



National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018

I, Graeme Head, Commissioner of the NDIS Quality and Safeguards Commission, make the following Guidelines.

Dated 27 September 2018

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Commissioner of the NDIS Quality and Safeguards Commission

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Introduction

The *National Disability Insurance Scheme Act 2013* provides that the National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission has complaints functions which are described in section 181 of the Act.

The *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* set out the complaint handling obligations of registered NDIS providers and the Commission. The Complaint Rules require registered NDIS providers to have complaints management arrangements in place and to support people with disability to understand how to make a complaint to the provider and the Commission.

The Commission is responsible for supporting the resolution of complaints about the provision of supports and services by all NDIS providers (not just those that are registered). All NDIS providers and their workers are obliged to comply with the NDIS Code of Conduct: <https://www.ndiscommission.gov.au/providers/ndis-code-conduct>

Complaints can play an important role in strengthening the NDIS and driving improvements in the quality of NDIS supports and services. Complaints can highlight weaknesses in service provision, unmet expectations and misunderstandings. A person's right to complain is also important to ensure that possible problems in NDIS service provision are identified and addressed at the earliest opportunity.

These broader benefits of complaints management can only be met if people have confidence that complaints will be handled and resolved fairly, impartially and efficiently. The Complaint Rules require the Commission and NDIS providers to have proper regard to procedural fairness requirements in managing complaints (ss 9, 30). These guidelines support that requirement.

Part 1 – Preliminary

1 Name

This instrument is the *National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018*.

2 Commencement

This instrument commences on the day after it is registered.

3 Authority

This instrument is made under subsection 181D(2) of the *National Disability Insurance Scheme Act 2013* and section 9 of the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018*.

Note 1: Section 181D sets out the functions of the Commission, and relevantly provides that the Commissioner must have due regard to procedural fairness in performing his or her functions (subsection 181D(3B)).

Note 2: Section 9 of the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* provides that the Commission may, by notifiable instrument, make guidelines relating to procedural fairness for the purpose of complaints management and resolution system requirements for registered NDIS providers.

4 Definitions

Note: A number of expressions used in this instrument are defined in section 9 of the Act, including the following:

- (a) Commissioner;
- (b) National Disability Insurance Scheme rules;
- (c) Commission;
- (d) NDIS provider;
- (e) nominee;
- (f) participant;
- (g) registered NDIS provider;
- (h) restrictive practice.

In this instrument:

Act means the *National Disability Insurance Scheme Act 2013*.

Complainant means a person who has made a complaint under the Complaint Rules to a registered NDIS provider or the Commission.

Complaint Rules means the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018*.

Investigation in the context of the Commission's complaints functions means an investigation conducted under Part 3 of the *Regulatory Powers (Standard Provisions) Act 2011* (see section 73ZF of the Act).

Worker means a person employed or otherwise engaged by a registered NDIS provider.

5 Interpretation

A reference in this instrument to a provider includes a reference to a person who is applying to become a registered NDIS provider under section 73C of the Act.

Part 2 – Procedural fairness and NDIS complaint handling

6 Application of this instrument

- (1) This instrument applies to the Commission’s complaints functions under section 181G of the Act in determining whether an NDIS provider or worker has contravened the Act or National Disability Insurance Scheme rules.
- (2) This instrument also applies to complaint handling by a registered NDIS provider under the Complaint Rules. Registered NDIS providers are required to have a complaints management and resolution system that both:
 - (a) supports people with disability to understand how to make a complaint to the provider and to the Commission; and
 - (b) requires that people are afforded procedural fairness when a complaint is dealt with by the provider.
- (3) Effective complaint management and resolution by registered NDIS providers and the Commission is important to a range of people and organisations, including complainants and NDIS providers and workers against whom complaints are made. They all have a direct interest in the complaint process being conducted properly and fairly.
- (4) Procedural fairness compliance by the Commission and NDIS providers is integral to building confidence in NDIS complaint processes.

7 An outline of procedural fairness

- (1) As part of the handling of a complaint under the Complaint Rules, procedural fairness must be afforded to a person if their rights or interests may be adversely or detrimentally affected in a direct and specific way. In those circumstances -
 - (a) the person must be given notice of each prejudicial matter that may be considered against them;
 - (b) the person must be given a reasonable opportunity to be heard on those matters before adverse action is taken, and to put forward information and submissions in support of an outcome that is favourable to their interests;
 - (c) the decision to take adverse action should be soundly based on the facts and issues that were raised during that process, and this should be apparent in the record of the decision, and
 - (d) the decision maker should be unbiased and maintain an unbiased appearance.

