

**Operational Guidelines for the NDIS Appeals**

# Preface

The Australian Government Department of Social Services (DSS) has a suite of documents which provide information relating to the Disability, Mental Health and Carers Program, Disability Carer and Support Activity – which includes the NDIS Appeals program. They provide the key starting point for organisations considering whether to participate in the Program and form the basis for the business relationship between the Department and the grant recipient.

These Operational Guidelines are an adjunct to the Program Guidelines, and provide more specific information about NDIS Appeals.

DSS reserves the right to amend these documents from time to time by whatever means it may determine in its absolute discretion and will provide reasonable notice of these amendments.

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**Activity Overview**

On 1 July 2013, the National Disability Insurance Scheme (NDIS) commenced in the Barwon area of Victoria, the Hunter area in New South Wales, Tasmania and South Australia, and on

1. July 2014 in the Australian Capital Territory, the Barkly region of the Northern Territory and the Perth Hills area in Western Australia.

The NDIS provides long-term, high quality individualised care and support that is reasonable and necessary to meet the needs of people with permanent disability, where their disability significantly affects their communication, mobility, self-care or self-management. This may include an individual plan and an individually funded package.

The Australian Government has established the National Disability Insurance Agency (NDIA) to administer the NDIS. The NDIA works closely with people with disability, governments, representative organisations, service providers and participating communities to ensure the transition to the new arrangements take account of local needs and experience.

The *National Disability Insurance Scheme Act 2013* creates the framework for the NDIS, including eligibility criteria, age requirements, and what constitutes reasonable and necessary support. The framework set up by the legislation is supported by detailed rules that keep it flexible and allow it to be adapted.

An external merit review process has been set up to review decisions of the NDIA. The aim of external merits review is to ensure the NDIA decisions are fair and robust. The Administrative Appeals Tribunal (AAT) is the external merits body for the NDIS. To ensure the external merits review process is accessible and as non-adversarial as possible for people with disability, the Government has established a designated division of the AAT, a fee waiver for applicants seeking a review of NDIA decisions, and support services (the support component).

## *NDIS Appeals (Support Persons and Legal Services)*

The support component provides support persons to assist applicants in navigating the process of AAT review of NDIA decisions. The support person’s role may involve attending AAT conferences and hearings with applicants, fostering self-advocacy for applicants to put their own cases before the AAT, or providing individual advocacy in cases where the person is unable to self-advocate.

Funding is directly provided to existing National Disability Advocacy Program (NDAP) agencies

in each state or territory for the provision of support persons.

While the focus is on non-legalistic self-advocacy services, there may be some cases where there is a legitimate need for applicants to access legal services; those cases which raise complex or novel legal issues.

Recognising this, NDIS Appeals program also provides capped funding to legal aid commissions.

To ensure that assessments of eligibility for legal services are handled consistently and by persons with appropriate legal expertise, a central assessment provider (the CAP) is

available. Applicants would primarily be referred to the CAP by the AAT or the support persons. The CAP role is undertaken by DSS Legal Branch.

The CAP make a recommendation to the delegate on whether a case is complex or novel and the delegate decides if they are eligible for legal services, legal services are then provided through the legal aid commission in each state and territory. It is anticipated that there will only be a small number of cases that will satisfy the criteria for assistance (those cases that raises complex or novel legal issues).

The majority of NDIA decisions that are subject to review are likely to relate to the application of eligibility criteria to individual circumstances (entailing questions of fact rather than law) or to decisions about the content of participants’ plans (entailing subjective assessments of

individuals’ circumstances rather than complex or novel legal questions). Clause 99 of the *National Disability Insurance Scheme Bill 2012* sets out which decisions are subject to review. Of these, a small number are expected to potentially raise complex or novel legal issues – for example, decisions about who is to speak on behalf of a child participant (clause 74 of the Bill) may potentially raise complex legal issues, and decisions about compensation issues (clauses 111 and 116 of the Bill).

If legal services are provided, the support person, subject to the applicant’s agreement, can

continue to support the applicant through the AAT process.

