The Senate Community Affairs Legislation Committee

National Disability Insurance Scheme Amendment (Integrity and Safeguarding) Bill 2025

Submission

Summary

1. This submission is about the safeguarding aspects of the Bill. I raise no concerns about the integrity aspect of the Bill.
2. To prevent further harm to NDIS participants, the Bill should be amended to make the National Disability Insurance Agency (NDIA) and its employees and agents subject to the same penalties as disability service providers and workers.
3. At the very least, there should be requirements for reporting and investigating serious harm alleged to result from the decisions, actions, or inactions of the NDIA and its employees and agents.
4. The Bill's liabilities and penalty regime should be made coherent with other regulatory regimes.
5. Penalty provisions ss. 73J and 73V should recognise the concept of reasonableness.

Introduction

6. I apologise for the length of the submission. Its length is in response to the cherry-picking that occurred during the drafting of the Bill; each element requires detailed consideration.

My background

7. I have been a consultant to disability service providers in relation to quality and safety issues, initiating and developing the workshop '*Right on Board: Practice and clinical governance for disability service providers'*.
8. I have retired. I will be devoting my retirement to research on reducing preventable harm to people with disabilities in service delivery.
9. I have been active in academic research and publication about harm to people with disabilities and workers in disability service provision. This has included analysing NDIS Quality and Safeguards Commission (NDIS Commission) proceedings and relevant work health and safety prosecutions (Hough et al., 2023, 2025; Marsh et al., 2024).
10. My main contribution has been conceiving a contemporary book on disability service provision and pitching the concept to Professor Christine Bigby. Professor Bigby asked me to be co-editor of the book. Our book, *Disability practice: Safeguarding quality service delivery,* was published in early 2024.

11. As a result of donations, including from my retirement savings, we were able to make the book available open source. At the date of writing, the book has been downloaded 115,000 times.

12. I am a person with disability, but I am not an NDIS participant.

13. I hold the honorary appointment of Adjunct Professor with the Living With Disability Research Centre at La Trobe University.

The current state

14. It is worth briefly explaining the current state. Under the *National Disability Insurance Scheme Act 2013*:

    14.1. Providers and workers are subject to regulation by the NDIS Commission. The two key existing sections that are relevant to this submission are s. 73J – 'Registered NDIS providers must comply with conditions of registration' – and s. 73V – 'NDIS Code of Conduct'. To prove a breach, the Commission must prove only that there is a violation of either the very broad NDIS Code of Conduct or, if a registered provider, a breach of the detailed NDIS Practice Standards.[1] The NDIS Commission is not required to prove that the provider or worker behaved unreasonably; nor is there a defence available to a provider or worker of reasonable conduct.[2]

    14.2. Providers can be subject to civil penalties of up to $412,500 per breach; workers can be subject to civil penalties of up to $82,500 per breach. All penalty payments go to Consolidated Revenue; compensation to participants and families would be paid separately under actions for negligence.

    14.3. Where harm is caused, there are usually multiple breaches because of the multifaceted nature of the regulatory instruments and because there is usually more than one worker involved in systematic neglect of a participant. Of the cases decided by the Federal Court, the average penalty across all cases has been $1,417,000 at the date of writing; for cases where participants have died, the average penalty has been $1,579,000.

    14.4. The NDIA is not subject to regulation and hence not subject to any penalties where it causes harm. NDIA staff who are public servants are subject only to the provisions of the *Public Service Act 1999*, which permits a maximum fine of 2 per cent of annual income. Thus, an NDIA public servant earning $100,000 could face a maximum fine of $2,000.

    14.5. In all contested cases against providers heard so far, all penalty amounts have been agreed by the parties, including the NDIS Commission. It should be noted that in

[1] This is the equivalent of holding government responsible and liable for any harm to its citizens, however caused.

[2] The Bill recognises reasonableness for the new offence of serious contravention. However, it does not do so for all contraventions. I return to this later in the submission

Commissioner of the NDIS Quality and Safeguards Commission v Valmar Support Services Ltd [2025] FCA 11, Her Honour Justice Raper was critical of the penalty proposed by the NDIS Commission of $1,916,250, observing that it was, in her view, at the lowest possible end of what was acceptable. Note that Her Honour was commenting on the determination of the penalty within the existing penalty scheme and was not suggesting that a new penalty regime was required.

15. Not acknowledged within the Explanatory Memorandum is that work health and safety legislation also applies to disability support. This legislation applies to anyone in the workplace, including workplaces that are a person's home, and includes NDIS participants.

