# *An enforceable duty of care for disability services providers*

***Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability***

***Young People In Nursing Homes National Alliance***
***October 2021***

## Introduction

We provide this brief submission to highlight a key reform we believe is urgently needed to improve the accountability of disability service providers for the safety and support of the people with disability who are their clients.

This key reform is to create an *enforceable duty of care for providers*, analogous to the duty contained in the Work Health and Safety legislative framework.

Recent history in the disability industry, the report of the 2015 Senate Inquiry and the work of this Royal Commission to date, have revealed that a standards monitoring system alone cannot deliver the effective safeguarding or the cultural change in service provision that is so badly needed.

While standards and quality systems are certainly important, without the clear framework and location of responsibility for duty of care in service delivery with directors and executives, standards compliance will remain primarily an administrative function in service providing organisations.

Had an enforceable duty of care been in place at the time of the scandals involving a number of high profile disability providers that led to the 2015 Senate Inquiry, the response would have been much different. Not only were executives and board members *not* held to account, but no civil or corporate penalties were levied (as prosecution under Occupational Health and Safety (OHS) legislation would require), but they retained their positions. While remedial action was taken in some of these organisations, it was largely undertaken in-house by salaried executives.

The Robertson Review that examined the regulatory response to the tragic Anne Marie Smith case, exposed the problem of a bifurcated system where the funder and the regulator were separate and had no overt communication exchange about vulnerable participants. In addressing the inability for the Commission to act proactively and the limitations of a standards system with periodic audits, Mr Robertson said:

> *At present in addressing the quality and safety, the NDIS Commission is substantially dependent on setting standards and imposing obligations on service providers and their workers. By its nature, audit is after the event albeit with some prospective elements which may help a service provider improve its operational capabilities. As the circumstances of Ms Smith demonstrate, even where there is a system of reportable incident and complaints, there is still a gap in terms of preventing harm to vulnerable participants.*[1]

[1] Robertson, A *Report to the Commissioner of the NDIS Quality and Safeguards Commission, Independent review of the adequacy of the regulation of the supports and services provided to Anne-Marie Smith, an NDIS participant who died on 6 April 2020*, Sydney, 2020: 74.

In further comments about the current framework, Robertson states that

> *The structure of the Framework also emphasises that responsibility for safeguarding does not lie with a single government agency or service provider.*[2]

This major flaw in the current system was neatly summed up in an opinion piece by Julia Farr Purple Orange CEO, Robbi Williams, who said

> *If someone….were to become the next Ann Marie Smith, we would not be able to link it to the alleged actions of one support agency or worker. It would be no one's fault and everyone's fault.*[3]

Because it will locate liability with directors and executives as Workplace Health and Safety (WHS) and OHS rules now do, the Alliance firmly believes that legislating an enforceable duty of care for disability providers will fundamentally change providers' approach to risk management and client safety. This will not only result in different but more effective organisational vigilance than our current standards led system can enforce; it will lead to the systemic reform in safeguarding that is so greatly needed.

We believe the introduction of an enforceable duty of care in disability services is something that the Disability Royal Commission must look at as part of its work.

As part of this submission, we attach legal advice the Alliance sought on the applicability of the WHS/OHS legislation to instances of injury or death of people with disability who are users of services.

**Provided to the Royal Commission into Quality and Safety in Aged Care for their consideration, this legal advice was prepared for the Alliance on the date that it bears and is legally professionally privileged.**

**However, in providing it to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, the YPINH Alliance will waive privilege over this advice for this purpose only. It should be noted that the advice was prepared for the benefit of the YPINH Alliance only and may not be relied on by another person or agency or quoted or referred to in a public document. Prepared on 4 April 2019, this advice has not been updated or reviewed regarding changes in legislation or case law from that date. We provide this advice to the Commission for its consideration and do not consent to this advice being published by the Commission.**

[2] Op.Cit.: 44.

