



Office of the
Public Advocate

Guide to NDIS decision-making

When a decision can be made
by, with, or for an adult with
significant cognitive
disability



About this guide

This guide addresses the question of when decision-making support, advocacy, or substitute decision-making is needed for potential and current National Disability Insurance Scheme (NDIS) participants who have significant cognitive disability. It does this in the context of each possible decision-making stage within the NDIS participant pathway.

One of the purposes of the NDIS is to provide funding for reasonable and necessary supports to enable eligible individuals to:

- make decisions that will affect their lives, to the extent of their ability
- achieve their goals, objectives and aspirations
- maximise their independence
- increase their social and economic participation
- develop their capacity to actively take part in the community

(National Disability Insurance Scheme Act 2013 (Cth) s 5).

The flowchart at the end of this guide outlines a process to assist in determining what decision-making arrangement is appropriate for an adult NDIS participant with significant cognitive disability.

The information provided in this guide is of a general nature. It should not be viewed as advice from the National Disability Insurance Agency.

The Victorian Office of the Public Advocate (OPA) was established under the *Guardianship and Administration Act 1986* (Vic) as an independent statutory office to protect and promote the rights, interests and dignity of people with disability.

Under the *Guardianship and Administration Act*, OPA is required to arrange, coordinate and promote informed public awareness and understanding about substitute decision-making laws and any other legislation dealing with or affecting persons with disability.

To access other systemic advocacy work published by OPA, or other OPA publications, including *Supported Decision-Making in Victoria: A guide for families in Victoria*, and *Side by Side: A guide to appointing supportive attorneys*, visit OPA's website at www.publicadvocate.vic.gov.au

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OPA acknowledges Victoria's Aboriginal communities and their rich culture. OPA pays respect to their Elders and communities who are the custodians of the land on which we work.

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ISBN-13: 978-0-9875861-1-7

First edition: January 2018

Key principles

1. “People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.”
(NDIS Act (Cth) s 4(8)).
2. “[P]eople with disability should be involved in decision-making processes that affect them, and where possible make decisions for themselves.”
(NDIS Act (Cth) s 5(a)).
3. The ability to make decisions usually involves four elements. The person needs to:
 - understand relevant information
 - retain or remember relevant information
 - use or weigh up relevant information
 - communicate the decision in words, gestures or by other means.Environmental factors, such as the quality of support relationships and the availability of someone willing to provide support, can shape a person’s ability to make a decision.
4. People should wherever possible be provided with the support to make and implement their own decisions.
(United Nations *Convention on the Rights of Persons with Disabilities*, article 12(3); NDIS Act (Cth) ss 4, 5).
5. “The role of families, carers and other significant persons in the lives of people with disability should be acknowledged and respected.”
(NDIS Act (Cth) s 4(12)).
6. “The role of advocacy in representing the interests of people with disability should be acknowledged and respected.”
(NDIS Act (Cth) s 4(13)).
7. Substitute decision-making should only be used as a last resort, where no less restrictive alternative exists.

Informal and formal decision-makers

The *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) acknowledges that a potential or current participant may need access to a variety of decision-making arrangements to progress along the participant pathway.

This may include elements of supported and substitute decision-making, and may operate through informal processes or via the formal appointment of others to make decisions on behalf of the participant (under the NDIS Act or under state or territory laws).

Where possible, the participant should make their own decisions and put these into effect (with assistance, if necessary).

Informal arrangements

A family member, carer or other significant person (referred to as supporters) can assist the participant by making a decision where there is no conflict about it and where it does not jeopardise the wellbeing of the participant. This decision should be based on the participant's wishes and preferences.

An advocate can promote the wishes and preferences of the participant and seek to enable them to access services and support.

Formal arrangements

Plan nominee

Under the NDIS Act, a plan nominee can be appointed at the request of the participant or on the initiative of the CEO (or their delegate, usually the planner) to perform acts on behalf of the participant in relation to:

- a) the preparation, review and replacement of the participant's plan
- b) the management of funding for supports under the participant's plan.

A plan nominee can only do an act in relation to the above if the plan nominee considers that the participant is not capable of doing, or being supported to do, it. An appointment can be limited in scope and can be in place for an indefinite period. A plan nominee can be a decision-making supporter and/or a substitute decision-maker. A plan nominee could be a family member or a supporter of the participant. Plan nominee arrangements only apply to participants over 18 years of age (different arrangements apply to children).

