



NDIS decision-making

Working with participants with significant cognitive disability

Plan development

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

Where the participant has limited ability to express their own wishes and preferences, supporters (such as family members, a carer or other significant person in the life of the participant) 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.

Sometimes the participant's service provider can provide information about the wishes and preferences of the participant. Reliance solely on this information will be problematic for complex decisions, or where there is a conflict of interest.

The planner can appoint a plan nominee to assist, or to act on behalf of, the participant in preparing the participant's plan.

Alternatively, where there is a guardian (or attorney) with relevant authority, they should be involved in the planning process.

The NDIA decides whether to approve the plan.

The participant and their substitute-decision maker(s), if any, should receive a copy.

Plan implementation

Support coordination

A participant with significant cognitive disability usually has funded support coordination.

The participant chooses their support coordinator.

A supporter or an advocate can assist the participant to choose a support coordinator if the choice is uncontentious and there is no real or apparent conflict of interest.

Those who can choose a support coordinator on behalf of the person are:

- a plan nominee
- a guardian with powers in relation to access to services.

A support coordinator can assist:

- the participant to coordinate their supports
- in sourcing services.

However, a support coordinator cannot choose other NDIS providers, nor can they sign service agreements on behalf of the participant.

Service agreements

The NDIA has advised that it is not a legislative or policy requirement that a service agreement be signed in order for an NDIS provider to commence providing services.

Unsigned service agreements

A supporter or an advocate can assist the participant to understand the nature and effect of a service agreement, but cannot sign on behalf of the participant.

Where the participant is unable to sign, and there is no legally authorised person who can sign on their behalf, the NDIA may require the support coordinator to explore the possibility of the service being provided without the agreement being signed.

In the absence of a signed agreement, the NDIS service provider should provide a statement identifying the services to be delivered and the service standards that apply. This statement should specify that any terms contained in the unsigned agreement do not apply, as such agreements can contain onerous duties on participants.

Where a service agreement is unsigned, the provider must deliver the service with due care and skill and ensure that the service provided is reasonably fit for the purpose specified in the service agreement.

Signed service agreements

A signed service agreement is a good way to establish what services are agreed to be provided and the terms for their provision. (Some NDIS providers may require a signed service agreement).

Only a legally authorised person can sign on behalf of the participant. A plan nominee, guardian, administrator/financial manager, or attorney can negotiate and sign a service agreement if the terms of the agreement are within the scope of their legal authority.

Reviews

The participant can request a review of their plan at any time. A supporter, advocate or substitute decision-maker (in consultation with the participant) can also request a review.

If the participant has a substitute decision-maker, they should be involved in the preparation for, and during, a plan review meeting, and if the participant has an administrator/financial manager, they should advise on relevant financial matters.

For more information see the *Guide to NDIS Decision-making* on the Victorian Office of the Public Advocate website at www.publicadvocate.vic.gov.au

Participants in the National Disability Insurance Scheme (NDIS) who have significant cognitive disability may need a combination of:

- **decision-making support**
- **advocacy**
- **substitute decision-making.**

This brochure is about NDIS decision-making and includes:

- information about decision-making
- information about the decision-making stages for NDIS participants and potential participants
- a flowchart about how to determine what decision-making arrangement is appropriate (see overleaf).

The information provided is of a general nature. It was developed by the Victorian Office of the Public Advocate and is not advice from the National Disability Insurance Agency (NDIA).

Decision-making

The ability to make a decision involves:

- understanding the relevant information
- retaining the relevant information
- using or weighing up the information
- communicating the decision in words, gestures or by other means.

People with disability have the same right as others to make decisions about the things that affect them, and should be:

- provided with support to make their own decisions, wherever possible
- involved in decision-making processes and, where possible, make their own decisions.

Roles that should be acknowledged and respected are:

- those of families, carers and other significant people in the lives of people with disability ('supporters')
- advocates representing the interests of people with disability.

Decision-making arrangements

Supporters and advocates play an important role in decision-making.

Substitute decision-making should only be used as a last resort, where no less restrictive alternative exists.

Examples of substitute decision-makers are:

- a plan nominee, appointed at the request of the participant or on the initiative of the NDIA CEO or their delegate (usually the planner)
- a state or territory-appointed guardian or administrator/financial manager
- an attorney appointed by the participant in an enduring power of attorney.

For more details about these, see overleaf.

NDIS decision-making stages

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

Becoming a participant

The NDIA requires an Access Request Form (ARF) to be signed in order for it to be valid.

Where a potential participant has a significant cognitive disability and is unable to sign, verification of their request should be obtained by other means, for example, using alternative communication.

The NDIA is prepared to accept an ARF signed on behalf of a potential participant by:

- a supporter
- an advocate
- a guardian, administrator/financial manager or attorney with relevant authority
- a service provider on behalf of a potential participant, if there is no conflict of interest.

Turn to back page for information about the plan development and plan implementation stages.

NDIS decision-making flowchart

November 2018

www.publicadvocate.vic.gov.au

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

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 relevant **formal 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

Informal supporters

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

Independent advocates

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

Formal substitute decision-makers

A plan nominee can be appointed under the NDIS Act:

- at the request of the participant
- on the initiative of the NDIA CEO or their delegate (usually the planner).

A plan nominee can act for the participant in relation to developing and implementing the participant's plan.

Guardians, administrators/financial managers and attorneys are substitute-decision makers who can make NDIS-related decisions on behalf of a participant where the decisions fall within the scope of their legal authority.

They may be appointed by a tribunal (or board) under state and territory laws for a person with disability.

Typically, the authority of a guardian, who is appointed by a tribunal, is limited to the area in which a decision is needed (such as access to services).

An administrator/financial manager will be appointed by a tribunal with authority to make decisions about financial matters.

Alternatively, the participant may have appointed a substitute decision-maker in an enduring power of attorney (or similar instrument) who may have the power to make financial and/or personal decisions.

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 who 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