

# Disability Rights in Real Life



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With support from The Law Foundation of South Australia



# Biographies



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Natalie Wade worked as a lawyer for the South Australian Government for the better part of a decade before deciding to set up the nation's first law firm led by people with disability for people with disability, Equality Lawyers. Equality Lawyers provides boutique legal services to people with disability and their families, offering expertise on wills and guardianship, discrimination and equal opportunity, NDIS appeals, and social security law. For Nat, this Handbook is about providing people with disability, their families, and allies with information and tools they need to protect and promote their rights so they can lead the conversation.

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Anna Bulman is a public international law consultant who also tries to explain human rights concepts through illustration. Anna is the co-creator of Picture Human Rights, a free online resource of illustrations that explain how human rights relate to other important disciplines and everyday life. For Anna, this Handbook is about inviting more productive conversations about disability in Australia to realise that it is not a person's disability that prevents their full participation in mainstream life. Rather, the structure of society prevents that person from fully participating on an equal basis with others. It is the structure that needs to change, not the person.

<https://www.picturehumanrights.org>  @picturerights



# Disability Rights in Real Life

Natalie Wade



Red Raven Books

## ***Disability Rights in Real Life***

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Edited and Illustrated by Anna Bulman

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This Handbook was created on the traditional lands of the Kurna and Ngarrindjeri peoples. The creators acknowledge the Traditional Owners and custodians of the lands on which they work, and pay respects to Indigenous Elders past and present. Sovereignty has never been ceded. It always was and always will be Aboriginal land.

The creators of this Handbook support the Uluru Statement from the Heart to achieve justice, recognition, and respect for First Nation's peoples and a referendum to enshrine a First Nation's Voice in the Constitution.

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# Dedication

**T**o Anna's child, Rory, whose journey into this world tracked that of the handbook, and who now joins a new generation ready to advance, protect, and promote the rights of all Australians with disabilities.

Our personal thanks to our partners Raymond and Ben for patiently supporting us over the many weekends, long nights, and existential crises it took to bring this project to fruition.

*Natalie Wade and Anna Bulman, Adelaide*

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# Foreword

**W**e asked famous and yet-to-be famous Australians what disability rights mean to them. We received responses from people around the country and are delighted to include them in this foreword to the *Justice for All Handbook*.

*Recognising the autonomy and dignity of disabled people everywhere to live their lives in mainstream society free of barriers.*

*Alastair McEwin AM, Commissioner Disability Royal Commission, Sydney NSW*

*Disability rights means that people who have a disability have the same rights as other people. Which means people can have the right to say if someone in their life isn't doing the right thing to them by not listening to them. Whether that be in their everyday life, or in their workplace or at their home.*

*Alice Waterman, Blogger, Kingswood SA*

*Participation, participation, participation! Disability rights allow us to be who we want to be, go where we want to go, and have equal opportunities in life – just like everyone else.*

*Amanda Lawrie-Jones, President Scleroderma Australia, Victoria*

*Disability rights are not one thing. They are everything. They are justice, equality, access, inclusion, and opportunity. Disability rights allow me to live and prosper.*

*Cassandra Grey, Co-Facilitator Children & Young People with Disability, Everton Heights QLD*

*Our goal must be a time where books like this serve only as an occasional reference point, because everyone's inalienable rights are truly self-evident.*

*Dr Dinesh Palipana OAM, Gold Coast University Hospital, Southport QLD*

*Proving we have been discriminated against represents a never-ending, unreasonable burden. If we are serious about protecting disability rights, that burden must be shared among all Australians.*

*Emma Bennison, Blind Citizens Australia, Hobart Tasmania*

*Disability rights provides me with the opportunity to live my life the way I choose, rather than the way society – and its soft bigotry of low expectations – imposes on me.*

*Graeme Innes AM, former Disability Discrimination Commissioner, Tweed Heads NSW*