[3] See https://indaily.com.au/opinion/2021/04/06/one-year-after-tragedy-why-hasnt-disability-care-changed/

## Consideration by the Royal Commission into Aged Care Quality and Safety

This issue was canvassed thoroughly by the Royal Commission into Aged Care Quality and Safety (ACRC). That Royal Commission made a key recommendation about an enforceable duty of care for aged care providers. We believe the inclusion of similarly enforceable duty is essential if the safeguards framework for disability services in Australia is to be successfully reformed.

Recommendation 14 of the ACRC final report called for a general duty to provide high quality and safe care. It said:

> *1. The new Act should include a general, positive and non-delegable statutory duty on any approved provider to ensure that the personal care or nursing care they provide is of high quality and safe so far as is reasonable, having regard to:*
>
> *a. the wishes of any person for whom the provider provides, or is engaged to provide, that care*
>
> *b. any reasonably foreseeable risks to any person to whom the provider provides, or is engaged to provide, that care, and*
>
> *c. any other relevant circumstances.*
>
> *2. Any entity that facilitates the provision of aged care services funded in whole or in part under the new Act should have a duty to ensure that any worker whom it makes available to perform personal care work has the experience, qualifications, skills and training to perform the particular personal care or nursing care work the person is being asked to perform.*

The government accepted this recommendation, saying "*This will be considered as part of the development of the new Aged Care Act through the measure* ***Governance - New Aged Care Act.***"[4]

In his final submission to the Royal Commission into Aged Care Quality and Safety, Senior Counsel Assisting, Peter Rozen QC said:

> 1. *We submit that there needs to be a general duty on an approved provider to ensure, so far as is reasonable, the quality and safety of its aged care services. This would send a clear message to providers, the community and the regulator about the primary duty of an approved provider: to protect the health, wellbeing and safety of its residents. This amendment should be made in the existing Aged Care Act 1997 (Cth) and transferred into the new Act we are proposing.*

[4] Australian Department of Health Australian Government response to the final report of the Royal Commission into aged care quality and safety, Canberra, May 2021: 15.

2. *The duty we propose is based in part on the employer's duty under occupational health and safety law, a duty that the vast majority of approved providers already owe to their employees and contractors.[5] Such a duty has operated in Australian law since the 1980's. It has been described as requiring employers to 'take an active, imaginative and flexible approach to potential dangers'.[6] It requires employers, guided by experts, to be proactive not reactive.[7] It requires employers to ensure that their staff are instructed, informed, trained and supervised so that they can work safely.[8]*

3. *Approved providers currently have a non-delegable common law duty to exercise reasonable care for the health and safety of residents. The notion of 'reasonable care' is not fixed but evolves as scientific and medical knowledge increases and in line with changing community expectations.[9]*

4. *The duty we are proposing would build on this common law duty and encourage a provider to do more than merely meet accreditation standards. It will clearly state that the duty of a provider is to service the needs of residents first and foremost. It will be an aspirational duty. To adapt the words of Professor Joseph Ibrahim of Monash University, accreditation should be a by-product and not the focus of providers.[10] That focus needs to be to provide the highest quality care that is reasonable.*

5. *In addition to providing clarity for residents and their families, the inclusion of such a duty in aged care legislation would provide a focus for the compliance and enforcement work of the aged care regulator, a point we will address later in these submissions. The introduction of a general occupational health and safety duty on employers in recent decades has dramatically shifted the approach of regulators away from enforcing prescriptive standards to targeting compliance with the general duty.[11] This effect was recently recognised by a comprehensive review of Victoria's environmental laws[12] and has led, for the first time, to the inclusion of a general duty in those laws.[13]*

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[5] See, for example, Occupational Health and Safety Act 2004 (Vic), s 21.

[6] Holmes v R.E. Spence & Co Pty Ltd (1992) 5 VIR 119 at 123 (Harper J).

[7] Occupational Health and Safety Act 2004 (Vic), s 4(3); W Creighton and P Rozen, Health and Safety Law in Victoria, (2017), Federation Press at [6.29]-[6.48].

[8] See, for example, Work Health and Safety Act 2011 (NSW), s 19(3)(f); Occupational Health and Safety Act 2004 (Vic), s 21(2)(e).

[9] Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301 at 314.

