



**SUBMISSION BY NATIONAL DISABILITY SERVICES  
IN RESPONSE TO  
THE NATIONAL REVIEW OF MODEL OHS LAWS**

**July 2008**

This submission draws attention to a significant tension between the application of Occupational Health and Safety (OHS) law and the obligations of disability service providers under disability legislation. NDS is seeking a resolution of this tension that compromises neither the rights of people with disabilities nor the health and safety of the people who work with them. We believe that this National Review provides an opportunity to advance a resolution. To achieve this, the harmonisation of OHS laws would need - at some level – to recognise meaningfully the particular circumstances of disability service delivery (and those of allied sectors, such as community aged care).

Disability service delivery has changed significantly since the passage of the Commonwealth *Disability Services Act 1986* and mirror State Acts in the years following. Prior to this, the support for persons with a disability focussed largely on 'care and protection' and was provided principally in congregate settings which allowed for the exercise of high levels of supervision and control.

The introduction of the *Disability Services Act* and the Disability Service Standards, with which disability service providers are required to comply, emphasized individual rights and choice, social inclusion and the creation of a 'least restrictive' environment for people with disability. Increasingly disability services are delivered in people's homes or in public places. Service providers are required to balance their 'duty of care' to their clients with the 'dignity of risk' that comes from empowering clients to exercise choice and actively participate in community life.

For example the NSW *Disability Services Act* states that services must be provided in a way that:

- ensures that the conditions of the everyday life of people with disabilities are the same as, or as close as possible to, those of the general community; and
- promotes the participation of people with disabilities in the life of the local community through maximum physical and social integration in that community.

All OHS legislation, on the other hand, requires the elimination, minimisation or control of workplace risks. OHS regulations treat all service delivery sites as work-sites. But in the context of disability services, these work-sites may also be people's homes or community spaces. Service providers cannot reasonably be expected to exercise the same risk management over these sites as they can over a conventional worksite where they have primary responsibility and control. Moreover, to apply an extensive OHS regime to a person's home would substantially detract from its home-like qualities and thus conflict with the principle of 'normalisation'.

Some clients of disability services display challenging behaviours which may be violent and erratic. While service providers should regularly update their risk assessment and risk management plans for such clients, they must ensure that any such plan is compatible with disability services legislation which severely restricts the use of constraint and seclusion and emphasises the participation of clients in everyday activities.

In some jurisdictions – perhaps responding to increased concerns about insurance costs, work safety and risk management – OHS inspectors have adopted a 'zero tolerance' approach to workplace risk. This has exacerbated the tension between OHS regulations and the Disability Services Standards.

Unless resolved, the tension will force service providers to revert to support models that maximise supervision and control in congregate settings. It could also force service providers to incur financial costs that they are not funded to bear. For example, there is a proposal that non-ambulant clients in their own homes should only be moved with the assistance of a hydraulic lift to mitigate the risk of support worker injury; and, according to the new National Code of Practice for Manual Handling, only in extreme circumstances should a 'team lift' (two or more persons) be employed to move the client. In most cases, installing a hydraulic lift in a person's home would be impracticable and unreasonable, as well as expensive. Similar concerns arise with the delivery of community aged care.

Disability service providers in every State and Territory have few specific guides to help them integrate their OHS obligations with their disability service practices. This lack of clarity can expose organisations to the risk of non-compliance with OHS law on the one hand; or, on the other, an overly conservative approach which limits service activities to those which pose few and known risks. It can also deny services to individuals whose disabilities present risks which appear complex or expensive to control.

NDS believes strongly that disability service providers should provide a safe workplace for their employees. Our concern is to ensure that the particular circumstances of workplace safety in the disability sector be understood and that the

tension arising from the interface between OHS regulations and disability services regulations be resolved in the design and application of a workplace safety regime.

## **Regulatory Structure**

NDS supports a legislative approach that balances community needs with what is practical or realistic to implement. Legislation should also acknowledge special needs areas. A regulatory structure could entail:

- The Act – which establishes the context of the legislation; who it is aimed at; and its principles; and establishes the protocols required to enforce the Act through its Regulations & Codes of Practice
- Regulations – which define the practical details and rules governed by the Act. These also need to make reference to relevant Codes of Practice and Standards which require enforcement.
- Codes of Practices – which set out benchmarks or minimum requirements.

