



Illawarra Disability Alliance

Response to the NDIS Q&S Commission consultation paper:

“Proposed Legislative Reforms to Strengthen the Regulatory Powers of the NDIS Commission” November 2024

SUBMISSION



ACKNOWLEDGEMENT OF COUNTRY

We wish to acknowledge and respect the Traditional Lands of all Aboriginal people and to acknowledge Aboriginal and Torres Strait Islander people as the First Australian people of the land that we wave upon. We pay our respects to all Elders past, present and those of the future and ask that all those who walk, work and live on Traditional Aboriginal Lands to be respectful of culture and traditions.

About Illawarra Disability Alliance

Illawarra Disability Alliance (IDA) is made up of not-for-profit disability-specific providers working together to deliver better outcomes for people with a disability in our community. IDA aims are to:

- work collaboratively with people with disability, their carers, and across agencies and government to advocate for the rights of people with disability and promote inclusion.**
- contribute to a strong functioning disability support network which proactively advocates for better outcomes for people with disability.**
- represent the local region and support market stewardship by contributing to State and National policy discussions.**
- ensure that as service providers we are well informed and supported.**
- liaise with all levels of government on region specific issues (e.g., health, education, housing, NDIS, etc...) in order to provide sound, timely advice that contributes to quality policy decisions.**

The secretariat function for the Illawarra Disability Alliance is proudly supported through the Community Industry Group the peak body working for community services and organisations in Southern NSW.

Introduction

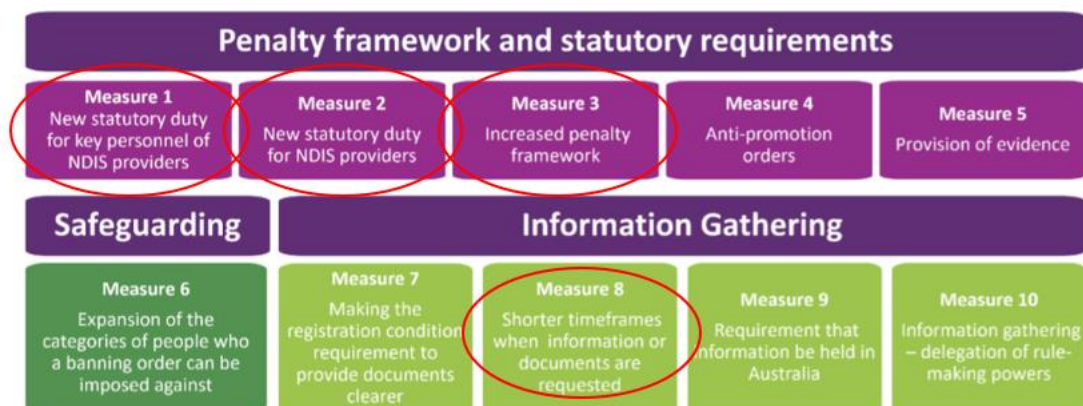
The Illawarra Disability Alliance (IDA) is supportive of changes to the NDIS Act that better support the human rights of people with disability including the introduction of new protections and penalties for bad practices.

IDA members are in favour of a well-regulated and governed NDIS which is adequately resourced and funded reflective of the complexity of the participants supported and the extent of regulatory requirements of providers.

The IDA supports enhanced regulation with regards to the NDIS Quality and Safeguards Commission's (the Commission) stated intent to "...significantly increase protections for NDIS participants and improve the quality and safety of supports."

However, IDA members are concerned that the consultation paper as presented lacks detail in relation to the proposed measures. More information is needed about the practical implementation and resource implications of the new measures.

This is particularly true for measures 1, 2, 3, and 8 associated with the penalty frameworks and statutory requirements and the information gathering timeframes.



Additionally, as reflected in the responses below IDA members raised concerns about potential unintended consequences of the introduction of these measures in terms of:

- Making it harder to attract and retain competent and skilled key personnel including board directors (who are largely voluntary positions),
- A more risk averse sector with flow on effects to other sectors,
- Challenges navigating conflicts between WHS and NDIS legislation,
- Increasing difficulties in obtaining adequate insurance coverage for services, and
- Increasing difficulties in accessing external professionals willing to consult and contract to the sector and provide their expertise to service providers.

IDA members stress that this is a time of rapid change and uncertainty within the sector and clear guidance is needed to support adaptation to further changes.

IDA responses to each of the Consultation Paper questions are below.

Measures 1 to 5: “Penalty framework and statutory requirements – to ensure a fit-for-purpose penalties and offences framework to deter people doing the wrong thing.”

