

NDIS Quality and Safeguards Commission

***Proposed legislative reforms to
strengthen the regulatory powers of the
NDIS Commission:
Consultation Paper***

Occupational Therapy Australia submission

December 2024

Introduction

Occupational Therapy Australia (OTA) welcomes the opportunity to provide feedback to the NDIS Quality and Safeguards Commission on proposed legislation reforms to the Commissions regulatory powers.

OTA is the professional association and peak representative body for occupational therapists in Australia. There are more than 32,000 registered occupational therapists working across the government, non-government, private and community sectors in Australia¹. Occupational therapists are allied health professionals whose role is to enable their clients to engage in meaningful and productive activities.

Occupational therapists and the NDIS

Occupational therapy is a person-centred health profession concerned with promoting health and wellbeing through participation in occupation. Occupational therapists achieve this by working with NDIS participants to enhance their ability to engage in the occupations (activities) they want, need, or are expected to do; or by modifying the occupation or the environment to better support their occupational engagement. Occupational therapists provide services across the lifespan and have a valuable role in supporting participants living with developmental disorders; physical, intellectual, chronic and/or progressive disability; and psychosocial disability.

Occupational therapists work in a diverse range of settings to deliver NDIS services, or support NDIS participants, including solo practice, small, medium and large private practice, rehabilitation settings, paediatric services, and public health and community services.

Occupational therapists help to unlock the value of the NDIS by working with scheme participants to identify goals and engage them with appropriate supports and services that promote independence, social connection, economic participation and protect and sustain physical and mental health. They deliver services including:

- functional capacity assessment;
- prescription and implementation of assistive technology and/or environmental modifications;
- positive behaviour support;
- driving assessments (when specifically trained to do so); and
- targeted, goal-focussed capacity building, for example, activities of daily living (ADL), or ADL training with participants with physical and/or psychosocial disability.

Occupational therapists are highly skilled in assessing the degree to which a person's disability affects their level of function in daily tasks. Based on these assessments, occupational therapists make recommendations for, and then deliver, interventions that enhance and maintain an individual's functional capacity, and prescribe supports, aides and assistive technology that help everyday Australians live as engaged, valued and contributing members of society.

Occupational therapists are registered health professionals who are subject to a range of stringent conditions and standards that are set by the Health Practitioner Regulation National Law and regulated by the Australian Health Practitioner Regulation Agency (AHPRA) which provides a high degree of trust and protection for Australian consumers.

¹ Occupational Therapy Board of Australia (2024) Registrant Data. Reporting period: 01 April 2024 to 30 June 2024. Available [online](#).

Service safety and quality

OTA considers that the provision of occupational therapy services are low-risk NDIS services, due to the nature of the limited services they provide under NDIS, the minimum qualifications and competencies that are required through mandatory professional registration through the AHPRA scheme which provide strong protection regarding patient or client safety, and the low rate of regulatory actions taken by AHPRA as part of its ongoing regulatory oversight of all occupational therapists practising in Australia.

Occupational therapists are required by law to only provide occupational therapy services in Australia if they are registered by AHPRA under the National Registration and Accreditation Scheme (NRAS). Through the AHPRA scheme, occupational therapists can only obtain registration if they meet a range of standards including minimum academic qualifications, language proficiency, criminal history check, compliance with the AHPRA Code of Practice, specific professional standards, continuing professional development, recency of practice and insurance requirements.

Occupational therapists are required to self-attest against AHPRA standards every year when they seek renewal of their registration, and are subject to mandatory notification requirements, random auditing and a safety complaints scheme which is administered by AHPRA.

For this reason, OTA believes that occupational therapists should be subject to the minimum regulatory requirements under any future NDIS regulatory scheme, including registration, and there should be appropriate recognition of the AHPRA scheme, wherever possible, to remove duplication.

Regulatory Burden

Occupational therapists delivering NDIS services may choose to operate as a registered provider or operate in an unregistered capacity. We note that feedback from members over several years has noted the significant existing regulatory burden of the NDIS scheme.

We also note there is a lack of regulatory proportionality that recognises low risk and highly regulated services like occupational therapy. There is also a lack of proportionality for smaller providers, who are faced with the same regulatory requirements as much larger providers. These significant regulatory burdens result in significant operating costs, particularly internal cost to maintain records, the requirement to undergo comprehensive audits, where relevant, and the significant cost of auditing services.

We strongly encourage careful consideration to proportionate regulatory approach for any future changes that targets high risk activities and providers and enables compliance from providers of all sizes, including small business and sole traders, and diverse business structures.

OTA Response to Consultation Paper questions

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?**

It is reasonable to expect that key personnel of NDIS providers that are incorporated are required to be aware of their NDIS obligations and take steps to ensure compliance with these requirements from their organisation.

Under Section 11A of the NDIS Act, key personnel is defined as:

- *a member of the group of persons who is responsible for the executive decisions of the person or [entity](#);*
- *(b) any other person who has authority or responsibility for (or significant influence over) [planning](#), directing or controlling the activities of the person or [entity](#).*
- *A director or board members*

OTA does not support the application of a due diligence duty for non-incorporated entities e.g. for smaller providers including those operated by a sole director, or as a sole trader. For small organisations where they are operated by a sole director or operate via a sole trader arrangement, it will be important to note that these personnel will already have total oversight over business operations and thus the requirement to exercise due diligence should not apply.

This new duty should align with due diligence requirements under the *Work Health and Safety Act 2011*, which only apply to key personnel or officers of corporations.

