



Australian Government
Department of Social Services

**Operational Guidelines for the
NDIS Appeals Program**

(January 2021)

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1. Introduction

1.1 Activity Overview

The National Disability Insurance Scheme (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.

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 in trial sites 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, what constitutes reasonable and necessary support, and review of decisions.

The aim of NDIS Appeals 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 (NDIS Appeals).

2. Program Description

NDIS Appeals provides assistance to NDIS applicants, and others affected by reviewable NDIA decisions, to navigate the external merits review process.

Funding is provided to a number of existing National Disability Advocacy Program (NDAP) providers around Australia, selected by DSS to provide the additional advocate services.

While the focus is on non-legalistic self-advocacy services, there may be some cases which progress to an AAT review where there is a legitimate need for applicants to access legal services; funding to be provided where the merits of the case warrant funding or where the applicant does not have the capacity to self-represent. Recognising this, NDIS Appeals provides funding to Legal Aid Commissions in every state and territory for legal representation.

Assessments of eligibility for legal services are undertaken by the Legal Aid Commissions. Applicants may be referred to a Legal Aid Commission by: the AAT; the NDIS Appeals advocate or other legal representatives of the AAT applicant; or they may self-refer.

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).

Section 99 of the *National Disability Insurance Scheme Act 2013* sets out which decisions are subject to review.

If legal services are provided, the advocate, subject to the applicant's agreement, continues to support the applicant through the AAT process.

2.1 Advocate's Role

The NDIS Appeals advocate:

- provides assistance and advice to applicants who wish to put their own cases forward (self-advocate) for a review of NDIA decisions;
- 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 a review of NDIA decisions, including preparing documents, attending conferences and hearings;
- refers to the relevant Legal Aid Commission where legal issues are highlighted and an application has been made to the AAT, for a determination to be made as to whether legal services are warranted;
- provides information about the availability and role of the advocate;
- refers AAT applicants to the relevant Legal Aid Commission if they require legal advice on their application for an external review;
- educates the community and potential applicants on NDIS Appeals and the review process; and
- conducts individual or group self-advocacy sessions.

Although all aspects of the role of the NDIS Appeals advocate, as described above, are funded under NDIS Appeals, priority rests with the provision of supports to AAT applicants and promotion of assistance available to persons seeking an external review of NDIA decisions.

All applicants seeking an advocate are seen within five days of contacting the NDIS Appeals provider.

Providers are required to have a referral strategy in place to refer applicants to other organisations when necessary. For example, if there is another organisation better located or if the organisation is at capacity.

2.2 Legal services

The legal services provider:

- provides legal counsel throughout the AAT process for applicant's eligible for legal services under NDIS Appeals;
- provides advice for AAT applicants and their advocate on their application for an external review, upon referral from an advocate; and
- assesses eligibility for legal services, using publicly available national guidelines.

Although all aspects of the role of legal services provider, as described above, are funded under NDIS Appeals, priority rests with the provision of legal counsel to AAT applicants eligible for legal support under NDIS Appeals.

Legal Aid Commissions are required to have a referral strategy in place for the advocate to contact when seeking advice on behalf of their applicant.

3. Aims and objectives

The objective is to ensure that all people with disability and other affected persons have:

- access to an advocate (for applicants seeking review of NDIA decisions); and

- access to legal services in circumstances where applicants are found eligible for NDIS Appeals legal services funding (for applicants seeking an external merits review in the AAT only).

4. Service provider eligibility

DSS will identify advocacy agencies who are providers under the NDAP for the provision of an advocate.

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

This covers the following entity types:

- Incorporated Associations (incorporated under State/Territory legislation, commonly have 'Association' or 'Incorporated' or 'Inc' in their legal name);
- Incorporated Cooperatives (also incorporated under State/Territory legislation, commonly have "Cooperative" in their legal name);
- 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);
- Aboriginal Corporations (incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006);
- 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, or a legal practitioner engaged pursuant to existing arrangements for Legal Aid Commissions.

5. Participants/clients/recipients/target group

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

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 support is not available to service providers.

DSS requires the delivery of a fair and equitable NDIS Appeals service that is accessible to people from culturally and linguistically diverse or Indigenous backgrounds, and from regional or remote localities.

