

<b>To:</b> OHS Act Review WorkCover NSW Locked Bag 2906 Lisarow NSW 2252 or Fax: (02) 9287 4920 or Email: ohsact.review@workcover.nsw.gov.au	<b>From:</b> <b>Jenna Bateman</b> <b>Executive officer</b> <b>Mental Health Coordinating</b> <b>Council</b>  <b>Phone: 02 9555 8388 x102</b> <b>Fax: 02 9810 8145</b> <b>Email: <a href="mailto:jenna@mhcc.org.au">jenna@mhcc.org.au</a></b>
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*Working For  
Mental Health*

Mental Health  
Co-ordinating Council

PO Box 668  
Rozelle, NSW 2039

Phone: (02) 9555 8388  
Fax: (02) 9810 8145  
Email: [info@mhcc.org.au](mailto:info@mhcc.org.au)  
Website: [www.mhcc.org.au](http://www.mhcc.org.au)

## Comments on the Review of the OHS Act 2000

### Introduction

This paper has been prepared by the Mental Health Coordinating Council (MHCC) as a response on behalf of its member organizations to WorkCover's request for comment on the validity of provisions under the OHS Act 2000. The MHCC is the peak NSW body for non-government organisations (NGOs) working in mental health throughout NSW. Our member organisations specialise in the provision of services and support for people with a disability due to mental illness. MHCC represents the views and interests of over 150 NGOs in the formation of policy and acts as a liaison between the government and non-government sectors. Our comments are therefore informed by many years of direct practice in administering services to people with a mental illness and the particular problems faced by organizations serving the needs of this severely disadvantaged community.

As detailed in this paper we believe that the provisions of the OHS Act go far beyond ensuring a safe workplace for employees and instead impose an unreasonable and impractical burden for mental health providers in NSW. Beyond simply critiquing the Act we have, wherever possible, suggested possible amendments to help overcome what we perceive to be problems in the legislation.

**Q1. Comment is sought on whether the policy objectives of the OHS Act 2000 remain valid.**

**Q2. Do the objectives omit any important OHS principles?**

Generally, the comments in this submission are directed at the impact of the general provisions rather than the stated objects of the Act. The difficulties faced by our members arise not from the objects of the legislation with which we concur but rather from the provisions supposedly aimed at achieving these objects. We mention clause 3(e) here only to highlight what we believe to be a fundamental contradiction in the legislation.

Section 8 of the OHS Act provides that the “employer *must* ensure the health, safety and welfare of the employees of the employer. The courts have confirmed that this obligation is absolute and “without limitation”:

The duties imposed by the Act are not merely duties to act as a reasonable or prudent person would in the same circumstances.... the obligation of the employer is to ‘ensure’ the health, safety and welfare of the employees at work. There is no warrant for limiting the detriments to safety contemplated to those which are reasonably foreseeable... the terms of [the] section specify that the obligation... is a strict or absolute liability to ensure that employees are not exposed to risks to health or safety.

*Drake Personnel t/as Drake Industrial v WorkCover Authority (NSW) (1999) 90 IR 432*

As one of its objects, the OHS Act at clause 3(e) directs duty holders to ensure that “risks to health and safety at a place of work are identified, assessed and eliminated or controlled”. This is a new object designed to link the Act to the risk management provisions of the OHS Regulation 2001. These provisions require employers to identify foreseeable hazards (clause 9), to assess the risk arising from hazards identified (clause 10) and to eliminate or, if not reasonably practicable to eliminate, to control those risks (clause 11).

The absolute duties in the Act to ensure that employees are not exposed to *any* risks to health or safety, foreseeable or unforeseeable, would seem to be in clear conflict with these provisions which require employers to identify only *foreseeable* hazards, to *assess the risks* of those hazards and then to *minimise* the risk of assessed risks where these cannot be eliminated.

We recognize that the current review is directed at the OHS Act and not the OHS Regulation, which is the subject of a subsequent review. However, as outlined later in this paper, we consider that there is a pressing need for the absolute and unrealistic nature of s.8 and other duties in the Act to be brought into line with the Regulation to reflect a more realistic expectation of NSW workplaces. We would therefore recommend that the risk management provision be included not as a general object under s.3(e) of the Act but as a direct responsibility under section 8. Exactly how this might be achieved is outlined below.

