



Submission to the Productivity Commission in response to its inquiry into Worker's Compensation and Occupational Health and Safety Frameworks

January 2004

ACROD is the national industry association for disability services, representing 550 organisations across Australia, almost all of them not-for-profit.

The goal of this submission is to draw attention to a significant and growing tension that exists between the application of Occupational Health and Safety (OHS) regulations and the obligations of disability service providers under disability legislation and funding agreements with governments. Our purpose in highlighting this tension is to seek remedies that compromise neither the rights of people with disabilities nor the health and safety of the people who work with them.

THE VALUES THAT GOVERN THE DISABILITY SECTOR

The last quarter century in Australia has seen a pronounced shift away from institutional care towards community-based care for people with disabilities. Originally driven by social reformers applying human rights and 'normalization' principles, it is a shift that is now supported by all the major political parties.

Although with varying levels of commitment, all governments have now adopted policies that seek to promote the inclusion of people with disabilities in normal community life and to foster environments which reflect the choices and decision-making of clients. While institutions for people with an intellectual disability still exist, the paternalism and the emphasis on supervision, treatment and control of people with disabilities that characterized the traditional model of an institution is now largely rejected as anachronistic.

The new directions were evident in the *Disability Services Act 1986* (DSA), a Commonwealth Act that was subsequently mirrored in legislation enacted by

all States and Territories. Under this legislation disability service providers are required to meet Principles and Objectives that articulate the rights of people with a disability. These Objectives broadly state that disability service providers must provide:

- programs tailored to individual needs;
- a 'least restrictive' environment in which people with a disability and their choices are respected;
- opportunities for integration and participation in the community and for people with a disability to achieve goals valued by the community;
- mechanisms for people with a disability to make decisions about the services they receive and to participate in the planning and operation of services; and
- processes to resolve grievances and protect clients' privacy and confidentiality.

The rights of people with disabilities are further protected in the *Disability Discrimination Act 1992* (DDA), which makes discrimination on the grounds of disability unlawful, and provides a framework for the setting of access standards in significant fields. In its object "to provide more definite and certain benchmarks for accessibility and equality than is provided by the general anti-discrimination model"¹ the DDA aims to ensure that people with disabilities have the same rights to participate in social and economic activities as other Australians.

Acceptance of funding from Australian governments requires organisations to deliver disability services under these prescribed standards and the monitoring of service providers' compliance with these standards is growing more stringent.

The Commonwealth Government, for example, has established a new quality assurance system, which requires the providers of disability employment services to be independently audited against the Disability Service Standards. Failure to achieve certification by the end of 2004 will render services ineligible for Commonwealth disability employment assistance funding. Increased economic and social participation is at the core of the Commonwealth Government's welfare reform agenda.²

These directions are also evident in funding decisions by State and Territory governments. Increasingly, these governments are giving funding preference to accommodation service models that support people in their own homes rather than re-locate them in a residential facility; and to community access service models that deliver day activities in mainstream community settings rather than in specialist day centres.

Current policy directions expect service providers to balance their 'duty of care' to clients with the 'dignity of risk' that comes from empowering clients to exercise choice and actively participate in social and economic life.

¹ *Australia's Welfare 2003*, AIHW, Canberra, p 333

² Participation Support for a More Equitable Society: Final Report of the reference Group on Welfare Reform, July 2000

A 'ZERO TOLERANCE' OHS REGIME

These directions are threatened by a rigid and insensitive enforcement of Occupational Health and Safety regulations. During the past 18 months, ACROD member organisations have reported that OHS safety inspectors in some jurisdictions are adopting a 'zero tolerance' approach that demonstrates little understanding of the ethos and principles that govern disability services. One OHS inspector, apparently oblivious of the DDA, remarked to a disability employment service provider that people with an intellectual disability should not be employed because "they are not the full bottle".

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 settings ranging from a TAFE college to a café, a recreation centre to a public park. Service providers cannot be reasonably expected to exercise the same risk management over these sites as they can over a conventional work-site 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'. In some cases, it would also incur financial costs that service providers are not funded to bear - for example, the proposal that non-ambulant clients in their own homes should only be moved with the assistance of a hydraulic lift.

