



NDIS Quality
and Safeguards
Commission

Banning Order Policy

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NDIS Quality and Safeguards Commission
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Purpose of this policy

The NDIS Quality and Safeguards Commission (the NDIS Commission) is an independent government body that works to improve the quality and safety of NDIS supports and services, investigates and resolves problems, and strengthens the skills and knowledge of providers and participants.

The regulatory powers and functions of the NDIS Commission are set out in the *National Disability Insurance Scheme Act 2013* (the NDIS Act) and associated Rules.

The NDIS Commission's compliance and enforcement activities are an important part of its work as a regulator. Those activities enable the NDIS Commission to encourage best practice among NDIS providers and manage risk to NDIS participants.

The NDIS Commission has a range of tools for responding to non-compliance that are provided for in Chapter 4, Part 3A of the NDIS Act. One of those tools is a banning order. This policy is one of a number of policies that expands on the overarching information and guidance provided in the NDIS Commission's [Compliance and Enforcement Policy](#).

This policy provides guidance on banning orders, the circumstances in which the NDIS Commissioner (the Commissioner) will issue a banning order and the approach that will be taken when deciding whether or not to do so. The policy is a guide only and not prescriptive. Each decision by the Commissioner to make, vary or revoke a banning order is made on a case-by-case basis on its particular facts and circumstances.

What is a banning order?

A banning order is an administrative tool available to the Commissioner and prohibits or restricts a person, either permanently or for a specified period, from engaging in, providing or being involved in the provision of specified activities, supports or services in the NDIS market.

Banning orders are considered the NDIS Commission's most serious compliance and enforcement tool and will therefore only be appropriate for the most serious cases of poor conduct.

A banning order is intended to apply in circumstances where it is the most appropriate regulatory option to protect and prevent people with disability from experiencing harm or detriment arising from poor quality, fraudulent, dishonest or unsafe services provided under the NDIS.

A banning order can be issued in a range of circumstances to past or present NDIS providers, people who are or were employed or otherwise engaged by an NDIS provider (workers) and people who are or were key personnel of an NDIS provider. A banning order can also be issued to a person who has never been or worked for an NDIS provider.

The relationship between banning orders and other regulatory tools

The NDIS Commission's [Compliance and Enforcement Policy](#) lists and discusses the various compliance and enforcement tools available to it.

When viewed as a whole, it is apparent the tools provide a range of options which allow the Commissioner to respond to situations of concern in the most appropriate way. The primary purpose of each of the tools can be characterised as follows:

1. to **protect** people with a disability from exposure to conduct which falls well

short of acceptable standards – banning orders, revocation of provider registration and injunctions;

2. to **deter** conduct which breaches the NDIS Act by imposition of a penalty - civil penalties and infringement notices; and
3. to ensure **compliance** with the NDIS Act – compliance notices and enforceable undertakings.

Looked at this way, it is apparent that a person could be subject to one or more regulatory responses in any given situation. For example, in the most serious cases, a person could be subject to both a banning order and civil penalty action, the aim being to both remove the person from operating in the disability sector and to deter the conduct giving rise to the banning order. A less serious breach might be the subject of a compliance notice, either alone or in conjunction with an infringement notice, to make sure the person is brought back into compliance with the NDIS Act. Further, different tools may be applied to different people involved in a situation of concern. For example, depending on the circumstances, it may be appropriate to take civil penalty proceedings against an NDIS provider while issuing a banning order against a worker for that provider (or vice versa).

In many cases, it may be appropriate to both revoke a provider's registration and issue a banning order. Registration is only required for a limited, higher risk range of activities provided to people with disability. A banning order can prohibit or restrict a much wider range of activities and therefore may be appropriate to provide greater protection to people with disability.

Banning order provisions

The provisions which are most relevant to banning orders are found in sections 73ZN and 73ZO of the NDIS Act. The following discussion summarises those and other relevant provisions. It is a summary only and readers should refer to the NDIS Act for precise wording.

Who can be given a banning order and in what circumstances?

Past or present NDIS providers, workers or key personnel

A banning order can be issued to a past or present NDIS provider, a person who is or was a worker for an NDIS provider or a person who is or was a member of the key personnel of an NDIS provider. The term "key personnel" is defined in section 11A of the NDIS Act and in essence means a person concerned in the senior management of the NDIS provider.

