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The urgent need for an enforceable, statutory duty of care for disability services

Response to the NDIS Review's paper on a new Safeguarding Framework for the NDIS

Young People In Nursing Homes National Alliance
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Introduction

The Alliance provides this submission to the NDIS Review to highlight an urgently needed reform that will improve the accountability of disability service providers for the safety and support of the people with disability who are their clients.

To deliver this important reform, we believe the safeguarding framework must incorporate a number of components. These are

- Strong regulation of providers with enforceable duties for the delivery of supports that align with the imperatives of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)
- Funded supported decision making for people with disability who require assistance with planning and decision making
- A detailed and proactive workforce strategy across the disability sector that addresses skill development and the attraction and retention of skilled workers to the sector
- Structured links with regulators in other sectors (WHS/OHS, consumer protection, health, aged care, transport, child services) and
- Active and appropriately funded support for a strong community sector (including advocacy services).

Our submission concentrates on the first of these components – the ***inclusion of an enforceable duty of care for disability providers***, analogous to the duty contained in the Work Health and Safety legislative framework.

The Alliance has proposed this reform in submissions to the Aged Care and Disability Royal Commissions, and this submission draws on that work.

Through our extensive work with disabled Australians needing joined up, multi system services, we have seen standards based systems in aged care and disability services repeatedly fail to respond to the abuse, neglect and harm inflicted on clients of care/support services. We've also seen a corresponding across-the-board failure to create a safeguarding environment that fosters needed cultural change across service provider industries to address this failure.

This change is at the very heart of a reformed safeguarding framework for the NDIS.

Numerous reports of the disability industry's abuse and neglect of people with disability have revealed that a stand alone standards monitoring system cannot deliver effective safeguarding or the cultural change in service provision that is so badly needed. This includes evidence from the Disability Royal Commission and the report of the 2015 *Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings.*[1]

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[1] See https://www.aph.gov.au/parliamentary_business/committees/senate/community_affairs/violence_abuse_neglect

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Standards and quality systems are certainly important parts of a safeguarding system. But without a clear framework that locates responsibility for duty of care in service delivery with provider directors and executives, standards compliance remains 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 entirely different. Not only were executives and board members of the organisations involved ***not*** held to account but, in contrast to the prosecution that would have been required under Occupational Health and Safety (OHS) legislation, ***no civil or corporate penalties were levied***. Adding further insult to injury, these answerable individuals retained their positions without consequence. While remedial action was taken in some of these organisations, it was largely undertaken in-house by salaried executives.

In examining the regulatory response to the tragic Anne Marie Smith case, the Robertson Review identified the problem of a bifurcated system wherein the funder and the regulator were separate and had no overt communication exchange about vulnerable participants. In addressing the inability for the NDIS Quality and Safeguards Commission to act proactively within 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.*[2]

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.*[3]

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.*[4]

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[2] 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.
[3] Op.Cit.: 44.
[4] See https://indaily.com.au/opinion/2021/04/06/one-year-after-tragedy-why-hasnt-disability-care-changed/

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Because it will locate liability with directors and executives as Workplace Health and Safety (WHS) and Occupational Health and Safety (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 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.

To support this important safeguarding reform, the Alliance sought legal advice on the applicability of the WHS/OHS legislation to instances of injury or death of people with disability who are users of services. Provided by one of Australia's top tier legal firms, this advice was provided to the Royal Commission into Quality and Safety in Aged Care for consideration.

This advice confirmed that disability providers owe a duty of care to their clients under the WHS/OHS framework. However, cases where this duty of care is enforced are unfortunately all too rare.

Workplace Health & Safety (WHS)/Occupational Health & Safety (OHS) legislation

Under the WHS/OHS legislation, businesses and organisations - including disability service providers - owe a duty of care to clients and customers.

Yet the extremely rare instances of incident reporting by disability services providers to WHS/OHS regulators and the even rarer prosecutions enacted, reveal that this legislative framework's accountability is not enforced. WHS/OHS regulators have the capacity to receive reports and investigate and prosecute cases where care recipients are injured, but very few reports and referrals are, in fact, made.

An effective legislative framework through which providers ***can*** be held legally accountable for breaches to their duty of care, would make referral to OHS/WHS regulators a routine occurrence. Because this has not been the case, WHS/OHS regulators have not built up a specialised knowledge of the disability services sector.

