



## **Submission re. Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety**

National Disability Services (NDS) welcomes this opportunity to provide input into the review of Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety (OHS). NDS recognises the positive outcomes that can be achieved for organisations that adopt good OHS practices. This submission highlights the unique circumstances that apply to the not-for-profit sector, in particular to disability service providers, and the challenges that this sector faces in relation to managing the tension between the compliance requirements of OHS regulations and disability regulations.

Disability service providers — the organisations which NDS represents — receive government funding for the provision of a broad range of support services to people living with a disability. They respond to the needs of some of the most disadvantaged people in our society.

The issue for the not-for-profit sector is that while OHS regulation is necessary for the protection that it provides to disability support workers, a one-size fits all approach of the regulation and enforcement is impractical and imposes unreasonable demands on those services.

### **Burden of Regulation**

#### **Funding constraints inhibit compliance to OHS Regulations**

The funding that disability service providers receive from both State and Federal Government rarely covers the full cost of service provision, training and administration. Disability funding does not provide adequately for back office business supports which incorporate the development, implementation and continuous improvement of OHS management systems (formal or informal); and the necessary qualified staff to fulfil those roles.

Invariably, organisations supplement Government funding with income generated through careful investment, bequests and fund-raising. Considerable effort is expended by disability support providers to identify and secure additional funding that can support the organisation to meet OHS regulations and other compliance requirements.

Disability service providers aim to provide a quality service, which ensures the safety of both the support worker and the person with a disability. However, organisations struggle to adequately fund the safety measures associated with the services they provide.

Disability service providers are hamstrung by a lack of funding to be able to meet all of the regulatory compliance requirements in the state or territory in which they operate. There is no research evidence about the true cost of effective safety management in the not-for-profit sector which could inform a sector bid for adequate funding to fully resource the 'safe' provision of services.

For those disability support organisations that provide services across more than one jurisdiction, the compliance burden is multiplied.

NDS recommends full costing of OHS compliance. This would involve costing the development and implementation of an OHS management system which is appropriate for the disability sector so that this evidence can inform appropriate funding of disability services.

### **One size doesn't fit all in OHS Regulation**

OHS regulation across Australian States and Territories applies to all businesses equally regardless of size or type. There is no variation in compliance expectation between Australia's most profitable companies and micro businesses and not-for-profit organisations. The requirements for safe systems of work, risk management practices, consultation and documentation are identical and enforceable to the same extent. The capacity of business and not-for-profit organisations to respond to these requirements varies across the spectrum of small to large organisations.

A review of successful prosecutions for breaches of OHS law in Victoria shows that even the most profitable well-resourced companies do not comply with all regulations all of the time. It could be argued that the regulatory burden for disability service providers and not-for-profit organisations is unreasonable given the inadequate funding base and the absence of evidence-based solutions for the sector.

### **Conflicting Legislation and impact on Disability service providers**

The most significant challenge for disability service providers is the tension arising from compliance with both OHS regulations and disability legislation. While there has been longstanding debate in the disability sector about the relative importance of legislation, anecdotal evidence is that disability service providers struggle to balance the requirements of both.

This dilemma regarding priority of compliance with OHS and state/territory disability legislation is further exacerbated by the prescriptive nature of the Commonwealth *Disability Services Act 1986* (DSA) which emphasises the rights of people with a disability to participate fully on an equitable basis in their community, reflecting a

citizenship model as distinct from the custodial model of previous generations. Rights-based objectives of the DSA and complementary state-based legislation have resulted in the development of work practices that focus on the rights of the person with disability to participate in activities previously deemed to be too risky for them. OHS legislation, on the other hand, requires the elimination, minimization or control of workplace risks. Disability service providers are faced with the challenge of supporting the 'dignity of risk' while minimising the risk to support staff in accordance with OHS regulation.

For Australian Disability Enterprises, the dilemma is even greater as they balance a 'duty of care' to their supported employees with the 'dignity of risk' that comes from empowering people with disability to exercise their right and actively and fully participate in economic life.

### **What is a workplace?**

Contemporary OHS regulations continue to be more appropriate for - and more directly applicable to - the factory work environments from which OHS regulation first arose. The workplaces in which disability services are provided are generally not typical traditional workplace environments, and as such are difficult for employers to exert control in relation to implementation of hazard controls. Disability supports are increasingly provided in:

- private homes where a person with a disability resides alone, with their family or carer; or other people with a disability and employed support staff
- public spaces such as the local swimming pool, library, shopping centre, public transport, public parks, concert hall or cinema.

The OHS 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 has limited or no control of the environment where work will be undertaken.

### **Documentation**

In order to provide services outside a standard segregated facility, disability service providers are required to undertake detailed risk assessments of the premises at which work is to be undertaken (eg. client's home, local café), and to document those assessments. Whilst consideration of risk is important to ensure the safety of the worker and the person with a disability, in the current funding environment, the need to document this process in order to meet legislative obligations reduces the time available for the client to participate in their chosen activity.

### **Consultation & Training**

Disability service organisations range in size and complexity, but typically multiple opportunities for communication and consultation with employees are embedded into

work practices. However, some employers report that legislative requirements for formal consultation systems which identify specific structures and mechanisms (such as OHS Committees for organisations of a certain size) impose a burden which does not demonstrate an outcome of reduced risk of injury or illness.

Furthermore, WorkSafe inspectors who prescribe specific consultative structures (such as elected health and safety representatives or OHS committees) are adding another layer of regulatory burden over existing systems. The additional requirements to train individual employees involved in specific OHS consultative mechanisms by way of a course of 4 to 5 days duration in a sector with relatively high staff turnover imposes significant additional compliance costs with a perceived minimal return. This, coupled with regulators' refusal to align mandatory training for OHS representatives with nationally recognised competency standards, provides another layer of business regulation and compliance with little return on investment for the organisation.

## **Benchmarking**

NDS seeks to ensure that the particular circumstances of workplace safety in the disability services sector are understood and that the tension arising from the interface between OHS regulations and disability services regulations is recognised in the design and application of any future benchmarking practices.

NDS recommends the development of benchmarking indicators that are specific to the disability service sector. Appropriate performance indicators should benchmark performance within the sector, and perhaps within service streams such as in-home support, respite, supported employment landscaping and supported employment food packaging.

Implementation of standardised benchmarks that are equally applicable to all businesses in all sectors is considered to have little relevance to individual service types and therefore likely to have limited uptake by the disability service sector if introduced as a first step.

However, the development of an agreed industry standard for disability service providers is more appropriate and would be well supported by the sector.

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## **About National Disability Services**

**National Disability Services** is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes more than 650 not-for-profit organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.