

# ELIGIBILITY

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'.

Eligibility is about whether or not you are able to get support through the NDIS. The NDIS Act refers to this as ‘gaining access’ to the Scheme. In order to be able to get support, you have to meet a list of conditions that are set out in the legislation. This Information Sheet is about your rights when decisions are made about whether or not you can get support through 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.

### **1. What the NDIS says about eligibility:**

The NDIS Act sets out a range of criteria for getting support under the scheme. The most detailed of these is about your disability. The NDIS Act mainly talks about how your disability affects your life, rather than what sort of diagnosis you have. It is important, when seeking support from the NDIS, to think about how your disability limits your ability to meet your goals in life, and to be part of the community.

Getting support from the NDIS is called becoming a participant. Part One of Chapter 3 of the NDIS ACT (the National Disability Insurance Scheme Act 2013 (Cth)) sets out the conditions for becoming a participant.

These conditions are about:

- Your age – you have to be under 65 when you first ask for support from the NDIS, unless you are already receiving disability support services before you ask for the NDIS to support you {link to Act};
- Where you live – you have to be an Australian resident {link to Act};
- Your disability – you have to have a disability that is either likely to be permanent (the “disability requirement”) or will get much worse if you don’t receive support early on (the “early intervention requirement”) {link to Act}.

The NDIS Act explains the meaning of these conditions. Some of the conditions are explained further in the Rules (the National Disability Insurance Scheme (Becoming a Participant) Rules 2013), which apply during the NDIS launch.

It is important to know what is in both the NDIS Act and the Rules. You can get more information about the conditions for becoming a participant from the [Advokit Becoming a Participant webpage](#) .

## 2. Eligibility and your rights:

The NDIS Act recognises a large range of disabilities. It is based on principles about the right to be part of the community. If you identify as a person with a disability and you need support to meet your goals in life and to be part of the community, chances are that you may be eligible for support under the NDIS. Your rights under the NDIS Act are about your diagnosis, but just as importantly, it is how the disability affects you that matters.

Here are some important rights issues to keep in mind about eligibility and the laws that can be relevant to it:

### a. The NDIS Act:

The [NDIS Act](#)  recognises a very large range of impairments or conditions when it describes disability: intellectual, cognitive, neurological, sensory, physical and psychiatric. It then goes on to focus mainly on how your life is affected by the condition – the ways it limits what you can do. The Act does not focus on what label you have, or what sort of diagnosis you might have been given by a doctor, or a psychiatrist, or a psychologist or some other professional. When the disability requirement is read alongside the early intervention requirement it covers not only those conditions that might not be very severe now, but also those that could become more severe in the future without support. It's a definition that appears to cover all the conditions that people typically associate with the word "disability".

The Principles of the NDIS Act stress the rights of people with a disability to be supported, and to participate, in the community. The principles are based on notions of inclusion and entitlement and of promoting positive change in communities and in peoples' lives.

The importance of helping you to participate in the community is also reinforced where the NDIS Act sets out extra Principles specifically related to becoming a participant.

This means that eligibility is not just about diagnosis. It is also about how your disability affects your life.

Some of the practical implications for eligibility in these sections of the NDIS Act include:

- If someone is trying to argue that your condition is not technically a disability, you may be able to draw attention to the Act's very inclusive definition of disability, and its focus on how the condition affects your life, rather than on what label or diagnosis you have;
- If someone is trying to argue that your disability is not severe enough, you may be able to argue that the Act intends for people to become participants to help lessen their need for more support in the future.

## b. Pursuing your rights about eligibility under the NDIS Act

Some of the points you may need to argue when pursuing your rights about eligibility are:

- How your disability fits in with the broad definitions set out in the Act;
- How your disability affects your life in a way that means you need extra support in order to be able to participate meaningfully in the community (you may need to get professional reports, such as from doctors, or psychologists, to support your argument here).

When making a complaint about a decision regarding your eligibility under the NDIS, 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.

## c. 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 (AAT) 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.

### d. 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 feel the reason for being denied eligibility for the NDIS is either because the Agency doesn't accept your disability as a real disability, or because your disability itself makes the assessment process difficult to comply with, this might be a case of disability discrimination. You should seek advice about whether or not you should pursue the matter as one of discrimination.

### e. The Disability Discrimination Act

[The DDA \(Disability Discrimination Act 1992 \(Cth\)\)](#)  makes it unlawful to discriminate against a person with a disability in a number of areas, including the administration of Commonwealth laws and programs. The DDA covers both direct discrimination (treating a person less favourably because of their [disability](#) ) , and indirect discrimination (requiring a person with a disability to meet a requirement that puts them at a disadvantage compared to a person who does not have that disability).

Some of the practical implications for eligibility of these sections of the DDA include:

- If there is an attempt to argue that your particular type of disability is not included in the NDIS, this might be discrimination;
- If you are required to do things to prove your eligibility that are unreasonable to expect of you because of your disability, this might be discrimination (such as being required to produce a large number of documents that are difficult for you to locate because you are blind).

### f. Pursuing your rights about eligibility under the Disability Discrimination Act

If you want to argue that you are experiencing unlawful disability discrimination, you should first attempt to resolve this matter by talking with the Agency about it. If this is not successful, you can then take your issue to the Australian Human Rights Commission.

Some of the points you may need to argue in doing this are:

- Either that your particular disability is not being recognised by the Agency even though it is recognised as a disability under the Disability Discrimination Act 1992;
- Or that you are having trouble demonstrating your eligibility for the NDIS because the Agency is requiring you to do something that is difficult for you to do because of your disability.

## 2: f: Pursuing your rights about eligibility under the Disability Discrimination Act: - continued

The Commission will try to resolve the matter through conciliation. This means a staff member from the Commission will meet with you and the Agency and try to come to an agreement together.

If you cannot come to an agreement through conciliation, then you can take the matter to Court. This would involve going to either the Federal Magistrates Court or the Federal Court of Australia. This can be very expensive and it is vital that you seek legal advice before taking this step. 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.

### 3. 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.

---

## DISCLAIMER

The material contained in these fact sheets is of the nature of general comment only and is not intended to be advice on any particular matter. Readers should not act on the basis of any material on this fact sheet without obtaining advice relevant to their own particular situations. The authors expressly disclaim any liability to a person in respect of any action taken or not taken in reliance on the contents of this publication.