

## **REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE WORKCOVER AUTHORITY**

**Organisation:** National Disability Services

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## **Submission to the Review of the exercise of the functions of the WorkCover Authority (Inquiry)**

National Disability Services (NDS) welcomes this opportunity to provide input into the review of the WorkCover Authority of NSW. NDS recognises the positive outcomes that can be achieved for organisations that adopt good WHS practices as well as the importance of supporting workers who have suffered work related injuries and the role of the WorkCover Authority in overseeing and ensuring these systems run efficiently and effectively.

This submission highlights the unique circumstances that apply to not-for-profit disability service providers, and the challenges that this sector faces in relation to managing work health and safety and injury management. The submission will explore a range of issues and challenges which have been raised by NDS member organisations, and make recommendations following these.

### **Commentary: specific sector issues and current reform**

#### **Background: Current disability sector reform**

Nationally and in NSW, the disability sector is presently implementing significant reforms which will change the face of disability service provision. At a National level, the implementation of the National Disability Insurance Scheme (NDIS) over the next five years will see a doubling of the number of people living with disability eligible for disability support. Models of care and support will also change, with home and community based supports becoming more prevalent, consistent with the individualization of services required of current policy settings. By some estimates this will require a doubling of the workforce needed to deliver these supports.

The NDIS will reorient the funding and provision of disability support so that participants exercise choice and control in the pursuit of their goals and in the planning and delivery of their supports. The policy direction is pragmatic, it will encourage an efficient use of resources: participants will be in the best position to make decisions about the supports they prefer.

Current reforms (including the National Disability Strategy) are consistent with the United Nations Convention on the Rights of Persons with Disabilities. The Convention is built on a principle of 'equal opportunity' according to which people should not have less or more opportunity than others on the basis of disability.

The NSW government has invested through a series of reforms (Stronger Together, Ready Together) to ensure that disability services in NSW are prepared to meet increased demand and the shift towards human rights based, person centred approaches. NSW is also reviewing its existing Disability Services Act 1993, to be replaced with a Disability Inclusion Act, and has passed legislation to ensure effective transition to the NDIS.

In this context, it is crucial that those systems which govern aspects of everyday operation of the disability service workplace, including Work Health and Safety systems, can be responsive to new challenges arising in the implementation of person centred disability services. We need to be flexible and solution-focused in working together to ensure the best possible outcomes for people with disability.

### **One sector, two different agendas**

NDS members consistently identify a tension arising from the need to comply with WHS regulations and disability legislation as a significant challenge that is likely to be exacerbated by developments in regulatory frameworks for both areas. Disability service providers report incompatibilities between the two regulatory frameworks that frustrate either or both meeting WHS obligations to workers and others or person centred outcomes for clients.

On the one hand, the broad policy and legislative agenda for the delivery of disability services focuses strongly on the human rights of people with disability, and the promotion of these rights through giving people with disability choice and control over the supports they receive, including especially the dignity to choose to take risks. When enacting such choices involves the support or assistance of a worker of a disability service provider, WHS obligations come into play.

NDS supports the objects of the Work Health and Safety Act and associated instruments and advocates strongly within our sector for measures which provide for the health and safety of workers. A real challenge remains, however, for service providers trying to meet their obligations to eliminate, minimise and control workplace risks at the same time as upholding the 'dignity of risk' of the people who choose their services.

A simple example of this tension is the situation where a disability service organisation is asked to attend a risky activity such as mountain bike riding with a non-accredited teacher. It is the choice of the person they are supporting to undertake this activity in this manner, and such a choice could be seen as equal to the type of choice another member of the community may make, as people make informed choices to take risks in their daily lives as a matter of course. However, exposure to such risks in the course of a support worker's employment would generally be viewed as intolerable without significant controls in place. These controls could undermine the individual's choice to undertake a risky activity with only equal constraints as those faced by the rest of the community.

## What is a workplace?

The workplaces in which disability services are provided are diverse. In addition to services based within a disability service provider outlet (typically congregate care settings such as day centres, residential units or shared accommodation), regular workplaces for disability service staff include private homes, public spaces and the provision of transport, sometimes necessarily over significant distances. The WHS regulatory mandate which requires employers to provide a working environment that is safe and without risk to health is a challenge for disability service providers when the employer may have limited or no control of the working environment.

The implementation of the NDIS is expected to exacerbate challenges associated with providing a safe working environment. As noted above, growth in demand and a widening of eligibility and entitlement for services (from 55,000 to 140,000 people in NSW by 2019) will require considerable growth in the disability workforce. Many of these are expected to be new entrants without prior experience or knowledge of the WHS obligations associated with supporting people living with disability. Moreover, the opportunities to learn from colleagues in congregate care settings will be diminished as people with disability, their families and carers become more experienced in making their own choices and pursue new (community based) individualised support options.