*It means our stories are told and heard. Our unique perspectives are acknowledged and embraced. Opportunities are created and talent is discovered. Together we can write our unwritten future.*

*Melanie Tran, UX Designer & Social Entrepreneur, Sydney NSW*

*Disability justice must ensure substantive equality for persons with disability in all areas of life, including decision-making, education, employment, health, culture, and family life.*

*Professor Ron McCallum AO, Emeritus Professor University of Sydney, Artarmon NSW*

*Justice for all cannot be achieved without the recognition that impairment can no longer be the basis for denying the rights of people with disability. It is only this social transformation that will achieve equality.*

*Rosemary Kayess, Chair UN Committee on Rights of Persons with Disabilities, Sydney NSW*

*We have the rights to speak up for our needs and services that are adequate to us no matter what shape or form the problems are we have the right to be treated equally and respectfully no matter what we have the rights differences and not to be treated differently or singled out just because we stand up for what we believe in we have the rights to be empowered and take action that's what it means to me and so much more.*

*Tiffany Littler, Joint Deputy Chair Our Voice SA, Woodville SA*

# A note to readers

**T**his Handbook is packed with important legal concepts that we hope will help you protect and promote your disability rights in Australia. There are a few points that are worth keeping in mind as you read and little tips that we have included along the way to make the read a little easier:

- **Illustrations** of the concepts we are discussing are a key feature of this Handbook. We have included drawings that explain important concepts of the text.
- Most importantly, **YOU** are the person with disability for whom we have written this Handbook. We hope that this book be useful for people with disability, but also their families, supporters and community members everywhere. Our writing reflects that this book has been written for people with disability by a person with disability.

# Introduction

**T**echnically, this is the 5th edition of what was known as *Justice for All – The Legal Rights of People with Intellectual Disability in South Australia*. In practice, however, it is an entirely different text. The 1st edition was written in 1987 when many people with disability, including those with intellectual disability, were institutionalised. As a result, people with disability had little access to core human rights such as education, employment, and healthcare. The original text was pioneering at the time. Each version sought to improve awareness of the legal rights of people with disability. Yet, at that time, the Handbook was written for carers and service providers, not for people with disability themselves. The newly titled *Disability Rights in Real Life* (this **Handbook**) fixes that.

The legal landscape has changed significantly since 1987, and even since 2004 when the 4th edition of *Justice for All* came out. So too has the lived experience of people with disability in Australia. People with disability are no longer placed in institutions as a standard form of housing, and employment rates, education, and life expectancy have increased throughout the community. Since 2004, there have been significant legal reforms that aim to improve the lives of people with disability and to promote their human rights. In 2008, Australia became a signatory to the *Convention on the Rights of Persons with Disabilities (CRPD)*. The CRPD establishes the human rights of people with disability. In addition, it brought a new wave of legislative and public policy reform to the disability space. Landmark reforms in Australia during this time have included the introduction of the National Disability Insurance Scheme (**NDIS**), the passing of the *Disability Inclusion Act 2018 (Cth)*, and South Australia released the first Disability Justice Plan (2014–2017).

These reforms have, in some respects, meant greater recognition of people with disability's human rights and a better quality of life. However, while there is a long way to realise the international human rights of people with disability fully, people with disability must know what their rights are and how to navigate the legal processes to protect their rights. From accessing funding support to making complaints of

discrimination, basic skills in navigating legal processes are now essential to living with a disability in Australia.

This Handbook is designed to help you – people with disability – understand your rights. It is intended to educate and inform the wider community. It is written to provide direction and save you ringing every disability advocate in town or awkwardly asking the service provider a question that is probably best not asked of them. The Handbook does not give legal advice and will not make you a top-skilled advocate. Yet, it will outline your rights, give you more information on the processes that protect those rights, and the knowledge for you to have a more informed conversation with your advocate or lawyer. Best of all, it may help you to advocate for yourself in a society that better understands what you are living.