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- (2) The precise requirements of procedural fairness can vary from one situation to another. The required steps can vary according to:
 - (a) the nature of the matter being dealt with;
 - (b) the options for resolving it;
 - (c) the time-frame for resolution;
 - (d) whether facts in issue are in dispute;
 - (e) the gravity of possible findings that may be reached; and
 - (f) the sanctions that could be imposed based on those findings.
 - (3) Sometimes a quick, informal and consultative procedure will be sufficient – but on other occasions procedural fairness may require a more formal, structured or arms-length procedure. A more formal procedure may be required if a complaint involves direct criticism of or an allegation against a worker, or consideration is being given to imposing a sanction on an NDIS provider or worker. Even in those situations, procedural fairness does not preclude the adoption initially of an informal and consultative process that can become more formal at the request of a party or if circumstances require. A transparent procedure should be adopted that ensures that any person whose interests may be directly and adversely affected by a complaint process is given the opportunity to have their views heard and considered in a fair and impartial manner.
 - (4) The obligation to provide procedural fairness must be balanced against the need to ensure that neither a complainant (including a person with disability) nor a person with disability affected by an issue raised in a complaint is disadvantaged as a result of the complaint being made and resolved. The steps adopted to ensure procedural fairness in any situation must be tailored to ensure that disadvantage is not suffered by the complainant or person with disability.
 - (5) Procedures developed by a registered NDIS provider as part of its complaints management and resolutions system must take into account the elements of, and approach to, procedural fairness described in this instrument.

Note: A complaints management and resolution system must be appropriate for the registered NDIS provider's size and the classes of supports or services provided – see Part 2, Complaint Rules.

8 Procedural fairness and other legal requirements

- (1) The Act and the Complaint Rules outline procedural steps that must be followed by registered NDIS providers and the Commission in complaint handling. The central purpose of those requirements is to ensure fairness for all involved parties. Compliance with those steps will go a long way towards meeting procedural fairness legal requirements.
- (2) It is important that the specific requirements of the Act and the National Disability Insurance Scheme rules are followed, in addition to procedural fairness requirements.

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- (3) Other laws such as the *Fair Work Act 2009* (Cth) contain protections for workers in relation to adverse employment action. Consideration may need to be given to the requirements of other laws in addition to procedural fairness requirements.

9 NDIS principles and objectives

- (1) The Act outlines the principles and objectives that guide the NDIS scheme generally, and complaint handling in particular. Those principles and objectives are relevant in deciding how procedural fairness requirements apply in particular circumstances, as the following examples illustrate:
 - (a) The objects of the Act include that people with disability have the same rights as other members of Australian society to pursue grievances and to be involved in decision making that affects them. To meet that objective when dealing with a complaint made on behalf of a person with disability, a registered NDIS provider or the Commission should, if necessary, consider taking separate procedural fairness steps in relation to both the person making the complaint and the person with disability.
 - (b) The Complaint Rules require the Commission to seek to resolve complaints as quickly and with as little formality as a proper consideration of the complaint allows (paragraph 16(5)(c)).
 - (c) The Complaint Rules allow that complaints to registered NDIS providers and the Commission may be made anonymously and that a complainant may request that information be kept confidential (subsections 8(1) and 15(3)). This is relevant in deciding the nature of the information to be disclosed to a provider or worker for the purposes of a procedural fairness hearing. The Complaint Rules equally acknowledge that it may not always be possible to fully honour a request for confidentiality if a complaint is to be properly investigated.
 - (d) The NDIS Code of Conduct requires providers (whether registered or not) and workers to act with respect for individuals and to respond to allegations of abuse. It may accordingly be necessary in resolving a complaint to reach a finding that is adverse to an individual worker or that results in a sanction being imposed. A fair process should be followed in reaching that adverse outcome, but procedural fairness does not preclude it.

10 How procedural fairness applies to NDIS complaint handling

- (1) This section contains brief examples and discussion of where the obligation to observe procedural fairness in NDIS complaint handling is likely to arise.
- (2) ***A complaint to a registered NDIS provider about the supports or services being provided to a person with disability:*** A registered NDIS provider must afford procedural fairness to a person making a complaint, as that person has an interest (and possibly an expectation) in how the complaint is managed and the outcome.
- (3) Procedural fairness requires only that the complainant has a reasonable opportunity to present their complaint, that the substance of their complaint is understood and their complaint is not dismissed on a view of the facts that was not raised with or apparent

to them. If the complaint is made by a representative on behalf of a person with disability, consideration should be given to separately providing procedural fairness to the person with disability.