All NDIS Appeals funded providers have a responsibility to provide support to Aboriginal and Torres Strait Islanders and to people from diverse cultural and linguistic backgrounds. Under NDAP, funding is provided to some providers that 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 providers may act in an advisory capacity to assist the generalist providers to provide culturally appropriate advocacy support.

6. Funding for the activity

6.1 Funding for the advocate

The funding for advocates is separate from other advocacy funding provided to advocacy providers under NDAP, and must be used to meet the costs of employing an advocate (and other eligible costs as per 7) and deliver services as outlined in 2.1. The funding has been distributed based on potential numbers of people in NDIS sites and a percentage of those likely to seek review in the AAT.

Funding for the advocate is provided subject to NDIS Appeals providers:

- 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; and
- complying with the Program Guidelines and these Operational Guidelines.

6.2 Funding for legal services

Funding for legal services (payable to the Legal Aid Commission, not the applicant) is separate from other Commonwealth funding provided to Legal Aid Commissions. It must be used to meet the costs of employing legal experts (and other eligible costs as per 7) and delivering services as outlined in 2.2. The funding has been distributed based on potential numbers of people in NDIS sites and a percentage of those likely to seek review in the AAT.

The funding is used to cover the costs of running a case, assessing applications for legal support and providing legal advice to AAT applicants referred by the advocate. This includes the provision of expert reports that may be required.

Funding to the Legal Aid Commissions is provided subject to them:

- signing a grant agreement with DSS;
- meeting all relevant legislative requirements;
- meeting all performance requirements; and
- complying with the Program Guidelines and these Operational Guidelines.

7. Eligible activities

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

- staff salaries and on-costs which can be directly attributed to the provision of advocates in the identified service area or areas as per the Grant Agreement;
- operating and administration expenses directly related to the delivery of advocacy, such as:
 - telephones;
 - rent and outgoings;
 - computer/IT/website/software;
 - insurance;
 - utilities;
 - postage;
 - stationery and printing;
 - accounting and auditing;
 - travel/accommodation costs; and

- motor vehicle purchase or lease.

The funding provided to Legal Aid Commissions may be used for:

- staff salaries and on-costs which can be directly attributed to the provision of legal services and assessments of applications for legal services;
- operating and administration expenses directly related to the delivery of legal services and assessment of applications for the provision of legal services, such as:
 - telephones;
 - rent and outgoings;
 - computer/IT/website/software;
 - insurance;
 - utilities;
 - postage;
 - stationery and printing;
 - accounting and auditing;
 - travel/accommodation costs; and
 - motor vehicle purchase or lease.
- covering the legal costs in running a case in the AAT in the identified service area as per the grant agreement.

8. Activity links and working with other agencies and services

The advocate and Legal Aid Commissions are required to work collaboratively with each other, the AAT, DSS, and the NDIA.

Advocates and Legal Aid Commission personnel may be asked to attend meetings or participate on committees contributing to government policy, service and program development of NDIS Appeals.

9. 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).

NDAP providers receive funding under the DSA. The DSA and its associated principles and objectives have a focus on outcomes for people with disability. All advocacy providers funded under the NDAP must comply with the DSA, including the National Standards for Disability Services.

The Legal Aid Commissions must comply with all relevant legislation, standards and guidelines.

10. 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.

11. Activity performance and reporting

DSS Standard Performance Framework requires that all Standard 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).

Service providers are required to submit to DSS a range of 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:

- six monthly performance reports against the activity work plan (Legal Aid Commissions only);
- six monthly reports (quantitative) summarising individual client data (de-identified) as reported in DEX;
- a yearly non-audited financial acquittal report.

11.1 Activity Work Plan (Legal Aid Commissions only)

The purpose of the AWP is to include output-level detail for the funded activity negotiated with the department. The information listed against each activity should include the activity details, deliverables, timeframes for delivery and measures of achievement. It may include a budget or other administrative controls intended to help manage activity risks. Once mutually agreed the AWP will form part of the Agreement. An AWP can contain more than one activity.

All Legal Aid Commission providers are required, as part of their funding agreement, to submit an AWP.

