



LA TROBE
UNIVERSITY

LIVING WITH DISABILITY
RESEARCH CENTRE

2024 RESEARCH

SEMINAR SERIES

12 June

What we will cover

- 3.00-3.50 pm: Australian WHS enforcement regarding service provision to people with disabilities: Lessons for service providers
- 3.55-4.25 pm: Issues for WHS policymakers and regulators
- 4.30-5.00 pm: Prosecutions by the NDIS Quality & Safeguards Commission: The first cases

Trigger warning

- Deaths of people supported, workers, and in one case, the worker's unborn child
- Including deaths of Aboriginal people. Will be using their names.
- Please exit now if this is not an appropriate webinar for you. Please look after your welfare.

WHS enforcement for service provision to people with disabilities



Approach

We need to eliminate preventable harm to clients and workers

With only some exceptions, “There but for the grace of God go I”

We are not generalizing from one case to suggest that all people of that class constitute a risk



The publications

Hough, Bigby & Marsh (2023). *Australian work health and safety enforcement regarding service provision to people with disabilities: Lessons for service providers*

Marsh, Hough & Bigby (2024). *Enforcement of work health and safety laws in services for people with disabilities: issues for policymakers and regulators*

See also latest research from WorkSafe Victoria



The research

- Attempted to locate every decision on prosecutions or enforceable undertakings in relation to service provision to people with disabilities in Australia
- Used legal databases and WHS regulators databases of cases: does not always capture 'not guilty' findings
- Lessons were 'obvious'



Context

- Looking at cases commencing in 1999. Legislation has changed across time. Nonetheless, believe the lessons are generalisable.
- All States & Territories other than Victoria follow the national model WHS laws – although with some differences. WA only recently (2022) adopted the model laws.
- Victoria has the Occupational Health and Safety Act which has different terminology and some differences in duties – but it still outcomes-based and embraces risk-minimisation principles.



Not just disability service providers ...

27 cases. Service providers to people with disabilities

- 20 cases concerned disability service providers (incl. Governments when providers)
- 6 schools (including a school inside a youth detention centre)
- 1 hospital