Most disability service providers work with some clients who display challenging behaviours – behaviours that are disruptive, unpredictable and confronting. Managing these behaviours is part of the expertise of service providers, but – short of isolating or physically constraining such clients, actions which would conflict with the Disability Service Standards - the risk such clients pose can be reduced but not eliminated.

Yet some OHS inspectors have recommended the isolation or physical constraint of such clients. ACROD has been told that one OHS inspector instructed an accommodation service provider to implement a system of locked doors and bodily restraints to protect the safety of employees.

Around Australia, Business Services employ 17,000 people with a disability. Some of these supported employees have a limited understanding of OHS regulations, leading some Business Services to implement simplified OHS training programs tailored to meet their employees' level of understanding. This would seem to be an entirely reasonable response, but some OHS regulators have stated that if supported employees cannot demonstrate the same level of OHS competency as employees without a disability, they should not be allowed to work.

This 'zero tolerance' approach threatens to exclude from employment people for whom work is a principal source of friendship, dignity, purpose and income.

Disability service providers find themselves in the invidious position of trying to comply with two sets of legislative demands that, in important respects, conflict. OHS regulators are not accountable to disability legislation and disability service regulators are not accountable to OHS legislation. The tension has thus been left unfairly to service providers to resolve: it should be resolved by government.

It seems beyond the capacity of the Courts to resolve. As noted in the Productivity Commission's Interim Report, there has been an increase in litigation resulting from OHS breaches, a trend that is reflected in the disability services sector. In one case, a service provider was deemed negligent for failing to protect an employee adequately against an aggressive client. The Service Provider explained that the service was delivered according the requirements of the Disability Services Standards, the DDA and the funding contract with government. The Court did not accept this as a mitigating factor, ruling that the safety of an employee was paramount. Remarkably, it recommended that the aggressive client be institutionalised, although this is not an option that is available to most service providers.

Yet institutionalization is the logical endpoint of a 'zero tolerance' application of OHS regulations. Only in institutions does the level of supervision and control of 'difficult clients' reach levels that would satisfy vigilant OHS regulators; only there is the isolation of people with disabilities from the risks associated with community-based service delivery possible. Only congregate settings, moreover, have the economies of scale to justify financially the installation of expensive lifting equipment.

Yet in terms of the human cost to people with disabilities and the social fabric, the development of new institutions would come at a very high price – one that would gain the endorsement neither of clients and their families, nor of disability support workers and managers, nor – presumably – of governments.

ACROD supports the Australian Chamber of Commerce recommendation in the Interim Report (p 46), to implement 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.

The AIHW report, *Australia's Welfare 2003*, welcomed the Productivity Commission's Inquiry to develop a National Worker's Compensation and OHS framework to ensure that legislation and regulation reflect the changes in the composition of the workforce and working arrangements, particularly within the community service sector.³ ACROD believes that OHS regulations should take greater account of the context in which they operate.

ACROD is not suggesting that disability service providers be exempt from providing a safe workplace for their employees; rather that the particular circumstances of workplace safety within the disability sector be better

³ *Australia's Welfare 2003*, AIHW, Canberra, p 339

understood and that all relevant legislation – including disability-specific regulations – are considered in matters of workplace safety.

In summary, ACROD recommends that in developing a National OHS framework, regulators need to:

- review the unintended consequences of applying 'zero tolerance' to disability services;
- conceptualize workplace risk in a manner appropriate to the community services sector;
- ensure that the application of OHS regulations does not violate the *Disability Service Act 1986* and the *Disability Discrimination Act 1992*.
- take into account non-traditional work settings, such as those increasingly common in disability service delivery;
- ensure that workplace safety improvements are realistic, given the financial constraints on not-for-profit disability service agencies;
- encourage OHS regulators to increase their understanding of the philosophy and practices of disability service provision.

Through consultation with its service provider members, ACROD would be pleased to provide further advice that would assist in resolving the tensions identified in this submission.

Contact
Ken Baker
Chief Executive
ACROD
(02) 6282 4333