- (4) ***A complaint to a registered NDIS provider that alleges inappropriate behaviour by a person who is identified:*** Procedural fairness must be provided to any worker who is the specific subject of a complaint.
- (5) Not every complaint to a registered NDIS provider will make adverse allegations, directly or implicitly, against an identifiable individual. Many complaints may instead be about the quality or level of supports or services provided by the provider or available to the person with disability. In those circumstances there is no obligation to afford procedural fairness to individual workers, unless a possible outcome of the investigation is that a worker will be identified as being at fault.
- (6) A registered NDIS provider should ensure that its complaints management and resolution system distinguishes between complaints that are specifically about the conduct of identifiable workers and complaints about the provision of supports and services that incidentally identify workers.
- (7) ***A complaint to the Commission about an NDIS provider:*** The Complaint Rules provide that a person may complain to the Commission about the provision of supports or services by an NDIS provider (whether or not the provider is registered) (section 15). The Commission is required to take action on each issue raised in a complaint. The actions that can be taken are set out in the Complaint Rules, and include the following options: taking no action on a complaint issue (for example, if it has already been dealt with); deferring action on a complaint issue (for example, where another inquiry process is underway); noting the withdrawal of the complaint; requiring the provider to attempt to resolve the complaint issue; requesting the parties to participate in a resolution process; requiring the provider to take remedial action; and recording an adverse finding against the provider on the complaint.
- (8) The Complaint Rules specify processes that the Commission may follow in deciding what action to take – for example, consulting with the NDIS provider and the complainant, reviewing documents and visiting the location at which supports or services are provided. In most instances those processes will adequately satisfy procedural fairness requirements.
- (9) In some instances the Commission may need to take additional procedural fairness steps, particularly if its complaint handling process could result in adverse action taken against a provider or adverse employment action being recorded against a worker. An example of an additional step is the disclosure of specific information to the provider as part of a formal invitation to make a submission. The core issue is whether there is a matter on which the provider can reasonably expect to be heard before action is taken by the Commission that could be regarded as adverse to the provider.
- (10) ***A complaint to the Commission that could result in an adverse finding against a worker:*** The Commission is not generally required to undertake a separate procedural fairness process in relation to workers of an NDIS provider in handling complaints about the provider's supports or services. Even if workers are incidentally identified

in the complaint to the Commission, the provider can decide which workers to consult after being notified of the complaint by the Commission.

- (11) The Commission will need to consider undertaking a separate procedural fairness process in relation to a worker against whom an adverse finding may be made by the Commission. This is recognised in paragraph 16(5)(b) of the Complaint Rules which provides that in dealing with a complaint the Commission must consider whether procedural fairness requires ‘allowing a worker reasonable opportunity to comment on any proposed adverse finding in relation to the person’. The procedural fairness process can be confined to the possible adverse finding and need not canvass other issues.
- (12) The NDIS provider would ordinarily be informed that a separate procedural fairness process was being undertaken with a worker, but not told of any provisional adverse finding. This allows the worker to make an effective submission that the provisional adverse finding should not be adopted. The final report by the Commission to the provider may nevertheless discuss the issue or allegation in another way in order to explain how the complaint was resolved.
- (13) ***A decision by the Commission to initiate an inquiry:*** The Commission may initiate an inquiry either independently of any complaint or in relation to issues that arise from complaints against a provider or complaints against more than one provider (section 29 of the Complaint Rules). A Commission decision to conduct an own motion inquiry potentially exposes a provider to reputational disadvantage if the fact of the inquiry becomes publicly known. Accordingly, it is generally prudent to provide advance notice of an inquiry to a provider that may be individually targeted or affected by the inquiry.
- (14) The Commission decides the terms of reference for an inquiry. Procedural fairness does not require that a provider is given a reasonable opportunity to comment on the draft terms of reference – but it can be prudent administrative practice to do so in order to focus the inquiry on relevant and specific matters. This step may be less appropriate if a large number of providers fall within the scope of the inquiry and each is no more specifically affected than other providers.
- (15) During the conduct of the inquiry there will be a need to take procedural fairness steps in relation to any provisional adverse finding against an individual provider, worker or other person. This is particularly important if the Commission may publish a report that sets out the adverse finding (subsection 29(6) of the Complaint Rules).
- (16) ***A referral by the Commission of an issue raised in a complaint to the Minister, the Agency or another person or body:*** A Commission decision to refer a complaint issue to another organisation under section 31 of the Complaint Rules may expose a provider to disadvantage – for example, if the matter referred involves an allegation against the provider, or the referral may lead to a separate inquiry by that other organisation into the actions of the provider.
- (17) It is generally prudent to advise a provider in advance that a referral is being made, to alert it to any possible disadvantage. It is not usually necessary to invite the provider to make a submission before the referral occurs, as the obligation to afford procedural fairness will apply to the other entity if it decides to take action on the referral.