This diversity in working environments will also occur simultaneously with the increasing prevalence of self-directed employment models. That is, where a person chooses to employ worker(s) directly, taking on an active employment role, or to share aspects of employment responsibility with a service provider. It is imperative that people with disability seeking to pursue this option are appropriately informed and skilled to do so – this is happening through a number of initiatives of the NSW government, known broadly as ‘Getting Prepared’. It is also imperative, however, that the WHS system be able to respond appropriately to such cases where a person with disability is carrying all or part of the employment risk.

Taken together, these factors (considerable growth, personalised service delivery, blended employment models) present major challenges to employers retaining responsibility for the ‘workplace’ and the management of safe working environments.

## The cost of compliance

NDS members report significant compliance burdens associated with risk assessment of home and community venues prior to commencement of service. In many cases this can involve a worker making a visit to a new venue for the sole purpose of completing a risk assessment prior to being able to provide service at that location. This can include but is not limited to:

- Assessment of a person’s home as a safe working environment prior to provision of in-home support;
- Assessment of community locations before the commencement of a group activity or excursion for child, adolescent or adult clients;
- Significant travel between the worker’s usual place of work and the site to be assessed, particularly in regional, rural and remote NSW.

Meeting these important WHS compliance responsibilities involves hours of travel, assessment and preparation of documentation. Ultimately these are hours that are not directed toward direct service provision. Moreover, disability service providers increasingly report that service recipients are becoming frustrated with the compliance related assessments that an employer is required to undertake on “their home”. This creates an unnecessary tension between employers’ obligations and related costs of compliance and the reasonable expectations of service recipients that package value and direct support hours are maximised. In an increasingly individualised funding environment there is a risk that WHS compliance activities are ‘crowded out’ as service providers seek to drive efficiency gains in their services and respond to (prospective) customer expectations about ‘the dignity of risk’ and maximising value from packages of support.

NDS continues to advocate strongly for funding and prices for disability services to reflect the full range of overhead and operational costs, including WHS compliance, and for disability service providers to determine prices that reflect full compliance with WHS responsibilities as a marker of a quality service. Regardless, the sector is currently in a position of having to find efficiencies and improve productivity wherever possible in order to maximise financial sustainability, particularly over the transition period from the current system to the NDIS (due for full roll-out in the 2018-19 financial year).

NDS members consider the current requirements around risk assessment of the workplace to be an area where significant efficiency gains are achievable. The disability sector would benefit significantly from the development of industry specific requirements and practice guidance which better reflect the realities of practice across multiple, uncontrolled environments. The role of the WorkCover Authority of NSW to support a national approach is directly implicated here.

## **The WorkCover Authority: Exercise of powers**

### **Prior initiatives**

NDS members report limited recent contact with the WorkCover Authority. As a previous ‘priority group’ due to high incident rates, the disability sector has received some advice and support from WorkCover in the past and WorkCover has funded some initiatives on which members continue to provide positive feedback. These have included:

- Development of an on-line training program on WHS for managers and supervisors
- Development of an Injury Management course for frontline supervisors
- Funding to train the disability sector on the changes to the WHS legislation.

These initiatives were seen by members as directly relevant to the participants. Members continue to reflect upon such initiatives providing the opportunity to reinforce the importance of Work Health and Safety measures within the sector.

## Loss of specialization

Following the abolition of sector specific teams and Industry Reference Groups within WorkCover, it is NDS's view that the Authority has lost its expert knowledge relating to the issues faced by our sector. Some members also report concerns that this loss of expertise and understanding may also have exposed disability service providers to actions by WorkCover Inspectors who do not understand what is 'reasonably practicable' within the specific operational context.

Previously, WorkCover has developed and published practice guidance of relevance to the disability sector, generally within a broader human services context. These have included 'Preventing Violence in Accommodation Services' (1996), the 'Community Services Safety Kit' (2004) and 'Working at External Locations' (2008). More recently, NDS has noted a lack of sector specific guidance material at a time where this is greatly needed for the reasons explored above.

The loss of specialist knowledge and assistance limits WorkCover's ability to fulfil its advisory role. NDS members are also concerned about the potential for enforcement activities which may arise through this.

## WorkCover Inspectors

NDS members report that their main contact with WorkCover is through the Inspectorate. The majority of members' experience with WorkCover Inspectors is positive.

Despite this, some members have reported feeling 'harassed' and 'intimidated' rather than supported where issues arise. Some members have also reported that the advice provided or recommendations for improvements made have at times been inappropriate or vague. Examples of each are:

- An Inspector demanding client specific details after a report of aggressive behaviour from workers who had been subject to disciplinary action,
- A service provider being issued with an improvement notice to increase the safety of staff from assaults without identifying what actions were needed to achieve this.

Some members also reported feeling that some WorkCover Inspectors rely too heavily on strict guidelines. Examples given indicated such Inspectors becoming preoccupied by documentation of all risks and formalisation of consultation systems rather than considering what is reasonably practicable for small but diverse disability service providers. It was felt that in these cases there was a lack of appreciation for the range of different activities and different environments which can make up the day to day operations of a service.