    15.1. The WHS legislation applies not just to providers and workers but also has upstream provisions regarding risks caused by direct funders, e.g., *SafeWork NSW v SNAP Programs Limited and State of New South Wales (Department of Communities and Justice)* [2021] NSWDC 259. Indirect funders such as the NDIA, and officers of such funders, do not appear to be subject to WHS regimes, although the issue is not beyond doubt (Marsh et al., 2024).

    15.2. Some States and Territories have been active in prosecuting WHS crimes against workers and clients in disability service provision, whereas others have let these crimes go unpunished (Hough et al., 2023; Marsh et al., 2024).

    15.3. In some States, a recent trend has been for proceedings under the NDIS Act to be followed by prosecution under the WHS legislation on the same facts or vice versa: examples include the cases against Integrity Care (SA) Ltd and LiveBetter Community Services, although there are no decided cases as yet. On the same set of facts, providers can be punished twice: civil penalties under the NDIS Act and criminal penalties under WHS legislation.

    15.4. Penalties under the WHS legislation vary by jurisdiction, but Safe Work Australia's Model Act recommends the following maximum fines for Category 1 (the most serious) offences:

        15.4.1. Individual (as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking) - $2,368,000

        15.4.2. Individual (otherwise) - $1,183,000

        15.4.3. Body corporate - $11,839,000.

    15.5. In reality, the penalties under the WHS Act are not fully applied (Johnstone & Tooma, 2022). According to SafeWork Australia's database, the average penalty across all offence categories is $123,000, and for Category 1 offences it is $831,000.[3]

The proposed amendments and the proffered rationale

[3] https://data.safeworkaustralia.gov.au/interactive-data/topic/whs-prosecutions

16. When Minister Shorten announced the proposed 40-fold increase in the maximum penalties under the NDIS Act on providers to $16.5 million, the argument was put that if the maximum penalty for harm to workers was around that amount, so too should the maximum penalty for harm to participants.

17. The Explanatory Memorandum (p. 7) justifies the increased penalty in the following terms:

> *The higher penalty is only intended to be available for these types of aggravated contraventions to reflect the seriousness of the breach and allow the court to impose a higher penalty when needed, to ensure the penalty amount is proportionate and will not be viewed as a cost of doing business by the provider. The penalty to be imposed in any given matter is determined solely by the Courts. Courts will have the discretion to determine the appropriate penalty amount, up to the maximum set under the proposed amendments.*

18. The Explanatory Memorandum (p. 7) also states that the proposed higher penalties are "also consistent with the Royal Commission recommendation that the Commission take stronger compliance action in response to serious or repeated non-compliance, demonstrated disregard for the safety of people with disability, or where non-compliance has caused serious harm to an NDIS participant (see recommendation 10.25(c)).

19. The Explantory Memorandum (p. 4) also asserts that "The NDIS Review also noted that several submissions to it highlighted that the Commission 'lacks teeth' to respond to concerns about provider conduct and does not do enough when faced with inappropriate or illegal conduct".

20. Similar assertions are made in the Explanatory Memorandum's Statement of Compatibility with Human Rights.

21. I was intrigued by the claim in the Explanatory Memorandum and stated elsewhere by the NDIS Commission that the existing penalties might be viewed as part of the cost of doing business. I therefore lodged a Freedom of Information request with the Commission for all evidence it holds to support this view. The Commission stated that it could not respond to the request within an agreed timeframe, and said that general comments would be provided, and invited me to withdraw the request. In the NDIS Commission's response, it cited court decisions that penalties need to have sufficient sting and stated that some providers have large revenue and high-value clients.

Concerns about the proffered rationale

22. Regarding Minister Shorten's views at paragraph 16, the claim ignores the facts previously stated.

    22.1. Harm caused by the NDIA and its employees and agents is ignored.

    22.2. Providers are already subject to the WHS legislation and thus subject to the maximum penalty under that legislation.

    22.3. The average amount of penalties actually imposed under the NDIS legislation already exceeds that under the WHS legislation.

