



NDIS Quality  
and Safeguards  
Commission

# Enforceable Undertakings Policy

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**NDIS Quality  
and Safeguards  
Commission**

NDIS Quality and Safeguards Commission PO Box 210, Penrith NSW 2750.

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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 regulatory powers are underpinned by the *Regulatory Powers (Standard Provisions) Act 2014* (RP Act).

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 is required to conduct compliance and enforcement activities in a risk responsive and proportionate manner. Actions to be taken are determined on a case by case basis taking into consideration factors such as the seriousness of the issue, the appropriateness of the provider's or other person's response, and the likelihood of further harm to persons with disability.

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 (Part 3A). This policy is one of a suite of policies that expands on the general information provided in the [Compliance and Enforcement Policy](#), and provides guidance on the NDIS Commission's approach to the use of enforceable undertakings.

The NDIS Commissioner is not bound to exercise their discretion to request an enforceable undertaking only in accordance with this policy. Each case will be considered on its particular facts.

## What is an enforceable undertaking?

Generally, an enforceable undertaking is a written commitment by a person to take specific action (or not take action) in order to prevent, or respond to, non-compliance.

An enforceable undertaking is legally binding and may be given as a result of a compliance activity, an investigation, a complaints resolution process, or as an alternative to the NDIS Commissioner commencing civil penalty proceedings. An undertaking may be accepted by the NDIS Commissioner relating to compliance with a relevant provision of the NDIS Act. The NDIS Commissioner may also delegate this power to a Commission officer, in writing.

An enforceable undertaking may include terms that encourage the person providing the undertaking to improve their compliance arrangements or limit the activities they can undertake. This can help the person comply with their current and future obligations under the NDIS Act and associated Rules, which in turn helps protect people with a disability.

The use of an enforceable undertaking can assist in improved compliance outcomes. An enforceable undertaking may be entered into regarding a contravention, or alleged contravention, of the NDIS Act. Undertakings provide a remedy other than the imposition of a financial sanction - that is, an infringement notice or civil penalty order. An enforceable undertaking may also assist in achieving a complaint resolution outcome through the provision of redress to the person who has suffered loss

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or damage as a result of the contravention or alleged contravention.

The NDIS Commissioner does not have the power to demand or compel a person to enter into an enforceable undertaking. In appropriate circumstances, the NDIS Commissioner may raise this compliance tool as an option and let the person consider whether they want to make such an offer, in lieu of the NDIS Commissioner taking other compliance or enforcement action(s).

The NDIS Commissioner may apply to a relevant court to enforce the undertaking. If a relevant court finds that an undertaking has been breached, it may order that a person comply with the undertaking, direct the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly, and that is reasonably attributable to the breach, or direct the person to compensate any other person who has suffered loss or damage as a result of the breach. It may also make any other order it considers appropriate in the circumstances.

## Legislative provisions

The provisions relevant to the NDIS Commissioner's use of enforceable undertakings are:

- section 73ZP of the NDIS Act; and
- Part 6 of the *Regulatory Powers (Standard Provisions) Act 2014* (RP Act).

Section 73ZP and Part 6 create a framework for accepting and enforcing undertakings in relation to contraventions, or alleged contraventions, of provisions of the NDIS Act. The NDIS Commissioner may accept an undertaking in relation to a contravention (or alleged contravention), and the undertaking may be enforced in a relevant court.

## The NDIS Commission's approach to the use of enforceable undertakings

The NDIS Commission must take a responsive and proportionate approach to compliance and enforcement activities, applying the strongest actions to the most serious breaches, and escalating actions where initial responses do not achieve intended outcomes. The NDIS Commission's use of enforceable undertakings forms part of its assessment of the most appropriate means to address contraventions (or alleged contraventions) of the NDIS Act. An enforceable undertaking is a tool designed to assist a person achieve compliance with the NDIS Act.

The NDIS Commissioner may consider the use of enforceable undertakings in tandem with, or instead of, using other compliance or enforcement tools and in conjunction with a complaint resolution process, including conciliation. The NDIS Commissioner will consider using an enforceable undertaking if the Commissioner believes this is the most effective and appropriate regulatory outcome given the significance of the contravention (or alleged contravention) to people with disability, the nature and seriousness of the contravention (or alleged contravention) and the compliance history of the person. This includes using an enforceable undertaking as a remedial tool in response to complaints received about a person providing services to a person with a disability.

