such protection for all consumers, regardless of the decision maker or service provider involved. The commission also considers it important that the mechanisms provide for accountability for the quality of services provided, as well as avenues for individual redress and review.

## **5. The current situation in NSW**

Consumers of government provided services in NSW have access to a number of generic accountability and administrative review mechanisms. These include the NSW Ombudsman, Freedom of Information legislation, the implementation of public sector requirements such as Guarantees of Service and Customer Councils.

However, once service provision moves outside the public sector, such generic mechanisms become unavailable to consumers. Further, as I have previously noted, the circumstances, age or ability of consumers limits the capacity of such generic mechanisms to protect the right of consumers of community services.

### **5.1 CAMA system**

In NSW however, the enactment of the *Community Services (Complaints, Appeals and Monitoring) Act 1993* provides an example of recent attempts to address the issue of protection for consumers in an area where service provision is being moved out from the government sector, and where many consumers are unlikely to be able to defend or promote their own interests.

CAMA provides for a package of consumer protection mechanisms through the establishment of 4 independent bodies -

- Community Services Commission - can receive and deal with complaints against service providers, conduct reviews of children or adults in the care of service providers, can conduct inquiries by referral from the Minister or on its own initiative on issues in community services, monitor standards in community service provision and identify and

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<sup>6</sup> Similar measures have been proposed for consumers of utilities subject to efficiency reforms - see "Utility Reform - a framework for protecting consumers"

make recommendations about systemic issues. The commission also has a function in educating and assisting service providers and consumers in dealing with complaints, and to support the development of advocacy programs for consumers of community services

- Community Services Appeals Tribunal - independent body with power to conduct merits reviews of certain decisions, as outlined in various community welfare legislation. Includes decisions relating to custody and guardianship of wards and protected persons, funding of disability services, provision of adoption information, licensing of adoption, fostering and child care services, services provided under the *Home Care Act 1988*
- Community Visitors - individuals appointed by the Minister for Community Services, with powers to visit residential services for children in care and people with disabilities, to advocate for residents and report on the quality of services to the commission and the Minister, and
- Community Services Review Council - body including heads of statutory bodies and the Departments of Community Services and Ageing and Disability, and representatives of service providers, consumers and people with an interest in community services. Established to encourage co-ordination of the CAMA bodies and to advise the Minister on the effectiveness of the CAMA mechanisms

### **5.2 Responsiveness to characteristics of community services consumers**

Within this system there are a number of important characteristics aimed at maximising access to avenues of redress as well as development of protection for consumers of community services. The CAMA system is unique in that it contains the following characteristics: a combination of proactive or preventative mechanisms as well as reactive powers; functions and powers relating to systemic issues as well as those which focus on individual redress or review; and a range of strategies for dealing with the fact that many consumers of community services are unable or unlikely to initiate contact with a tribunal or commission.

- a. Mix of reactive and preventative strategies.** This is important both as recognition that many consumers of community services will be unwilling or unable to bring a grievance to a formal body such as the commission or the Tribunal; and that in the longer term 'prevention is better than cure'. In addition to the reactive mechanisms of complaints handling and merits review, the CAMA system also provides a number of preventative mechanisms. These include Community Visitors (who can assist in local resolution of grievances), a requirement that all funded services develop complaints procedures, provision of education and training of service providers and consumers about consumer rights and complaints handling, and the support for advocacy development to provide consumers with a voice in decision making. The recent regulation requires that service providers give reasons for decisions to those persons affected by the decision. It is hoped that this requirement will eventually lead to an improvement in the primary decision making of service providers.

- b. Focus on issues for both individuals and the system.** The CAMA package has a range of options for the redress of individual matters through complaints, appeals, and reviews. However, the commission's functions also include monitoring, analysing and making recommendations about systemic issues, while the actions and decisions of the Tribunal seek to improve primary decision making. Review Council has a role in advising the Minister of the effectiveness of the CAMA system.
- c. Having regard to people who are unable or unlikely to complain.** There are a range of strategies which acknowledge that some consumers of community services are unlikely or unable to bring a complaint or appeal themselves. These include broad standing for complaints and appeals (where any person with a 'genuine concern in the subject matter' may make a complaint or lodge an appeal), use of community visitors to go to people in care (rather than waiting for them to come forward), and reviews that are initiated by the commission.<sup>7</sup> The fact that there is no cost to bring a complaint or appeal, and efforts by the Tribunal and the commission to use as little formality as possible, also enhances accessibility. The Tribunal and Commission enable the participation of consumers such as children or people with disabilities by appointing representatives in hearings or working closely with advocates.

### **5.3 Responsiveness to new landscape of community service provision**

The increasing role of the non-government sector in community services is reflected in the CAMA powers and functions. The jurisdictions in most of the CAMA functions cover services funded (or in some cases licensed) by either the Department of Community Services or the Ageing and Disability Department, as well as those provided directly by the Department of Community Services.

However, there are still a number of jurisdictional anomalies in the CAMA package, leaving some consumers with inadequate avenues of redress. These anomalies include:

- lack of coverage over services which are not funded or provided by the state government, but which offer the same service to the same consumer group e.g. residential services for state wards which are privately financed or charge fees for care, privately financed in-home support services, boarding houses which provide accommodation for people with disabilities
- appeal rights which are based on the decision maker rather than the nature of the decision e.g. there is a right of appeal where the Minister or DG terminates custody of a foster child, but no appeal right where that decision is made by a non-government foster agency
- appeal rights over some services which are licensed, but not others e.g. appeal rights regarding child care licensing, but not private-for-profit boarding houses

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<sup>7</sup>Examples of this include initiating reviews of children or people with disabilities who have been left in 'short term' or respite care for extended periods

In summary, while the CAMA package represents a model of consumer protection and redress which takes into account both the characteristics of the particular consumer group and the changing face of community services, it does not provide all consumers with uniform access to avenues of redress and protection. There is however, the potential for further development to deal with jurisdictional anomalies, either through regulation or amendment of CAMA legislation, through changes to the related acts (e.g. Children Care and Protection Act) or through Ministerial agreements.

**6. Concluding comments:**

The current trend to moving direct service provision away from the public sector shows no sign of abating (although there may be stops and starts along the way). In some cases, this trend does bear potential benefits to consumers, particularly where such a move breaks a nexus between providing and monitoring of services (as in the case of state wards, where previously the department with guardianship responsibility was also the dominant service provider). However, there is also the need to ensure that avenues of review, redress and consumer safeguards are responsive to these changes in delivery and decision making. It would be tragic to pursue reforms in the name of increased effectiveness and efficiency without ensuring a commensurate development in access to accountability mechanisms.

The move to contracting out and privatising of community services means that there is now a wide array of service financing and delivery options, with varying levels of accountability and access to complaints and appeals for consumers. There is a need for a new system of administrative law and other consumer safeguards that takes into account the new shape and form of community services and ensures equitable access for all consumers. The nature of the services provided and the interests affected, should determine access to redress and protection, rather than the more arbitrary grounds of financing and delivery models.

Any package of consumer protection mechanisms must also be responsive to the particular needs and characteristics of consumers of community services.

The current system of administrative review and other consumer protection mechanisms do not yet meet this challenge, although in NSW we believe the CAMA system provides a good basis for this development. However, there is much more to be done to ensure that the current reforms do not leave consumers with less access to administrative review and other avenues of redress, than previously was the case.

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