appeal procedure: Dispute resolution for reviewable decisions

## Title

Appeal procedure: dispute resolution for reviewable decisions.

## Purpose

This procedure outlines the appeal process for reviewable decisions under the South Australian Restrictive Practices Authorisation scheme.

## Introduction

Accessible and fair appeal processes demonstrate the integrity and rigour of the South Australian Restrictive Practices Authorisation scheme. The ability to disagree with a decision and obtain a review of that decision by an independent person protects and facilitates people’s rights.

The Restrictive Practices Unit (RPU) will ensure people have:

* clear and accessible information
* accessible and safe ways to communicate their concerns, wishes and preferences
* support to seek an appeal against a reviewable decision and participate in the process
* an outcome.

Part 6A of the *Disability Inclusion Act* 2018 s. 23Y and s. 23Z (the Act) and the *Disability Inclusion (Restrictive Practices – NDIS) Regulations* 2021 s. 14 (the Regulations) establishes the appeal process for the South Australian Restrictive Practices Authorisation scheme. The Act and Regulations specifies which decisions can be the subject of an appeal, and who can review them.

## Scope

This procedure is written for RPU staff when responding to appeals of reviewable decisions. It helps people with disability, their family and National Disability Insurance Scheme (NDIS) service providers to know what to expect when an appeal is made.

According to the Act, reviewable decisions are:

* s. 23L - decision by the Senior Authorising Officer (SAO) about the authorisation of a nominated person to be an Authorised Program Officer (APO), including any conditions or limitations on that authorisation.
* s. 23N - decision of an APO about the authorisation of Level 1 restrictive practice.
* s. 23O - decision of the SAO about the authorisation of a Level 1 or Level 2 restrictive practice.
* s. 23P - decision of the SAO about the revocation of authorisation to use restrictive practice.
* s. 23Y - decision of the SAO in the review of a decision made by the APO or NDIS service provider.

Complaints about the RPU follow the RPU complaints resolution procedure.

## Appeal reviewers

#### Decisions made by the APO

Appeals of reviewable decisions made by the APO are undertaken by the SAO. To ensure objectivity in decision making and maintain public trust, the SAO must recuse themself from the review where there is a perceived or actual conflict of interest. The SAO must be perceived as being impartial, having no personal stake or interest in the matter to be decided.

#### Decisions made by the SAO

Appeals of reviewable decisions made by the SAO are undertaken by the South Australian Civil and Administrative Tribunal (SACAT).

An aggrieved person may ask the SAO to reconsider their original decision. This is an administrative process that is not established in legislation but provides an additional opportunity for the aggrieved person’s views to be heard and considered. It may also help an aggrieved person to decide whether they want to seek an appeal to SACAT.

## Use of a restrictive practice during appeal period

During the appeal process, authorised restrictive practices may be implemented if the practice is required to maintain the safety of the person with disability and others around them, and there is no other way to minimise the risk of harm, or prevent further harm being caused, that is reasonably available in the circumstances.

The decision to use or not use the authorised restrictive practice during the appeal process is made by the NDIS implementing provider. This decision is to be communicated to the person with disability and their supports by the NDIS implementing provider.

Process

# 1. Reviewable decisions made by the authorised program officer

The appeal process for Level 1 restrictive practice authorisation decisions made by the Authorised Program Officer (APO) is led by the Senior Authorising Officer (SAO).

The appeal may relate to a:

* procedural error: the correct process was not followed
* factual error: the correct information was not considered
* belief that the decision is unfair or unreasonable in the circumstances.

## 1.1. Application

Any person who is aggrieved by a Level 1 restrictive practice authorisation decision is entitled to appeal against the decision, including:

* the person who is the subject of the decision
* a family member of the person with disability
* a person with disability who is impacted by an authorisation decision made about another person.

The request to appeal against a reviewable decision is made verbally or in writing by the aggrieved person or their nominated advocate to the Restrictive Practices Unit (RPU).

The request must be made within 30 days from the original authorisation decision. The SAO may extend this time limit for appropriate reasons. For example, the aggrieved person needing additional time and support to understand the original decision and/or submit the appeal.

In providing additional time to support the communication and additional requirements of the aggrieved person, the SAO may:

* arrange a home visit or attend an alternative venue as nominated by the aggrieved person
* arrange a communication partner, interpreter or cultural support
* hold several meetings over time to obtain the details of the appeal.

### Receipt of application

RPU staff will gather basic details about the appeal and complete the appeal log.

The SAO accepts the application if it meets the criteria for an appeal as set out in section 23Y of the *Disability Inclusion Act* 2018 (the Act).

The aggrieved person and their advocate are advised verbally and in writing of the acceptance outcome.

When accepted the SAO confirms the:

* specific decision which is being appealed against
* appeal process and timelines
* outcomes sought.

When declined the SAO will:

* provide a rationale for declining the appeal application
* provide information on avenues for alternative dispute resolution.

## 1.2 Notice to original decision maker and those affected

The SAO will advise the original decision maker (APO), and those affected by the decision under review:

* of an appeal being undertaken
* specific decision which is being appealed
* invitation to participate in the appeal process.

Those affected by the decision under review include:

* person subject to the restrictive practice
* National Disability Insurance Scheme (NDIS) implementing provider
* legal guardian or person holding other legal status under an Act.

The original decision maker and those affected are advised verbally and in writing.