## *Support Persons’ Role*

The support person:

* + - fosters self-advocacy (supporting individuals to put their own case before the AAT)
		- where self-advocacy is not appropriate, provides individual advocacy support, developing and implementing an individual plan in partnership with the applicant
		- assists applicants to navigate the process of seeking AAT review of NDIA decisions, including preparing documents, attending conferences and hearings
		- refers to the CAP where legal issues are highlighted for a determination to be made as to whether legal services are warranted (for complex or novel legal cases)
		- provides information about the availability and role of the support person
		- conducts individual or group self-advocacy sessions.

Funding through NDIS Appeals is prioritised for NDIA applicants or participants for their application for review in the AAT. The priority for expenditure of funding must be for AAT applicants but the support person may be available for the applicant before they apply to the AAT. All applicants seeking a support person are seen within five days of contacting NDIS Appeals provider.

## *Aims and objectives*

The objective is to ensure that all people with disability and other affected persons have access to support when they are seeking review in the AAT of NDIA decisions through:

* + - access to a support person
		- access to legal services in circumstances where a case raises complex or novel legal issues.

## *Service provider eligibility*

DSS will identify advocacy agencies in NDIS region who are providers under the NDAP for the provision of support persons.

Eligible organisations for funding for the NDAP are defined in section 7 of the *Disability Services Act 1986*.

This covers the following entity types:

1. Incorporated Associations (incorporated under State/Territory legislation, commonly have ‘Association’ or ‘Incorporated’ or ‘Inc’ in their legal name)
2. Incorporated Cooperatives (also incorporated under State/Territory legislation, commonly have “Cooperative’ in their legal name)
3. Companies (incorporated under the Corporations Act 2001 – may be not-for-profit or for- profit proprietary company (limited by shares or by guarantee) or public companies)
4. Aboriginal Corporations (incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006)
5. Organisations established through a specific piece of Commonwealth or State/Territory legislation (many public benevolent institutions, churches, universities, unions etc)

Service Providers are eligible for providing **legal services** if they are a legal aid commission in each state or territory, or a legal practitioner engaged pursuant to existing arrangements for legal aid commissions.

## *Participants/clients/recipients/target group*

A person who is directly affected by a reviewable decision made by the NDIA may request review by the AAT under s103 of the *National Disability Insurance Scheme Act 2013*.

Applicants access NDIS Appeals once they have exhausted all avenues of review in the NDIA and have made an application to the AAT. Upon application to the AAT, a participant is made aware of the availability of a support person.

The primary participant group for NDIS Appeals are people with disability, but applicants may also be guardians and nominees of people with disability and carers and family members of people with disability. NDIS Appeals is not available to service providers.

Legal services are only available if it is determined that the case raises complex or novel legal issues. The participant will be advised if legal services are available to them after an assessment is made by the DSS.

NDIS Appeals requires the delivery of a fair and equitable service that is accessible to Aboriginal and Torres Strait Islander persons, people from culturally and linguistically diverse and from regional or remote locations.

All disability advocacy agencies funded under NDAP have a responsibility to provide disability advocacy support to Aboriginal and Torres Strait Islander persons and to people from cultural and linguistically diverse backgrounds. Under the NDAP, funding is provided to some agencies who specialise in providing advocacy support to people from an Aboriginal or Torres Strait Islander background, from a culturally and linguistically diverse background, or with a specific type of disability. These specialist agencies may act in an advisory capacity to assist the generalist agencies to provide culturally appropriate disability advocacy support.

## *Funding for the activity*

### Funding for the Support Person

Agencies providing services under NDIS Appeals are funded to meet the costs of employing a support person (and other eligible costs as per **1.7**). The funding has been distributed based on potential numbers of NDIS applicants and a percentage of those likely to seek review in the AAT.

Funding for the support person is provided subject to agencies:

* + - Signing a Grant Agreement and complying with the Terms and Conditions of the grant of financial assistance
		- complying with the *Disability Services Act 1986*
		- meeting all other relevant legislative requirements
		- meeting all performance requirements
		- complying with the Program Guidelines and these Operational Guidelines.

