

**MDAA response to
ACROD NSW Division**

**Discussion Paper:
OHS Challenges in the
Disability Services Sector**



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Introduction - about MDAA

The Multicultural Disability Advocacy Association of NSW (MDAA) is a non-profit peak body for people from a non-English speaking background (NESB) with disability and their families and carers in NSW. Our activities include individual advocacy for people from a NESB with disability and their families and carers; advocacy development; systemic advocacy; research; industry development; and training in cultural and disability awareness. MDAA is also a registered training organisation.

Our comments on the ACROD NSW discussion paper, '*OHS Challenges in the Disability Services Sector*' are based on our work with people from a NESB with disability and their families and carers. They follow the format and headings of ACROD's paper.

We appreciate the opportunity ACROD has provided to discuss the range of challenges identified and how they can be addressed.

Key policy issues

The over-riding issue ACROD's paper identifies is that disability service providers have obligations under various NSW statutes which have different and apparently conflicting objectives. This gives rise to confusion for service providers as evinced in later sections of ACROD's paper, with apparent conflict between obligations they have as service providers to people with disability and as employers to their employees.

The relevant legislation and objectives can be summarised as:

1. *Disability Services Act 1993* – to ensure services are provided to enable people with disability to achieve their maximum potential as members of the community
2. *Occupational Health and Safety Act 2000* – to secure and promote health and safety at work and ensure that risks are identified and controlled
3. *Civil Liability Act 2002* – to define negligence and provide a civil remedy for injury or damage resulting from it
4. *Workers Compensation Act 1987* and *Workplace Injury Management & Workers Compensation Act 1998* – to establish a system to secure the health, safety and welfare of workers, prevent work-related injury and provide prompt treatment of injuries

In our view there is no real conflict between these varying obligations or the objectives that give rise to them. We agree that section 8 of the *Occupational Health and Safety Act 2000* (OHS Act) should be amended as discussed later and that this would clarify much of the current confusion.

As ACROD is the peak body for service providers its discussion paper focuses on practical difficulties for service providers arising from the confusion about the various obligations. We are concerned, however, that the paper does not also focus on how this confusion affects people with disability. Where the paper does mention people with disability it does so in a negative way, for example, people with disability being aggressive without provocation; being obliged to provide private information about their disability; or living in unsafe premises that create risks for employees. We agree with the comment in the Appendix to ACROD's paper that focusing on worst case scenarios gives an unrealistic picture of risk and that it can lead to extreme responses which in turn affect people with disability adversely. We would prefer to see ACROD focusing on best practice for service providers in seeking ways to fulfil all of their various obligations.

In our experience some people from a NESB with disability have been told by service providers that they will have to modify their homes (at considerable expense) if they want the service to continue. We have had to negotiate with some service providers to continue the services required and to stop scaring people with disability unnecessarily. We believe people with disability have a right to quiet enjoyment of their own home and that service providers should work cooperatively with the person concerned and their family and landlord (if appropriate) to find mutually acceptable ways to manage any health and safety risks to the service provider's employees. The real challenge for service providers is to find safe ways for their employees to provide the services clients require, that respect the dignity and humanity of each client in their particular circumstances.

Definition of 'reasonably practicable'

We agree that an employer's obligation to comply with the general duties outlined in section 8 of the OHSA is absolute at present, unless the employer can prove that it was not reasonably practicable to comply. The question is whether this obligation is unreasonable, either for employers generally or for disability services in particular.

Because it can be very difficult to prove a negative, we agree with ACROD that the onus should be on WorkCover to prove that it was reasonably practicable in the circumstances for the employer to carry out the general duty, rather than on the employer to prove that it was *not*. We believe it is reasonable to amend the NSW legislation to conform to the other Australian jurisdictions to achieve this. A 2004 report¹ into the Victorian legislation stated that WorkSafe Victoria had no difficulties in proving offences under the general duties because of the burden of having to prove reasonable practicability. "...The Authority is well positioned to bear the onus of proof and, in particular, the burden of proving that there were available measures which it was reasonably practicable to implement and which would have removed or controlled the relevant risk or hazard."²

¹ Chris Maxwell, QC, *Occupational Health and Safety Review*, State of Victoria, 2004

² *ibid*, p 358

An amendment to section 8 of the OHS Act would affect all NSW employers, not just disability service providers. It would mean that the employer's obligation to comply with the duties set out in section 8 would remain absolute, so long as it was reasonably practicable to comply in the particular circumstances.