The NDIS Commissioner will also consider whether the undertaking would provide a more appropriate regulatory outcome than non-negotiated, administrative or civil sanctions. The NDIS Commissioner

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will not consider an enforceable undertaking unless the NDIS Commissioner believes there has been a contravention, or alleged contravention, of the NDIS Act.

The NDIS Commissioner will determine whether to accept or enforce an undertaking on a case-by-case basis.

## What factors are considered regarding the use of enforceable undertakings?

A person may offer an enforceable undertaking to demonstrate a commitment to compliance with the NDIS Act which promotes high quality and safe supports and services provided under the NDIS. An enforceable undertaking may be used to secure compliance with the NDIS Act in lieu of civil proceedings. A person may also offer an enforceable undertaking to provide compensation to the person who has suffered loss or damage as a result of the contravention or alleged contravention.

The suitability of an enforceable undertaking in connection with a contravention may involve consideration of a number of factors, including:

- the nature and extent of the relevant contravention (or alleged contravention);
- the quality of the remedial action proposed and the extent to which it achieves measurable improvements to the quality and safety of supports and services provided to people with disability;
- whether the person has demonstrated a commitment to working collaboratively with the NDIS Commission to take steps to remedy and then maintain compliance;
- the capacity of the person to meet the undertaking and whether an enforceable undertaking is likely to be complied with;
- the likelihood that the enforceable undertaking will deliver real benefits to NDIS participants, the NDIS market or community beyond that which would normally be expected of a person;
- whether the conduct was inadvertent;
- whether there is any immediate or critical risk of harm to NDIS participants;
- whether the conduct was undertaken with the knowledge of senior officers in the context of an NDIS provider;
- whether the person has any history of non-compliance or has been the subject of complaints;
- whether a timely return to full compliance is defined; and
- whether there are any other compliance tools available to the NDIS Commission that are more appropriate in all of the circumstances.

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## When an enforceable undertaking is an appropriate compliance tool

Enforceable undertakings are a tool designed to encourage compliance and to provide an avenue for redress to a person who has suffered loss or damage as a result of the contravention or alleged contravention. Enforceable undertakings may be used as an effective compliance tool in instances where there is evidence of a contravention, or alleged contravention, with the NDIS Act, but where it may not be in the public interest to commence litigation or use another form of compliance or enforcement action. An enforceable undertaking may be appropriate where there are:

- non-compliance issues that must be addressed;
- the person has demonstrated a willingness to take specified measures to improve compliance;
- the contravention or alleged contravention does not give rise to, or has not resulted in, a serious risk to the health, safety and wellbeing of a person with disability.

## When an enforceable undertaking is not an appropriate compliance tool

An enforceable undertaking will generally not be accepted in circumstances where there has been a serious contravention, or alleged contravention, causing harm to a person with disability or in cases involving deliberate misconduct, or conduct involving a degree of recklessness.

## How to make an enforceable undertaking

### Who can make an offer of an enforceable undertaking?

A person who believes they have, or may have, contravened the NDIS Act can offer to provide an enforceable undertaking to the NDIS Commission at any time. This includes in circumstances where they may already be the subject of other regulatory action by the NDIS Commission - for instance, civil penalty proceedings - or even where a matter is still under investigation.

### Acceptance of undertakings

The NDIS Commissioner may accept a written undertaking committing a person to particular action (or inaction) in order to prevent, or respond to, a contravention or alleged contravention of a provision in Part 3A. The NDIS Commissioner may accept a written undertaking that a person will, in order to provide compensation for loss or damage suffered as a result of a contravention or alleged contravention, pay another person an amount worked out in accordance with the undertaking. Such an undertaking must be expressed to be an undertaking under section 114 of the RP Act.

For example, the NDIS Commissioner may accept any of the following written undertakings given by a person that a person will:

- (a) in order to comply with a provision, take specified action;
- (b) in order to comply with a provision, refrain from taking specified action; or
- (c) take specified action directed towards ensuring that the person does not contravene a

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provision of the NDIS Act, or is unlikely to contravene a provision, in the future.