**Natalie Wade (Equality Lawyers) and  
Anna Bulman (Picture Human Rights)**

# Acknowledgements

We thank the Law Foundation of South Australia for their generous support of this project. This Handbook would not have been possible without it.

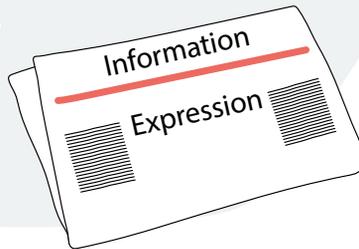
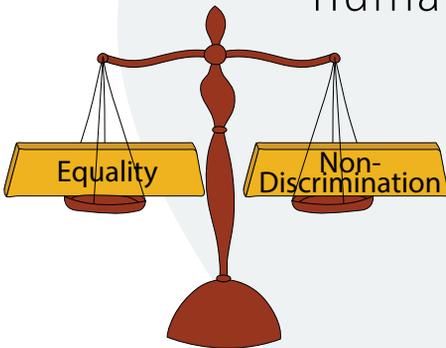
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We thank Lara Simpson and Pip Kruger for helping Anna muddle her way through Illustrator.

We extend our deep appreciation to The Copy Collective, and especially Maureen Shelley, who worked tirelessly to ensure this resource is of the highest quality and, most importantly, accessible. We also thank the disability activists who provided their input and insights for the foreword. We are grateful to the support of so many people in the publication of this work.



You have the human right to...



# 1

## The Social Model of Disability and Human Rights

Over time, the conversation about disability has changed. Historically, disability was spoken about in the medical model as “an individual impairment to be ‘cured’ or ‘contained’”.<sup>1</sup> The conversation has since shifted to talking about disability in the context of the social model of disability. The social model of disability adopts an inclusive definition of disability. It explains that “people with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.<sup>2</sup> That is, it is not the person’s disability that prevents their participation.

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*Instead, it is the structure of our community and society that prevents the person from participating equally with others.*

---

Throughout this Handbook, the social model of disability is used to explain what your rights are.

The *Convention on the Rights of Persons with Disabilities (CRPD)* is a disability-specific international human rights treaty. Treaties are legal instruments that countries can agree to implement. This Handbook talks a lot about the CRPD because it specifically sets out the human rights of people with disability, though not all have been fully realised in Australia yet. The CRPD is made up of “articles” which articulate specific human rights of people with disability. For example, the right to education, the right to freedom from exploitation, violence and abuse, and the right

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1 Louise Humpage, ‘Models of Disability, Work and Welfare in Australia’ (2007) 41,3 *Social Policy and Administration Journal* 215, 216.

2 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 1 (entered into force 3 May 2008).

to live independently and be included in the community. These are all human rights for everyone, including those who do not have a disability. Still, the CRPD specifically elaborates on those human rights in the context of disability. It recognises that specific action is required from governments to ensure that people with disability enjoy those rights on an equal basis with others.

When Australia agrees to an international treaty, the country's lawmakers (members of parliament) can then choose whether to incorporate the articles (or the whole treaty) into domestic laws. Incorporating the CRPD into domestic laws makes them legally enforceable and actionable in Australia.

To date, the CRPD has not been wholly incorporated into Australian law, but parts of it have been implemented in some laws and public policy. For example, the CRPD sets out the right of people with disability to be equal social and economic participants. This means that we should be able to access the community, live independently and work on an equal basis with others. At the national level, the *National Disability Insurance Scheme Act 2013* (Cth) creates a legal obligation for funding and support to be provided to people with disability to ensure they can be social and economic participants on an equal basis with others.

The human rights of people with disability are not fully recognised without the complete incorporation of the CRPD into Australian law. This situation makes the realisation of those rights difficult. It is fundamental for people with disability to understand what their international human rights are to promote them and seek their protection in everyday life. This Handbook is underpinned by the CRPD and provides commentary on how the articles of the CRPD can guide people's protection and promotion of their human rights.