OHS regulation holds that those in control of workplaces have an obligation to ensure the safety of employees and others at the location. This presents a significant risk-management dilemma for those disability service providers who work in the homes of people with disability but are not the controllers of these private premises. In such circumstances, service providers can only advise the controller of the premises what they want: for example, that they will only use a certain cleaning chemical because they have done the appropriate risk assessments of that chemical and deem it safe for their staff to use. If the controller of the premises cannot or will not comply, the service provider is faced with the invidious choice of continuing to provide a service with the associated health and safety risks for staff or withdrawing the service from a person who may be unable to complete basic personal care tasks without assistance.

A Code of Practice would assist service providers in this situation. As stated in the Model OHS Act discussion paper (p.41) Codes of Practice are 'practical guidance' materials to assist an organisation meet its statutory compliance.

### Codes of practice

There are ten principal OHS statutes across Australia — six state, two territory and two Australian Government. Each has the core objective of preventing workplace injuries. All Australian OHS legislation is based on the principle of a general duty of care owed by those having control of workplaces. Compliance with this duty is based on the assessment and management of workplace risks. This general duty is given structure by extensive regulation and codes of practice in relation to some industries, in some jurisdictions<sup>1</sup>.

In this diverse regulatory environment, disability services depend on guidance materials. There is no comprehensive guidance available specifically tailored for disability services in any jurisdiction and no industry codes of practice have been formulated in relation to any facet of disability services in any jurisdiction.

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<sup>1</sup> Productivity Commission National Workers Compensation and Occupational Health and Safety Frameworks June 2004  
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Guidance material provided to assist the wider community services sector, in which disability services are located, is often too general to allow ready application to the circumstances and culture of disability services. Some issues have been addressed in individual jurisdictions.

With the NSW Department of Ageing, Disability and Home Care and the NSW WorkCover Authority, NDS has formed a working party to try to resolve issues relating to the tension between OHS and Disability Services legislation. This working party has overseen the [Disability Sector Occupational Health and Safety Project \(DSOP\)](#). In 2006, DSOP identified three key risk areas for disability services and developed guidance materials to assist organisations to meet those risks. In other states, some resources have been published to address some emerging risk areas, such as service delivery in private dwellings. Essentially, however, the availability of OHS guidance material for disability services is better characterised by its absence than by examples of what has been developed.

The National OHS Strategy 2002-2012 proposed the development that ASCC develop industry codes of practice. While such codes are not binding within individual jurisdictions unless adopted as part of local OHS regulation, such codes in relation to specific, perhaps unique, risk areas would contribute to development of an authoritative body of knowledge to guide disability service employers, regulators and those responsible for judging the merits of any prosecution brought against disability service providers.

**Recommendation** In consultation with industry representatives, a National Code of Practice should be developed that provides practical guidance to help service providers to address key hazards and risks associated with disability support work – in particular work carried out in ‘uncontrolled’ environments such as private homes and community settings.

### **Titles, objects and principles**

OHS legislation should promote *improved* health, safety and welfare in the workplace, balanced with the need to minimise the regulatory burden and compliance costs imposed on organisations.

The 2007 joint Statement by the UK Health and Safety Executive and the Disability Rights Commission<sup>2</sup> provides principles pertinent to the disability services sector and particularly the employment of people with disability:

We believe that health and safety law and its implementation is in the interests of all employees, whether disabled or non-disabled, and of the employer. Disabled people should expect effective and enabling risk management in the workplace.

Health and Safety law and the Disability Discrimination Act when used appropriately will work together to increase the employability and retention of disabled people. A

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<sup>2</sup> <http://www.hse.gov.uk/aboutus/diversity/jointstatement.htm> - Health and Safety Executive Website in the United Kingdom, January 2007

positive and sensible approach to risk management can and should in most circumstances encourage the inclusion of disabled people in the workplace.

Risk assessment should not focus unduly on an individual's disability. It should look more broadly at the overall demands of the work and how best to manage associated risk.

