



Queensland Alliance for Mental Health

Proposed Legislative Reforms to Strengthen the Regulatory Powers of the NDIS Commission – QAMH Submission

December 2024

Who is QAMH?

The Queensland Alliance for Mental Health (QAMH) is the peak body for the Community Mental Health and Wellbeing Sector and people with experiences of psychosocial disability in Queensland. We represent more than 100 organisations and stakeholders involved in the delivery of community mental health and wellbeing services across the state. Our role is to reform, promote and drive community mental health and wellbeing service delivery for all Queenslanders, through our influence and collaboration with our members and strategic partners. We provide information about services, work to build community awareness, education and training to influence attitudes and remove barriers to inclusion and advise government on issues affecting people with experiences of psychosocial challenges. At a national level, we have a formal collaboration with Community Mental Health Australia and provide input and advice to the work of Mental Health Australia and the National Mental Health Commission where appropriate. Locally, we work alongside our members, government, the Queensland Mental Health Commission and other stakeholders to add value to the sector and act as a strong advocate on issues that impact their operations in Queensland communities.

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Acknowledgement of Country

QAMH acknowledges the Traditional Custodians of the land on which we live, learn, and work and recognises their continuing connection to land, waters and community. We pay our respects to them and their cultures; and to Elders past, present and emerging.

Recognition of Lived Experience

QAMH recognises that the Community Mental Health and Wellbeing Sector exists because of people with Lived Experience of mental distress, their families, carers and support people. We acknowledge the expertise and the courage of people with Lived Experience, and we commit to work with and alongside people with Lived Experience in all we do.

Introduction

QAMH welcomes the opportunity to provide feedback on the NDIS Quality and Safeguards Commission's consultation paper regarding proposed legislative reforms to strengthen regulatory powers. As an organisation committed to person-led care and human rights, QAMH fundamentally supports efforts to protect participant safety and rights through appropriate oversight and regulation. QAMH recognises the importance of quality service provision and safeguarding participant wellbeing, which is evidenced by our longstanding support for compulsory provider registration and engagement in reforms of the pricing model. However, we have concerns about the timing and approach of implementing these significant regulatory changes.

These reforms are being undertaken in a challenging context where:

- Recent data from the National Disability Services State of the Disability Sector Report 2024 shows that 80% of providers report concerns about continuing to provide NDIS services at current prices¹
- The sector faces a high existing compliance burden, with providers already accredited under multiple standards including NDIS Practice Standards, National Standards for Mental Health Services, Human Services Quality Framework, and others
- Analysis by Health Policy Analysis reveals that across Australia, 230,500 people with severe mental illness and 263,100 people with moderate mental illness are not receiving the psychosocial support they need²
- The broader system is undergoing substantial change through various reform processes

QAMH supports strengthening protections for participants, particularly those with psychosocial disability who may face additional vulnerabilities due to reduced informal supports and self-advocacy challenges. However, implementing major regulatory reforms before allowing recently introduced measures to take effect and be evaluated risks creating unintended consequences. There needs to be careful consideration of whether adjustments to existing frameworks, such as WHS legislation, may be sufficient to enhance protections before introducing new regulatory requirements.

If it is determined that additional legislation is required, the proposals outlined in this submission should be considered within a broader strategy that:

- Ensures consistency across sectors providing similar services such as aged care and health

¹ National Disability Services. (2024). *State of the Disability Sector Report 2024*. Accessed online 13/12/2024 at <https://apo.org.au/node/329289>

² Health Policy Analysis. (2024). *Analysis of unmet need for psychosocial supports outside of the National Disability Insurance Scheme*. Accessed online 19/08/2024 at [Final Report - Analysis of unmet need for psychosocial supports outside of the National Disability Insurance Scheme \(health.gov.au\)](https://healthpolicyanalysis.org.au/analysis-of-unmet-need-for-psychosocial-supports-outside-of-the-national-disability-insurance-scheme)

- Addresses underlying systemic issues impacting quality and safety
- Takes a proportionate approach to compliance requirements and penalties
- Maintains focus on addressing critical service gaps and unmet needs
- Supports provider sustainability to enable ongoing service provision

Our submission explores these considerations in detail and offers constructive recommendations for achieving enhanced safeguarding while supporting continued delivery of essential services to participants.

Responses to consultation questions

Penalty Framework and Statutory Requirements

Questions 1 and 2: Do you support the proposed statutory duties for NDIS providers and their key personnel? Should these duties be more or less expansive, or revised in other ways?