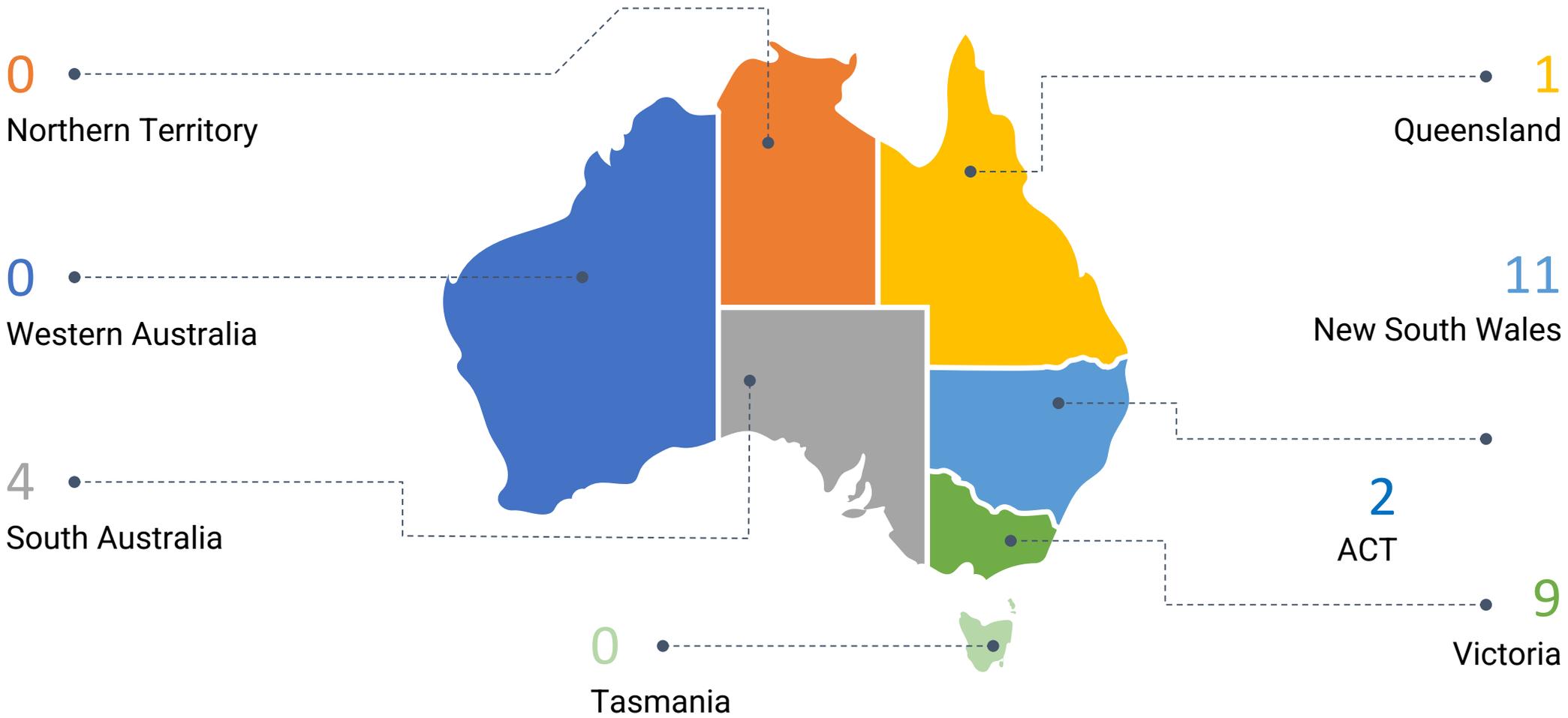


Cases

- 4 enforceable undertakings; 23 prosecutions
- 24 cases concerned providers; 3 prosecutions of individual workers; no cases as yet on directors and officers, but Integrity Care SA and its directors are currently before the courts following the death of Ann Marie Smith
- 18 cases concerned harm to workers; 2 cases concerned harm to workers and clients; 7 harm to clients alone. *Harm to clients made invisible.*
- 14 cases of physical assaults; 7 neglect; 3 sexual assaults, 3 physical injuries unrelated to assaults



WHS cases about service provision



Case examples

- Case 1: Death of Scott Bremner: Yasmar Detention Centre case ((2002) NSWIRComm 259)
- Case 1: Deaths of Riley Shortland, Rachel Martin, and Rachel's unborn child ((2021) NSWDC 259)
- Case 3: Serious harm to Eden Camac (Office of the Work Health and Safety Prosecutor, 2023)



Lessons

- Lesson 1: Providers are responsible for health and safety, even if risks are created by others
- Lesson 2: When an instance of serious harm occurs, a provider should expect that this will usually demonstrate failures in its systems
- Lesson 3: A provider's commitment must be more than just commitment on paper
- Lesson 4: A provider's quality and safety management systems must be comprehensive and dynamic
- Lesson 5: Providers must identify and manage risks arising from the physical environment



Lessons

- Lesson 6: A provider must obtain relevant information and ensure that it is shared with those who need it
- Lesson 7: A provider's difficulties in attracting and retaining staff are irrelevant to legal requirements
- Lesson 8: A provider's actions must be timely
- Lesson 9: In determining a provider's multiple responsibilities, work health and safety rights *appear* to trump human rights and trauma-informed approaches



Implications for policymakers and regulators

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Enforcement of work health and safety laws in services for people with disabilities: issues for policymakers and regulators