[10] Exhibit 3-70, Sydney Hearing 1, Statement of Joseph Ibrahim, WIT.0115.0001.0001 at 0059 [314].

[11] R Johnstone, L Bluff and A Clayton, Work Health and Safety Law and Policy, (2012, Thomson Reuters) at [8.455]; W Creighton and P Rozen, Health and Safety Law in Victoria, (2017, Federation Press) at [10.60]–[10.66].

[12] P Armytage, J Brockington and J van Reyk, Independent Inquiry into the Environment Protection Authority, 2016, pp 221–222.

[13] Environment Protection Amendment Act 2018 (Vic), s 7 (which will come into effect in July 2021).

## Board duty of care liability for people with disability

Senior Counsel Assisting, Kate Eastman SC, recently referred to board members' liability in relation to the Sunnyfield case.[14] The Alliance is keen to see the Royal Commission investigate this issue further and examine the feasibility of a statutory duty of care for disability service providers as the Aged Care Royal Commission did in the aged care context.

The fact that boards and responsible executives of disability and aged care providers do not already have positive and enforceable duties of care for their services to people with disability, but carry statutory liability for financial management and work health and safety, is a major failing of Australia's care services governance framework. It is also a contributing factor to the poor outcomes experienced by people in aged care and disability services. Both Royal Commissions have heard evidence about the shortcomings of quality systems in both service systems. As systemic as well as organisational failures, the Alliance believes these shortcomings are as much a failure of governance as they are a failure of practice.

In practice, an organisation's duty of care to its employees is far better articulated and observed than its duty of care to its service recipients. While complicating factors, such as the impact of siloed standards and administrative reporting arrangements continue to define industry practice, the failure to impose duty of care liabilities on board members and senior management of service providing organisations, remains of concern.

If boards carry ultimate legal responsibility for OHS and financial management, then why not hold responsibility for their duty of care to people with disability? Quality and safety in human services cannot be mediated by standards systems unless this liability for breaches is located with boards and executives.

Unless a legally enforceable duty of care in place, providers and regulators will continue to run the 'bad apple' line that blames harm on singe perpetrators and fail to acknowledge that acts of neglect and abuse have systemic causes.

## Duty of care in disability services

In disability services as in aged care services, the duty of care question has been delegated to quality systems with diffuse service standards. The current 'bureaucratic' approach to managing incidents via IT systems and standard incident reporting forms, reduces these incidents to a manageable business risk rather than a core duty of care concern for boards and executives. Abuse, neglect, injury and the death of a person with disability is thereby defined as a service delivery issue rather than one of a criminal or civil liability.

In a very practical sense, people with disability using services (and indeed older people resident in aged care facilities) are defined in their service delivery context rather than as full citizens with civil and legal rights.

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[14] Reported in Guardian Australia. See https://www.theguardian.com/australia-news/2021/sep/11/sydney-disability-homes-board-also-accountable-for-alleged-abuse-of-residents-royal-commission-told

People with disability are thus defined and valued by their status as service users. By equating the value of their lives with their support needs (sometimes describes as 'challenging' or 'complex') their humanity is diminished.

Because the liability is clear and insurable, financial management and OHS are standing items on board and executive meetings as statutory liabilities for directors. In contrast, care quality issues are usually only discussed in these meetings when an audit is looming, the result of an audit needs discussion, or when a complaint has been made that has found its way to the highest levels of the organisation.

While it is feasible for the OHS/WHS regime to be used to investigate and prosecute cases of abuse, neglect, injury or death in disability services, it is far from an ideal regulatory arrangement. Now that we have a disability safeguards regulator, this regulator must have the commensurate powers to deliver the same outcomes without having to rely on a separate system to do so.

If the ACRC's recommendation for an enforceable duty of care is to be replicated for disability services, this must be enshrined in the NDIS legislation in the same way that the aged care duty will become part of new aged care legislation.

It is worth noting that, in the disability context, 'duty of care' is different to that concept as it is understood in aged care. It is therefore critically important that the definition of duty of care in the disability services context sits firmly within a human rights framework, taking account of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the NDIS Code of Conduct. It would be a terrible outcome if the introduction of an enforceable duty of care in disability services resulted in providers compromising their clients' choices and their the dignity of risk in the interest of corporate compliance.