ACROD's paper discusses the need to clarify the meaning of 'reasonably practicable'. The difficulty here is that what is reasonably practicable depends on the circumstances of both the service provider and the person with disability: what is reasonably practicable in one set of circumstances may be completely impracticable in another. The kind of certainty ACROD wants to achieve may therefore not be possible but we suggest that the Victorian approach is a useful model to argue for. Section 20 of the *Occupational Health and Safety Act 2004* (Vic) includes the matters that must be taken into account in '...determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety -

- (a) the likelihood of the hazard or risk concerned eventuating;
- (b) the degree of harm that would result if the hazard or risk eventuated;
- (c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
- (d) the availability and suitability of ways to eliminate or reduce the hazard or risk;
- (e) the cost of eliminating or reducing the hazard or risk.'

If the OHS Act were amended to include a similar section we believe much of the confusion and uncertainty for disability service providers would be resolved.

We agree that it is overly punitive to make employers liable for penalties under the OHS Act for ignoring risks that are not foreseeable or significant.

We note that under section 8 of the OHS Act employers have a duty to ensure the health, safety and welfare at work of all employees by ensuring that any premises *controlled by* the employer are safe. Section 10 sets out the duties of '*controllers of work premises, plant or substances*' and clearly states that the duties do not apply to premises occupied only as a private dwelling and apply only to matters over which the person has control.

In our view the home of a person with disability can only be described as 'controlled by' the disability service provider if the service provider owns or rents the building (e.g. group home or institution) and has the power to make decisions about the premises, for example, to authorise repairs or alterations, or to negotiate with the landlord as head tenant. In these circumstances it is reasonable that the service provider take whatever action is reasonably practicable to ensure that the premises are safe, in consultation with the person

with disability (and their family if this is appropriate) and the landlord if there is one.

What is 'reasonably practicable' becomes less certain where the person with disability owns or leases their home and the service provider's employees provide services (i.e. work) in the person's home. If the service provider believes the person's home is not a safe working environment for its employees, we believe the service provider should identify exactly what is unsafe about it and what options there are for making it safe, and should discuss the matter with the person with disability (and their family if this is appropriate), to try to reach agreement on how the person's home can be made safe. What the service provider regards as unsafe could include, for example, objects such as furniture, fittings or floor coverings, actions of family pets, or actions of the person with disability or their family members, some of which may result from different cultural practices or understandings about disability. Some of these risks to health and safety may be resolved relatively easily through discussion, staff training in OHS or cultural awareness and mutual understanding, depending on the circumstances.

If the building itself is unsafe or some part of it needs to be modified, the discussion may need to involve the landlord for rented premises, but that would be a matter for the person with disability or their family to initiate, with support from the service provider or an advocate if necessary. If the person with disability or their family owns the building, what is reasonably practicable may depend on the funds available to make the building safe. In our view so long as the service provider, together with the person with disability, is taking action that is reasonable in the particular circumstances to make the premises safe, this should be enough to demonstrate that the service provider is complying with their section 8 duties so far as is 'reasonably practicable'. A service provider would be justified in withdrawing services only in very rare circumstances and then only after all reasonable alternatives had been explored, discussed with the person with disability and their family if appropriate and rejected.

Availability of information about service users' disability

ACROD's paper proposes an amendment to the Commonwealth and NSW *Disability Services Acts* (DSA) to require people with disability to disclose or consent to disclosure of information about their disability that is reasonably necessary to ensure workplace safety. The proposal is seen as a way to assist service providers to meet their obligations under the OHS Act and to meet the individual needs of people with disability.

We do not agree with this proposal. In our view there are better ways to ensure that the individual needs of people with disability are protected, including discussing with the person (and their family if this is appropriate) what their needs are and what services the provider can provide. People with disability

have their privacy and dignity invaded enough at the moment, without increasing the opportunities for that to happen.