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ABSTRACT

This article builds on an earlier study of more than two decades of Australian work health and safety prosecutions and enforceable undertakings involving services for people with disabilities that identified lessons for disability service providers. Through a cross case thematic analysis of the 27 cases in the earlier study, we identify systemic work health and safety issues that are beyond the control of individual organisations. We identify seven issues for policymakers and regulators to consider in stewarding the evolution of work health and safety law and practice and which might be pursued by advocacy organisations in seeking change. First, regulators should not ignore work health and safety crimes against people with disabilities. Second, work health and safety interventions should emphasise the prevention of challenging behaviours not just their control. Third, a quadripartite approach - including the voices of people supported - should be adopted in work health and safety policy and legislation. Fourth, there needs to be greater awareness of the scope for third-party advocacy and third-party enforcement. Fifth, funders should at times bear the work health and safety consequences of their decisions. Sixth, legislation should allow beneficial arrangements for supporting people with very complex needs. Seventh, governments should have full legal liability for their criminal acts; the degree of liability of not-for-profits should continue to be decided on a case-by-case basis.

ARTICLE HISTORY

Accepted 17 January 2024

KEYWORDS

Work health and safety; occupational health and safety; disability services; people with disabilities; workers

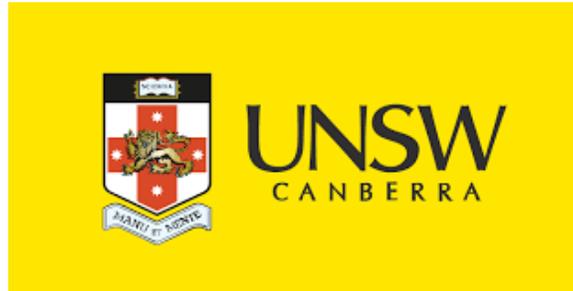
Australia's work health and safety laws hold employers to account for work safety and empower workers to ensure their safety is protected. They have their origins in a catastrophic mine collapse in Wales (Committee on Safety and Health at Work, 1972). This model of "duties-based" regulation, based on the common law concept of

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1. Regulators should not ignore work health and safety crimes against people with disabilities

- A PCBU must ensure, so far as is reasonably practicable, that the health and safety of **other persons** is not **put at risk** from work carried out as part of the conduct of the business or undertaking
- 6 cases appeared to **overlook risk** to person with disability



NDIS Quality and Safeguards Commission

- Kyah Lucas (\$1.8 M)
- Merna Aprem (\$400K)
- Oak Tasmania investigation

2. Work health and safety interventions should emphasise prevention of challenging behaviours not just their control

- ~~Workers' rights vs rights of people with disabilities~~
- Human-rights approach for all