A banning order can be issued to such a provider or person if the Commissioner reasonably believes that the provider or person:

- has contravened, is contravening or is likely to contravene the NDIS Act;
- has been or is likely to become involved in the contravention of the NDIS Act by another person;
- is not suitable to provide or be involved in the provision of supports or services to people with disability; or
- in the case of a current NDIS provider, worker or member of the key personnel, poses an immediate danger to the health, safety or wellbeing of a person with disability.

A banning order can also be issued to such a provider or person if the provider or person has been convicted of an offence involving fraud or dishonesty or becomes insolvent. Finally, a banning order can be issued to a person who was a registered NDIS provider where that registration has been revoked.

Those who have never been an NDIS provider or been a member of the key personnel of or worked for an NDIS provider

A banning order can be issued to such a person if the Commissioner reasonably believes the person is not suitable to be involved in the provision of specified supports or services to people with disability.

Content and features of a banning order

A banning order prohibits or restricts the person to whom it is issued from carrying out, engaging in or being involved in the activities, supports or services specified in the order. The banning order can be of general or limited application. The order can be permanent or for a specified period and can be subject to conditions.

Unless the banning order is issued because there is an immediate danger to a person with disability or because the proposed recipient's registration as a registered NDIS provider has been revoked, the proposed recipient of an order must be given the opportunity to make submissions in response to the Commissioner's intention to issue the order.

A banning order must be issued in writing and must include a statement of reasons. Written notice of the order must be given to the person against whom it is issued. A banning order is a reviewable decision under section 99 of the NDIS Act. This means that the recipient may request an internal review of the order and, if the result of that review is that a banning order still applies either in the same or a revised form, the recipient may apply to the Administrative Appeals Tribunal for further review.

If a banning order is breached, the Commissioner can take enforcement action such as seeking an injunction, taking civil penalty proceedings or issuing an infringement notice. The maximum civil penalty for breaching a banning order is 5,000 penalty units for a corporation and 1,000 penalty units for others. This is the largest maximum civil penalty available for a breach of the NDIS Act, indicating how seriously breaches are viewed.

Revoking or varying a banning order

The Commissioner may revoke or vary a banning order if the Commissioner is satisfied it is appropriate to do so.

The revocation or variation can occur either at the Commissioner's own initiative or on the written application of the recipient of the order. A decision to vary or to refuse to vary or revoke a banning order is a reviewable decision under section 99 of the NDIS Act (see above). Before deciding to *refuse* an application to vary or revoke a banning order, the Commissioner must give the applicant an opportunity to make submissions.

The NDIS Provider Register

Section 73ZS of the NDIS Act sets out what is to be contained in the Provider Register. Banning orders that are in force must be included on the Register, with details of the identity of the provider as well as information in respect of the banning order. The Register may contain similar details in relation to banning orders that are no longer in force.

The NDIS Commission's approach to the use of banning orders

Banning orders are considered the NDIS Commission's most serious regulatory response. Given that the NDIS Commission is required to conduct compliance and enforcement activities in a risk responsive and proportionate manner and the significant impact a banning order can have on the recipient and on people with disability, it will be reserved for circumstances where it is needed to protect people with disability from the risk of being exposed to conduct that falls well short of acceptable standards.

The requirement to be proportionate means that banning orders shouldn't be for a longer period than is considered necessary in the circumstances. Further, banning orders should only be general (as opposed to limited) or prohibit (as opposed to restrict) if that is considered necessary and appropriate given the circumstances of the case.

Relevant factors and considerations

Every decision to issue a banning order will be determined on a case-by-case basis taking into account all relevant considerations in an objective and impartial way. It is not possible to list all the factors or considerations exhaustively. In the context of the decision to issue a banning order, they would include:

- the seriousness of the contravention or conduct in terms of both how far below acceptable standards it falls and also the harm or detriment it caused, particularly to people with disability or other vulnerable people;
- whether the person's employment has been terminated because of the contravention or conduct
- whether the person has committed or engaged in the same or similar contravention or conduct previously and, if so, how often;
- whether the contravention or conduct is likely to re-occur and whether it poses an ongoing or immediate risk (and, if so, the extent of that risk) to people with disability;
- the state of mind of the person who committed or engaged in the contravention or conduct - was the contravention or conduct deliberate, reckless or negligent as opposed to inadvertent;
- whether the contravention or conduct gives rise to other protections that may be considered sufficient to reduce the risk to people with disability to the extent that a banning order is not necessary or appropriate, for example where the result of a person's NDIS worker screening check is an exclusion and applicable state or territory law prohibits a person with an exclusion working in the disability sector; and
- any mitigating factors, including whether the person has shown remorse or contrition, has any reasonable explanation for the contravention or conduct or has demonstrated the steps taken to reduce the risk of re-occurrence.