11.2 Activity Work Plan Report (Legal Aid Commissions only)

The AWP Report seeks details of progress on requirements in the AWP for the reporting period, including any compliance requirements. This report is intended to detail the achievements/outcomes for the previous 12 months undertaken by the provider and should align with the content of the AWP.

11.3 Six monthly performance reporting (Advocacy Support providers only)

DEX has two standardised six monthly performance reporting periods each financial year:

- Reporting Period 1 runs from 1 July to 31 December
- Reporting Period 2 runs from 1 January to 30 June

Providers can enter data at any time within a reporting period, and are encouraged to do so regularly to make best use of the self-service reports and avoid unnecessary backlog.

The reporting period automatically closes at the end of the 30 days (i.e. 30 July and 30 January each year). Providers are required to finalise the submission of data within the Data Exchange for each reporting period within 30 days of the reporting period ceasing, known as 'closing periods'.

Once a reporting period has closed, data relating to that period of time will no longer be able to be recorded. Data outside a reporting period may only be entered if a provider has sought and been granted an extension.

11.4 Partnership approach

For all NDAP and NDIS Appeals Advocacy Support providers, participation in the 'partnership approach' is a requirement of funding from Reporting Period 2, January 2021. By participating, you will provide some additional information in exchange for the receipt of regular and relevant reports.

The main focus of the 'partnership approach' is collecting information about the outcomes achieved by clients as a result of service delivery. The 'partnership approach' also includes some extended data items that provide additional information about client demographics, needs and circumstances.

11.5 Financial Acquittal Report

A Financial Acquittal must be submitted for each financial year (FY) funded under the Grant Agreement - to align with the relevant FY 1 July to 30 June and submitted on 31 October following the end of the FY. This declaration is a certification from the Grantee stating that the funds were spent for the purpose as outlined in the Grant Agreement and in-which the Grantee is required to declare unspent funds.

If a provider has received SACS Supplementation for any of the activities, they must provide the department with a declaration for each activity (for more information go to page 12 of the NDAP Commonwealth Simple Grant Agreement).

12. Complaints about advocacy providers and legal services

Disability advocacy providers should have processes in place for the management of complaints in a positive, timely and fair way. Initially, complaints (from consumers or others) should be raised directly with the disability advocacy agency. Clients must be made aware of the avenues available to them to make a complaint, e.g. in person, in writing, over the phone, and via email.

Providers must maintain a formal register of complaints received, including the nature of the complaint and actions taken to resolve the client's issues and concerns, and how it was resolved, including whether it was referred to another authority. Providers must provide the register to the department, if requested. Providers should refer to the department's Complaints Procedures for further information.

If a satisfactory resolution is not reached through the agency's 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, including advocacy providers. CRRS can be contacted on 1800 880 052 and further

information can be found on the CRRS website at:
<https://www.jobaccess.gov.au/complaints/crrs>

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 for that state or territory.

Providers must immediately notify their FAM about significant complaints, that is, those related to serious harm or misconduct, or serious injury to a client, and keep their FAM informed of developments.

Although most complaints should be handled by the advocacy agency 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 advocacy agency. These may include allegations of assault or abuse and neglect which should be referred to police. If you suspect a child or young person is in need of protection from abuse or harm you should report your concerns to the Child Protection agency in your relevant State or Territory.

12.1 Serious incidents

Providers must comply with Commonwealth, state and territory laws if there is a serious incident in relation to providing the advocacy support services. A serious incident is an event that disrupts service provision or threatens the safety of people or property.

Serious incidents include:

- incidents involving fraud
- incidents of alleged physical or sexual assault of a client committed by an employee
- incidents of alleged physical or sexual assault of a client committed by another client while in the care of the provider
- culpable neglect
- serious unexplained injury
- death of a client (irrespective of cause)
- unauthorised use of restrictive practices (seclusion, chemical restraint, mechanical restraint, physical restraint, environmental restraint).

13. Contact information

Inquiries related to NDIS Appeals or the Commonwealth role in disability advocacy can be directed to disabilityadvocacy@DSS.gov.au

or via post to:

Department of Social Services
Disability, Employment and Carers Group
Disability Advocacy Section
PO Box 9820
Canberra ACT 2601