The NDIS (Nominees) Rules deal with whether a plan nominee should be appointed, who should be appointed, duties of nominees, cancellation and suspension of an appointment.

Guardian

Under state and territory guardianship laws, a guardian may be appointed for a person with disability where an application is made to the appropriate tribunal. Different criteria for the appointment of guardians exist in the guardianship laws in force throughout Australia. As a general comment, tribunals must at least be satisfied that a person has impaired decision-making ability, and that there is a decision that needs to be made. The order of appointment sets out the authority of the guardian.

A guardian can have powers in relation to personal and lifestyle matters, including access to services and accommodation (which enables the guardian to decide where and with whom a person can live).

A guardian may be appointed where there are different views between family members about, for example, what is in the best interests of the person with disability which cannot be resolved, and where a decision needs to be made. A guardian will only be appointed where there is no less-restrictive option available.

Where there is no other suitable person to be appointed, the Public Advocate or Public Guardian may be appointed as guardian. This is a last resort arrangement.

Typically, relevant state and territory laws contain provisions to ensure that the authority of a guardian is limited to the specific area in which a decision is needed (such as accommodation, access to services, and medical treatment). Guardianship orders should be in place for the shortest time possible and are subject to regular review.

Administrator/financial manager

Under state and territory guardianship laws, an administrator/financial manager is generally appointed according to similar criteria that apply to the appointment of a guardian, however, they have the power to make decisions about legal or financial matters related to the person's estate.

In practice, the Public Trustee (State Trustees Limited in Victoria) performs the role of administrator/financial manager when no other suitable appointment can be made. A potential or current participant may have both a guardian and an administrator/financial manager appointed.



A guardian or administrator/financial manager can be a plan nominee. Where the participant has a guardian or administrator/financial manager and their powers and responsibilities are comparable with those of a plan nominee, and the CEO (or their delegate) consider the appointment of a plan nominee necessary, there is a presumption that the guardian and/or administrator/financial manager should be appointed as the plan nominee (NDIS Act s 88(4)).

The CEO (or their delegate) should limit a guardian's and/or administrator's/financial manager's powers as plan nominee to the powers each has under the order of their appointment (for example, powers in relation to accommodation or powers in relation to financial decisions).

Where a guardian or administrator/financial manager who is appointed as a plan nominee is making a decision for the participant, they must comply with the general principles guiding actions of people who act on behalf of others (NDIS Act s 5), the duties of nominees (NDIS (Nominees) Rules pt 5), as well as the relevant state or territory legislation under which they are appointed and the appointment terms.

Attorney

Other representatives (often called attorneys) can be appointed under enduring powers of attorney (and similar instruments) which are regulated by state and territory laws. These can empower representatives to make financial and personal decisions (depending on the terms of appointment). The decision of such representatives has the same legal force as if it had been made by the person who appointed them. A representative can only make an NDIS-related decision on behalf of a potential participant or participant where the decision falls within the scope of their legal authority (as contained in the instrument of their appointment). An attorney can be a plan nominee.

The powers of attorney law in Victoria provides for the appointment of a supportive attorney. A supportive attorney can be appointed by a person to assist them to make decisions. However, the supportive attorney cannot make decisions for the person. A supportive attorney can be appointed with powers in relation to accessing information from organisations, communicating the person's decisions to third parties, and giving effect to the person's decisions.

Participant pathway

Three key decision-making stages

1. Access. Becoming a participant

- i. **Who can sign an Access Request Form (ARF) on behalf of a potential participant who is unable to sign the form due to their significant cognitive disability?**

The NDIA requires an ARF to be signed in order for it to be a valid access request. Ideally, the potential participant will sign their own ARF. Where a potential participant has a significant cognitive disability and is unable to sign the ARF, reasonable adjustments should be undertaken to obtain verification from the potential participant by other means, for example, using alternative communication methods. The NDIA cannot sign an ARF for a potential participant.

The NDIA is prepared to accept an ARF signed on behalf of a potential participant by a supporter, or an advocate.

Where appointed, a guardian, administrator/financial manager and attorney with relevant authority can sign an ARF on behalf of a potential participant.