Eight general principles underpin your rights as set out in the CRPD. It is important to know these principles when learning about your rights:

1. Respect for your inherent dignity and individual autonomy, including the freedom to make your own choices and have your independence.
2. Non-discrimination.
3. Full and effective participation and inclusion in society.
4. Respect for difference and acceptance of people with disability as part of human diversity and humanity.

5. Equality of opportunity.
6. Accessibility.
7. Equality between men and women.
8. Respect for the evolving capacities of children with disability and respect for the right of children with disability to preserve their identities.<sup>3</sup>

By way of overview, here are the specific rights that the CRPD creates and a translation of what they mean to you. If you would like more information on what these rights mean for your specific situation, contact your disability rights lawyer:

**Table 1 Convention on the Rights of Persons with Disabilities**

CRPD article	What does it mean?
Equality and non-discrimination	<p>The law applies equally to you and protects you like it protects everyone else.</p> <p>Australia must stop you from being treated differently because of your disability and ensure reasonable accommodation is provided.</p>
Full and equal enjoyment of human rights for women and girls with disability	<p>Women and girls with disability face multiple disadvantages, and Australia has to take measures to ensure that you have full and equal enjoyment of your human rights and freedoms.</p>
Full and equal enjoyment of human rights for children with disability	<p>Children with disability must be treated equally with other children.</p> <p>Children with disability have the right to express their views freely on all matters affecting them.</p>

<sup>3</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 3 (entered into force 3 May 2008).

<b>CRPD article</b>	<b>What does it mean?</b>
Raise awareness throughout society regarding people with disability, and foster respect for the rights and dignity of people with disability	Australia should have public education programs, initiatives, and laws to ensure that everyone knows how to respect the rights of people with disability and understands the value of people with disability.
Accessibility	You live independently and participate fully in all aspects of life. Therefore, Australia must remove barriers to buildings, roads, facilities, information, and emergency services, among others.
Right to life	You have the right to be alive.
Protection and safety in situations of risk and humanitarian emergencies	If there is a conflict (such as a war) or natural disaster, Australia must take all necessary measures to keep you safe and protect you.
Equal recognition before the law	All laws apply to and protect you. You can make legal decisions and can receive support to make decisions.
Access to justice	You can participate in justice systems and all legal proceedings equally.
Right to liberty and security	You cannot be detained or left unable to move about because of your disability.

<b>CRPD article</b>	<b>What does it mean?</b>
Freedom from torture or cruel, inhuman or degrading treatment or punishment	You must not be tortured or subject to cruel, inhuman, or degrading treatment or punishment.
Freedom from exploitation, violence and abuse	Australia must enact laws and policies to prevent exploitation, violence, and abuse from happening to you within and outside of the home.
Protecting the integrity of the person	You have the right to respect for your physical and mental integrity, like everyone else.
Liberty of movement and nationality	You can move wherever you want and choose where you live on an equal basis with others.
Living independently and being included in the community	You can choose where you live, who you live with, and what support you receive to achieve this. You can access all community services and facilities equally.
Personal mobility	You should have personal mobility with the greatest possible independence. You get to choose your mobility and should have access to quality aids, devices, and assistive technologies at an affordable cost.
Freedom of expression and opinion, and access to information	Australia must ensure that you can express your opinion and access information and ideas like everyone else. Information intended for the public should be available in accessible formats, in a timely fashion, and without additional cost.