## Cultural change in the service provision industry

The WHS/OHS legislative framework has been in place for over 15 years. In that time, there has been a noticeable shift in the culture of organisations where OHS issues are respected and investments in WHS are made in the normal course of business.

The OHS movement has made workplace safety a mainstream conversation and embedded it in every part of the community. Through a program of legislation, enforcement and public health campaigning, regulators have moved workplace safety from a topic of ridicule to one that is now taken very seriously.

It is shameful that the providers' duty of care to people with disability who use their support services is not culturally embedded in the same way that OHS has been, particularly since care services are the very reason for providers' existence.

Shifting the locus of responsibility and elevating the importance of duty of care in disability services to a core responsibility of directors, will improve this situation and result in similar positive cultural change. As described, the enforceable duty of care is not a replacement for

a standards system but is actually the framework the standards sit within. In doing so, the compliance becomes a priority as part of organisational governance.

As the legal advice we have provided confirms, businesses and organisations owe a duty of care to clients and customers under the WHS/OHS legislation. Yet incident reporting by disability services providers to WHS/OHS regulators is rare and prosecutions even rarer.

By way of example, using the search term 'disability' to search for the outcomes of prosecutions on the Worksafe Victoria website, revealed only a single case where a client was injured and the provider was found to be in breach of the Victorian OHS Act. This case involved a client who, because of a worker's neglect, fell off a tilt table and broke his leg.[15] All other prosecutions listed in the disability category were related to injuries to workers employed in disability or mental health services.

Given the regularity of injuries/deaths to people with disability in service settings, it is highly disturbing - and revealing - that there are not more prosecutions of these matters.

In *DPP v St Vincent's Care Service Pty Ltd,* the Victorian County Court recently saw an aged care provider found guilty of breaching S23 of the Victorian Occupational Health and Safety Act 1986[16] The case dealt with a resident of an aged care facility who fell into an excavation culvert near the front of the facility. The resident was badly injured and was taken to hospital once he was found.

In the judgement, it was found that the care provider *did* have liability for the safety of residents under the OHS Act. The judge notes the responsibility of the provider when he states:

> *Much of what is contended here comes down to common sense and the practicalities of monitoring residents in case they get into difficulty. On the evidence adduced at trial there is more than sufficient evidence to identify the risk and the means by which it might be addressed.*[17]

This case exemplifies the type of injury to care recipients that can occur in disability and aged care services but is routinely managed via incident reports to the relevant industry regulator and would not, therefore, have landed in the County Court with a successful prosecution. Interestingly, the report to Worksafe Victoria that led to the investigation and prosecution was not made by the service provider, but by a member of Victoria Police. This reveals the habit (or reluctance) of providers to engage with the OHS/WHS regulators when a client is injured.

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[15] See: https://content.api.worksafe.vic.gov.au/sites/default/files/directories/prs/LEG-Enforceable-undertaking-australian-homecare-services-2017-05.pdf

[16] DPP v St Vincent's Care Service Pty Ltd [2021] VCC 1035).

[17] Ibid.

As it is an effective legislative framework through which providers can be held legally accountable for breaches to their duty of care, referral to OHS/WHS regulators must be routine.

This case (albeit from aged care) also indicates that, in its definition of duty of care to service users, the OHS/WHS legislation is effective and enables the court to interpret it broadly enough to include persons other than employees to whom a provider owes a duty. It also reveals that such cases can result in prosecution.

OHS/WHS regulators have the capacity to receive reports and investigate and prosecute cases where care recipients are injured, but because reporting relies mostly on self -report by providers, it does not happen often.

Disability providers have policies, procedures and IT systems that direct incident reports for injuries to clients to the NDIS Quality and Safeguards Commission. It is for the Royal Commission to consider why this is the case and why reports to the OHS/WHS regulator are so rare, even for serious injuries, particularly where a duty of care exists under that legislative framework.