The NDIA is also prepared to accept an ARF signed by a service provider on behalf of a potential participant if there is no conflict of interest.

At this stage of the participant pathway, it is not possible for the CEO (or their delegate) to appoint a plan nominee for a potential participant.

2. Participate. Plan development

- i. **Who can promote the wishes and preferences of a person with significant cognitive disability in the planning process?**

The NDIA cannot represent the wishes and preferences of the participant during the planning process.

Where the participant has limited ability to express, in whichever way, their own wishes and preferences, supporters are often best-placed to promote the wishes and preferences of the participant in the planning process.

Where there is no supporter available, or where there is conflict in the family, involvement of an independent advocate should be considered. Referral to an advocate can be made by the NDIA or another interested person.

There may be instances where the participant's service provider can provide information about the wishes and preferences of the participant based on their knowledge of that person. Documentation kept by a service provider can be used as a basis for the development of the participant's statement of goals and aspirations and their statement of supports. Reliance solely on these materials will be problematic where there is a complex decision to be made, and where there is a conflict of interest (where, for instance, the service provider may wish to be chosen to provide NDIS-funded services to the participant).

The CEO's delegate (usually the planner) can elect to appoint a plan nominee to assist, or to act on behalf of, the participant in relation to the preparation of the participant's plan. The NDIS Act outlines a number of duties a plan nominee has to the participant, including: to support decision-making by the participant; and to have regard to, and give appropriate weight to, the views of the participant.



Where there is a guardian with relevant authority, which includes the powers to make decisions about access to services and/or accommodation, the guardian can represent the wishes and preferences of the participant. Guardianship laws in each state and territory generally require a guardian, in making a decision, to act as an advocate for the person, and to act in consultation with the person, taking into account the wishes of the person. The NDIA may choose to appoint the guardian as the participant's plan nominee.

Where appointed, an administrator/financial manager can provide information about the person's financial matters, taking into account, as far as possible, the person's wishes.

Powers of attorney laws typically require the attorney to act in a way that promotes the interests of the person, and to give all practicable and appropriate effect to the person's wishes.

ii. Who approves the participant's plan?

The NDIA decides whether or not to approve the statement of participant supports (the participant's plan).

iii. Who receives the participant's plan?

The participant, and, where appointed, a formal decision-maker, including a plan nominee, guardian, administrator/financial manager, attorney (with relevant powers), should receive a copy of the approved plan, prior to its implementation.

3. Receive. Plan implementation

i. When should support coordination be included in the participant's plan?

A support coordinator can assist the participant to coordinate the other supports within their plan. A person with significant cognitive disability should usually have support coordination funded within their plan.

The participant chooses their support coordinator. Where the participant has a significant cognitive disability, they may be unable to choose for themselves.

A support coordinator can source services for the participant to give effect to the participant's plan, however, they cannot choose the service providers nor can they sign service agreements on behalf of participants.

ii. Who can make a decision about choosing a support coordinator?

The choice and control afforded to the participant under the NDIS Act encourages, in the first instance, the participant and, in instances where the participant has a significant cognitive disability, their supporter or an advocate, to promote their wishes and preferences.

A supporter, or, if necessary, an advocate, can assist the participant to choose a support coordinator. Where a preferred support coordinator is identified in this way, that support coordinator can be engaged so long as the choice of support coordinator is uncontentious and no real or apparent conflict exists in relation to it.

A service provider cannot choose a support coordinator on behalf of the participant.

A plan nominee can choose a support coordinator on behalf of the participant.

A guardian with powers in relation to access to services can choose a support coordinator on behalf of the participant.



An administrator/financial manager would not choose a support coordinator, however, they would advise a support coordinator of any relevant financial information about the participant.

In the event of the participant having both a plan nominee and a guardian (or attorney), and these roles are being performed by different people, and where they have power to make decisions in the same area, the plan nominee has authority to make an NDIS decision. The expectation is that such representatives would act collaboratively.

iii. Who can negotiate and sign a service agreement on behalf of the participant?

The NDIA encourages participants and providers to enter into service agreements.

People with significant cognitive disability should have the best possible opportunity to negotiate and agree to the terms of a service agreement.