**Q3. Comment is sought on any issues in regard to the scope of the general duties.**

**Q4. Are the general duties appropriate for securing the objectives of the OHS Act 2000?**

Is the scope of the current Part 2, Division 1 General Duties appropriate? The MHCC believes that it is not. WorkCover points out in its Discussion Paper that further clarification to the scope of the general duties of the OHS Act may be required to remove ambiguities and improve understanding in relation to new types of workplace arrangements such as contractors and labour hire (p.24). The MHCC submits that there is another type of arrangement that the Act needs to take into account: premises that become workplaces by virtue of employees temporarily working there.

### *Employees*

Section 8(1) of the Act provides that employers must ensure the health and safety of employees at work. This includes at clause 8(1) (a) ensuring that premises are “safe and without risks to health.” While such an obligation may be fair when the employee is at the employer’s “workplace” (be this an office, factory or construction site) the obligation becomes untenable when the “workplace” is ‘temporal’ in nature such as a residential home administered by an NGO. How many hazards are likely to occur in a client’s home each day? NGOs have had incidents where staff have slipped on milk spilt by a client or been bitten by a dog normally kept outside the premises. Hazards of this type are likely to emerge on a daily, almost an hourly basis. An absolute obligation (in the terms outlined by the courts in *Drake*) to ensure that such premises are safe and without risks to health is impractical and impossible to achieve.

The onerous nature of this duty is highlighted when one considers what the OHS Regulation requires employers to do in order to meet their duty of care. To expect small mental health employers that are traditionally under resourced and under financed to identify and control hazards as varied as “the storage of “hazardous substances”, the potential for “electrocution”, “slipping, tripping or falling” and “contact with moving or stationary objects” is, for most, overwhelming.

This point is taken to absurd levels when applied to situations where an employee takes a client out for the day for a leisure activity such as shopping. Under a strict interpretation of the Act the shopping mall, etc would also constitute the employer’s place of work’. How is an employer to identify and control hazards in these circumstances? It is our view that the legislation requires urgent amendment to ensure that the duties imposed on employers are, in the words of the ACCI, “reasonable, practicable and foreseeable and capable of being achieved, economically and practically.”<sup>1</sup>

### *Others at the Workplace*

The case for distinguishing between true “workplaces” and places where persons work temporarily becomes even stronger when one considers the obligations imposed by s.8(2) of the Act. Under that section the employer’s duties extend beyond the employee’s health and safety to other people “at the employer’s place of work”. If the employer’s place of work is wherever the work activity requires the employee to be (*Inspector Callaghan v Starr (1992)*) mental health providers are faced with the onerous duty of ensuring that clients and any other persons at the client’s premises are not exposed to risks (at least whilst their employees are visiting there). It goes without saying that many of the

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<sup>1</sup> Australian Chamber of Commerce and Industry, *Modern Workplace: Safer Workplace - An Australian Blueprint for Improving OHS 2005-2015*, Canberra, 2005, p. 55  
*OH & S Act Review Submission – Mental Health Co-ordinating Council 2 September 2005*

clients cared for by mental health providers are unstable, unpredictable and liable to self-harm. To expect NGOs to ensure that such clients are immune from risks “arising from the conduct of the employer’s undertaking” is unrealistic and counter-productive. Indeed, such an approach would seem to be in direct conflict with the Mental Health Act 1990 and Disabilities Services Act 1993.

### *Conflict between OHS Act 2000 and Disability Services Act 1993*

One of the prime objects of the Disability Services Act 1993 is to ensure the provision of services to facilitate people with a disability leading productive lives within the broader community. At the service level this requires a good deal of client contact and hands-on assistance by NGO staff. The Act also foresees this being done in a context in which the privacy and dignity of the client are paramount. Such an objective would seem to be at odds with the OHS Act 2000, with its focus on monitoring and assessing client risks and the supervision of employees by the employer.

The impact of the OHS Act on the provision of services under the Disability Services Act has been profound. Indeed, a recent inquiry by the NSW Ombudsman identified OHS legislation as a key reason for the diminishing number of services offered by community sector organizations to persons capable of violence or challenging behaviour.<sup>2</sup> Today NGOs are faced with a stark choice: to continue services at their current levels or to divert valuable resources into meeting obligations under the OHS Act 2000.

### *Costs of Compliance*

In this context one of our member organizations recently estimated the costs involved in complying with the employer’s duty of care under OHS legislation. This was based on a NGO with 48 clients and 10 workers (a conservative ratio). To meet their legal obligations the NGO determined that a formal risk assessment of each client site would be required at least twice a year. As a result of the ongoing nature of the assessment process staff would spend 10% of their time documenting occupational health and safety actions and related issues. In addition, to discharge their duty to ensure that “effective procedures are in place to identify hazards...while work is being carried out” they determined that each worker would need to receive a minimum of two days on-the-job training from a specialist to equip them to perform this task. The total hours involved in undertaking and documenting risk assessments and in staff training amounted to over 300 days or 4.7 extra hours per worker per week.