## The Workers' Compensation System

Whilst every effort is made to prevent workplace injuries, some injuries do still occur. A number of points have been raised by NDS members regarding how the WorkCover Authority administers the Workers' Compensation System. These are described below:

- The WorkCover Authority assigns agents to manage Workers' Compensation claims. The perception from some members is that some scheme agents are driven more by a need to meet the Authority's KPIs rather than the employer's and worker's needs. This can go on to have a negative impact on the employer's Workers' Compensation insurance premium.

Experiences range from a reported lack of investigation leading to claims being accepted that should have been denied/limited due to the existence of a pre-existing condition, to agreeing to the payment of extensive medical investigations into an injury for a claim which was ultimately denied, where the costs incurred still affected the premium calculations.

Another example was the inability to obtain independent medical advice when a treating doctor was seen by the Authority to be complying but was thought by the employer to be certifying a worker off work unnecessarily.

- Many disability service organisations are small and have minimal claims experience, which often means they do not have a dedicated case manager. This can compromise good communication with the scheme agent and efficiency of the claims management process. NDS estimates that this would affect service providers with an annual turnover of \$12m or less, or supported accommodation providers with annual turnover of \$8m or less. From a sector currently comprising some 671 organisations across NSW, this would account for 70% of operators within the sector.
- Recent legislative changes have resulted in new rates of payment which in some cases are far in excess of the average pre-injury earnings employees within the disability sector. This decision has imposed increased claims costs on NDS members. Workers injured prior to June 2012 have their pre-injury earnings based on a set rate of \$948.50 per week, rather than their actual pre-injury average weekly earnings given historically low wages for frontline disability sector workers and a highly casualized workforce profile. This has resulted in an unplanned increase to Workers' Compensation premiums as well as a disincentive to return to work.
- Basing the Pre-injury Average Weekly Earnings on all earnings over a 12 month period can disadvantage an employer if a worker has performed an occasional night shift over the period. This causes difficulty in minimising premium effects through the provision of sufficient hours to counteract these earnings.
- The regulation of Workers' Compensation results in a non-competitive market where there is no opportunity to reduce costs by effective management of the full range of insurance premiums. This reduces the incentives available for good WHS performance. In some cases, one unavoidable claim can lead to

such a premium increase that a service provider may not be able to continue to operate.

- Industry codes which do not always reflect the risk of the activities undertaken also lead to increased costs which many providers have difficulty paying. It appears that many disability service types which involve generally low-risk work have been ascribed a WIC code which more appropriately fits higher-risk disability service types such as supported accommodation. Many of the service types to which this applies involve little or no personal care or manual handling, and should not be coded as if they require more complex, risky work.

## **Disability Safe**

The NSW Government, through the Industry Development Fund, continues to support an NDS initiative – Disability Safe. Through this initiative, NDS and ADHC have worked successfully in recent years to address many of the issues raised in this submission.

Disability Safe currently supports several disability service organisations to manage their injury management and provides a range of training and support material and advice in the area of Work Health and Safety.

## **Recommendations**

NDS respectfully makes the following recommendations to the Law and Justice Committee in relation to the exercise and functions of the WorkCover Authority:

1. Reintroduce the Premium Discount or similar scheme so as to reward service providers with effective WHS Management Systems.
2. Update statistical information and systems to access relevant industry sector data. The publication of positive benchmarking indicators would also assist organisations to measure and improve their performance.
3. Provide expertise and funding for further initiatives related to the sector through reintroduction of a sector-specific team or an Industry Reference Group, or through introduction of another similar model.
4. Disseminate of publications which address specific issues faced by the disability sector, including but not limited to WHS roles and responsibilities of different parties under the NDIS.
5. Undertake research into the true costs and benefits of investing in work health and safety. Findings would assist organisations to better understand the business case for WHS and inform price setting for disability services – as government and industry together attempt to better understand the full service costs of service delivery in the NDIS environment.
6. Consider the establishment of industry specific teams within insurers or other strategies to improve the effectiveness of claims handling for smaller service providers.



7. Introduce a range of more suitable Industry codes for the Disability Sector which reflect the diversity of services and the varying nature and level of risk within these.
8. Review of the cost impact of decisions made regarding transition rates and Pre-Injury Average Weekly Earnings (PIAWE) calculations.
9. Limit the opportunity for claiming Workers' Compensation to cover a pre-existing condition where the worker has failed to reveal the existence of the condition to the employer.

NDS is willing to appear before the Committee to discuss these recommendations and any other matters considered relevant.

## **About National Disability Services**

National Disability Services is the peak body for non-government disability services. Its purpose is to promote quality service provision and life opportunities for people with disability. NDS's Australia-wide membership includes more than 900 non-government organisations, which support people with all forms of disability. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.

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