The introduction of statutory duties for NDIS providers and their key personnel represents a significant shift in accountability requirements that must be considered within the broader context of sector sustainability. QAMH acknowledges the importance of ensuring providers and key personnel maintain high standards of service delivery and safety. However, we have serious concerns about implementing these new duties without first addressing systemic issues in pricing and support.

A fundamental challenge lies in the current Disability Support Worker Cost Model, which fails to adequately account for the infrastructure required to meet enhanced compliance obligations. Providers are already struggling to cover essential costs for training, supervision, quality assurance systems and professional development. The Ability Roundtable's recent analysis reveals that many providers delivering complex supports are operating with margins so thin that any additional regulatory burden risks making their services unsustainable.

The proposed statutory duty requiring key personnel to exercise 'due diligence' raises significant concerns due to its lack of clarity around what constitutes 'reasonably practicable' measures for compliance. This ambiguity is particularly problematic given that the proposed new Practice Standards for Psychosocial Supports - which would help inform these requirements - have not yet been released.

The current uncertainty creates substantial challenges for:

- Smaller providers with limited resources and administrative capacity
- Organisations operating in regional and remote areas where staffing and resources are already stretched thin

- Providers supporting people with psychosocial disability who require specialised approaches to care

Without clear guidance, practical implementation support, and alignment with forthcoming practice standards, these providers may find themselves unable to meet new obligations despite their commitment to quality service provision and participant safety. This risks further reducing service availability in areas and for populations that already face significant barriers to accessing support.

Of equal concern is the proposed statutory duty of care for providers. While we strongly support measures to prevent adverse effects on participant health and safety, the legislation must recognise the complex nature of psychosocial disability support. The episodic nature of mental illness means that adverse health effects may occur despite best practice service delivery. The legislation needs to clearly differentiate between preventable harm and the natural progression of health conditions.

For these statutory duties to be effective while supporting sector sustainability, QAMH recommends several key refinements:

1. Explicit 'reasonably practicable' tests must be included in the legislation to provide clear compliance frameworks. These should account for provider size, location and the nature of supports delivered.
2. Implementation must align with comprehensive pricing reform that reflects the true costs of quality service delivery, including adequate provision for training, supervision and compliance activities.
3. Clear guidance and transition support should be provided, with consideration for provider size and location in compliance expectations.

The implementation of increased penalties must be considered within the broader context of sector sustainability. The NDIS Pricing Reform 2024 will make already tight profit margins increasingly unattractive for providers to stay in operation. In remote and rural settings where costs of goods and services are higher compared to urban areas, the threat of sector collapse is real - operators on margins slightly above zero will have zero incentive to operate.

This situation is further complicated by significant workforce challenges across the sector. QAMH members frequently report the existence of multiple co-existing workforces with stark disparities in remuneration and conditions:

- The largely underpaid and casualised NDIS workforce
- Better remunerated staff funded under state and commonwealth contracts
- The aged care workforce, which has recently received substantial wage increases and additional funding support

These wage disparities create significant challenges for workforce retention and service quality, particularly in rural and remote areas where the differences are even more pronounced. The proposal to introduce enhanced penalties for NDIS providers, which exceed those applied in comparable sectors like aged care, creates an inequitable regulatory environment. This approach fails to acknowledge the

underlying systemic workforce issues and risks accelerating service withdrawal from communities where supports are already limited.

The combination of workforce challenges, remuneration disparities, and an uneven penalty framework across sectors may have the unintended consequence of further destabilising service provision, particularly in areas of greatest need.

Questions 3 and 4: Do you support the proposed new and increased penalties and offences framework? Should this framework be revised in any way?

The proposed enhancement of civil and criminal penalties raises concerns about proportionality and sector impact. While QAMH supports appropriate consequences for serious breaches, the suggested alignment with workplace health and safety legislation overlooks crucial considerations in sector context and capacity.

The consultation paper's comparison with WHS penalties requires careful examination. The paper notes that penalties for breaching WHS legislation can reach up to \$15 million, contrasting this with current NDIS maximum penalties of \$412,500. However, this comparison fails to acknowledge several critical factors.

Many providers deliver services across multiple sectors including disability, aged care, and community-based health services. Safety and quality standards should logically be consistent across these interconnected sectors, with WHS legislation serving as an overarching framework for ensuring worker and participant safety. Rather than creating a parallel penalty system under the NDIS, there may be value in examining how the current WHS framework could be better utilised to address quality and safeguarding concerns, while recognising that adequate service provision - a core aspect of participant safety - remains a NDIS framework responsibility.