Even under a conservative estimate this would require an additional full time staff member, something which most small providers are simply unable to afford under current funding arrangements. The alternative is greatly reduced service hours to clients from existing staff, an experience which, as mentioned, there is evidence to suggest is already occurring. This estimate only takes into account the time involved in assessing risks. Once NGOs have assessed the risk they are also obligated to control that issue. Often this takes on a surreal quality. WorkCover has advised some members, for example, that residential units used by clients require a second or alternative door to ensure that employees have a “means of exit” that is “safe and without risks to health” within the terms of section 8(1)(a). Such a requirement clearly impacts upon the ability of the NGO to provide affordable housing for clients and, if implemented across the sector, would result in the placement of multiple clients in larger group homes, something which for many is inappropriate and contrary to the spirit of the Mental Health and Disability Services Acts.

The alternative, also suggested by WorkCover, is similarly expensive. Inspectors have recommended that NGOs allocate two employees per client visit. To implement such a proposal across the sector would result in a significant reduction in the number of clients that NGOs could

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<sup>2</sup> NSW Ombudsman, *Final Report arising from an Inquiry into Accessing to and Existing from the Supported Accommodation Assistance Program*, May 2004  
*OH & S Act Review Submission – Mental Health Co-ordinating Council 2 September 2005*

assist and would be opposed by clients who value their privacy and independence. This highlights a further problem in the legislation: the need under section 8(1)(d) to provide adequate supervision for employees. How is this to take place in a client's home? Is the alternative to insist that clients with a mental illness visit NGOs in centres equipped and staffed to deal with "the potential for workplace violence"? This option again increases infrastructure costs for cash-strapped NGOs and is contrary to the spirit of mental health legislation which aims to assimilate those with a mental disorder into the community via the security of their own home.

It is pertinent to note in this context the unwritten policy of the Department of Health, with crisis staff becoming increasingly circumspect in their response to aggressive clients. Workers are simply no longer entering homes where clients are suspected of having the potential for violence. Instead, the Department is increasingly relying upon the police. Treating the police as de facto mental health workers has significant implications for how the community views people with a mental illness and again conflicts with the spirit of the Mental Health and Disability Services Acts. Indeed, this heavy handed approach to what might be an isolated and transitory episode can result in the readmission of the client into an institution something that does the client, community and state little good. The MHCC strongly opposes this trend.

### *Suggested Approach*

In our view the OHS Act needs to deal with the *practical* realities faced by employers in the mental health sector. The legislation should reflect only what is capable of being achieved. It is our submission that the OHS Act be amended to exempt employers from their duties to ensure a safe "place of work" when that workplace is a domestic premises. We are not contesting that the employer bears obligations to train and instruct employees in these circumstances, however the burden of providing a safe working environment in these contexts is in our view unachievable and inappropriate. In the words of the recent ACCI Blueprint for OHS, "The regulatory framework must recognize that, in the real world, no matter how committed employers and employees are to workplace safety...neither an employer or employee can predict or control every activity or event around them." The legislation as it currently stands makes no allowance for this and mental health providers are currently faced with a choice of reducing services or continuing the direct provision of services, only to face prosecution when the unpredictable occurs.

In our view the Act needs to distinguish (in terms of the obligations imposed) between a real "workplace" (with all the attendant features of a workplace) and one which becomes a workplace by virtue of the employee visiting it: between premises "that have the inherent character of a place of work", as one commentator puts it, "and other premises which become transformed to a place of work of the employer by the presence of some of their employees"<sup>3</sup>.

At the very least we would submit that the absolute duty in section 8 be tempered by a proviso of "reasonableness". We would therefore recommend that the term "reasonably practicable" be added to section 8. We note here the fact that the term "reasonably practicable" has "been significantly distorted... to the point where [it] no longer reflect[s] what is reasonable, practical and achievable."<sup>4</sup> For this reason we would also recommend that the term "reasonable practicable" be defined in the principal Act. Here we consider the definition outlined in the Victorian Maxwell Report and section 20 of the Victorian OHS Act to be a good starting point; namely that "practicability" be defined according to the following five principles:

- the severity of the hazard;
- the state of knowledge about the hazard;

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<sup>3</sup> Tooma, M, *Tooma's Annotated Occupational Health and Safety Act 2000*, Law Book Co. 2004, pp17-18

<sup>4</sup> ACCI, op.cit, p.21

- the availability and suitability of ways to remove the hazard;
- the cost of removing the hazard and,
- the level of control which the employer had over the hazard.

