

WHEN THE SUPPORTS YOU NEED ARE NOT AVAILABLE

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'.

Sometimes, the supports you need to enable you to reach your goals and aspirations, and to fully participate in community life in the way you want, will not be available. This Information Sheet is about your rights in relation to services and supports that are not available.

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 services and supports that are not yet available:

The NDIS Act does not give the Scheme a clear role in making sure that services are available as people need them. But the Act does set up some broad roles for the Agency, and for the Ministerial Council that are relevant to this.

The NDIS Act does not refer specifically to the Scheme's role in relation to services that people with disabilities might need but that are not yet available, such as if you have need for a particular type of service that is not available in your area, or if you need something very specialised that no one provides yet.

There are, however, some provisions of the Act that seem to allow it to play a role in this area:

- Section 12 of the Act sets up a Ministerial Council, whose functions include considering, and advising the Minister on policy matters that relate to the NDIS. Gaps in available services and supports would be one such policy matter.
- Section 13 of the Act defines the general support role of the Agency in very broad terms, including engaging in coordination, strategic or referral activities on behalf of a person. Strategic service development work, undertaken on your behalf, to ensure service gaps are filled could be one such activity.

2. Unavailable services and your rights:

Just because services are not there, or because they are expensive, your right to be supported to meet your goals and to be part of the community still holds. This can sometimes mean you have to argue even harder for the supports you need. Advocacy agencies have an important role to play in lobbying governments and the community to do a better job in providing the supports that people with disabilities need.

Your right to the support you need is not diminished just because that support is not yet available. Both the NDIS Act and the UN Convention on the Rights of Persons with Disabilities may be helpful to you in arguing for new services to be established when these are needed to enable you to meet your goals and to participate in the community.

a. NDIS Act

Section 33(2) of the NDIS Act requires that the NDIA records, in your Participant Plan, the “general supports” that you will receive. These are the supports the Agency itself will deliver, as provided in Section 13 of the Act (see above). This means you can ask the Agency to work proactively to get the services and supports you need, even if these are not yet available.

It can also include doing some work with mainstream services and organisations that already exist in the community, so they are properly equipped to include you, to be accessible to you, and to be relevant to your needs.

It is reasonable that you ask the Agency to include in your Plan some detail about how it will go about doing this.

There may be a number of ways this could happen. It might be a matter of negotiating with an existing service provider to adapt or build on some of its current practices so they become more relevant to what you need. It may be a matter of the government facilitating or funding new services to be added to ones already delivered by a particular provider, either mainstream or disability-specific. Or it may be a matter of establishing completely new services altogether.

Obviously, some of these will be more easily achieved than others. There are some supports, especially if they require very specialised expertise that is hard to obtain, which will be very difficult to set up at all, but it is important that you have this discussion with the Agency and push your entitlement to have the Agency do whatever it reasonably can to ensure you get the support you need.

b. Pursuing your rights about unavailable services under the NDIS Act

Remember, then, when negotiating your Participant Plan, to think about exactly what supports you really need in order to achieve your goals and to participate meaningfully in the community. Do not be constrained to thinking only about what is currently available or what it will cost.

If what you need is not yet available, then ask for the Agency to include in your Plan, as part of the general supports you will receive and what actions it will take to attempt to get the services in place that you need, along with what compromise services and supports it will organise for you in the meantime.

In arguing this, you may need to refer particularly to Section 31 of the NDIS Act in which the Principles that underpin planning are set out. These Principles stress the importance of you directing the planning process, and of being able to participate in the community in ways that will help you achieve your goals and aspirations.

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 of 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](#) .

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

The UN Convention gives you lots of rights. Some of these will be especially relevant to you when you are arguing for more supports to be provided 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 argument for more supports.

The UN Convention on the Rights of Persons with Disabilities sets out a large number of rights for people with disabilities. With it, goes an even larger range of responsibilities for governments to make those rights a reality. The Australian government has agreed with these rights and with the responsibilities it has because of them.

Some of the rights that are especially relevant when you need supports that are unavailable are:

- Article 9, which asserts your right to an accessible community and the government's responsibility to make sure that you receive the assistance and adjustments and supports you need in order to be able to access the community, the built environment, public transports, information, goods and services, etc, in the way other people do.
- Article 19, which asserts your right to live independently and to be included in the community, along with the government's responsibility to provide you with the supports you need to be part of the community, and to enable you to make your own choices about those supports.
- Article 20, which asserts your right to be able to get around and therefore the government's responsibility to ensure you have access to affordable aids and equipment, technology and personal assistance to enable you to do this.
- Article 26, which asserts your right to disability-specific services that help you develop your independence, to reach your potential, and to overcome the limitations that your disability places on you.
- Article 27, which asserts your right to work and, therefore, the government's responsibility to make sure you have access to the training and support to enable you to prepare for work and find it.

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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