<b>CRPD article</b>	<b>What does it mean?</b>
Respect for privacy	Regardless of where you live or who you live with, you have the right not to have others interfere with your privacy, family, home, or correspondence like everyone else.
Respect for home and families	<p>You have the right to get married, have a family, be a parent, and have a relationship like everyone else.</p> <p>Children with disability have the right to live with their families, and support should be provided to prevent them from being separated from their parents against their will.</p>
Education	<p>You have the right to inclusive education on an equal basis with others.</p> <p>You must not be excluded from the general education system and can receive reasonable accommodations as you require.</p>
Health	You have the right to achieve the highest attainable standard of health without discrimination because of your disability. That includes accessing the same health services as everyone else, as well as specific health services for your disability, such as early intervention.
Habilitation and rehabilitation	You have the right to maximum independence, full physical, mental, social, and vocational ability, and full inclusion and participation in all aspects of life.
Work and employment	You have the right to work on an equal basis with others. You should not be discriminated against at work because of your disability.

CRPD article	What does it mean?
Adequate standard of living and social protection	You have the right to adequate food, clean water, clothing, and housing, and the continuous improvement of living conditions. This includes access to public housing, retirement benefits and affordable services, devices, and other assistance for disability-related needs.
Participation in political and public life	You can vote and participate in public affairs like everyone else.
Participation in cultural life, recreation, leisure, and sport	You can access cultural materials, television programs, films, and theatre on an equal basis with others. You can participate in the arts, sports, and community activities like everyone else.

Throughout, this Handbook will address these human rights and let you know what your rights look like at a practical level and how you can promote them or get help to protect them.



## INDIRECT DISCRIMINATION

# 2

## Disability Discrimination

The word “discrimination” is used a lot when things go wrong, or someone is treated differently because of their disability. But often, people do not know what it means from a legal perspective or how discrimination laws protect their rights. There is also much confusion around how effective disability discrimination laws can be to protect people with disability. This chapter explains what discrimination means legally and when the relevant laws apply in everyday situations.

### The law

The *Convention on the Rights of Persons with Disabilities (CRPD)* says that all people are equal before the law, and Australia must prohibit all discrimination on the basis of disability.<sup>4</sup> That means that all laws must also apply to people with disability equally, and you should not be treated unfavourably because you have a disability.

In Australia, there are State and Federal laws which prohibit discrimination against people with disability. The Federal law is the *Disability Discrimination Act 1992 (Cth)*. In each State and Territory, there is an equal opportunity law that prohibits discrimination on the basis of disability. For example, the *Equality Opportunity Act 1984 (SA)* or *Anti-Discrimination Act 1977 (NSW)*. There are legal differences between the laws, and if you make a disability discrimination complaint (more on that in Chapter 3), you can only make a complaint under one law. For more information on the differences between the laws and complaints processes, contact your disability rights lawyer.

This chapter focuses on the *Disability Discrimination Act* because it applies to everyone in Australia. But if you have been discriminated against, speak to your disability rights lawyer about any protections in your State or Territory discrimination laws that might also be available.

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<sup>4</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 5 (entered into force 3 May 2008).

## Defining disability

The first step to establishing if disability discrimination has taken place is to identify whether you have a disability according to the legislation. This is what lawyers will refer to as the “ground of discrimination”. Other grounds of discrimination that are protected by Australian domestic law include sex,<sup>5</sup> race,<sup>6</sup> and age.<sup>7</sup>

The *Disability Discrimination Act* defines disability as:

- (a) total or partial loss of the person’s bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person’s body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;  
and includes a disability that:
  - (h) presently exists; or
  - (i) previously existed but no longer exists; or
  - (j) may exist in the future (including because of a genetic predisposition to that disability); or
  - (k) is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.

Most of these descriptors are self-explanatory, but they are written in medical language. This can be off-putting when using the social model

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5 *Sex Discrimination Act 1984* (Cth).

6 *Racial Discrimination Act 1975* (Cth).

7 *Discrimination Act 2004* (Cth).

of disability (where barriers and attitudes in the community disable you, rather than your condition) to identify as having a disability. An example of a disability under the *Disability Discrimination Act* is a person using a mobility aid who may have “total or partial loss of a part of the body”. Another example is a person with a learning disability who may have “a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction”. If you are having trouble applying these definitions to yourself, speak to your disability rights lawyer.