As an alternative, we would support the ACCI's recommendation that in place of an absolute duty imposed on *all* employers, the standard imposed on community employers including NGOs should rather be "based on the implementation and maintenance of a safety management system relevant to the industry, size and resources of each particular business"<sup>5</sup>. Such a system could be developed by a specialist consultant funded by Government, adapted to NGOs' circumstances and implemented across the community mental health sector. Whatever action is taken, one thing is clear: without urgent change NGOs in the mental health sector will continue to be overwhelmed by a piece of legislation that is impractical, divorced from reality and unable to be met without a significant reduction in services to clients.

#### **Q6. Comment is sought on the issues associated with the defences in the OHS Act.**

The obligation under section 8 which obliges employers to ensure health and safety in absolute terms is an onerous and unrealistic burden. We recognize that the employer has overall responsibility for ensuring employees are not exposed to health and safety risks, however the absolute obligation as it is currently stated is virtually impossible to meet.

As outlined above, the duty of an employer and others under Part 2 should be to ensure safety as far as *is reasonably practicable*. We consider that the OHS Act should be amended to reflect that principle. This would bring the NSW Act into line with the principal OHS Acts in Victoria (s.21), Queensland (s.21), South Australia (s.19), Western Australia (s.19), Tasmania (s.9), Northern Territory (s.29) and the ACT (s.27), all of which limit the absolute nature of the legislation with the reasonably practicable proviso. WorkCover, in its Discussion Paper, applauds the "high level of national consistency" in the OHS Acts of Australian jurisdictions (p.23). Clearly with respect to this issue NSW is out of step with the principal Acts in every other jurisdiction.

In its Discussion Paper WorkCover implies that the inclusion of "reasonably practicability" as a defence under section 28 of the Act means that there is little distinction between NSW and other jurisdictions. The MHCC disagrees. With criminal sanctions and significant penalties (including custodial sentences) imposed by the OHS Act it is vital that the prosecution bears the onus of proof to demonstrate that it was reasonably practicable for the defendant to comply. As noted above, we also consider that a definition of "reasonable practicability" is needed to counter the trend within some jurisdictions to interpret these terms until they resemble almost the opposite of their ordinary meaning.

It is considered that the impact of such a change on WorkCover prosecutions would be minimal. As outlined in the recent Maxwell Report into the Victorian OHS Act, WorkSafe Victoria has had no difficulties in proving offences under the general duties because of the burden of having to prove the practicability element: "The Authority is successful in the vast majority of prosecutions it conducts".<sup>6</sup> As Maxwell noted, "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

<sup>5</sup> ACCI, op.cit, p.56

<sup>6</sup> Maxwell.C, *Occupational Health and Safety Review*, State of Victoria, 2004, p.357  
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implement and which would have removed or controlled the relevant risk or hazard.”<sup>7</sup> The same is certainly true for NSW.

In its Discussion Paper WorkCover NSW states that its “prevention and compliance policies are... critical to informing individuals of what is expected of them in respect of workplace health and safety” (p.14). In our view it is critical that this expectation not be left to “prosecution policy” or to the discretion of the individual inspector but should be stated clearly and unambiguously in the principal legislation. Such a move would assist employers and other duty holders in understanding that while the obligation to ensure safety remains, it is tempered by the application of reasonableness. The current position where employers bear the onus of discharging an absolute burden of proof does nothing to improve the administration of safety in NSW and, to the contrary, reinforces the perception held by many that the employer will be guilty of a breach of the Act irrespective of what action they take to manage safety.

#### **Q7. Comment is sought on the issues in relation to the obligation for controllers of premises.**

A further problem in the general duties is highlighted by s.10 of the Act relating to the controller of premises. This section obliges an organisation with control of premises used as a place of work to ensure that the premises are safe and without risks to health. The broad application of this duty creates confusion among NGOs which diminishes the applicability and impact of the legislation. An examination of the practical reality for most community mental health service providers brings this point home.