This lack of routine referral was apparent when the term 'disability' was used to search for prosecution outcomes on the Worksafe Victoria website. Only a single case was identified. This case involved a client who, because of a worker's neglect, fell off a tilt table and broke his leg.[5] The provider was consequently found to be in breach of the Victorian OHS Act. 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 disturbing - and highly revealing - that there are not more prosecutions of these matters.

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

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In *DPP v St Vincent's Care Service Pty Ltd,* the Victorian County Court found an aged care provider guilty of breaching S23 of the Victorian Occupational Health and Safety Act 1986.[6] 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.

The judgement found that the care provider had liability for the safety of residents under the OHS Act. The judge noted the responsibility of the provider in this case, saying:

> *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.*[7]

This case exemplifies the type of injury to care recipients that can occur in disability services, but is routinely managed via incident reports to the relevant industry regulator and would not 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.

Albeit from aged care, this case 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.

Disability providers have policies, procedures and IT systems that direct incident reports for injuries to clients to the NDIS Quality and Safeguards Commission but not to the WHS/OHS regulator. It is for the NDIS Review to consider why this is the case and why serious injury reports to the OHS/WHS regulator are so rare, particularly when a duty of care requirement 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?

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

[7] Ibid.

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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. For disability services, it is the NDIS Quality and Safeguards Commission.

Provider governance and duty of care liability

In considering board members' liability for the alleged abuse of residents of its services, Kate Eastman SC, Senior Counsel Assisting the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, referred to the Sunnyfield case where three residents were allegedly abused by support workers employed by Sunnyfield.[8]

Responsibility for that abuse lay not only with the accused support workers, Ms Eastman concluded, but also lay "with Sunnyfield, its board, its CEO and its [senior leadership team".

In supporting Ms Eastman's conclusion, the Alliance strongly believes the NDIS Review must investigate the issue of board accountability further and examine the feasibility of a statutory duty of care for disability service providers as the Aged Care Royal Commission did for the aged care context.

The fact that boards and responsible executives of disability and aged care providers carry statutory liability for financial management and work health and safety but do not have positive and enforceable duties of care for their services to people with disability, 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.

The Aged Care and Disability Royal Commissions have both heard damning evidence about the shortcomings of quality processes in both service systems. As both systemic and 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, failing to impose duty of care liabilities on board members and senior management of service providing organisations, remains a significant and self evident concern.

[8] 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

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

This systemic failing has been interrogated by the Disability Royal Commission in a number of public hearings. Reflecting on a case study outlined in an earlier hearing, the Chair of the Commission highlighted this enduring lack of accountability in an exchange with Senior Counsel assisting, saying:

> *During the public hearing, an issue was raised with Ms Robbs about whether or not the events that Sophie was subjected to were brought to the attention of the Board, and the evidence was that they weren't in a timely fashion. But of more significance was the line of questioning, if confronted with Sophie's scenario in December 2021, would you do anything differently? And, in broad terms, the answer was no. Yes, there was discussion about reporting lines and some changes, but that answer was a very stark answer which revealed, in our submission, a lack of understanding, empathy and insight into what should have happened.*[9]

As this example reveals, without a legally enforceable duty of care, providers and regulators will continue to run the 'bad apple' line of defence, wherein harm is blamed on single perpetrators and the systemic causes of acts of neglect and abuse are not acknowledged.

Duty of care in disability services

As it has in aged care services, the question of duty of care in disability services has been delegated to quality management 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 criminal or civil liability.

Far from being respected as citizens with civil and legal rights, people with disability using services are too frequently defined by their service delivery context. In other words, people with disability are defined by and valued solely for their status as service users. By equating the value of their lives with their support needs (sometimes described as 'challenging' or 'complex') the person with disability's humanity is diminished and they continue to be comprehensively 'othered'.

Because their liability is clear and insurable, financial management and OHS are standing items on board and executive meetings as directors' statutory liabilities. In contrast, care

[9] DRC Transcript 28/4/22 par 583. See https://disability.royalcommission.gov.au/system/files/2022-06/Transcript%20Day%207%20-%20Public%20hearing%2020%2C%20Virtual.pdf

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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.

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 the new Aged Care legislation.