While some experience of disability may present legal complexities, for most, self-identification of a disability is fine. Chapter 3 goes through the steps of making a disability discrimination complaint, and you will see that a complaint form requires you to identify “disability” as your ground. It is good practice to consider how the legal definition might apply to you, but don’t get too caught up in it. If you self-identify as having a disability, that is a great starting position. You do not need any medical evidence of your disability to start a complaint. If you are unsure, reach out to your disability rights lawyer for advice.

## Protected places and situations

The *Disability Discrimination Act* protects people with disability in certain places but exempts other places and situations:

**Table 2 Protected Places and Situations under the DDA**

Protected	Exempt
<ul style="list-style-type: none"> <li>• Work</li> <li>• Education</li> <li>• Access to premises</li> <li>• Goods, services, and facilities</li> <li>• Accommodation</li> <li>• Land</li> <li>• Clubs and incorporated associations</li> <li>• Sport</li> <li>• Commonwealth laws and programs</li> </ul>	<ul style="list-style-type: none"> <li>• Superannuation and insurance</li> <li>• An act authorised by law</li> <li>• Infectious diseases</li> <li>• Charities</li> <li>• Pensions and allowances</li> <li>• Migration</li> <li>• Combat duties and peacekeeping services</li> </ul>

You should be aware that the protected places and situations and the exemptions vary between States and Territories. For example, under the *Equal Opportunity Act 1984* (SA), projects that are “for the benefit of persons with particular disability” are exempt from discrimination provisions. So, if a cooking school was specifically set up for people with vision impairments and a person with an intellectual disability was denied participation at the cooking school, this exemption may apply. This is because it was a project set up to benefit persons with vision impairments.

All discrimination complaints vary, so it is good to get specific legal advice from your disability rights lawyer.

## Types of discrimination

It is tricky, but disability discrimination law describes *two types* of discrimination: **direct** and **indirect discrimination**. Both types may apply to people with disability who are discriminated against in the places and situations discussed earlier. However, there can only be one type of discrimination (direct or indirect) based on the same set of facts. For example, if you visit the local library and do not have wheelchair access, your disability discrimination complaint may identify direct discrimination. It is a good idea to get legal advice on this, but it is not compulsory. If you are making a disability discrimination complaint without legal help, the Australian Human Rights Commission or local Equal Opportunity Commission can help you work through this.

The criteria for establishing direct or indirect discrimination are set out in the *Disability Discrimination Act*. The State and Territory discrimination laws also prohibit direct and indirect disability discrimination, but the legal tests for these types of discrimination vary.

There are some differences between State and Federal law as to the legal tests for direct or indirect discrimination but, generally, they are described like this:

### Direct discrimination *is where:*

- **because** of your disability,
- you are treated **less favourably** by another person (including an organisation or government department) than that person would treat somebody without your disability,
- in circumstances that are **not materially different**.<sup>8</sup>

For example, a school allows all 5-year-old children who live in Smith Street, Adelaide, to enrol for Term 1 of the school year. However, that school then refuses to enrol a student with an intellectual disability who lives on Smith Street in Term 1 because they have an intellectual disability. The school's refusal would be direct discrimination.

### Indirect discrimination *is where:*

- you are required to comply with a requirement or condition that people without your disability could comply with, but because of your disability you cannot; and
- the condition or requirement disadvantages all people with your disability.<sup>9</sup>

The requirement will *not* be indirect discrimination if it is reasonable in the circumstances.<sup>10</sup> The person (including an organisation or government department) who is alleged to have discriminated against you must prove that it was reasonable.

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8 *Disability Discrimination Act 1992* (Cth), s 5.

9 *Disability Discrimination Act 1992* (Cth), s 6(1).

10 *Disability Discrimination Act 1992* (Cth), s 6(3).