In the event that sole traders and sole directors are not excluded, OTA argues that there should be a varying degree of penalty imposed, differentiated depending on if a person operates as an individual, or is an officer of a corporation. The individual penalty should be significantly less.

This new duty should include an expansive definition of what is considered due diligence activities (similar to section 27(5) of the *Work Health and Safety Act 2011*. In addition, NDIS Commission should develop additional supportive guidance, in consultation with stakeholders, that includes practical examples of what due diligence looks like in practice. OTA recommends an easy-to-use checklist to assist providers to comply.

The legislation must also enable adequate transition time of at least 12 months to support duty holders to understand the new requirements and build their ability to comply.

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?

As above, OTA recommends that the new duty is targeted only to entities that are incorporated or are operated via a managing board, which may include more arm's length operational oversight of key activities. The duty should not apply to entities where the controlling personnel have an intimate and direct oversight of day-to-day operations, for examples those operated by a sole director or sole traders.

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

OTA supports proportionate protections for people with disability and requirements that ensure that providers comply with their registration and service provision requirements. The NDIS Commission needs to ensure that they provide adequate information to current and new providers on the framework and how to ensure compliance.

The legislation must also enable adequate transition time of at least 12 months to support duty holders to understand the new requirements and build their ability to comply.

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

OTA submits that the offences should include a caveat to protect against accidental or non-deliberate contraventions, or where matters are outside of the providers' control.

For the duty to comply with requirement to give information, this duty should include a caveat similar to section 57 of the NDIS Act to ensure they are not penalised where they have a reasonable excuse for not meeting this requirement.

The banning order offences should also be modernised to include delivery of banning order notices by both mail and email, to ensure they are received in a timely way.

The NDIS Commission should provide appropriate guidance and support to duty holders to ensure they understand their duties and penalty offences and provide accessible guidance on how to comply with these requirements.

The Legislation should include adequate transition time of at least 12 months after passage before new/enhanced offence provisions take effect to enable duty holders to adjust to new arrangements.

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

It is noted that occupational therapists and other regulated allied health professions are bound by the AHPRA Code of Conduct, which places restrictions on advertising for occupational therapists in certain circumstances, including testimonials about client services. AHPRA has also published *Guidelines for advertising a regulated health service* (the advertising guidelines) which also defines what is considered a testimonial, and who is responsible for complying with the AHPRA National Law, in relation to advertising, including third parties. It is important for NDIS Commission to be aware of these restrictions and duties to ensure any changes to not result in regulatory duplication.

OTA supports the ability for NDIS Commission to restrict a person from advertising or marketing NDIS services or supports where the promotion undermines the integrity and principles of the NDIS. OTA has heard reports of certain NDIS providers representing themselves as being able to provide services that should only be provided by a trained and skilled occupational therapist, presenting issues of service safety and quality for participants who may engage services from practitioners who are not appropriately qualified. Previously there has been no regulatory pathway to address these issues.

It will be important for NDIS Commission to work with stakeholders to develop an advanced understanding of the scope of practice of various professions and providers who service the NDIS industry to ensure it can understand what constitutes false or misleading advertising regarding professional scope, and act to address issues of false or misleading representation that may impact the safety or quality of NDIS services.

OTA notes that the NDIS Commission should adapt its complaints processes to enable receipt of complaints about these types of false promotions to enable them to investigate and take action as appropriate.

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

No comment.

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?)

No comment.

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; i.e. beyond NDIS providers and workers, to include NDIS auditors and consultants?

OTA supports expansion of scope to enable NDIS Commission to take action to ban services that may impact the safety and quality of NDIS services. OTA recommends that the scope of this power also capture providers of NDIS training for both NDIS providers and workers. OTA has heard reports of training providers offering to upskill providers to enable them to meet NDIS criteria, for example specialist driving instruction training, but offering training that is not adequate to meet this unique and specialised area of practice.

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

As noted above, the NDIS Commission should be able to impose banning orders on training providers.

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?)

OTA recommends the following enhancements and adaptations to these proposed powers to ensure they are workable and proportionate for providers.

Measure 8 – Shorter timeframe for the production of information or documents

OTA opposes the proposed changes to response timeframes. The current 14-day response time should be maintained and is reasonable and appropriate to respond to requests for additional information. Many occupational therapists are sole traders or small businesses, who operate a mixed practice working at capacity navigating the NDIS and other schemes. Reducing response timeframes would adversely impact practitioners and may result in delayed or cancelled client appointments and consequential delayed or poorer health outcomes and would also significantly impact upon a community of practitioners who are already experiencing a significant amount of financial stress due to the cost-of-living

pressures and continued NDIS pricing freeze.

OTA recommends that the requirement enables delivery of NDIS Commission notices/correspondence via email as well as post to ensure it meets modern communication methods. OTA notes that under Section 57 of the NDIS Act, that there is a caveat where the person has a reasonable excuse for not meeting this requirement, which should be maintained.

Measure 9 – Requirement that information be held in Australia

OTA notes that this requirement will impact providers who choose to use Google based cloud services as currently there are no Google servers located in Australia. We note that there are Microsoft servers in Australia, along with a range of other server companies, so while the requirement may impact providers and require them to change cloud service provider, the requirement is not unworkable. However, as this new requirement may require some providers to change systems OTA recommends adequate transition time of at least two years to enable providers to make appropriate business changes without undue additional cost.

Conclusion

OTA thanks the NDIA Commission for the opportunity to comment on proposed NDIS regulatory reforms. Please note that representatives of OTA would gladly meet with representatives of the Commission to expand on any of the matters raised in this submission.

Contact

For additional clarification please contact policy@otaus.com.au.