Is it because the WHS/OHS regulators do not have an active education/inspection regime that reminds providers of their duty of care to people with disability as well as their workers?

Perhaps it is because the injuries and deaths of people with disabilities using services are seen as 'matters for the disability system' because there are 'different circumstances'?

Or is it because there are established reporting lines for incidents and injuries to clients that go only to the disability regulator?

In discussing why there isn't more traffic in reports and investigations coming from disability providers, a WHS/OHS regulator told the Alliance that the WHS investigators do not know much about the conduct of these disability services and they are happier for the industry regulator to manage this area.

Standards monitoring in disability services (and aged care), occurs within the same system that provides funding. As a result, IT and other administrative systems are different for workers and for 'clients' of service providers, while reports for injuries or incidents for 'clients' go vertically to the appropriate government agency. In aged care this is the Aged Care Quality and Safety Commission and for disability services it is the NDIS Quality and Safeguards Commission.

The NDIS Quality and Safeguards Commission does have a range of powers, including the capacity to enforce penalties on providers found to have breached their obligations or the NDIS Code of Conduct. While enforceable undertakings can also be imposed, the penalties are more akin to corporate fines than the significant legal and financial penalties an enforceable duty of care would impose. When compared to the OHS/WHS legislation

liabilities, these are clearly not enough to substantially change the culture and the behaviour of providers.

## NDIS Quality and Safeguards Commission

As the Aged Care Royal Commission indicated, a safeguarding system that relies on service standards alone is a poorly designed system.

Even with legislated powers that are superior to previous state/territory disability regulators, the NDIS Quality and Safeguards Commission remains process driven with an influence on service providers that is purely procedural. In the Alliance's experience, it has failed to have any noticeable impact on providers' operations; does not participate in conversations about service quality; and has made the NDIS Code of Conduct an inconsequential influence on providers' operations.

Through its legislation, the NDIS Quality and Safeguards Commission has the capacity to work with other regulators in investigating complaints of neglect and abuse in disability services. In data obtained by the Alliance through Freedom of Information requests to the NDIS Quality and Safeguards Commission, it was confirmed that:

- In the 12 moths to March 2021, the Commission had made no referrals for investigation to WHS/OHS or consumer affairs regulators in any jurisdiction. (Data was not sought for previous time periods to know if there has ever been such a referral).
- In the Ann-Marie Smith case, the Commission did communicate with Safework SA about its investigation. While Safework SA was notified about the revocation and banning of Integrity Care as a provider under section 67E of the National Disability Insurance Scheme Act 2013, no referral for investigation under the SA WHS Act was made.
- The Alliance has sought clarification from Worksafe SA about whether it initiated any investigation itself, but they have not responded to questions.

The NDIS Quality and Safeguards Commission has capacity through its legislation to work with other regulators and in 2020, formalised information sharing protocols with a number of other regulators (including consumer affairs agencies and WHS/OHS regulators). The protocols with Worksafe Victoria are attached to this submission.

The schedule unfortunately does not cover the making of referrals or requests for specific investigations. This again reveals the Commission's lack of ambition for systemic change, collaboration, or any determination to see instances of abuse and neglect followed up with the maximum rigour and legal force available.

In the short term, we would like to see these schedules amended to see reports and referrals of incidents go in both directions and a comprehensive awareness program instigated to ensure staff working for both regulators are aware and enforce the regulations

according to their legislation. In this way, cases that warrant investigation and prosecution by WHS/OHS regulators would come to their attention.

## Conclusion

In the longer term, we would like to see the enforceable duty of care implemented in disability services. It is neither practical nor desirable for the NDIS Quality and Safeguards Commission to rely on an external regulator to enforce a duty of care from another legislative framework. As a result, this duty must be included in the NDIS legislation.

We are aware of instances where families of people with disabilities who have died in disability services have instigated common law action against the provider. However, this is a complicated process and is not an appropriate systemic response to the risk of abuse, neglect, injury and death of people in service settings.

## Further contact

The Alliance would like to open a dialogue with the DRC about the issues raised in this submission and the attached legal advice.

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