Firstly, NDIS providers are already subject to WHS legislation, meaning they potentially face penalties under multiple regulatory frameworks for the same incident. Section 207 of the National Disability Insurance Scheme Act 2013 explicitly enables both WHS and NDIS Act proceedings to be pursued. The cumulative impact of these overlapping penalty frameworks has not been adequately considered.

Secondly, the financial context of NDIS service provision differs significantly from many industries subject to WHS legislation. Recent sector analysis shows that:

- The average NDIS provider operates on margins below 2%
- Complex support providers frequently operate at a loss
- Many providers are reducing services or exiting the market
- Insurance costs are increasingly prohibitive

Questions 5 and 6: Do you support the proposed anti-promotion orders powers? Should these powers be revised in anyway?

QAMH strongly supports robust action to address exploitative marketing practices within the NDIS marketplace. Misleading or deceptive promotion of services can have severe consequences for participants, who may make life-altering decisions based on incorrect information. The examples provided in the consultation paper - particularly regarding misleading advertising for Short Term Accommodation and exaggerated claims about Specialist Disability Accommodation profits - highlight serious issues that require decisive regulatory intervention to protect vulnerable participants.

However, the proposed anti-promotion order powers require careful consideration to ensure they do not inadvertently restrict legitimate provider communication with participants and the community. The consultation paper provides limited detail about what constitutes prohibited conduct beyond broad statements about undermining scheme integrity. This lack of specificity creates uncertainty for providers attempting to communicate their services effectively.

We recommend the development of clear guidelines regarding prohibited conduct through genuine consultation with the sector. These guidelines should:

- Provide explicit criteria for determining when marketing undermines scheme integrity, ensuring providers can confidently develop compliant communication strategies.
- Establish transparent processes for issuing and reviewing anti-promotion orders, including appropriate appeal mechanisms.
- Consider the needs of smaller providers and those serving specific communities, including culturally appropriate communication methods.

Question 7: Do you have concerns about evidentiary certificates?

The proposal to allow evidentiary certificates signed by the NDIS Commissioner as prima facie evidence requires careful consideration of procedural fairness and administrative efficiency. While we understand the intention to streamline legal processes and reduce resource burden, several important considerations must be addressed.

The consultation paper suggests that evidentiary certificates would primarily cover formal, technical, and non-contentious evidence. However, without clear parameters around what constitutes 'non-contentious' evidence, there is potential for certificates to be used more broadly than intended. This could disadvantage providers, particularly smaller organisations with limited resources to challenge certificate contents.

We recommend the establishment of clear criteria governing:

- The specific types of information that may be included in evidentiary certificates
- Clear and simple processes for providers to review and contest certificate contents before court proceedings

- Appropriate limitations on certificate use in more complex or contested matters

Safeguarding

Questions 8 and 9: Do you support the proposed expansion of banning order categories? Are there additional categories that should be included?

QAMH supports, in principle, extending banning order powers to include NDIS auditors and consultants. The significant influence these roles have on provider operations and participant outcomes justifies their inclusion in safeguarding mechanisms. However, implementation must be carefully considered to avoid unintended consequences.

The expansion of banning orders must be accompanied by clear guidelines regarding:

- The specific conduct that may trigger a banning order
- The evidence required to support banning decisions
- Appeal mechanisms and procedural fairness requirements
- Transition arrangements for affected participants and providers

The consultation paper's suggestion that these powers would apply to those providing "fraudulent, unsafe or otherwise contrary" advice requires greater specificity. Without clear definitions, there is risk of inconsistent application and potential misuse of these powers.

Information Gathering

Question 10: Do you have concerns about the proposed measures to strengthen the NDIS Commission's powers to obtain relevant information from NDIS providers?

The proposed enhancement of information gathering powers, including shortened timeframes and Australian-based storage requirements, presents significant practical challenges for providers. While QAMH supports effective oversight, these requirements must be balanced against operational realities and resource constraints.

The requirement for Australian-based information storage particularly impacts providers using international software solutions or cloud-based systems. The transition costs and ongoing operational implications of this requirement have not been adequately addressed in the consultation paper. Small and medium-sized providers may struggle to meet these requirements within current pricing constraints.

The proposed shortened timeframes for information provision raise concerns about provider capacity, particularly in circumstances requiring complex data collection or involving multiple service locations. Regional and remote providers face additional challenges in meeting reduced response times due to infrastructure limitations and staffing constraints.