1. Do you support the two new proposed statutory duties for NDIS providers and their key personnel?

IDA Response:

IDA members note that in relation to the new statutory duties:

1. a required *due diligence* for key personnel and
2. a *reasonably practicable duty of care* not to engage in conduct that causes adverse effects to participants for providers,

Clarification is required in relation to the guidelines and what they mean for key personnel and providers. Key terms “*due diligence*” and “*reasonably practicable*” require clear definition.

Registered providers are already required to undertake independent quality audits to demonstrate due diligence and duty of care involving key personnel through compliance with the NDIS Practice Standards including in areas of provider governance and operational management. These audits, while not a guarantee that mistakes or errors will not occur, already provide evidence of due diligence and duty of care in their conformance and *efforts and attempts* to conform to the practice standards through their systems and practices.

As stated in the consultation paper “*Key personnel of NDIS Providers are already required to comply with these obligations (i.e. NDIS Practice Standard or conditions of registration)*” (p.9) and then goes on to provide an example of where this has not occurred, without much detail or context around the provider’s failings.

The example provided does not demonstrate how the civil penalty would support greater accountability. IDA members question the validity of the imposition of a civil penalty as a deterrent to ensure the safety of participants. A more effective approach is to enable timely action on the part of the Commission to trigger an intervention involving a market response.

For example, in the event where the Commission is concerned about the safety and wellbeing of participants it should have the power to intervene. It is preferable to allocate another registered provider at short notice to take up a participant’s supports rather than applying a civil penalty after harm has occurred.

2. Do you think the proposed new statutory duties for NDIS providers and their key personnel should be more or less expansive, or revised in other ways?

IDA Response:

IDA members advise that the detail in relation to the new statutory duties requires further clarification to avoid ambiguity. The NDIS Act already provides clarity in relation to a number of requirements for providers (compliance with standards and code of conduct, incident and complaints management, and protection of disclosers) therefore it will be important to articulate parameters of these statutory duties clearly.

The term “*reasonably practicable*” also requires further definition as it applies to duty of care and is also a legal term within WHS legislation. Providers are constantly required to

manage and navigate this conflict between taking reasonably practicable steps to keep workers safe and taking reasonably practicable steps to uphold duty of care and rights of participants. These issues of tension and interpretation need to be reflected in the framework and the term more clearly defined as it applies to duty of care.

IDA members also identified that there is very often a clear tension that must be navigated between a participant's dignity of risk and their risk management and support plans which is highly relevant for duty of care of key personnel. For example, this is seen often in relation to mealtime management plans which a participant does not wish to adhere to placing them at risk. The framework must include clear guidelines which acknowledge dignity of risk and choice and control for participants and their supported decision makers to mitigate risk for key personnel.

IDA members also identify that risks arising from poor planning practices by NDIA personnel are being passed on to key personnel – a situation beyond key personnel control. This is seen for example where planners approve funding at levels that are insufficient to meet the person's care and support requirements. There is a duty of care on the part of the NDIA and planners to accurately assess and fund service requirements which IDA members would like to see acknowledged in the framework.

3. Do you support the proposed new and increased penalties and offences framework?

IDA Response:

In relation to the new criminal offences and civil penalty provisions the IDA members would like to see more detail in relation to the penalty framework noting that the new proposed penalty structure is unclear despite the example provided.

IDA members are concerned in relation to the framework that as not for profit organisations the new penalties and offences framework will further impact their ability to attract skilled and competent voluntary board members. Directors operate under a few governance compliance frameworks already and are compelled to act in good faith. Imposing a raft of new penalties on directors may discourage them from directorships in the sector.

4. Do you think the proposed new and increased penalties and offences framework should be revised in any way?

IDA Response:

IDA members identified several areas for revision and clarification.

Clarification of the term "serious failure to comply" is needed and what this means in practice.

The level of penalties proposed may have unintended consequences acting as a deterrent for reputable and capable registered providers and seeing participants with high needs and complexity unable to find a provider willing to support them.

Directors and Key Personnel are likely to become more risk averse because of these changes. This may lead to providers "cherry picking" participants who pose less risk. Inevitably participants with complex needs will have less choice of providers prepared to take on their support and may even fall back to the care of the health and criminal justice service systems.

There is a risk to the diversity and therefore choice in the system due to the proposed penalty structure. For example, many IDA members who are all registered, reputable, long standing, not for profit providers lack financial capacity to be able to respond to a \$15m fine which would potentially be an insolvency event.

The proposed statutory duties for key personnel will negatively impact the capacity to attract staff and board members.

The IDA recommends that the framework recognise the size and scope of an organisation, the seniority and experience of staff, and the duration of tenure within an organisation for these statutory duties for key personnel to be considered reasonable.

IDA members identified that a clearer definition is required in relation to proof of causation of harm because of an alleged breach of due diligence or duty of care. Therefore, the IDA strongly recommends that there be greater emphasis in the framework on burden of proof and evidentiary requirements in terms of causation of harm.