We want:

- employers to develop a working environment in which employees feel safe and supported to disclose and discuss its impact (including potential barriers to engagement, development and advancement within the workplace) on the management of their disability or long term health condition;
- employees to work collaboratively with employers to help manage risk and to discuss positively with their employer approaches to making reasonable adjustments;
- the findings of risk assessments to provide clear recommendations wherever appropriate on how reasonable adjustments and timescales for implementing them are to be built into successful risk management.

Health and safety should never be used as a false excuse to justify discriminatory treatment. It will be the exception rather than the rule to exclude disabled people from particular jobs and tasks.

## Scope, Application & Definitions

### **Should the model OHS Act maintain the status quo in each jurisdiction regarding industry specific safety legislation?**

In each jurisdiction there are various laws regulating OHS. The Commonwealth, for example, has separate laws relating to Australian government employees, seafarers, offshore oil and gas safety, workers in the nuclear industry, as well as laws relating to chemicals. Some States and Territories have separate laws relating to mining safety (including specific legislation for different types of mining), electrical safety, rail safety and dangerous goods. This fragmentation is compounded by there being various portfolios and agencies at the national, state and territory levels with policy responsibilities for different, sometimes overlapping, areas of OHS regulation.

More than three decades ago, Lord Robens's<sup>3</sup> proposals contemplated the coverage of all industries under a single law. While recognising that each industry has unique features, Lord Robens saw "no difficulty in making special provision and special enforcement and advisory arrangements for particular industries" under unified OHS legislation. We note here that the United Kingdom has brought most of its OHS laws under one jurisdiction.

The challenge is to bring together all OHS laws into one harmonized system, while retaining recognition of industry differences and special circumstances where justified. NDS's view is that the special circumstances of the disability services sector

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<sup>3</sup> Report of the Committee on Safety and Health at Work, Lord Robens, 1972, p. 32

(and allied sectors) justify recognition. Much of this can be achieved through the development of guidance and educational materials and the allowance of a reasonable time for compliance.

### **Definition of Workplace**

Generally, the duties of care in principal OHS Acts are limited so that they cover a 'workplace' or 'premises', though in some circumstances this is extended to areas 'at or near a workplace'. However, the definition of 'workplace' has evolved to mean any place where work is performed: the focus is on the conduct of work. For example, Queensland's *Workplace Health and Safety Act 1995* defines a 'workplace' as any place where work is, or is to be performed by either a worker or a person conducting a business or undertaking. This approach covers activities that are undertaken outside the confines of the traditional workplace, for example in private residences, in vehicles or at temporary workplaces (e.g. work on transmission lines, work in public places).

As indicated above, some disability work is undertaken in unconventional settings: private homes, public places and motor vehicles, for example. Caution should thus be exercised in determining the definition of a 'workplace', but clarity is certainly required.

There are several issues relating to the treatment of public safety under OHS laws:

- the duties held to persons other than workers;
- the position in OHS (or related) legislation of matters (including plant and dangerous substances) where the associated hazards may not only occur 'off site' but also outside the work context; and
- the appropriate boundary between OHS legislation and public safety regulation.

While OHS laws in all jurisdictions involve safety duties owed to third parties, who may or may not be members of the public, there is significant divergence as to whether the duties are geographically restricted (for example, to a member of the public at an employer's workplace; or a member of the public in the vicinity of the employer's workplace) or more broadly linked to the 'conduct of the undertaking'.

### Public Safety

The issue of 'public safety' for others, which is covered in the Victorian and New South Wales' legislation, can lead to confusion in relation to insurance – public liability versus worker's compensation. Clear definitions within the Model OHS Act will be important.

A key issue identified in a number of recent reviews of OHS legislation is how duties of care should extend beyond traditional employment relationships and address contemporary forms of work organisation and labour market arrangements, e.g., contracting, franchising, and labour hire.<sup>4</sup> The manner in which jurisdictions have attempted to deal with these changes in their OHS laws varies considerably.

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<sup>4</sup> Queensland 2001; Maxwell, C, 2003& 2004; ACT OHS Council 2005; Tasmania 2006; WA 2002 ('Laing Review').

Australia has experienced unprecedented growth in casual, part-time and temporary work, outsourcing, job-sharing and the use of agency labour and home workers. This trend is reflected in the disability services sector. The use of migrant workers has increased due to skilled labour shortages. These changes in the structure and organisation of work pose regulatory challenges for the duties of care, for effective worker participation in OHS and for compliance and enforcement. They have an impact on worker's compensation premiums and other business insurances.