Part 3 – Key elements of procedural fairness

11 Procedural fairness steps – an illustrative summary

- (1) Registered NDIS providers and the Commission must have regard to procedural fairness obligations in a range of different circumstances that are noted above. The nature of the procedural fairness obligation can vary in each situation.
- (2) The following summary illustrates the procedural fairness steps that may need to be taken in one typical situation - when a registered NDIS provider has received a complaint that alleges inappropriate behaviour by a worker.

12 Procedural fairness steps in dealing with a complaint that alleges inappropriate conduct by a worker

- (1) A registered NDIS provider that is intending to investigate or act upon a complaint it has received that expressly or implicitly alleges inappropriate conduct by a worker should have regard to the following procedural fairness steps:
 - (a) Identify whether any information that may be taken into account in resolving the complaint was provided on a confidential basis or may be confidential in nature, and if so –
 - i. consider how confidentiality can be maintained consistently with affording procedural fairness to the worker, and
 - ii. if it may be difficult practically to maintain confidentiality in resolving the complaint, consult with the person who provided the information to inform them of this difficulty and ascertain if they wish the complaint to proceed.
 - (b) Identify if the allegation relates to the behaviour of more than worker, and whether the same (or different) procedural fairness steps should apply to each worker.
 - (c) Consider who is an appropriate person within the registered NDIS provider’s organisation to manage the complaint, and whether more than one person should discharge the role of examining the complaint, consulting with interested parties, ensuring that procedural fairness is provided to the worker, and making a decision on the complaint. More than one person may manage the complaint for organisational reasons or to avoid conflicts of interest or the appearance of bias.
 - (d) Identify the training, policies, procedures and any other relevant systems of work provided to the worker in the context of the supports or services in which the allegation arose.
 - (e) Determine an appropriate process for managing the complaint, having regard to the matters considered in paragraphs (a), (b) and (c), and aspects of this instrument.

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- (f) Inform the worker of the issue to be investigated, and the allegation(s) made against the worker. There is no formal requirement as to how the notice is to be given or the issues are to be framed – though the prudent course is to give notice in writing if the matters or potential sanctions under consideration are serious in nature.
 - (g) Inform the worker how the matter will be investigated, including who is conducting the investigation, how long it is expected to take, and how the investigation will be reported.
 - (h) Adequate details of any allegation should be given to enable the worker to respond in a constructive manner – for example, tell the worker what they are alleged to have done or omitted to do, when the incident occurred, and of any evidence that tends to confirm the allegation. Draw the worker’s attention to any issue that may be critical to the outcome but which may not be apparent to them. It is not generally necessary to identify who made the allegation, though this may be unavoidable in providing other details.
 - (i) It is not generally necessary to give the worker access to records relating to the complaint – providing them with a summary of the information that may be relied on in reaching a decision is usually sufficient. Depending on the nature of an allegation it may be necessary to allow a person to inspect a document or to listen to or view an audio-visual recording that may be taken into account.
 - (j) The decision maker or person conducting the inquiry or investigation is not required to notify their provisional views or tentative findings. However, it can enhance the fairness of a process to alert a person to a perceived deficiency or inconsistency in their submission.
- (2) Inform the worker of any potential sanction that may be imposed.
- (a) A sanction may be formal in nature (such as dismissal or an investigation into an alleged contravention of the Code of Conduct) or be an adverse consequence of a different kind (for example, work restrictions, or publication of an investigation report that reflects adversely on the worker’s performance).
 - (b) The notice to the worker should identify considerations that may be relevant to deciding on a sanction to be imposed. This is particularly important if a harsh sanction such as dismissal or reduction in salary is a possibility.
 - (c) It may be desirable to conduct a separate hearing or procedure to decide on a sanction, to ensure fairness to the worker and to remove any appearance of bias.
- (3) Give the worker a reasonable opportunity to respond to the issue to be investigated, the allegation(s) against the worker and possible sanctions.
- (a) What will be a ‘reasonable opportunity’ will depend on the circumstances. Many issues can be dealt with quickly – by discussion or allowing the worker a few days to prepare a response. Other issues may require a longer period for the worker to consult others, obtain information or prepare a more extended response. The central requirement is that the worker should have a reasonable opportunity
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to comment upon or rebut adverse or prejudicial material and to put forward information and submissions in support of a favourable outcome.