Our member organizations provide support services to assist mentally ill clients to live valued lives in the wider community. This has become increasingly prevalent since the Richmond Report with its emphasis on removing people from long-term institutional care, in favour of maintaining people within community accommodation (e.g. half way houses). In many cases this accommodation is:

- owned by the Government (e.g. Department of Housing) and leased to the NGO;
- owned by the Government, managed by a Government-funded Housing Association and directly leased to the client;
- owned privately, managed by a Government-funded Housing Association and directly leased to the client.

Despite this the responsibility for setting up and administering the accommodation usually rests with the NGO. In such circumstances there is much confusion about exactly who is the controller of the premises and which obligations attach to each party. It would appear that in most cases the Department is the “controller”, yet the NGO may be deemed a controller if it contracts repair and maintenance work to be undertaken by a tradesperson at those premises. In any case, as noted earlier, the NGO retains responsibility for the premises by virtue of s.8(1) and (2). The breakdown in obligations between each party in these situations is virtually impossible to determine. WorkCover may argue that such uncertainty helps to improve health and safety outcomes, with each party striving to achieve optimum safety standards. Maxwell, who looked at this issue in detail, noted otherwise: “the existence of multiple overlapping duties breeds confusion and frustration, and ultimately to a failure of responsibility”.<sup>8</sup>

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<sup>7</sup> Ibid, p.358

<sup>8</sup> Maxwell, op.cit, p.111

In that context it is sobering to note the response of some government agencies in response to this uncertainty. In an apparent effort to limit its liability under occupational health and safety legislation the Department of Housing has, since 2001, progressively withdrawn face to face contact with mentally ill clients; for example, by undertaking only two home visits per year. In lengthening the duration between its home visits the Department is essentially seeking to shift the requisite duty of care to the NGO which leases or manages the property on its behalf. In addition, where the NGO identifies a physical hazard (e.g. a potential slip or fire hazard) the first response is usually to refer the issue to the owner. The response by the owner can be slow or non-existent, in which case the NGO is usually forced to undertake the repairs themselves, creating liability for itself by assuming the role of a controller.

While WorkCover may argue that the Department cannot 'contract out' its legal obligations this provides little comfort to the NGO which is likely to be found liable were an incident to occur. This practice it is submitted derives directly from the lack of clarity in the Act, with affected parties left to interpret where the demarcation lines lie.

MHCC considers that firm and clear direction is needed on which party (e.g. the employer or controller) is responsible for meeting various obligations under the Act and Regulation (e.g. access and egress, emergency equipment, electrical installations). At the moment responsibility for such issues is extremely murky with, in many cases, the under-resourced NGO left to interpret and implement controls as best as they can. A guiding principle for legislation that imposes serious criminal penalties should be that it articulates duties clearly, realistically and unambiguously.

**Q8. Comment is sought on issues in regard to the scope and effectiveness of the consultation obligations.**

MHCC fully supports the principle outlined in section 3(d) of the Act that consultation and cooperation between employers and employees is vital to achieving superior OHS outcomes. With this in mind the MHCC welcomes the flexibility provided under section 16 in relation to consultation options.

Notwithstanding this the MHCC believes that further clarification is needed in relation to "other agreed arrangements." While the scope and mechanics of OHS Committees and OHS Representatives are well understood in NSW there is considerable confusion and misinformation about what constitutes "other agreed arrangements" and the scope and powers of such arrangements; for example:

- What is considered sufficient evidence of an "agreement" in relation to a consultative arrangement and must this agreement be by all staff or is a majority agreement sufficient?
- What shape can these "other arrangements" take e.g. would an intranet service directing OHS issues to staff and providing them with an opportunity to provide input be classed as such an "arrangement"?
- What if any training is required for managers/staff under other agreed arrangements?
- Do representatives under other arrangements need to be elected or may they be appointed by management?
- Can management representatives outnumber employee representatives?

There are currently a host of possible answers to these questions floating about NSW industry. This uncertainty and the varied interpretations provided by WorkCover inspectors has meant that "other agreed arrangements" are rarely canvassed or taken up by organizations in the mental health sector. This leads us to a situation where, 5 years after implementation of the Act, NGOs opt for OHS

Committees simply because the mechanics of this forum are certain and understood. The time involved in OHS Committee administration and the mandatory 4 day training required for members can be a significant impost for smaller mental health providers, and could be better directed toward more practical and effective safety outcomes.

We would recommend that WorkCover provide better clarity in the Act as to what constitutes “other arrangements” and how such arrangements may be established and operate. We would also recommend that WorkCover publicise the availability of “other arrangements” as a mechanism for meeting consultation obligations under the OHS Act 2000, especially for small and community based organizations (such as the majority of mental health providers) which are limited in time and resources. Alternatively we would recommend that the current 4 day training for OHS Committees be reduced to one day.