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

In designing a statutory duty for the NDIS legislation it is critically important then that the definition of duty of care in the disability services context is not only about safety and risk reduction, but sits firmly within a human rights framework. The United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the NDIS Code of Conduct should be the starting points for the wording of an enforceable duty for disability services.

It is worth noting that in the contemporary disability context, a 'duty of care' would be defined differently to an enforceable duty in aged care or health services. In disability services it would include obligations to support choice and respect as well as valued status in the community and safety.

Registered and unregistered providers

Regardless of their size, type, structure or registration status, an enforceable duty of care applies to all providers liable to provide supports consistent with this duty. The introduction of a statutory duty of care for disability providers funded through the NDIS will therefore ensure comprehensive provider oversight of both registered *and* unregistered providers.

The varied composition of the disability support market and the need to retain participant choice, makes it neither appropriate nor feasible to require all providers to be registered.

However, having an enforceable statutory duty of care that applies to all providers establishes clear standards that, with education and strong investigation and prosecution activity, can be enforced across the entire disability services market.

Should the NDIS and the NDIS Commission need to set specific requirements for providers of particular supports (e.g. accommodation support, aged care or equipment supply), then specific registration or accreditation rules can be established where the scheme and/or participants require particular outcomes or minimum qualifications.
By avoiding the need for a byzantine regulatory system to accommodate the varied provider types and transactions that comprises the disability services market, a statutory duty of care is a simple but highly effective means of dealing with the provider registration question.

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

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 this submission indicates, the enforceable duty of care is not a replacement for a standards system but is actually the framework the standards sit within. Compliance thus becomes a priority as part of organisational governance.

NDIS Quality and Safeguards Commission

The NDIS Quality and Safeguards Commission has 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.

Highlighted in a research report commissioned by the Disability Royal Commission, expectations of legal and policy clarity, of high standards of service delivery practice and the consequence of failure, are pivotal to a functioning safeguards framework. The report declared that:

> *Accommodation, educational, employment or community services more generally benefit from a clear understanding of what constitutes community expectations and accepted standards. To these ends, legal and policy frameworks to guide and direct services are essential. These could include*

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> *human rights legislation, employment and industrial legislation and legislation governing the provision of education.*[10]

And of course, legislation covering disability services.

The disability industry's lack of reporting to the WHS/OHS regulators shows a significant deficit exists in the safeguarding arrangements for people with disability that are overseen by the NDIS Quality and Safeguards Commission.

Collaboration with other regulators

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' processes and procedures.

Through its legislation, the NDIS Quality and Safeguards Commission has the capacity to work with other regulators to investigate 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:

- Requests made by the Alliance to the Commission in 2021 and 2023, confirmed that the Commission had made no documented referrals for investigation to WHS/OHS or consumer affairs regulators in any jurisdiction. The Alliance believes the Commission has missed a significant opportunity to hold providers to account through an existing legislative framework.
- 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 Safework SA about whether it initiated any investigation itself, but they have not responded to questions.

With its legislation enabling it to work with other regulators, the NDIS Quality and Safeguards Commission formalised information sharing protocols with a number of other regulators (including consumer affairs agencies and WHS/OHS regulators) in 2020.

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[10] McVilly, K., Ainsworth, S., Graham, L., Harrison, M., Sojo, V., Spivakovsky, C., Gale, L.,Genat, A., Zirnsak, T. *Outcomes associated with 'inclusive', 'segregated' and 'integrated' settings: Accommodation and community living, employment and education. A research report commissioned by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, University of Melbourne, Melbourne, 2022: 124

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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 respective legislation. In this way, cases that warrant investigation and prosecution by WHS/OHS regulators would come to the NDIS Commission's attention and vice versa.

Enabling the NDIS Quality and Safeguards Commission to operate under a statutory set of duties for NDIS providers requires that it be structured differently. Using WHS regulators as a guide to a regulator's operation in this context, the Commission's restructuring can deliver

- stronger public facing communications and education functions
- an inspection and investigation function to complement its complaints handling role
- a publications unit to provide specific guidance to providers and plan managers
- structured referral and information sharing protocols with other regulators
- a much improved structured engagement with people with disability
- capacity to hold providers, their boards and executives to account under the provisions of a statutory duty of care.

Contemporary expectations

We strongly believe the NDIS Review must initiate work with people with disability and their organisations to define and develop a fit for purpose statutory duty of care for the disability services industry and the NDIS market. Service quality, practice that includes people in decisions about their own lives and the activation of human rights, are all service areas that intertwine with safety and, in disability services, define the duties that service providers must uphold in the course of their work.

