

# DISCRIMINATION

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'.

Discrimination is when you are treated less favourably because of your disability. This Information Sheet talks about your rights in relation to discrimination and the NDIS.

### 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.

There are laws in every State, as well as Federal laws, against disability discrimination. These laws will generally apply to the NDIS and to the services you receive through the NDIS. Sometimes it can be difficult to know which law is the best law to use if you want to make a complaint about disability discrimination. It is important to get advice from an advocate. Every State and Territory has a disability discrimination legal service that can help you with this See [Australian Capital Territory](#) , [New South Wales](#) , [Northern Territory](#) , [Queensland](#) , [South Australia](#) , Tasmania, [Victoria](#) , [Western Australia](#) .

## 1. Disability discrimination and your rights under the NDIS:

There are several ways in which a person with a disability might experience discrimination in their access to the NDIS. This could include the way the Agency treats you, how far they go to make information accessible to you, or the decisions they make about what support you can get.

The NDIS Act does not specifically mention discrimination. But there are a number of ways in which your right to be protected against disability discrimination are relevant to the NDIS. These include:

- Because the NDIS Act is a Commonwealth law, it must comply with the Disability Discrimination Act 1992 (Cth) (the DDA), and must be interpreted in ways that are consistent with the DDA;
- Because the National Disability Insurance Agency is a government agency, it should operate in a way that does not discriminate against you because of your disability;
- Because the NDIS is a scheme of the Australian Government, it should be consistent with the UN Convention on the Rights of Persons with Disabilities and should respect and protect your right to be protected from discrimination as proclaimed in Article 5 of the Convention;
- The National Disability Insurance Agency should not refer you to any service provider that discriminates against you because of your disability.

## 1: Disability discrimination and your rights under the NDIS: - continued

Here are some examples of ways in which you might experience disability discrimination in the context of the NDIS:

- You have a disability that the Agency does not want to recognise as being covered by the NDIS. If it is a disability that is covered by the DDA, then you may be able to argue that this is discrimination under the DDA;
- The process that you are required to go through in order to get the support you need through the NDIS may disadvantage you because of your disability (such as being required to read documents that are not available in alternative formats, which may be difficult for you because of a vision impairment; or being required to attend meetings which may be difficult for you because you do not have access to accessible transport). If the requirements or conditions are unreasonable in the circumstances then you may be able to argue that this is indirect discrimination under the DDA;
- The Agency might refer you to a service or organisation that unlawfully discriminates against you, such as by not making the adjustments that you need to have made because of your disability.

## 2. Other types of discrimination

Other types of discrimination are also unlawful. These include discrimination based on your gender, ethnicity, age, sexuality, beliefs, appearance, as well as many other things. If you feel you are being treated unfairly because of some aspect of who you are, you should get legal advice to see if you can make a discrimination complaint.

There are types of discrimination, other than disability discrimination, that are also unlawful. These include discrimination on the basis of your sex, your ethnicity or your age. States and Territories also have their own anti-discrimination laws that sometimes cover more areas of discrimination, such as sexuality, personal appearance, political and religious beliefs, and so on. If you feel you are being treated unfairly because of any aspect of who you are as a person, then chances are that some area of anti-discrimination law may cover it. You should seek advice from an advocate or lawyer, or a Community Legal Centre, if you think this might be happening.

### 3. Pursuing your rights about discrimination:

Getting advice about whether or not you should pursue a matter under anti-discrimination law is important. Taking action under one law can sometimes mean that you can't then take action about the same thing under another law. An advocate or lawyer can help you work out the best course of action to take.

If you feel you are experiencing disability discrimination or any other form of unlawful discrimination in your contact with the NDIS – whether through the Agency or through another service provider – you should seek advice about the best way to deal with the matter. This will include advice about:

- Whether it's best to pursue it as a discrimination matter or in some other way;
- If it is a discrimination matter, who you should be making the complaint against – such as the Agency, a service provider, or both;
- If it is a discrimination matter, whether it's best to pursue it under Commonwealth anti-discrimination legislation, or under legislation in your own State or Territory.

Generally, it will be best to first see if you can resolve the matter internally – either by asking for the National Disability Insurance Agency to review a decision it has made, or to change its processes to stop the discrimination, or by addressing the matter with the service provider.

When making a complaint, usually you will start by asking the Agency 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. 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.

#### i. The NDIA

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 is 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](#) .

If you think going to the NDIA or the AAT does not seem to be the best way to deal with a discrimination matter, you may want to take it to the Human Rights Commission instead. The Human Rights Commission deals with matters under the Disability Discrimination Act.

#### **a. The Human Rights Commission**

If pursuing your complaint through the NDIA or the AAT doesn't seem to be the appropriate course for you to take, then you might want to pursue it as a discrimination complaint under the DDA.

This involves lodging a complaint with the Australian Human Rights Commission, who will investigate the complaint and, if it seems to be a valid complaint, they will try to resolve it through conciliation. If it cannot be resolved through conciliation, then you can take your complaint to the Federal Court of Australia or the Federal Magistrates' Court, which has the power to make a decision about your complaint. This can be an expensive and complicated process and it is vital that you get legal advice before taking this step, and legal help to assist you through the process. Be aware that you have 60 days from the date the Australian Human Rights Commission finalises the complaint to apply to the Federal Court of Australia or the Federal Magistrates' Court.

#### **4. 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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