The Model OHS Act needs to be sufficiently broad and flexible to accommodate new and evolving work arrangements – including in its definitions of 'employee' and 'contractor'.

### Risk Emergence

Ongoing changes to the economy, technology, work organisation and population demographics will generate new hazards and risks, as well as reducing some existing hazards and risks. In the disability sector, as in some other sectors, psychosocial and work environment problems such as stress, fatigue and bullying are emerging as prevalent risks.

While duties of care in OHS laws aim to protect persons from all types of hazards and risks arising from work activities, some OHS Acts recognize the importance of particular issues. For example, the objectives of the NSW OHS Act 2000 refer to promoting a work environment that is adapted to the physiological and psychological needs of people at work (Section 3) and the Victorian OHS Act 2004 explicitly includes psychological health in its definition of 'health'.

At some level, the Model OHS Act needs to take into consideration the variation across industries in risk patterns and emerging risks.

### **Duties of Care – Who owes them and to whom?**

All jurisdictions implicitly or explicitly have incorporated the concept of 'control' into their OHS Acts to determine who has the duty, the extent of duty owed and the provision of a defence. Yet the concept is not well-defined or explained in legislation, resulting in a re-examination of the meaning of the term whenever the question of control arises. The lack of a clear definition of 'control', or a test to determine its applicability, creates confusion for duty holders. A 2004 review of the Victorian OHS Act recommended that 'control' be defined and included in the list of factors to determine what is 'reasonably practicable.' This latter concept is a key one for the disability services sector.

### **'Reasonably Practicable' and Risk Management**

What is reasonably practicable? The 'reasonably practicable' qualification is a statutory codification of 'the calculus of negligence' in common law negligence

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actions. To be successful in a common law negligence action against an employer, an employee must prove:

- that the employer owed the employee a duty of care (it is well accepted that the employer owes the employee such a duty)
- that the employer's acts or omissions breached the standard of care required to discharge that duty to the employee;
- that the breach in fact caused the worker's injuries, in the sense that, on the balance of probabilities, the defendant employer's act or omission materially contributed to the harm suffered by the plaintiff employee; and
- that the injury or damage was not too remote in the sense that the damage was reasonably foreseeable as a consequence of the employer's negligent acts or omissions.

If these four elements are proved by the injured worker, the worker can then ask the court to award compensation for economic and non-economic loss.

Proving that the duty owed was breached requires the court to determine, on an objective basis, first, whether the risk was one that the defendant should have considered taking measures to guard against; and second, the measures that a reasonable person in the position of the defendant should have taken to control the risk.

In its publication [How WorkSafe applies the law in relation to Reasonably Practicable](#), November 2007 Edition 1, WorkSafe Victoria gives a definition and practical work explanation of how 'reasonably practicable' can be applied in practice.

The Disability Sector Occupational Health and Safety Project reached a resolution of how, in practical terms, 'reasonably practicable' could be formulated for the disability sector. The outcome is summarized below:

The working party considered ways in which the sector might be assisted to understand its obligations under the OHS Act and in particular the requirement to adopt a reasonably practicable approach to risk management. The sector's concerns in relation to obligations under the OHS Act and the Disability Services Act have been addressed through explanation of the principle of reasonably practicable, as expressed under the OHS Act, in the context of disability service delivery. The DSOP Working Party developed practical guidance material on how obligations under both Acts could be met in relation to the three identified high risk areas. Guidance materials developed by the project included specific advice about reasonably practicable responses to those risks. This advice expanded upon the following constituent elements of such an approach for each of the risk areas identified. These elements are:

1. Active involvement and commitment by senior management;
2. A consultative culture;
3. Safe work procedures;
4. Training and supervision;

5. Hazard and incident reporting; and
6. Workers compensation and injury management.

Further guidance material sits under each of these six headings. The adoption of such an approach would effectively mean that an employer who could demonstrate that he or she had complied with the guidance advice under each of these headings would have satisfied the requirement to do all that was 'reasonably practicable' to manage workplace risk.

**Recommendation** In terms of its application to the disability services sector, a national approach to 'reasonably practicable' and risk management should endorse the development of practical guidance material such as that produced by the Disability Sector Occupational Health and Safety Project.

