

DECISION MAKING

This Fact Sheet is about your rights as a person using the NDIS or as a person who wants to use the NDIS. If you want more information about how the NDIS works, including on issues covered in this Fact Sheet, go to Advokit <http://www.advokit.org.au> 

AAT:

The Administrative Appeals Tribunal. This is a panel of people who can decide whether or not the NDIA should change a decision you are unhappy with.

The Agency:

Another name for the National Disability Insurance Agency. They deliver and administer the NDIS.

Complaints mechanism:

A technical term to describe the steps you can go through when you are not happy with some aspect of the service and support you are getting from the NDIA.

Hearing:

A formal meeting where the Administrative Appeals Tribunal listens to why you want the NDIA to change some of their decisions about your participant plan. The Administrative Appeals Tribunal will then decide whether or not the decision should be changed.

NDIA:

The National Disability Insurance Agency. They deliver and administer the NDIS.

NDIS:

The National Disability Insurance Scheme. This is the name of the overall program set up to organise your support and services.

NDIS Act:

The National Disability Insurance Scheme Act. Sometimes it is just called 'the Act', or 'the legislation'. It is the legislation that outlines how the National Disability Insurance Scheme will work.

Necessary and reasonable supports:

This is the term used in the NDIS Act to describe the extent of support you are entitled to receive. It means that the support you get must not exceed what you require, and it must be support that is reasonable. There can sometimes be a lot of debate about what this will mean for a particular person.

Participant:

This is the word used to refer to a participant who is getting support through the NDIS.

Participant plan:

This sets out the sort of supports a person with a disability will get through the NDIS.

Rules:

The NDIS Rules provide details about how the NDIS is to operate. The NDIS Act outlines what sorts of issues the Rules should address. The Rules are then used alongside the NDIS Act.

Scheme:

A short way of saying 'the National Disability Insurance Scheme'.

Many decisions need to be made in relation to your support from the NDIS. These include decisions about what supports you will receive, how those supports will be managed and then day-to-day decisions about how those supports are delivered. This Information Sheet is about your rights to have control over those decisions.

The importance of advocacy:

The information on this sheet is only basic information. Working out how to apply it to your circumstances can be complex, because everyone's situation is different.

It is important to obtain further information and advice from an advocate if you find yourself in a position of needing to make a complaint or pursue your rights on anything covered by this Fact Sheet.

1. What the NDIS Act says about decision making:

The NDIS recognises your right to make decisions about the supports you receive. It also recognises your right to be supported when you make those decisions. It also sets up a system of 'nominees' if you want someone to access information on your behalf, or to make decisions on your behalf about the support you get.

The NDIS is based on a basic principle that you should have as much choice and control as possible over the supports you receive. This is part of the core principles of the [Act](#) . It is therefore also an important principle that should underpin the process for organising your participant plan.

These principles also acknowledge that you might need support to help you make choices, and to exercise control throughout your engagement with the NDIS.

The Act also has provisions for appointing *nominees*. These are people who can either enter into correspondence about the NDIS on your behalf (a correspondence nominee), or can make decisions about your supports on your behalf (a plan nominee). Nominees are appointed by the Agency, either if you ask them to or if the Agency itself thinks a nominee is needed.

You can read more about nominees, how they are appointed and what their role is, in the Advokit page on [Decision Making](#) .

If you have a guardian appointed to make decisions about your support, or a financial administrator appointed to make decisions about the management of your money, these people may also have a role to play in making decisions about the support you get from the NDIS.

2. Decision making and your rights:

Here are some important rights issues to keep in mind about decision making, and the laws that are relevant to it:

a. The NDIS Act

You are entitled to be supported with decisions you make under the NDIS. Information should be given to you in a way that you understand and have time to digest. If you need support to make decisions, you can receive this in different ways, such as from a friend, an advocate, a support person or a nominee.

The NDIS Act's focus on your rights to decision making and control, and your right to support to enable you to exercise that control, has some important implications for your rights, and other people's responsibilities, in relation to your decision making:

- The Agency should do whatever it reasonably can to make it possible for you to make your own decisions about your support and about how your support should be managed. It should not appoint a nominee if there are less restrictive ways of supporting you to make decisions.
- You are entitled to have people assist you in making decisions, such as a friend, an advocate or support person.
- If a nominee is appointed, whether this is a correspondence nominee or a plan nominee, their main purpose should be to support you to exercise choice and control, rather than to take over. Even if your disability means that you are unable to make decisions yourself, you will still have preferences and wishes, and it is the nominee's job to find out what these are, and to be guided by them.

b. Pursuing your rights under the NDIS Act

If you are being supported by a nominee but are not happy with them, you can ask to have another one appointed.

If you have appointed the nominee yourself, and are not happy with what they are doing, you can ask the agency to cancel the appointment. If you ask the Agency to cancel the appointment under these circumstances, the Agency must cancel it as soon as is practical.

If the Agency has appointed the nominee, and you are not happy with what they are doing, you can ask the agency to cancel the appointment. If you ask the Agency to cancel the appointment under these circumstances, the Agency may cancel it. The Agency has to make this decision within 14 days of you asking them, and if they decide not to cancel the appointment, they must explain their reason to you.

If you are not happy with this decision, you can ask for it to be reviewed by the Agency.

i. The NDIA

When making a complaint about how much control you have over decisions, usually you will start by asking the Agency either to do something differently, or to change a decision it has made. If this doesn't work, you may need to go to the AAT. You don't have to argue legal issues when you make a complaint. You just have to show why you think the decision is incorrect. But having an advocate or lawyer help you, especially if you are arguing your case to the AAT, can help keep you on track and give you a better chance of having your side of the story heard properly.