**Q10. Comment is sought in regard to issues arising from the provisions, principles and defences (section 26) for directors and managers.**

One of the most inequitable aspects of the current Act is the burden that it imposes on Directors under section 26. Since volunteers are neither employers nor employees within the terms of the OHS Act they seem to be exempt from OHS obligations. However, the same does not seem to be true for volunteers who act as Directors. These individuals seem to be caught by section 26 which simply refers the liability of a Director (voluntary or paid) to the liability of the corporation as a whole. While such an obligation may be appropriate for Directors and senior managers of large corporations, to impose these duties on Directors of community NGOs who are for the most part unpaid and voluntary is unfair in the extreme.

WorkCover may consider that such Directors are adequately covered by the defences in section 26 e.g. that the Directors were not in a position to influence the conduct of the corporation or that they exercised “all due diligence”. However, the courts have interpreted these defences extremely narrowly (“All due diligence” for example is considered to be something between “perfection and due diligence”<sup>9</sup>) and Directors of NGOs are still likely to be caught.

The MHCC is aware that Directors currently holding honorary positions within NGOs are beginning to reconsider their position in the light of this personal liability. In view of this, the MHCC believes that the Act should be amended to make it clear that voluntary Directors of NGOs (who receive little or no remuneration for their public service) should be exempt from liability under section 26. Without a clear amendment of this type fewer and fewer capable individuals will come forward as volunteer Directors. The consequences of that situation will be a rapid deterioration of the community health sector and further discrimination against one of the most disadvantaged groups in our community: the mentally ill.

**Q25. Comment is sought on the provisions relating to notices in the OHS Act 2000.**

The MHCC believes that the appeal time against an inspector’s Notice under section 96(2) of 7 days is too short. This particularly the case when one considers that transmission time seems often to be included as part of this seven day period. The MHCC is aware of one community organisation which had two Improvement Notices served on it. These Notices were received by fax with the transmitting WorkCover date imprinted seven days after the date of WorkCover’s visit. When the organisation

<sup>9</sup> *State Pollution Control Commission v Kelly* (1991) 5 ASCR 607  
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appealed against one of the Notices it was advised that the appeal was out of time, even though the appeal was within seven days of the imprinted date.

In practice it may be impossible or impractical for an organisation to appeal within seven days. In any case we consider 14 days to be a more reasonable limit. This is particularly the case in relation to Notices issued to community based organisations which, unlike for example a factory situation, are unlikely to relate to an immediate threat to health and safety.

**Q26. Comment is sought on the desirability of introducing non-mandatory advisory notices to assist in achieving the policy objectives of the OHS Act 2000.**

The MHCC considers that the provision of practical, accurate and plain English advice for the mental health sector is paramount. Generally employers want to comply with OHS legislation. Most are what WorkCover calls in its Discussion Paper “Learners (Beginners) – “committed but not sure what to do” (p.13). While larger employers can afford to engage health and safety consultants or full-time staff to advise on health and safety compliance such resources for smaller, under-funded NGOs simply do not exist. Among such employers there is, in the words of the recent Maxwell Report, “but the vaguest awareness of what is required and how it is to be achieved”.<sup>10</sup>

This issue was discussed at length in the Maxwell Report. Maxwell noted the frustration of employers “at the refusal of WorkSafe inspectors to provide guidance or advice as to how they should go about complying with the Act. Of all the many issues raised during the review, this is the issue which has been raised most often, and most vociferously”.<sup>11</sup> We would contend that NSW employers are in exactly the same position. WorkSafe in Victoria responded by providing inspectors with a specific power to provide advice on how a party can comply with a duty under the Act (section 18). A similar provision in the NSW Act would be highly justified.

Mental health organizations have had positive experiences when inspectors have acted in this role. In the words of one of our members,

“Several years ago [we were] planning to undertake a new activity [and] we asked WorkCover for advice. The WorkCover person visited the site, gave advice, left us with some brochures and followed up with some written information. All for no charge and all to achieve a good outcome. In my opinion, that type of behaviour should be at the forefront of what WorkCover is about... I support the concept of WorkCover having a role in helping employers to achieve safer workplaces. In fact, I consider that this is a primary function.”