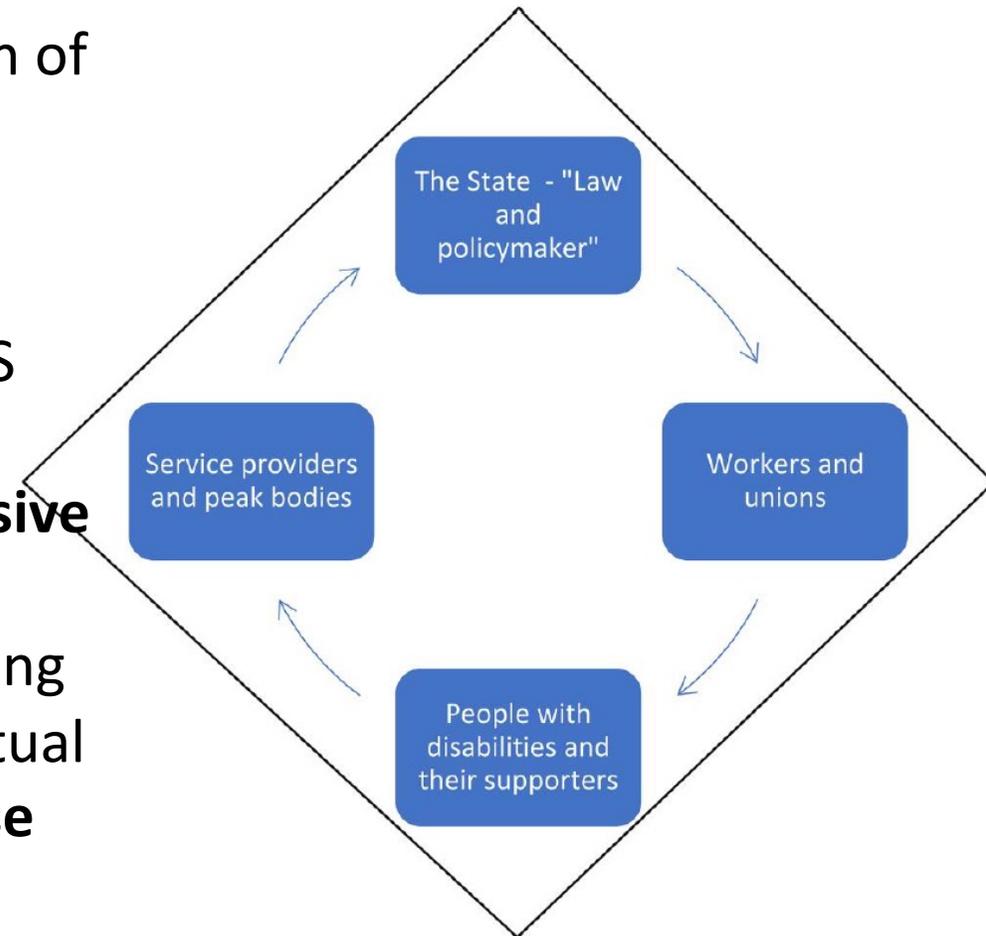


UNITED NATIONS

- Behaviour support plans **should** enable individuals to realise their full potential
- Courts may be seeing them as 'risk control plans'
- Meeting a person's needs is highest order 'risk control':
 - PBS; Active Support

3. A quadripartite approach - including the voices of people supported - should be adopted in work health and safety policy and legislation

- **Tripartism** a strength of the WHS system
- Why not **quadripartitism**?
- Consistent with NDIS practice standard expectation re **inclusive governance**
- Challenges in including people with intellectual disability is **no excuse**



4. There needs to be greater awareness of the scope for third-party advocacy and third-party enforcement

- Early cases in our study initiated by **non-regulator** prosecution (still supported in NZ)
- All safety laws entitle inaction by regulator to be taken to account (WHS: s 231)
- Opportunity for **advocates** to seek more regulator action
- Other regulatory schemes support **compensation** for those impacted by breach
- Important for 'other persons' **not covered** by worker's compensation
- Role for '**restorative justice**'?

5. Funders should at times bear the work health & safety consequences of their decisions

- Nischal Ghimire case: Reported that NDIA **refused funding** of second support worker
- **NDIS policy:** refuses to deal directly with providers of services about rosters
- WHS Act applies to **Fed agencies**
- WHS duties apply **concurrently** to all persons with '**capacity to influence**' safety outcome



Australian Government

Comcare

6. Legislation should allow beneficial arrangements for supporting people with very complex needs

- Supporting those with the most challenging behaviours
- Reality of the market-based approach **incentivises** avoiding those with most challenging behaviours and favouring those **easiest to support**
- **No guidance** on how WHS is to be met with the most challenging behaviours – only the wisdom of **hindsight**
- Can WHS regulators, NDIA and NDIS agree on WHS implementation plans that enable prosecution to be taken **off the table?**

7. Governments should have full legal liability for their criminal acts; the degree of liability of not-for-profits should continue to be decided on a case-by-case basis

- Sentencing guidelines
- Examined cases show **no clear trend** on NFP status
- Should NFP status be a factor in weighing punishment?
- What about Government agencies found guilty?