We recommend:

1. A more nuanced approach to timeframes that considers the type of information requested and provider circumstances. Critical safeguarding matters may warrant urgent responses, but routine information requests should maintain reasonable timeframes.
2. Clear guidance on information storage requirements, including transition periods and support for providers to achieve compliance.
3. Consideration of the cost implications within NDIS pricing frameworks to ensure providers can maintain appropriate information management systems.

The proposal to extend powers to 'make and change Prescribed Bodies Rules' to the NDIS Commissioner warrants particular attention. While these powers were introduced under the last Bill, their expansion requires careful consideration. There are significant concerns about the appropriate level of oversight and accountability for such broad-ranging powers.

We recommend that:

1. Changes fundamental to scheme operation should be subject to greater public scrutiny than is possible through delegated legislation. The development of rules that significantly impact service delivery should involve robust parliamentary oversight.
2. The principle of co-design must be maintained in rule development. The disability community's voice should be central in developing regulations that directly affect service provision and participant outcomes.
3. Clear limitations should be placed on rule-making powers to ensure they cannot be used to make fundamental changes to scheme operations without appropriate consultation and oversight.

Conclusions and recommendations

The proposed legislative reforms represent significant changes to the regulatory framework governing NDIS service provision. While QAMH supports high-quality service delivery and appropriate mechanisms to deter bad practice, the evidence suggests that additional regulatory changes may be unnecessary and potentially counterproductive.

The sector already faces significant challenges in meeting current service demand, with over 493,600 Australians lacking access to needed psychosocial supports. Existing data reveals that 80% of providers are already reporting concerns about sustaining service delivery, and many operate on margins below 2%. Any further regulatory changes must be carefully designed to enhance rather than restrict service

availability. This is particularly crucial in rural and remote areas where service viability is already precarious and alternative support options are limited.

Our analysis highlights several critical areas requiring attention before proceeding with the proposed reforms:

Pricing reform priority

The implementation of enhanced penalties and compliance requirements must be preceded by comprehensive pricing reform. Current pricing structures do not adequately support the infrastructure required for quality service delivery and regulatory compliance. Without addressing this fundamental issue, increased penalties risk driving quality providers from the market, particularly those delivering complex supports.

We recommend:

- A comprehensive review of the Disability Support Worker Cost Model to reflect true service delivery costs
- Inclusion of specific provisions for training, supervision and compliance activities
- Development of targeted support for providers delivering complex services
- Recognition of additional costs faced by regional and remote providers
- Inclusion of specific provisions for training, supervision and compliance activities
- Development of targeted support for providers delivering complex services
- Recognition of additional costs faced by regional and remote providers

Implementation approach

The proposed reforms require careful staging to ensure providers can adapt while maintaining service continuity. Rather than implementing all changes simultaneously, we recommend a graduated approach that:

1. Establishes clear guidance and support mechanisms before introducing new requirements. This includes detailed implementation guidelines, training resources, and transition support.
2. Allows adequate time for providers to develop necessary systems and processes, particularly regarding information management requirements.
3. Considers the differing capacities of providers based on size, location and service type in compliance expectations and timeframes

Regulatory alignment

Greater consideration must be given to how these reforms align with existing regulatory frameworks. The interaction between NDIS requirements and other regulatory schemes, particularly workplace health and safety legislation, requires careful examination to avoid creating unnecessarily complex or overlapping obligations.

Sector support

The successful implementation of these reforms requires significant sector support. We recommend:

- Development of comprehensive guidance materials
- Establishment of provider support mechanisms
- Creation of targeted assistance for smaller providers
- Provision of implementation support for regional and remote services

Information management

The proposed information gathering powers and storage requirements need refinement to ensure they are practical and achievable. This includes:

- Developing realistic timeframes for information provision that consider provider circumstances and capacity.
- Providing clear guidance on storage requirements and supporting transition arrangements.
- Ensuring pricing frameworks reflects the cost of maintaining compliant information management systems.

Final comments

QAMH supports the objective of enhancing quality and safety in NDIS service delivery. However, the current proposals risk undermining these objectives by creating unsustainable operating conditions for providers. We encourage the NDIS Commission to consider our recommendations and engage in further consultation with the sector if the government pursues this direction to develop implementation approaches that achieve the desired outcomes while supporting continued service delivery.

The challenges faced by people with psychosocial disability in accessing appropriate supports are already significant. Any regulatory changes must be carefully designed to enhance rather than restrict service availability and quality. We look forward to working with the NDIS Commission to refine these proposals in ways that strengthen both safeguarding and sector sustainability.