Indirect discrimination covers “stereotyping” and conditions or requirements that seem neutral but do disadvantage people with disability. An example of indirect discrimination is when an employer requires all staff to use office software that does not have screen reader capabilities. This would mean that some people with vision impairment cannot work with that employer. In addition, if a person with a vision impairment applied for a job with the employer and the employer refused to provide alternative software compatible with a screen reader, that could be indirect discrimination.

For more information on this in the context of making a complaint, turn to Chapter 3.

## Reasonable adjustments

When we talk about disability discrimination laws, often the concept of “reasonable adjustments” comes up. Reasonable adjustments describe those adjustments that people with disability need to access all the areas protected by disability discrimination laws, such as work, education, or facilities such as the local library or community hall.

Reasonable adjustments are put in place to ensure a person with disability can participate equally. Reasonable adjustments need to be made unless doing so would cause unjustifiable hardship (more on that later). If you need a specific reasonable adjustment that is not available in your workplace, school, university, or public service, you can request it. For example, a person can request that their employer provide essential information to do their job in an accessible format. If you need help working through whether the adjustment you are requesting is a reasonable adjustment, speak to your disability rights lawyer.

## Defences and unjustifiable hardship

Even where disability discrimination has occurred, a defence may apply. If a Commissioner or Court/Tribunal accepts a defence, then the complaint will not succeed. A defence is different from an exemption (detailed above) because an **exemption** would stop the complaint from going ahead. In contrast, a **defence** means the complaint is made out but will not ultimately succeed because the discriminator has a defence as to why they acted the way they did.

A known defence that you may already have heard of is **unjustifiable hardship**. This is used where an organisation or government department says, “that’s too expensive” or “making changes to our business for you to participate would be an extreme departure from what we usually do”. The *Disability Discrimination Act* provides a defence of unjustifiable hardship where discrimination is alleged to have occurred in work and other areas such as access to premises, education, and goods, services and facilities.<sup>11</sup> The defence requires the person (including an organisation or government department) to prove that they would suffer unjustifiable hardship.<sup>12</sup> The *Disability Discrimination Act* explains that in determining whether a hardship would be unjustifiable, all relevant circumstances of the particular case must be taken into account, including:

- the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- the effect of the disability of any person concerned;
- the financial circumstances, and the estimated amount of expenditure required to be made by the person alleged to have discriminated against another; and
- any Disability Action Plans made in accordance with the *Disability Discrimination Act*.<sup>13</sup>

It can be scary to think that someone who you say has discriminated against you could respond with, “Well, it’s all too hard to accommodate these changes, so we don’t have to”. But that is not what the law is saying. The threshold to meet unjustifiable hardship is quite high, and the discriminator would have to have a compelling reason in the circumstances of the case to make this out.

Another specific defence to a discrimination complaint which only exists in the context of work is the **inherent requirements of the job**.<sup>14</sup> This defence says that discrimination has not occurred if the person with disability was treated differently. Still, even with reasonable adjustments, they could not have performed the requirements of the job. For example,

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11 Sections 21B and 29A.

12 *Disability Discrimination Act 1992* (Cth), s11(2).

13 *Disability Discrimination Act 1992* (Cth), s11.

14 *Disability Discrimination Act 1992* (Cth) s21A.

a person who has limited arm movement and uses a wheelchair may not be successful in applying for a job as a tree arborist because it is an inherent requirement of the job to use heavy equipment to reach high tree branches.

If you bring a complaint under your State or Territory anti-discrimination legislation, there may be other defences that need to be considered. Ensure that you speak with your disability rights lawyer about this.

## Victimisation

It is unlawful to subject someone to a detriment, such as harm or loss, because they are making a complaint or are entitled to make a complaint under discrimination law. Doing so is called victimisation. For example, suppose you are refused entry to the local café because it is not accessible. You tell the café owner that their premises should be accessible, and the café owner then blocks you from the neighbourhood social media group in response to your complaint. That may be an act of victimisation.