23. Regarding the statement in the Explanatory Memorandum cited at paragraph 17, I acknowledge that penalties needing 'sting' is supported by regulatory scholarship

(Langevoort, 2021; Raskolnikov, 2021) and by the courts. However, Raskolnikov (2021, p. 184) writes:

> *… neither higher sanctions nor a greater probability of detection unambiguously increases deterrence. The interaction of the deterrence and the chilling effects [from the inappropriate imposition of liability] is the reason. Higher expected sanctions induce some agents participating in the regime to switch from violations to compliance ... However higher expected sanctions also induce some previously complying agents to abstain from participation altogether.[4] Depending on the relative magnitudes of the two shifts higher sanctions may end up reducing both the number of compliers and their share of all participants.*

24. I will return to the unexpected outcomes of higher sanctions later in the submission.

25. In relation to the Explanatory Memorandum's citation of recommendation 10.25(c) of the Disability Royal Commission, the statement in the Explanatory Memorandum is misleading. The Royal Commission made no recommendation for an increase in penalty levels; its recommendation 10.25 begins with the following words "The NDIS Quality and Safeguards Commission should review its compliance and enforcement policy …" and is not a recommendation for increased penalty amounts.

26. In relation to the Explanatory Memorandum's citation of the NDIS Review, again the Explanatory Memorandum is misleading. Although the Review's Action 17.6 called for strengthened compliance activities, the words 'penalty' or 'penalties' appear only once in the NDIS Review and that is in the context of explaining system elements. A fair reading of the Review is that it wanted the Commission to engage in greater use of its existing powers, not to create new ones.

27. To summarise on these points, we have no real insight as to where the proposal for the lopsided, increased penalties came from, and it appears that the proposal is not grounded in evidence. Citing the Disability Royal Commission and the NDIS Review in the way this occurs in the Explanatory Memorandum is misleading the Parliament. **The Explanatory Memorandum should be amended to correct the misleading statements.**

28. In relation to the general comments by the NDIS Commission cited at paragraph 21, I note that the comment confuse the concepts of revenue and profit or surplus. It is well established that many participants are having dangerous cuts to their plans. The reduced income flows on to providers. Most traditional disability service providers are losing money or, at best, breaking even, under the NDIA's pricing (National Disability Services, 2025). Indeed, one arm of government – the NDIA – is arguably setting up the circumstances by which another arm of government – the NDIS Commission – can then proceed against providers for breach. Further, Safe Work Australia (2025) in its recently published *Model code of practice for the healthcare and social assistance industry* explicitly states that "If your organisation faces resourcing pressures, this does not

[4] For example, allied health professionals can choose to work in health care, where they face no comparable liabilities or penalties, rather than in disability service provision.

remove your legal responsibilities to manage WHS risks" (p. 21). It is a catch-22 for providers.

29. Of course, the view of the NDIS Commission might be that it would not commence proceedings where the participant and provider were essentially the victim of unreasonable NDIA decision-making. This would the equivalent of the NDIS Commission saying, "trust us" and "I am from the government, and I am here to help you". See my later comments about including a test of reasonableness for all matters.

One-sided nature of the Bill

30. There have been recent media reports about the deaths in late 2025 of 4-year-old Koa Gibson and 22-year-old Noah Johnston, with allegations that decisions by NDIA contributed to their deaths. I do not express a view as to whether these allegations are accurate, because there has been, as yet, no independent investigation into the circumstances that led to their deaths.

31. In 2019, there was the death of Adelaide support worker Nischal Ghimire, who drowned when escorting a child with disability on a beachside walk. The child had known absconding behaviours. It appears that the boy went into the surf, and Nischal went into the surf to retrieve him; the child survived, but Nischal did not. After Nischal's death, South Australian MLA Jayne Stinson criticised the NDIA, stating that the boy's family requested a second carer for their son's outdoor activities but one was not provided.

32. I am aware of another case where the NDIA's funding decisions might have contributed to a participant's death, but I am bound by client confidentiality not to provide details. Providers do not want to publicise these deaths for fear that the NDIS Commission will attempt to hold them responsible. A conspiracy of silence results. I strongly suspect that there are other relevant deaths of participants and certainly relevant cases of serious harm to participants and probably to workers as a result of NDIA decision-making.

33. Some might question why the NDIA and its employees and agents should have responsibility and liability when they are simply the funder and not the provider. However, the principle of 'upstream' liability has been recognised in WHS legislation in respect of direct funders. For reasons of policy effectiveness and equity, upstream liability should also apply to indirect funders.

34. Under the current and proposed legislation, there is no requirement to report these deaths to the NDIS Commission. No inquiries have been announced by the NDIA or the NDIS Commission in response to the deaths, although it might be that coronial inquiries will be held in relation to the deaths of Koa and Noah. Despite Nischal's death being in 2019, no coronial inquiry has been held. **It is almost as if the lives of people with disabilities and overseas-born workers are regarded as expendable when that harm is allegedly caused by the NDIA.**

35. In summary, the legislation should be amended:

- to mandate reporting and investigation of deaths where there is a suspicion that decisions of NDIA and its employees and agents might have contributed to those deaths, and
- to create responsibility and liability for quality and safeguarding on the part of the NDIA and its employees and agents.