The National Disability Insurance Agency has its own internal complaints handling processes.

If your complaint is about how the staff at the Agency has treated you, or about delays in getting things done, or anything else to do with the way the Agency operates, there is a complaints-handling process within the Agency for dealing with this. The staff are required to explain this process to you, if you want to make this sort of complaint. If you are not happy talking about this with the staff member you have been dealing with, then you can talk to another staff member about it. It can be very helpful to have an advocate to support you in this.

If your complaint is about a decision that has been made, such as whether or not you are eligible for support, or what sort of support you can get, then there is a different process. This involves:

- First, asking the Agency to review the decision;
- Second, asking the Administrative Appeals Tribunal to review the decision.

You should ask the Agency to review the decision before going to the AAT.

Here's a little bit more about what the process of making complaints involves, and what your rights are:

In making a complaint under the NDIS Act, you are entitled to expect the matter to be handled fairly and as quickly as possible.

You are also entitled to have an advocate support you. This can be whatever advocate you choose. It does not have to be an advocate suggested by the Agency.

In arguing for a decision to be reviewed under the NDIS Act, you don't have to prove any particular legal issue; you just have to explain why you don't like the decision that was originally made.

But your chances of getting the decision changed, and getting the decision you want, are likely to be better if you can couch your argument in terms of one of the laws that the Agency is expected to be upholding.

This can mean arguing things such as:

- There is a better way to help you meet your personal goals and aspirations than the first decision;
- There are better ways of helping you become included in the community than the first decision;
- The first decision doesn't really represent good value for money;
- The first decision doesn't respect your choices adequately, or didn't give you enough of a chance to have your say;
- The first decision in some way discriminates against you because of your disability;
- The first decision doesn't respect one or more of your rights under the UN Convention.

ii. The AAT

Complaining about a decision the Agency has made usually begins with asking the Agency to review the decision. If you are still unhappy with their decision, you can take the matter to the AAT.

If you want the AAT to review a decision the Agency has made, you normally have to ask for this within 28 days of the Agency making the first decision. The AAT can sometimes extend this time if they think it is reasonable to do so, but you have to apply for this and explain why it is reasonable to give you more time beyond the 28 days.

Once you have applied to the AAT for the Agency's decision to be reviewed, usually a Case Conference will be held. This involves you and someone from the Agency meeting with a staff member from the AAT to work out the best way to handle your case. Sometimes you can come to an agreement at this stage.

If you don't come to an agreement at the Case Conference, the staff member from the AAT will work out with you whether to try to resolve things at a Conciliation meeting. This is another way of trying to come to an agreement. Again, it involves sitting down and trying to talk through what you think, and what the Agency thinks, and trying to come to an agreement. A staff member from the AAT will help run the meeting.

If this doesn't work, then your case would need to go to a Hearing. This is much more formal, although not quite as formal as a court would be. Some people have a lawyer represent them at the Hearing. You can do this if you wish. The Agency might also be represented by a lawyer at the Hearing. Whether you go to the Hearing with a lawyer or without, you should at least get some legal advice beforehand, or help from an advocate, to help prepare yourself. You may need to bring a lot of paperwork and other evidence to support your argument.

Most Hearings are open to the public, but you can ask for the Hearing to be closed to the public if you wish,

There is no cost in applying to the AAT.

You can find out more about the AAT process on their [website](#) .

3. The UN Convention on the Rights of Persons with Disabilities

The UN Convention gives you a broad range of rights. Some of these will be especially relevant to your decision making rights under the NDIS. The NDIS should be run in a way that respects your rights under the Convention. An advocate can help you to refer to the right parts of the Convention, in support of your complaint.

Article 12 of the UN Convention on the Rights of Persons with Disabilities stresses your right to enjoy legal capacity equally with other people. This means you have the right to control your life, and the decisions made about your life, including your support under the NDIS, to the same degree as anyone else does.

Article 12 of the Convention goes on to say that if you need support in order to exercise that right, then that support should be tailored to your individual needs, and should not be any more restrictive than it needs to be.

These values are reflected in the NDIS Act's principles about choice and control.

This means that nominees, guardians and administrators only have a role in making decisions about your NDIS support to the extent that is needed for you personally. They should not have more decision-making power than is absolutely necessary, and they should exercise that power in a way that is primarily about supporting you to make your own choices and to give effect to your own preferences. They are there to enable you to make decisions, not to take over.

If you feel that a nominee, guardian or administrator is overstepping their role then you have a right to complain about this and to either ask for the appointment to be revoked, or for the powers of the person appointed to be changed, or for someone else to be appointed.

If this is about a nominee, you need to make the complaint to the Agency.

If it is about a guardian or an administrator, you will need to take the matter to whichever Tribunal or Court deals with guardianship and administration appointments in your state or territory.

a. How the United Nations Convention on the Rights of Persons with Disabilities is relevant to your rights

Australia is a signatory to the UN Convention, which recognises a large number of important rights for people with disabilities. Some of these will be very relevant in arguing how the NDIS Act should be understood and applied. If you want to pursue a matter under the United Nations Convention, remember that it is mainly relevant to how the law should be interpreted and implemented. It is therefore always important to relate the right from the Convention back to the actual interpretation of the NDIS Act, or to the way the Agency is administering it, whichever of these is most relevant to your particular issue.

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