Examples of circumstances where the Commissioner may be more likely to consider a

banning order to be appropriate include where:

- the conduct caused serious harm or detriment to the health, safety or wellbeing of people with disability;
- the conduct was deliberate or reckless and shows disregard for other people's health, safety or wellbeing, particularly people with disability or other vulnerable people;
- there is a reasonable belief that the conduct amounts to a serious criminal offence, for example sexual or physical assaults, fraud or criminal neglect;
- the conduct has occurred on multiple occasions or poses an ongoing risk of serious harm to people with disability; and/or
- the conduct was negligent and gives rise to a set of circumstances posing an immediate risk of serious harm to people with disability.

Examples where the issuing of a banning order would not be appropriate include where:

- the conduct was inadvertent and caused no harm to the health, safety or wellbeing of people with disability;
- the conduct was a one-off and posed no or minimal risk of harm to the health, safety or wellbeing of people with disability; and/or
- the conduct is more appropriately addressed by use of one of the NDIS Commission's other compliance and enforcement tools.

Permanent or for a specified period?

The factors the Commissioner will take into account in determining the length of a banning order are similar to those to be considered when determining whether a banning order is appropriate. In essence, the more serious the conduct and surrounding circumstances, the longer the banning order.

However, as set out above, a banning order should not be imposed for a period that is longer than is considered necessary. Accordingly, a permanent banning order will only be imposed in the most serious cases and in circumstances where it is considered appropriate that the person or provider should never be allowed to provide, or be involved in the provision of, supports or service to people with disability.

Crimes involving violence, fraud or dishonesty or criminal neglect are of particular concern to the NDIS Commission, particularly when committed against those who are vulnerable, such as the aged, children or those with disability. The NDIS Commission has received and will continue to receive information that a person involved in the disability sector has been charged with these or similar offences. These charges can relate to alleged conduct of the person in providing supports or services to people with disability but can also relate to alleged crimes committed against the general public.

Where such an offence has been charged but the charge is yet to be heard, the Commissioner may consider that a banning order is warranted. The mere fact a charge has been laid will of itself be unlikely to justify a banning order. Rather, the Commissioner will look at all available information and evidence obtained either voluntarily or through use of the NDIS Commission's investigative powers, to determine

whether a banning order is warranted and appropriate.

If a banning order is issued pending the determination of charges, the NDIS Commission's practice is for the banning order to apply for a period sufficient to allow the charge to be determined. Once the charge is determined, the Commissioner will then consider whether the banning order should be varied, for example to specify a longer period.

To whom should a banning order be issued?

The Commissioner will carefully consider the circumstances of a case in deciding on the recipient of a banning order. A key determining factor will be whether the person or provider is considered culpable and responsible for the conduct giving rise to the banning order. For example, in circumstances where the acts of a worker form the basis of the conduct justifying a banning order, it may seem obvious that the worker is the most appropriate person to receive a banning order. The NDIS provider could however also receive a banning order if, for example, it failed to properly supervise or instruct the worker or failed to ensure the worker had appropriate qualifications to perform the role in which they were engaged at the time of the conduct. The NDIS provider would however be unlikely to receive a banning order if the worker's conduct was outside the scope of his/her role and was not something the NDIS provider could have either reasonably foreseen or prevented.

Similarly, a member of the key personnel of the NDIS provider would be unlikely to receive a banning order, unless either directly involved in the conduct of concern or having failed to take appropriate steps for which they were responsible which significantly facilitated, contributed to or exacerbated the conduct.

People who have left the disability sector or have never been in it

As discussed above, it is possible to issue a banning order against a person who has left the disability sector or indeed a person who has never been in it.

While it may appear unusual for the Commissioner to consider a banning order against someone who has left the sector, it is not uncommon. For example, the person may have been employed in the sector but their employment terminated as a result of the conduct which gives rise to the banning order. Without the banning order, the person may be able to re-enter the sector.

Further, the Commissioner may become aware of conduct by someone who has never worked in the disability sector but who is employed in a similar sector (such as aged care or child care) and/or is looking to become involved in the disability sector. Depending on the circumstances, it may well be considered an appropriate response to ban the person from entering the sector.