### Preparation for participation

The SAO may facilitate understanding of the appeal process and help prepare people to participate to the degree they feel comfortable and able by:

* providing easy read information
* providing information sheets.

The SAO will promote and facilitate an environment:

* that supports and enhances positive and respectful relationships
* in which people feel comfortable to participate and engage in discussions and shared problem solving.

This approach increases the likelihood of the outcome being accepted and supports stakeholders’ ongoing relationship with each other.

## 1.3 Review of decision

For fair and accountable decision-making, the SAO must ensure:

* the aggrieved person and those affected are provided a reasonable opportunity to hear and understand the issues being appealed
* the aggrieved person and those affected are provided a reasonable opportunity to communicate their views and contribute to the appeal
* the original decision maker (APO) has the opportunity to submit documentation which informed their decision and provide a verbal submission
* there is no perceived or actual conflict of interest for the SAO. The SAO must bring an impartial mind to the appeal process, making decisions based on the merits of the case before them.

### Review activities

In undertaking review activities, the SAO will ensure a process of inquiry, where questions are asked to understand the different perspectives and experiences, providing rigour in decision making. The process is not legalistic or adversarial.

Review activities are to occur quickly, while ensuring people have opportunities to participate and provide information to ensure sound outcomes are reached.

The SAO will:

* gather, request and consider relevant documentation
* obtain views of parties:
* the aggrieved person
* the person with disability
* the original decision maker
* the NDIS implementing provider
* those holding a legal obligation to the person subject to the restrictive practice
* individuals with other relevant expertise (for example, cultural advisor, behaviour support practitioner, medical practitioner)
* analyse information for its completeness, reliability, relevance and impartiality
* form a provisional conclusion.

The SAO will seek any information they deem necessary to make a sound and fair decision. This includes seeking information and considering information that may not have been available at the time of the original decision. Sections 23Q and 23R of the Act provides the SAO powers to obtain information. Section 23W of the Act allows for information to be provided to the SAO which is relevant to the functions of the SAO under the Act.

### Consultation

The SAO must consult with the person with disability to determine their needs, wishes and preferences to the maximum extent possible. The SAO will consider their specific needs (culture, language, communication, age, disability, religion, gender, sexuality or other matters).

Consultation occurs on a continuum; directly wherever possible and indirectly where the person may have needs that affect their ability to directly provide their views. Indirect consultation includes reasonable attempts by the SAO to obtain information about the person’s experience and knowledge of the issue under appeal. This information may be sought from people providing supports and services, and/or have knowledge and experiences of the person.

### Keeping people informed

RPU staff will keep the APO and aggrieved person updated on the progress of the appeal.

## 1.4 Form a provisional outcome

The SAO can:

* confirm the original decision
* vary the original decision
* reverse the original decision.

The provisional outcome and rationale will be discussed with the:

* aggrieved person
* original decision maker
* affected people.

The aggrieved person, original decision maker and affected others are provided with an opportunity to discuss the outcome and rationale. They may also provide additional information and clarify existing information which is incorporated into the final assessment.

The provisional and final outcome must be based on relevant information gathered during the review process which supports the conclusion reached.

## 1.5 Finalise or escalate

The aggrieved person, original decision maker (APO) and affected others are informed verbally and in writing of the outcome, which includes:

* process undertaken
* information considered
* final outcome
* rationale for the outcome
* information on further appeal and complaint pathways.

The SAO will complete a written report.

### Administration tasks

Documents about the review process and outcome are saved on Objective.

# 2. Reviewable decisions made by the senior authorising officer

Decisions made by the Senior Authorising Officer (SAO) may be reviewed via two pathways:

* appeal made to the South Australian Civil and Administration Tribunal (SACAT)
* administrative review conducted by the SAO.

An administrative review is an internal dispute resolution process where the SAO reconsiders their original reviewable decision. An administrative review is not established in the Act or Regulations. An aggrieved person may choose an administrative review instead of an appeal to SACAT or before appealing to SACAT.

Reviewable decisions made by the SAO include the:

* authorisation of a nominated person to be an Authorised Program Officer (APO), including any conditions or limitations on that authorisation
* authorisation of a Level 1 and Level 2 restrictive practice
* revocation of authorisation to use a restrictive practice
* decision of the SAO in the review of a decision made by the APO or National Disability Insurance Scheme (NDIS) implementing provider.

Persons who may appeal against a reviewable decision made by the SAO include:

* the person who the decision relates to
* family members
* legal guardian
* a NDIS provider who delivers, or is to deliver, NDIS supports to the person who the decision relates
* nominated advocate of the person who the decision relates.

A nominated advocate is a person who has been nominated by the participant to act as an applicant on behalf of the participant and assist the participant in relation to the review.

## 2.1 SACAT review pathway

Requests for reviews are made directly to SACAT. The request must be made within 30 days from the original authorisation decision. SACAT may extend this time for appropriate reasons, as determined by SACAT.

The SAO will brief the Chief Executive of the Department of Human Services when a matter has or is likely to progress to SACAT.

## 2.2 Administrative review pathway

An administrative review provides an avenue where reviewable decisions made by the SAO can be re-considered outside of a tribunal setting. An administrative review is limited, because the process doesn’t involve an independent review by an external person.

An administrative review should occur within a timeframe that does not preclude the aggrieved person from making an application to SACAT. The SAO will discuss this with the person who has made the application for an administrative review.

### Process

An administrative review follows the process undertaken for appeals against Level 1 authorisation decisions made by APOs.

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