Definitional clarity is required in relation to level of risk and impact on outcomes for participants. Sometimes a relatively low level of risk in every day support may result in an extremely serious outcome for a participant (e.g. a medication error). The definition must be enhanced to reflect the reality of dynamic care environments in which staff are making decisions and taking action that may seem low level in terms of risk however can have serious consequences. Acknowledgement should be provided through the framework that such outcomes are occasionally experienced in care environments in spite of the existence of a well-functioning quality system and highly trained personnel.

Accessing insurance to cover service provision is a current challenge and is likely to be made more challenging through the creation of new and increased penalties and offences. This will impact on market capacity as providers look at their viability and ability to continue to provide services, again particularly to high risk and complex participants.

5. Do you support the proposed anti-promotion orders powers?

IDA Response:

The IDA supports the proposed ability for the Commission to be able to issue an anti-promotion order to restrict a provider from advertising or marketing NDIS services or supports where it is deemed that such promotion undermines the integrity and principles of the NDIS and the application of a civil penalty.

6. Do you think the proposed anti-promotion orders powers should be revised in any way?

IDA Response:

The specific definitions need to be clearly outlined in the NDIS Rules and reasonable and standard timeframes for compliance with anti-promotion orders provided.

IDA members identified several instances where the “NDIS” name and logo can be used by unscrupulous providers in a way that is confusing or misleading for participants. It is identified that there is a need for the NDIS to clarify the use of the NDIS name and logo in all marketing and promotional materials to ensure they are not used to mislead.

7. Do you have any concerns about the proposal to enable evidentiary certificates signed by the NDIS Commissioner to be prima facie evidence of matters specified in the certificate? (If so, what are your concerns?)

IDA Response:

No concerns were raised in relation to this measure.

***Measure 6:** “Safeguarding – to ensure unsuitable persons can be excluded from the NDIS by adding categories of people who a banning order can be imposed against.”*

8. Do you support the proposed expansion of categories of people against whom a banning order may be imposed; ie beyond NDIS providers and workers, to include NDIS auditors and consultants?

IDA Response:

This may have unanticipated implications for consultants such as those providing advice of a legal nature who, through this change now need to treat the NDIA as their client as well as the provider they are consulting to. To be subject of a banning order by the Commission would likely be a significant risk to the reputation and business of any professional and they might avoid providing services to the sector.

9. Are there additional categories of people involved in the NDIS that you think the NDIS Commission should be able to impose bans against?

IDA Response:

The IDA members identified a potential category of professionals not directly referred to in the consultation paper with regards to SDA developers and / or SDA investors who may not themselves be an SDA provider. This category of people may have a direct financial interest in a property and potentially be found to be acting in a way that is at odds with the NDIS principles and rules, for example seeking to limit the choice and control of an eligible SDA participant to achieve a financial gain. It is recommended that such people should be included in the proposed banning order categories.

***Measures 7 to 10:** “Information gathering – strengthening the NDIS Commission’s powers to obtain relevant information from NDIS providers and other persons within appropriate timeframes.”*

10. Do you have any concerns about the proposed measures to strengthen the NDIS Commission’s powers to obtain relevant information from NDIS providers? (If so, what are your concerns?)

IDA Response:

IDA members are concerned about measure 8 and do not agree to the shortened timeframe. Even 14 days is already often an unreasonable timeframe for complex matters that occurred in the past.

The Commission does not seem to hold itself to similar short timeframes when it comes to systems and information sharing to ensure participant safety.

There are presently numerous issues experienced regarding Commission practices that result in duplication and repetition due to apparent poor systems management. Also,

requests for information frequently come from the Commission in relation to very old (12 month+) reports. This raises the question of why concerns were not investigated at the time of the incident. The IDA recommends that systemic efficiency issues within the Commission are addressed to avoid reporting duplication and to enable greater visibility for the Commission and its staff. This approach would have a greater impact on enhancing quality as opposed to reducing reporting time frames.

The Commission must recognise that requests that require a short turn around to produce information often means that resources must be diverted from elsewhere. This is not always possible particularly for smaller registered providers who run very lean operations and can put other services at risk of being distracted from maintaining quality and safeguarding practices.

The Commission should also consider dedicating resources to immediate intervention which may be needed to keep a participant safe. In the event where the Commission is concerned about the safety and wellbeing of participants, IDA members recommend that timely action is needed and that having the power to intervene and allocate another registered provider at short notice to take up a participant's supports in a rapid timeframe is a power the Commission should have.

For More Information:

E: info@cigroup.org.au

PS: (02) 4256 4333

W: communityindustrygroup.org.au

Community Industry Group

Lot 26 Mortlock Ave,

Port Kembla, 2505

ABN 95 589 148 519