Part of this work is to articulate how this duty could be implemented, monitored and measured. It is critical that the WHS/OHS regulators are involved in this component of the work. Their inspection and communication models have a great deal to offer a new and stronger safeguarding system in disability services that has a statutory duty of care at its core.

Provider status

The Alliance has participated in a number of discussions about the issue of safeguarding, the NDIS registration status of disability providers and the gaps that are evident…concerns that have also been raised by the Minister for the NDIS and Government Services.

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Media reports of dishonest or 'sharp' commercial practice by providers has highlighted the vulnerability of some people with disability who have been exposed to poaching by providers, as well as poor service and lack of transparency in service delivery. While this has been most obvious in the SRS sector, the growth of unregistered Supported Disability Accommodation providers delivering Supported Independent Living (SIL) shared residential services, has also been a growing concern.

At present, the disability services sector lacks a comprehensive industry culture, with many of the poor practice examples that have inflicted harm on people with disability being found in the not-for-profit sector that now prioritises commercial realities over their historical mission. While part of this can be attributed to NDIS funding structures, much of it is a feature of the NDIS market at work.

Under the NDIS decentralised market model, individual transactions and quality are not transparent. Responsibilities for provider oversight and management are split across the NDIS, the person with disability and/or their family, support coordinators, local area coordinators, advocates and providers themselves. The current safeguarding arrangements are clearly less than adequate to deal with such diffuse responsibility.

Such a decentralised and diffuse system clearly requires the universal application of a statutory duty of care that disincentivises poor practice and is embedded in the culture of service delivery in the same way that OHS is embedded in business enterprises.

In the same way that WHS/OHS rules and obligations cover many different types of employers and enterprises, an enforceable duty of care for disability services incorporating human rights, dignity and choice making, would apply to all providers regardless of NDIS registration status.

Consideration by the Royal Commission into Aged Care Quality and Safety

The need for a statutory duty of care for aged care providers was canvassed thoroughly by the Royal Commission into Aged Care Quality and Safety (ACRC).

In his final submission to the Royal Commission, 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.*

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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.*[11] *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'.*[12] *It requires employers, guided by experts, to be proactive not reactive.*[13] *It requires employers to ensure that their staff are instructed, informed, trained and supervised so that they can work safely.*[14]
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.*[15]
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.*[16] *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.*[17] *This effect was recently recognised by a comprehensive review of Victoria's environmental laws*[18] *and has led, for the first time, to the inclusion of a general duty in those laws.*[19]

In its Final Report, the Royal Commission recommended that an enforceable duty of care for aged care providers was imperative if high quality and safe care was to be provided, saying in Recommendation 14 that:

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[11] See, for example, *Occupational Health and Safety Act 2004* (Vic), s 21.
[12] Holmes v R.E. Spence & Co Pty Ltd (1992) 5 VIR 119 at 123 (Harper J).
[13] 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].
[14] 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).
[15] Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301 at 314.
[16] Exhibit 3-70, Sydney Hearing 1, Statement of Joseph Ibrahim, WIT.0115.0001.0001 at 0059 [314].
[17] 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].
[18] P Armytage, J Brockington and J van Reyk, *Independent Inquiry into the Environment Protection Authority*, 2016, pp 221–222.
[19] Environment Protection Amendment Act 2018 (Vic), s 7 (which will come into effect in July 2021).

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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.***"[20]

From discussions with senior officials from the Department of Health, the Alliance understands a statutory duty of care will be included in the exposure draft of the new Aged Care Act that will be released for discussion later this year.

We believe the inclusion of a similarly enforceable duty is essential if the safeguards framework for disability services in Australia is to be successfully reformed and applied to the NDIS.

Recommendation

To ensure an effective safeguarding system is in place, we urge the NDIS Review to prioritise the introduction of an enforceable duty of care in disability services as a matter of urgency.

This work must include close consultation with the Australian Department of Health concerning their work to include an enforceable duty for aged care providers in the new aged care legislation currently being drafted.

Commissioning people with disability and their organisations to ensure the statutory duty's requirements are consistent with the UNCRPD and the existing NDIS Code of Conduct is also imperative.

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[20] 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.

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