Unfortunately there is a perception among many of our members that in more recent times the role of inspectors has swung back to the enforcement model, with substantial fines imposed for breaches of OHS legislation particularly in relation to assaults by clients. To quote the same employer,

“since that time... WorkCover has lost the desire to contribute cooperatively with employers to achieve safety at work. It is sad to note that... last year Improvement Notices were issued during what was marketed by WorkCover as a fact finding exercise.”

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<sup>10</sup> Maxwell, op.cit, p.258

<sup>11</sup> Maxwell, op.cit, p.259

We note that WorkCover's Discussion Paper (at page 12) refers to the role of inspectors as follows:

"WorkCover's inspectorate and experts in technical and scientific fields are uniquely positioned to provide high quality information and practical advice to industry, because of their first hand knowledge about issues and problems in the workplace."

Yet the OHS Act is conspicuously silent on the role of WorkCover in providing advice to workplaces. This would appear to us an omission which needs to be corrected. We would also stress that any advice provided by inspectors needs to be practical and relevant, identifying solutions to particular workplace safety issues. Simply providing general comments and distributing brochures is not enough. Our members want to comply with the legislation, they need specific advice on how they can do so.

WorkCover's Discussion Paper speaks of "advice of a non-mandatory nature" (p.43). We consider such a position to be palpably unfair, a case of "do what we tell you to do but it still may not be right." We consider that advice provided to workplaces should be written and have legal effect. Our members are keen to comply. Firm, accurate and legally binding advice would be a positive move to this end.

The issue of accurate advice raises a broader issue for WorkCover: the need for consistency. Our members have complained of considerable inconsistency in terms of the advice issued by inspectors. What one inspector sees as a reasonable response to a safety issue will be enough to warrant an Improvement Notice from another. There is a real need for WorkCover to provide clearer directions to inspectors on how particular industries should comply with the legislation. By way of example clear and *practical* advice on the management of violence in the mental health sector would help struggling employers and provide better safety outcomes across the sector.

**Q20. Comment is sought on issues relating to approved codes of practice and their role in the health and safety framework.**

**Q21. Comment is sought on the desirability of clarifying that approved codes of practice can be used as evidence to demonstrate that general duties and risk management duties have been discharged.**

Inspector advice is of vital assistance to employers. However, we believe that this principle needs to go much further. To assist consistency of advice and compliance by smaller employers the MHCC recommends that WorkCover publish detailed and specific guidance on how WorkCover interprets each section of the Act. We noted earlier the difficulties experienced by mental health and other community service sectors in interpreting section 8 (particularly in relation to remote "workplaces" such as client residences) and the interplay between section 8 and section 10 in terms of safe premises. Publishing specific material on these issues would go some way toward alleviating the confusion evident within the industry at the current time.

Again, this was an issue considered by the recent Maxwell Review in Victoria. Maxwell recommended WorkSafe publish "Safety Rulings" to meet "the demand for answers to the question: "what do I need to do to comply?"<sup>12</sup> Whether such advice is in the form of "Safety Rulings" or industry codes of practice is of little concern to our sector. Whatever the advice is called it should be central to WorkCover's health and safety framework and be capable of providing positive evidentiary value in the event of a prosecution. We recognize that this may require amending the evidentiary

<sup>12</sup> Maxwell, op.cit, p.291

power of codes of practice under the section 46 of the Act and we consider that such a move is perfectly logical: If not following an industry code can be used to prove an offence then surely the opposite should apply. This would also meet the ACCI's call for appropriate standards for business that provide unambiguous information on "what to do and how to do it in order to comply with the relevant legislation."<sup>13</sup>

## A Way Forward

As outlined in this submission it is the view of MHCC that the OHS Act as it currently stands imposes an unrealistic burden on mental health providers in NSW and provides little clarity as to how these organizations can meet their legal duties. Rather than simply critiquing the legislation this submission has, wherever possible, suggested ways in which these issues could be addressed. These include:

- Removing the absolute nature of the duty of care under the Act by imposing the proviso of "reasonable practicability" within section 8.
- Providing a definition of "reasonable practicability" within the Act which obligation bearers, WorkCover and the courts would need to take into account. This definition to include the severity of the hazard; the state of knowledge about the hazard; the availability and suitability of ways to remove the hazard; the cost of removing the hazard and the level of control which the obligation bearer had over the hazard.
- Removing the obligations of employers for premises (such as client's homes) that are workplaces only by virtue of occasional visits by employees.
- Distinguishing between the duties owed by corporate employers and those owed by community employers. The duty for such obligation bearers should be the implementation of an OHS system appropriate to their size and industry sector. Government funding to be provided to assist development and implementation of this system.
- Clarifying the obligations of controllers viz a viz employers to provide certainty to this area.
- Providing greater clarity as to what constitutes "other agreed consultative arrangements" and how such arrangements should be established and operate.
- Clarifying the Act to make it clear that voluntary Directors of NGOs are not liable to prosecution under section 26.
- Providing a specific power enabling WorkCover inspectors to provide advice to employers on how to meet legal obligations under the Act. This advice should be written and legally binding.
- WorkCover publishing specific and detailed advice directed at smaller employers on how each section of the Act is to be interpreted and implemented. These rulings to have legal force and be illustrated by industry specific examples.

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<sup>13</sup> ACCI, op.cit, p.39

## Conclusion

Mental illness is a serious and pervasive issue in NSW. It is estimated that most people suffer some type of mental illness at some time in their lives. For persons with a chronic mental illness the barriers to social and community acceptance can be enormous. Community based organizations of the type we represent play an essential role in stabilizing such persons and assisting their recovery, a role long accepted by the government and the broader community:

Community support services including housing, home help, recreation, family support, employment and education... are essential elements in improving the quality of life of people with mental illness and psychiatric disability. *Commonwealth Department of Health and Family Services, National Mental Health Plan, 1988*

The role of community mental health providers has become even more critical as a result of the Richmond Inquiry with its focus away from institutional care and toward integration of persons with a mental illness within the broader community. Most community based organizations are staffed by dedicated professional people with a strong community spirit and commitment to doing the best possible for the clients they serve. Equally, most of these organizations lack the resources available to private and government employers and operate often on shoestring budgets. To impose the same obligations and expectations from such organizations as from government instrumentalities or private sector organisations with large budgets and multiple resources seems palpably unfair.

We would argue, moreover, that the OHS burden imposed on community mental health organisations is even greater than most. While many government agencies and private sector employers operate from fixed workplaces that are finite and easy to manage, the workplaces of community based mental health providers include the residential premises of clients. As we have argued, these can change on a daily basis and are virtually impossible to make risk-free. To expect such organizations to manage this type of risk is overwhelming and impossible to achieve without a serious reduction in the already stretched services to clients with a mental illness.

For these reasons the principal Act regulating occupational health and safety in NSW needs to make allowance for employers who provide a service to the community of NSW. There is already a precedent for this in the recent Civil Liability (Personal Responsibility) Act 2002 which limits the personal liability of government agencies and persons engaged in charitable, benevolent, philanthropic, educational or cultural activities. It should be noted that this Act arose from the likelihood that charitable associations may have had to withdraw their services as a result of public liability actions. We would submit that a very similar situation exists in relation to community organizations and the OHS Act in this state.

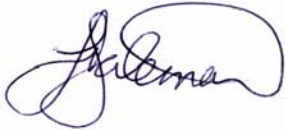
One way of achieving this legislatively would be to distinguish between workplaces that have the essential nature of a workplace – offices, factories and construction sites – and those such as residential premises which become workplaces simply because someone is working there. To expect community organizations to manage the risks associated with such “temporal” workplaces is impractical in the extreme. This paper has also gone on to recommend other changes to the Act which would assist mental health providers in meeting standards that are more attuned to the realities faced by such organizations in their daily operations.

Earlier in this paper we noted the growing disquiet within the mental health community with the changes instituted by the OHS Act and Regulation in NSW. The mental health sector provides an essential service in caring for individuals who would otherwise lead neglected and unfulfilled lives in institutional care. In that sense the community mental health sector defrays the significant costs of mental health care for governments at both state and federal levels. We have argued in this submission that the operational costs of compliance with the OHS Act by NGOs are so prohibitive that they cannot be absorbed without significantly compromising the level of service that NGOs

provide to the mentally ill. If governments wish to continue to reap the benefits served by NGOs in caring for disadvantaged communities they need to amend the enabling legislation to reflect operational reality or provide significantly greater resources to assist compliance. Without such a move the ability for such organizations to continue their vital work will be severely compromised.

We would be pleased to provide further advice or to elaborate on any of the issues outlined in this submission. If further information is required please do not hesitate to contact me on (02) 9555 8388 or by email at [jenna@mhcc.org.au](mailto:jenna@mhcc.org.au).

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Jenna Bateman', with a large, stylized flourish at the end.

Jenna Bateman  
Executive Officer  
Mental Health Coordinating Council

