



Australian Government

Department of Social Services

Operational Guidelines

NDIS Appeals

Preface

The Australian Government Department of Social Services (DSS) has a suite of documents (the **Program Guideline Suite**) 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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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).

1.1 NDIS Appeals

NDIS Appeals provides assistance to NDIS applicants, and others affected by reviewable NDIA decisions, to navigate the review process. It is available in every location the NDIS operates.

Funding is provided to a number of existing National Disability Advocacy Program (NDAP) agencies, selected by DSS to provide the additional support person 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 support person 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 support person, subject to the applicant's agreement, continues to support the applicant through the AAT process.

1.2 Support Persons' Role

The support person:

- 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 support person;
- 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 support person, 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 a support person 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.

1.3 Legal services

The legal services provider:

- provides legal counsel throughout the AAT process for applicant's eligible for legal assistance under NDIS Appeals;
- provides advice for AAT applicants and their support person on their application for an external review, upon referral from a support person; 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 Support Persons to contact when seeking advice on behalf of their applicant.

1.4 Aims and objectives

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

- access to a support person (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).

1.5 Service provider eligibility

DSS will identify advocacy agencies 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:

- a) Incorporated Associations (incorporated under State/Territory legislation, commonly have 'Association' or 'Incorporated' or 'Inc' in their legal name);
- b) Incorporated Cooperatives (also incorporated under State/Territory legislation, commonly have "Cooperative" in their legal name);
- c) 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);
- d) Aboriginal Corporations (incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006);
- e) 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.

1.6 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 is not available to service providers.

NDIS Appeals requires the delivery of a fair and equitable 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 agencies 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 agencies may act in an advisory capacity to assist the generalist agencies to provide culturally appropriate advocacy support.

1.7 Funding for the activity

Funding for the Support Person

The funding for support persons is separate from other advocacy funding provided to advocacy agencies under NDAP, and must be used to meet the costs of employing a support person (and other eligible costs as per **1.8**) and deliver services as outlined in **1.2**. 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.

Funding for the support person 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.

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 **1.8**) and delivering services as outlined in **1.3**. 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 support persons. 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.

1.8 Eligible activities

The funding provided to NDIS Appeals support persons 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; 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.

1.9 Activity links and working with other agencies and services

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

Support persons 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.

1.10 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 agencies receive funding under the DSA. The DSA and its associated principles and objectives have a focus on outcomes for people with disability. All advocacy agencies 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.

1.11 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.

1.12 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.

1.13 Complaints about advocacy agencies and legal services

NDAP agencies 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 advocacy agency.

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 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 agencies. CRRS can be contacted on 1800 880 052 and further information can be found on the CRRS website at: www.crrs.net.au.

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.

2 Application Process

2.1 Overview of the Application Process

The process for selecting NDAP 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 offers the opportunity to deliver in the NDIS sites with known, low risk and high performing providers.

2.2 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 provider – this direct approach achieves value with public money as it uses an existing provider and therefore there is a lower administrative cost in implementing this measure; an efficient, effective, economical and ethical use of Commonwealth resources;
- risk – the agency must be assessed as 'low risk' against the DSS Service Delivery Monitoring Tool. This tool considers a range of elements which include financial management, governance, and issues management;
- reporting – the service provider must have met all milestones for performance, data and financial reporting against their existing DSS Grant Agreement Schedule;
- performance – the agency 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' 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 agency must have capacity to deliver the services within the timeframe for implementation; and
- quality assurance – must have current 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 NDIS 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 the provision of legal services;
- 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;
- ability to provide standardised training as well as ensuring consistent advice and representation to applicants, and feedback on the process to DSS; and
- 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.

3 Contact information

For further information, contact DSS:

Department of Social Services
Disability and Carers Group
Participation and Assurance Branch
PO Box 9820
Canberra Mail Centre ACT 2610

Email: NDIS.Appeals@dss.gov.au