Another way to ensure that service providers meet their OHS obligations is to provide training in safe, healthy work practices for their employees on the job. This is especially important for employees whose first language is not English. This kind of training would require the agreement of the person with disability (and their family if this is appropriate) for services provided in the person's home.

Enforceable OHS undertakings

ACROD's paper proposes a diversion from the prosecution procedures for service providers who make written undertakings to address any alleged breaches of the OHS. We would only support this proposal if there were a requirement for the service provider to act on the undertakings within a reasonable time set by the court. Prosecution would then resume automatically if the deadline passed without the service provider having implemented their undertakings.

Funding for OHS-related equipment

Our earlier suggestion that service providers conduct on the job OHS training for employees may result in a decrease in manual handling injuries, including back injuries and other sprains and strains.

Program of Appliances for Disabled People

MADA made a submission to the PriceWaterhouseCoopers review of the PADP program (available on our website: www.mdaa.org.au). We agree that timely provision of equipment under the PADP program is essential for people with disability who need it, but we do not see any delay in providing equipment as an excuse for service providers to avoid their responsibility to comply with the OHS. The focus of the PADP program is on meeting the needs of people with disability and we would not want to see any funds diverted to meet service providers' OHS obligations as a consequence of the review.

DADHC Equipment and Modifications Fund

MADA would support the expansion of this fund to other DADHC funded programs in addition to the Community Participation and Transition to Work programs.

OHS Information and Training

We understand that the Department of Family and Community Services (FaCS) will no longer fund the provision of a Consumer Support Agency that provides face to face training for people with disability who work in business services. The question is: who will provide this training. An additional problem not raised in ACROD's paper is that training for people from a NESB with disability who work in business services and who do not speak English well or at all does not exist.

The built environment

ACROD's paper states that excluding private dwellings from section 10 of the OHS Act places the health and safety of service providers' employees at risk and places a burden on service providers who must ensure their employees' safety even though they have no control over the private dwellings in which their employees do their work. We disagree. In our view, excluding private homes from section 10 is an acknowledgement by Parliament that employers cannot control every situation in which their employees are required to work and are not expected to have any control over people's privately owned or rented homes. As indicated earlier, we believe any aspects of a person's home that present risks to disability services' employees can best be resolved through discussion and training. People with disability already experience enough unwarranted social control without adding to it.

MDAA responded to the NSW Housing and Human Services Accord consultation. We agree that it has the potential to improve the timeliness of modifications and repairs to premises owned or leased by the Department of Housing but we believe additional resources will be required to achieve this and the other objectives of the Accord.

MDAA undertook research on the experiences of people from a NESB with disability living in the community and published a report in November 2005. The report is available on our website (www.mdaa.org.au). We support the proposals for increasing the level of in-home support and do not see them as conflicting in any way with the OHS Act obligations of disability service providers.

Other matters

One other way to alleviate the concerns expressed by service providers is for WorkCover to provide consistent advice to employers about how they can comply with their duties in particular industries or sectors. We agree with the approach outlined in the 2004 review of the Victorian legislation for WorkSafe Victoria to publish safety rulings to meet "...the demand for answers to the question: what do I need to do to comply?"³

In our view WorkCover should do whatever is reasonably practicable to assist employers to fulfil their duties, including providing published advice that can be produced as evidence in proceedings if necessary. Such advice could be called safety rulings, codes of conduct or whatever has meaning for WorkCover and employers generally. We agree with the Mental Health Coordinating Council (MHCC) that this system of providing formal advice should be one of WorkCover's essential functions⁴. If WorkCover published advice for disability

³ Maxwell, *op cit*, p 291

⁴ Jenna Bateman, *Comments on the Review of the OHS Act 2000*, Mental Health Coordinating Council, 2.9.05, p 11

services on the interpretation of sections 8 and 10, giving examples relevant to the disability sector, this should alleviate much of the existing confusion.

The MHCC also suggests that the OHS Act be amended to authorise WorkCover inspectors to provide written, legally binding advice to employers on how to meet legal obligations under the Act⁵. ACROD may wish to pursue this suggestion.

⁵ Bateman, *op cit*, pp 10-12