Limitations, further research and conclusions

- Reported decisions = **worst case scenarios**
- Value in examining **'micro' decisions** by WHS regulators to understand how human rights are balanced and risk managed
- Do WHS regulators understand **PBS and Active Support?**



Prosecutions by the NDIS Quality & Safeguards Commission: The first cases



Context

- NDIS regulation just one source of legal responsibility and liability: e.g., criminal law; actions for negligence; breach of contract; WHS; etc.
- NDIS legislation requirements are absolute: does not have: *mens rea* (intention) requirement of criminal law or ALARP ('as low as reasonably possible') 'defence' of WHS law
- At the moment, penalties can be administrative and/or civil; in the future, potentially criminal



Context cont.

- Workers and providers (registered or not) can be given Infringement Notices: \$3,756 per breach for workers or \$18,780 per breach for corporations (set amounts)
- Workers and providers (registered or not) can be subject to civil penalties for breaching the NDIS Code of Conduct: \$78,250 max. per breach for workers or \$391,250 max. per breach for corporations
- Registered providers can be additionally subject to civil penalties for breaching conditions of registration: Same amounts
- Criminal penalties proposed in Aged Care for providers and directors and executives: If so, flow-on to disability sector inevitable



The cases

www.tinyurl.com/2t29pnhj

1. AFFORD (concluded)
2. Integrity Care SA (adjourned)
3. Aurora Community Care Pty Ltd* (in progress)
4. LiveBetter (concluded)
5. Valmar Support Services (in progress)
6. Oak Tasmania Inc. (in progress)



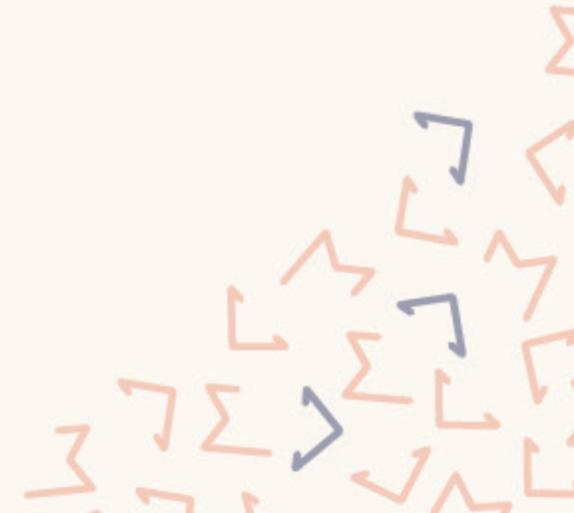
Example 1: AFFORD

- Death of Merna Aprem, as a result of seizure while bathing
- Unsafe practice
- Unsafe environment
- \$400,000 penalty + costs



Example 2: LiveBetter

- Death of Kyah Lucas, consequence of scalding
- Unsafe practice
- Unsafe risk assessment
- Unsafe training
- Unsafe competence assessment
- \$1.8 million civil penalty + costs



Implications for providers

- Amateur hour is over!
- Most harm is not deliberate
- Serious harm can occur quickly
- Need for: risk assessment; intake controls; information sharing; shift plans; quality training, tailored to the unique circumstances of the individual supported; tailored competency assessment; situational awareness by frontline staff; appropriate practice leadership; practice and clinical governance; Human Factors (e.g., cognitive biases)
- All of these are not without practical challenges



Implications for policy and regulatory practice

- Some people will be outraged by any discussion that does not simply blame providers
- With aged care, one of the most regulated sectors in Australia. Most regulated disability sector in the world?
- Lack of transparency about Infringement Notices; limited discretion
- Regulatory creep through prosecutions, e.g., competency assessment
- Policy equity: unregistered NDIS providers; NDIA and its officers; other indirect funders; hospitals; non-NDIS disability services
- Policy efficacy: Why are individual workers not being prosecuted? Should providers be held responsible for actions of workers beyond their control?