- (b) It is good practice to allow the worker to choose how they will respond – for example, a face-to-face interview or meeting to discuss the issue, a written submission, or a meeting at which the worker is accompanied by a support person that could be a colleague, a family member, or a representative (see paragraph (c) below).
 - (c) A worker may choose to consult a lawyer or union official in preparing a statement, and obtain advice about what they intend to say in making a verbal submission. The person may have the union official or lawyer attend a meeting as their support person or representative respectively.
 - (d) It may be necessary to allow a person to make more than one statement or submission before a final decision is made. For example, it may transpire at a meeting that some disputed matters cannot fairly be resolved without a further statement or evidence. Equally, if a harsh sanction is to be imposed it may be desirable to split the hearing into two stages – an initial finding on the complaint allegation, followed by a decision on the sanction to be imposed.
 - (e) Special measures may be required to ensure that a person has a reasonable opportunity to respond – such as use of an interpreter, conducting an interview/hearing at a separate location, or agreeing to a worker’s request (supported by reasons) for an extension of time or adjournment.
- (4) Inform the worker in writing of the decision that has been made following the investigation.
- (a) A written record of the decision is important to ensure clarity and certainty, and to enable the worker to decide whether to follow up.
 - (b) The written form can vary according to the circumstances. For example, a formal letter of advice should be used to notify an adverse decision that could be distressing to a worker or impair their career. In other circumstances – including if a decision is favourable to a worker – it may be sufficient to notify the decision by email, or to invite the worker to sign/initial a written record of the decision.
 - (c) If a sanction is imposed on a worker (including an adverse finding recorded on their personnel record) the nature of the sanction should be clearly stated. If the worker has a right to challenge or review the sanction, the procedure for doing so should be outlined.
- (5) Ensure that the investigation of the complaint or allegation is conducted in a fair and unbiased manner.
- (a) A transparent process should be followed that gives a worker a reasonable opportunity to present their views on all relevant issues.

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- (b) The person conducting the investigation should do so with an open mind and avoid forming a view on whether to sustain a complaint allegation against a worker before the investigation is complete.
 - (c) Consider whether any decision to impose a sanction should be made separately by someone other than the person who conducted the investigation, to avoid any appearance of prejudice or prejudgement at this stage.

13 Procedural fairness – practical considerations

- (1) ***Fair process***: Procedural fairness requirements aim to ensure that a fair process is followed in decision making that could adversely or detrimentally affect the rights or interests of a person. The underlying assumption is that a fair process will lead to better decision-making – and, in this context, better and fairer complaint handling. However, procedural fairness requirements stop short of assessing whether a particular decision or outcome is fair: they address the process to be followed in reaching a decision, but not the substantive merits of that decision.
- (2) ***Fair process overall***: The obligation to afford procedural fairness applies to the overall process of making a decision or resolving a complaint, and not separately to each stage in that process. A person should be given a reasonable and informed opportunity to comment on any adverse finding or sanction before it is finally determined. The precise point in the process at which that opportunity is given can be of secondary importance.
- (3) An illustration of that principle is that there is generally no procedural fairness obligation to notify a person of an adverse allegation or potential finding when a complaint is first recorded or referred to another body. A reasonable opportunity to comment on the allegation or potential finding can be given at a later stage. This enables appropriate analysis of a complaint to determine if it should be managed as a complaint about the level or quality of services or supports that a person with disability is receiving, rather than an allegation of inappropriate conduct by a worker.
- (4) A person who is facing a potential adverse finding or sanction should be reassured as necessary that the overall process will be fair. Equally, a deficiency at an early stage of the process can be corrected at a later stage, provided this is done by a good faith process in which the decision maker approaches the issue with an open mind and gives genuine consideration to any submission made by the person to whom procedural fairness is owed.
- (5) ***The dual purpose of procedural fairness***: Procedural fairness is a legal obligation that applies to decisions made under statute that adversely affect the interests of others in a direct and specific manner. A failure to comply with this legal obligation may lead to an adverse decision being set aside by a court or questioned by a review tribunal or body.
- (6) As importantly, procedural fairness aims to strengthen the fairness and integrity of administrative processes, regardless of whether legal proceedings for a breach are a possibility. Decision-makers should, accordingly, ensure procedural fairness in the pursuit of good administration as an overriding objective.