The NDIA and service providers have a responsibility to ensure accessible information is provided to the participant, which may include providing the participant with an opportunity to experience the options available. A supporter or an advocate can assist the participant to understand the nature and effect of a service agreement. A plan nominee, guardian, administrator/financial manager and an attorney can negotiate and sign a service agreement where the conditions are within the scope of their authority.

The NDIA has advised that it is not a legislative or policy requirement that a service agreement be signed in order for a service provider to commence providing services. A signed service agreement is the best way to establish what services are agreed to be provided and the terms for their provision. Some service providers may require a signed service agreement. Sometimes a signed service agreement is the best protection for the participant. In these situations, only a legally authorised person can sign on behalf of the participant.

This includes a plan nominee, guardian, administrator/financial manager or attorney within the limits of their legal authority.

A guardian is unable to sign a service agreement where it:

- goes beyond the powers the guardian has in relation to the participant (for example, the agreement contains provisions that affect the participant's finances)
- asks the guardian to take responsibility for matters that only the participant has control over (for example, the agreement requires the participant to treat the staff of the service provider with courtesy and respect).

An administrator/financial manager can sign only those parts of a service agreement that have an impact on the participant's financial affairs.

An attorney can only sign a service agreement where they have relevant decision-making authority (they may have powers in relation to financial matters or personal matters, or both).

The authority of a plan nominee is limited to the conditions set out by the CEO (or their delegate) in their appointment. It is unlikely a plan nominee's authority will extend to agreeing to conditions that are personal to the participant and over which the participant has sole control.



Others without formal authorisation to act on behalf of the participant, such as a supporter or an advocate, and the NDIA, are not authorised to enter into a service agreement on behalf of the participant.

Where the participant is unable to sign a service agreement and there is no legally authorised person who can sign the agreement on their behalf, the NDIA may require the support coordinator to explore the possibility of the service being provided without the agreement being signed. Such an avenue should only be sought where the choice of service provider is uncontentious and where no real or apparent conflict of interest exists.

Where there is conflict, or where the personal and social wellbeing of the participant may be at risk, appointment of a plan nominee or an application for guardianship should be considered.

While provision of services can occur without a signed service agreement being in place, a statement identifying the services to be delivered and the service standards should be provided to the participant and any relevant supporter, advocate or appointed decision-maker.

iv. Who can assist the participant to request a plan review and/or take part in the regular plan review?

The participant, or a supporter, advocate or appointed decision-maker (in consultation with the participant), can request a review of the participant's plan at any time.

A supporter or an advocate can promote the wishes and preferences of the participant in the preparation for, and during, a plan review meeting. It may be appropriate for a support coordinator to be included in the plan review meeting.

Where appointed, a formal decision-maker, including a plan nominee, guardian and attorney (with relevant powers), should be involved in the preparation for, and during, a plan review meeting. An administrator/financial manager should advise on relevant financial matters.

Is there a significant decision that needs to be made?

NO

YES

No action is required, although advocacy support may still benefit the participant (for instance, to enable the planning process to proceed and/or for possible future decisions to be identified).

END

Does the participant have the ability to make the decision?

YES

NO

The participant makes the decision and is supported as needed to put it into effect.

END

Does the participant have a formal relevant substitute decision-maker already in place (such as a plan nominee, state or territory appointed guardian or administrator/financial manager or attorney)?

YES

NO

NDIA should ensure formal decision-makers (to the extent their powers are relevant) are involved in making the decision.

END

Are there one or more informal supporters around the participant (such as family members, a carer or other significant person) and is there agreement about the decision that should be made?

NO

YES

Could the NDIA or another interested party obtain the involvement of an independent advocate to assist the participant to make a decision?

NO

YES

Was the support provided sufficient to enable the participant to make a decision?

NO

YES

Does the NDIA still have concerns that the decision being made is a significant decision that constitutes a significant risk to the personal and social wellbeing of the participant?

YES

NO

Is there an individual whom the NDIA is confident can make the decision on behalf of the participant (who in doing so will take account of the wishes and preferences of the participant and promote their personal and social wellbeing)?

NO

YES

The informal decision-making arrangement should be respected and the decision can be put into effect.

END

A guardianship application should be considered, which may result in the tribunal requesting an investigation and/or the appointment of a guardian or administrator/financial manager.

END

NDIA may elect to appoint a plan nominee.

END

How to determine what decision-making arrangement is appropriate for an adult NDIS participant with significant cognitive disability



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