### **Other undertakings – including financial payment**

Section 73ZP(4) of the NDIS Act broadens the types of written undertakings that can be accepted by the NDIS Commissioner to include providing compensation for loss or damage as a result of a contravention or alleged contravention of the NDIS Act.

In addition, the NDIS Commissioner may accept an undertaking given by a person in connection with any matter relating to a contravention or alleged contravention by the person under the NDIS Act.

## **Terms of an enforceable undertaking**

In order to be enforceable, the undertaking must be sufficiently specific for the person making the undertaking to know exactly what is expected of them, to ensure any failure to comply is readily apparent. The undertaking should directly address the activity that has given rise to the matters in relation to which the undertaking is being given.

The terms of an enforceable undertaking may include:

- (a) an acknowledgement by the person that a contravention of the NDIS Act has occurred, or has otherwise been alleged by the NDIS Commissioner;
- (b) an agreement specifying how the person will address the relevant contravention or alleged contravention, including where appropriate a positive commitment to cease the conduct that is in contravention of the NDIS Act (or allegedly in contravention) and not to recommence the conduct for a specified period of time, if at all;
- (c) a time period within which compliance with undertakings will be met;
- (d) a commitment by the person to future compliance measures (for example, regular reporting to the NDIS Commissioner, training for providers, or regular internal audits); and
- (e) an acknowledgement that the undertaking may, in whole or in part, be published on the NDIS Commission's website.

### **Terms not generally accepted**

The following terms will not normally be acceptable to the NDIS Commissioner for inclusion in an enforceable undertaking:

- (a) denials that any relevant conduct contravened, or was likely to have contravened the NDIS Act;
- (b) any terms purporting to impose conditions on the NDIS Commission;
- (c) any requirement that the NDIS Commission will not instigate future proceedings in the particular matter;



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- (d) terms purporting to set up defences for possible non-compliance;
  - (e) any statement that the relevant conduct was inadvertent;
  - (f) any statement that purports to impose conditions on third parties; or
  - (g) any statement that seeks to minimise the possible consequences faced by the person as a result of the conduct for public relations or promotional purposes.

### **Withdrawal or variation of an enforceable undertaking**

The person giving an enforceable undertaking may vary or withdraw an undertaking at any time, provided the NDIS Commissioner gives written consent to the variation or withdrawal.

This enables negotiation between the NDIS Commissioner and the person who gave an enforceable undertaking where, for example:

- circumstances have changed such that the original terms of the enforceable undertaking have become impracticable or may no longer be relevant; or
- where it would be appropriate to address issues that were not foreseen at the time the undertaking was first accepted.

However, any proposed variation which alters the spirit of the original undertaking will not be accepted.

The NDIS Commission applies the same criteria to considering requests for variation of an enforceable undertaking as to considering accepting an enforceable undertaking.

The NDIS Commissioner may cancel the enforceable undertaking by giving written notice given to the person.

## **How to enforce an undertaking**

Taking action to enforce an undertaking is one of the court-based compliance and enforcement actions available to the NDIS Commissioner.

The NDIS Commissioner may apply to a relevant court to have an undertaking enforced if:

- (a) a person has given an undertaking;
- (b) the undertaking has not been withdrawn or cancelled; and
- (c) the NDIS Commission considers that the person has breached the undertaking.

If the relevant court is satisfied that the person has breached the undertaking, the court may make any or all of the following orders:

- (a) an order directing the person to comply with the undertaking;
- (b) an order directing the person to pay the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably

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- attributable to the breach;
- (c) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach; or
  - (d) any other order that the court considers appropriate.

## Record keeping and publication

The NDIS Commission will keep records of the acceptance of enforceable undertakings.

Section 73ZS of the NDIS Act requires the NDIS Commission to establish and maintain a register known as the NDIS Provider Register. This register must record whether an NDIS provider (registered or not registered) has given an enforceable undertaking and, if so, information about the enforceable undertaking. Information about an undertaking, including the terms of an undertaking in their entirety, may also be separately published by the NDIS Commission on its website.

Where permitted by law, the NDIS Commission may also provide information about its acceptance of enforceable undertakings to other regulators to assist those regulators in carrying out their responsibilities.