14 Dealing with confidential information

- (1) Information to be considered in a complaint management and resolution process may have been received on a confidential basis. For example, a complainant, informant, witness or whistleblower may request that their identity remain confidential, or private personal information about a third party may be revealed during an investigation.
- (2) The Complaint Rules (paragraph 8(5)(b)) require that a registered NDIS provider's complaints management and resolution system ensures that information provided in a complaint is kept confidential, and only disclosed if the disclosure is:
 - (a) required by law; or
 - (b) is otherwise appropriate in the circumstances.
- (3) Procedural fairness principles recognise that protection of identity and confidentiality can be important elements of effective complaint handling and dispute resolution. This must nevertheless be balanced against the obligation to provide procedural fairness to a person whose interests may be adversely affected by an administrative action, particularly if a sanction may be imposed on a person as part of the resolution of a complaint or allegation.
- (4) This means that the obligation to provide procedural fairness may override – in whole or in part - the obligation to maintain confidentiality, depending on the circumstances.
- (5) Confidentiality can more easily be safeguarded if a complaint is classified as one about the quality or level of supports provided to a person with disability, rather than a complaint that alleges inappropriate conduct by a worker. Accordingly, a registered NDIS provider should consider at the outset whether any worker who is identified in a complaint is identified only in a manner incidental to describing a complaint issue about the quality or level of supports.
- (6) Where a complaint involves allegations about the conduct of a worker, it may be practicable to provide the worker with the allegation and the details given in support of it, without disclosing the identity of the source of any prejudicial information. This may not be possible if, for example, the identity of the source of information will be readily apparent from the nature of the allegation. Sometimes, too, fairness may require that a source of information is revealed, so that the worker can better understand how to comment upon or rebut that information. Generally, disclosure is required to a level necessary to avoid any practical injustice to a person to whom procedural fairness is owed.
- (7) The decision maker or person conducting the inquiry or investigation should look for ways of balancing fairness and confidentiality and effectively safeguarding the interests of all parties. It may be desirable to conduct a separate preliminary discussion with each of the interested parties, so they may offer suggestions or make undertakings that ensure an appropriate balance can be struck.

15 Maintaining an impartial and unbiased appearance

- (1) A decision maker should be impartial and free of actual or apprehended bias. The test for apprehended bias is whether a fair-minded observer might reasonably suspect that the decision maker is not impartial.
- (2) Apprehended bias can be inferred from a person's conduct, comments, associations or other relevant circumstances. Examples of apprehended bias can include situations in which a decision maker (or person conducting an inquiry) -
 - (a) has a conflict of interest or personal stake in the matter to be resolved, or a relationship with one of the parties that casts doubt on the appearance of fairness
 - (b) displayed hostility or favouritism to one of the parties involved in a matter
 - (c) made comments that suggest the decision maker has prejudged a disputed issue and will not approach the evidence with an open mind
 - (d) was involved at an earlier stage of the process, for example, in making the allegation to be investigated or providing a statement in support of one of the parties.
- (3) Actual or apprehended bias of a decision maker can undermine both the integrity and legal validity of the decision making process and outcome. The responsibility rests on the decision maker to ensure there is no actual or apprehended bias, and if necessary to withdraw from the process and assign the decision making responsibility to another person. If that is not practical (for example, it is a small organisation) another option is to outsource the inquiry/assessment role to an external professional to prepare a report for the decision maker. A registered NDIS provider has flexibility in deciding how to deal with bias and conflict of interest concerns.
- (4) It is good practice to clarify bias and conflict of interest concerns before the process commences. It is open to the parties, once informed of a potential issue, to waive any objection and to allow the decision maker to continue. On the other hand, a decision maker should not withdraw merely because one of the parties raises a bias objection: the test of the 'fair-minded observer' should be followed. It is common that decision makers will know or work with one or other of the parties, have some familiarity with the issues to be decided, or have expressed a preliminary view on or more of those issues.
- (5) If a bias issue arises during the course of an inquiry after evidence and submissions have already been collected, these can generally be made available to the new inquirer/decision maker, subject to ensuring procedural fairness. It is good practice to consult the parties about this option before doing so.