### Funding for legal services

Funding for legal services (payable to the legal aid commission, not the applicant) is made available where a case is determined by DSS to raise complex or novel legal issues.

There is capped legal services funding available per applicant, which is payable to the legal aid commissions - to cover their costs in running a case. This excludes the provision of expert reports that may be required. In cases where it is determined by the legal aid commission and DSS that an expert report is required, additional capped funds will be made available.

Funding to the legal aid commissions is provided subject to them:

* + - Signing a Memorandum of Understanding with DSS
		- meeting all relevant legislative requirements
		- meeting all performance requirements
		- complying with the Program Guidelines and these Operational Guidelines.

## *Eligible and in-eligible activities*

The funding provided to NDIS Appeals providers may be used for:

* + - staff salaries and on-costs which can be directly attributed to the provision of support persons in the identified service area or areas as per the Grant Agreement;
		- operating and administration expenses directly related to the delivery of support persons, such as:
			* telephones
			* rent and outgoings
			* computer/IT/website/software
			* insurance
			* utilities
			* postage
			* stationery and printing
			* accounting and auditing
			* travel/accommodation costs
			* motor vehicle purchase or lease.
			* increasing awareness of the NDIS appeal and providing community education of NDIS Appeals

The funding provided to legal aid commissions may be used to cover all the legal costs in running a case in the AAT in the identified service area as per the Memorandum of Understanding.

The funding provided under NDIS Appeals may **not** be used for:

* + - the provision of a support person or legal services for the NDIA internal review;
		- the provision of advocacy support or legal services outside of the NDIS Appeals

process

* + - the provision of a support person or legal services in jurisdictions beyond the AAT

## *Activity links and working with other agencies and services*

The support persons and legal aid commissions in each state or territory are required to work with each other, the AAT, DSS, and the NDIA.

The support persons and legal aid commissions may be asked to participate in a steering committee to provide direction on the implementation and evaluation of NDIS Appeals.

## *Specialist requirements (e.g. Legislative requirements)*

The policy and implementation of NDIS Appeals is guided by the principles and objectives of key legislation, conventions, agreements and frameworks, including but not limited to: the United Nations Convention on the Rights of Persons with Disabilities; the National Disability Strategy; the National Disability Agreement, the National Disability Advocacy Framework; the National Disability Insurance Scheme Act 2013; and the Disability Services Act 1986 (the DSA).

## *Information technology*

Grant recipients are expected to ensure they have suitable information technology systems in place to allow them to meet their data collection and reporting obligations.

## *Activity performance and reporting*

DSS Standard Performance Framework requires that all streamlined Grant Agreement Schedules include a set of performance indicators which can be used to measure and report on the performance of the funded activities.

DSS monitors the outcomes and service provider performance. Reporting is based on achieving the activity outcomes. Data is collected directly from service providers through the DSS Data Exchange (DEX)

Performance indicators focus on the following questions:

1. Did it make a difference? (outcomes) – e.g. percentage and number of applicants reporting that they were satisfied with the support and services received
2. How well is it being done? (quality) – e.g. percentage and number of individuals from Indigenous and culturally and linguistically diverse backgrounds
3. How much is being done? (deliverables/outputs) – e.g. number of individuals assisted with a support person or legal assistance

Service providers are required to submit to DSS reports as part of government reporting and accountability requirements. In applying the proportionality principle in determining the reporting and acquittal requirements for this activity, consideration has been given to the current arrangements in place for the service providers (through existing agreements) recognising a consistent record of high performance and reliability and the policy outcomes being sought. The reporting requirements include quantitative, qualitative and milestone information and are:

* + a yearly performance report against the performance indicators
	+ a yearly report (quantitative) summarising individual client data (de-identified) that covers disability type, location, and nature of assistance provided
	+ a yearly qualitative report
	+ a yearly non-audited financial acquittal report.
	1. **Complaints about advocacy agencies and legal services**

NDIS Appeals providers are required to have processes in place to manage complaints in a positive, timely and fair way. Initially, complaints (from consumers or others) should be raised directly with the disability advocacy agency.