### **Consultation, Participation and Representation:**

NDS agrees that consultation between employers and workers is essential for effective OHS management and for enabling participation of workers in health and safety.

The New South Wales and Victorian OHS Laws are regarded as best practice in respect to setting out the requirements for communication and consultation in the workplace. They have contributed to improvements in workplace safety and been a means of identifying relevant policy issues.

The interpretation, adaptation and application of general OHS law to the special circumstances of particular industries would be assisted by the creation of panels with specialist knowledge of industries or sectors.

**Recommendation** Independent advisory panels should be established to assist the interpretation, adaptation and application of OHS regulations to different industries or sectors. These panels would broadly be sector or industry-based (Community Services, for example) and would consist of an OHS professional, one or two service practitioners from the relevant field and at least one government representative.

### **Regulator Functions, Powers & Accountability:**

OHS regulators are central to the successful operation of OHS regulation. Each jurisdiction has established such bodies, normally under its principal OHS legislation. The powers and functions of the regulators are usually specified, to varying degrees, in those Acts and generally include:

- administering and enforcing the Act
- making recommendations and providing advice on the Act and other supporting laws to the responsible Minister

- monitoring standards of OHS
- advising employers, workers and others on their rights and obligations under the Act
- formulating and disseminating standards, guidance and other information to assist persons to comply with their duties and obligations under the Act
- fostering cooperative and consultative relationships between employers, workers and others on OHS
- promoting education and training in OHS by facilitating the development and provision of OHS training courses
- promoting public awareness of OHS
- initiating and encouraging research into OHS improvements
- collecting and publishing OHS statistics and data.

Good public administration requires accountability. This requires, among other things, the exercise of powers and the performance of functions to be transparent, readily identifiable and capable of being challenged in a fair process. The Model OHS Act also needs to state who will be the 'administrator' of the Act and its reporting mechanism.

### **Compliance & Enforcement:**

The implementation of the Model OHS Act should allow sufficient time for all organisations to comply. In New South Wales, the two-year timeframe which applied to the new OHS Act was in some respects insufficient. Community services organisations often develop their budgetary plans on a three-year timeframe to reflect government funding. In determining the implementation of the Model OHS Act, the length of this budgetary cycle needs to be taken into account.

In general, financial resources are very tight for not-for-profit disability services and any surplus that they generate is re-invested in service delivery. For some organisations in the disability sector, fines for non-compliance of up to \$250,000 could mean closure and the displacement of their clients.

***Recommendation*** To avoid the closure of not-for-profit disability service providers and the displacement of their clients, organisations convicted of an OHS offence should be required to demonstrate to the court that a sum equivalent to the fine is devoted to improving safety in the organisation, rather than it being paid into government's general revenue.

### Inspectors and their roles

The NSW WorkCover Authority defines an inspector's primary role as

to provide advice and assistance. At the same time, Inspectors are responsible for ensuring that all persons and organisations meet their OHS and workers compensation obligations.

NDS would support strategies for improving OHS performance rather than continuing to focus on penalties and enforcement breaches. There is also a need to educate OHS authorities about the role, responsibility and operation of disability services, which are not well understood within OHS agencies.

Inspectors should be more educators and advisors than enforcers. They need a good understanding not just of OHS regulations, but also of the sectors they monitor. At present, from the experience of the disability sector, that understanding is often lacking.

**Recommendation** Define the role of inspectors to include a substantial educational component and require inspectors who monitor disability service organisations to undergo disability awareness training.

### **Worker's Compensation**

The Reviewing Panel for the Model OHS Act will need to be aware of the implications of its design and collation of relevant legislation for worker's compensation and injury management. Currently, the disability sector is financially disadvantaged in terms of the premiums it pays by its classification under the relevant ANZSIC codes.

**Recommendation** The Reviewing Panel should seek further industry comment and consult relevant administration authorities on how the Model OHS Act will affect Worker's Compensation and Injury Management.

**National Disability Services (NDS)** is the peak body for non-government disability services. Its Australia-wide membership includes 630 not-for-profit organisations, which support people with all forms of disability. Through the provision of information, representation and policy advice (to federal and state/territory governments), NDS promotes and advances services which support people with disability to participate in all domains of life.