Policy coherence

36. I have wider concerns about policy coherence across NDIS, aged care and WHS legislation. As previously noted, the proposed 40-fold increase in maximum civil penalties for providers from 250 to 10,000 penalty units lacks a clear and compelling rationale and is highly inequitable given the concerns raised about risk and harm created by the NDIA and its employees and agents.

37. Table 1 compares the different levels of liability of providers under the different regulatory regimes. The incoherence in the underlying policy decisions is noteworthy, as is the double liability in some industries but not others.

Table 1. Liability of providers under different regulatory regimes

	Disability – Providers	Disability – NDIA	Aged care providers	Health providers
WHS	Yes	Yes, but only in relation to its own operations, not in relation to funding and planning decisions	Yes	Yes
Industry-specific regulation	Yes. Maximum penalty is proposed to be $16,500,000 per breach	Nil	Yes. Maximum penalty is proposed to be $1,584,000 per breach	Nil

38. Table 2 compares the different levels of responsibility and liability of workers under different regulatory regimes.

Table 2. Liability of workers under different regulatory regimes

	Disability – Worker employed by providers	Disability – Worker employed by NDIA	Aged care workers	Health workers
WHS	Yes	Yes, but only in relation to own actions and not in	Yes	Yes

		relation to funding and planning decisions		
Industry-specific regulation	Yes. Maximum penalty is $82,500 per breach. Includes volunteers.	2% of annual income, e.g., $2000 for a worker on $100,000	Yes. Maximum penalty is $82,500 per breach. Includes volunteers.	Nil

39. A by-product of this lack of consistency is that there is inequity in outcomes for people with disabilities who are put at risk by service systems, depending on which regulatory system applies.

40. I note that the Productivity Commission (2025), in its report on *Delivering quality care more efficiently*, said that a starting point towards increasing commonality and efficiency across the care systems is not to create new points of difference. Yet this Bill does exactly that.

Including a test of reasonableness for all contraventions, not only serious contraventions

41. The Bill creates a new concept of 'serious contraventions', which applies to a range of penalty provisions. Under the proposed s. 11B definition, significant contravention can apply if the failure (a) involves a significant failure; or (b) is part of a systematic pattern of conduct. Reasonableness is recognised in the significant failure definition, where it states "The conduct of an NDIS provider … or a member of its key personnel involves a significant failure if the conduct represents a significant departure from the conduct that could reasonably be expected from an NDIS provider or its key personnel …" However, the concept of reasonableness is not recognised in relation to contraventions that are not 'serious contraventions' involving a significant failure. Given my comments at paragraph 28, the failure to consider reasonableness in all circumstances for actions under ss. 73J and 73V is unreasonable. **The penalty provision of the Bill should include consideration of reasonableness in all ss. 73J and 73V proceedings. To put the matter beyond doubt, the legislation should include a definition of reasonableness that refers to the reasonableness of NDIA planning and funding decisions.**

Likelihood of unintended outcomes

42. At paragraph 23, I quoted academic literature in relation to the so-called "chilling effects" of deterrence and how it *cannot* be assumed that higher penalties produce socially desirable outcomes in all circumstances. Unintended outcomes can include:
    42.1. workers and providers leaving the disability field to work in other areas where deterrence measures do not apply or apply less (e.g., allied health professionals choosing to work in the health system rather than disability support)
    42.2. providers increasing the existing tendency to 'cream' clientele, supporting participants who are relatively easy to support, and

42.3. the NDIS quality and safeguarding system and the NDIS Commission having reduced credibility because of perceptions of a lop-sided system and a lop-sided regulator.

Conclusion

43. I am deeply concerned about avoiding preventable harm, including preventable death, in relation to disability services. Such harm can be caused by providers and workers, and the NDIA and its employees and agents.

44. I support the inclusion of deterrence measures and their meaningful application where it is reasonable to do so, as part of a broad suite of measures to promote the quality of support and the safety of participants and workers.

45. I do not support unreasonable deterrence measures and believe that they could ultimately be counterproductive to promoting quality and safety, diverting energy from more effective interventions.

Alan Hough, PhD
3 February 2026

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