Although most complaints should be handled by the provider in the first instance, particular complaints will require an external referral such as complaints of a serious or sensitive nature that cannot be handled by the NDIS Appeals providers. These may include allegations of assault or abuse and neglect which should be referred to police.

If a satisfactory resolution is not reached through the NDIS Appeals providers internal complaints system, or if the complainant prefers to raise the matter with an independent organisation, the complaint can be referred to the Complaints Resolution and Referral Service (CRRS) which is an independent service, funded by the Australian Government for complaints about services funded under the DSA. CRRS can be contacted on 1800 880 052 and further information can be found at: [www.jobaccess.gov.au/complaints](https://www.jobaccess.gov.au/complaints).

Each legal aid commission has a complaint process in place that outlines how matters relating to them will be dealt with. If a person is not satisfied with the outcome of their complaint by the legal aid commission they can contact the Ombudsman or the Legal Services Commission for that state or territory.

# Application Process

## *Overview of the Application Process*

The process for selecting NDIS Appeals providers and legal service providers is a direct selection process.

The process selected has been informed by consideration of the policy outcomes being sought; the purpose and value of the grant; the nature and type of deliverables; the nature and level of the risks involved; the timeframe for delivery; the specific location of the service provision; and the capability of service providers. The direct process selected offers the opportunity to deliver services with known, low risk and high performing providers.

## *Selection Criteria*

### Support Person

The support person role is provided through high performing, currently funded NDAP agencies. DSS directly selects agencies, based on a range of criteria (all criteria are weighted equally):

* + - currently funded NDAP providers. This direct approach achieves value with public money as it uses an existing providers and therefore there is a lower administrative cost in implementing this measure - an efficient, effective, economical and ethical use of Commonwealth resources
		- risk – the agencies must be assessed as ‘low risk’ against the DSS Service Provider Risk Assessment. This tool considers a range of elements which include financial management, governance, and issues management
		- reporting – the service providers must have met all milestones for performance, data and financial reporting against their existing DSS Grant Agreement Schedule
		- performance – the agencies must have demonstrated their ability to respond to new initiatives and measures introduced by DSS, expand to meet new service delivery requirements, have demonstrated flexibility and responsiveness in meeting DSS’s requests and have demonstrated an ability to problem solve and adjust their service delivery approach to meet the needs of people with disability
		- timeframe – there is urgency in the timing of the delivery of this measure. The agreements with providers need to be in place before appeals begin flowing to the AAT. The agencies must have capacity to deliver the services within the timeframe for implementation
		- quality assurance – must have achieved certification in the NDAP Quality Assurance system and demonstrate compliance against the National Standards for Disability Services.

### Legal Services

Legal services are provided by the legal aid commissions on the basis of their:

* + - existing reporting arrangements with government, and existing data collection in place which can be enhanced at no cost. This enables the collection of standardised data by legal aid commissions to accurately reflect the requirements of applicants receiving legal advice and representation
		- relevant experience in providing services to people with disability and existing expertise in working in an AAT environment. This proven capability and experience reduces the lead time necessary for the service provider to understand the full scope of the work
		- national coverage and a physical presence in each site
		- ability to draw on existing expertise within their services - able to consult with other legal assistance providers, including the National Association of Community Legal Centres and the Aboriginal and Torres Strait Islander Legal Services (ATSILS) as required. As Indigenous Australians have significantly higher disability rates than non-Indigenous Australians, the ATSILS provide culturally appropriate services nationally and would be best equipped to provide assistance
		- the high likelihood of the legal aid commissions being approached for grants of assistance for many people seeking AAT review and their agreement to the limited funding for complex or novel matters (funding is capped at $6,720 per case)
		- time available for conducting a selection process – there is urgency in the timing of the delivery of this measure. The agreements with providers need to be in place before appeals begin flowing to the AAT
		- this approach allows for standardised training to be provided as well as ensuring consistent advice and representation to applicants during the NDIA trial stage, and feedback on the process to DSS
		- value with public money – as existing providers there is a lower administrative cost in implementing this measure, therefore this is an efficient, effective, economical and ethical use of Commonwealth resources.

# Contact information

For further information, contact DSS:

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