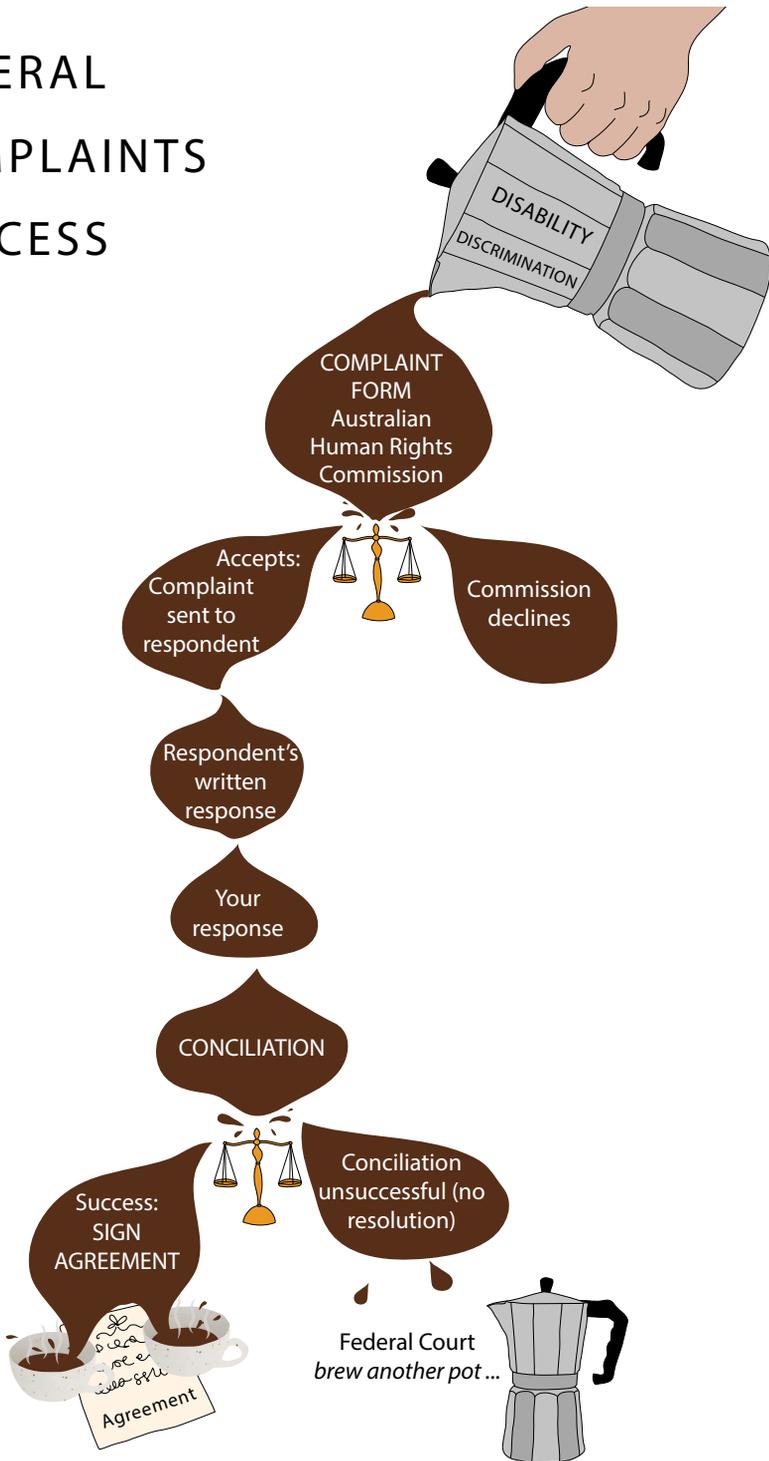
There are significant penalties for victimisation. For example, under the *Disability Discrimination Act*, the penalty is six months' imprisonment. In State and Territory anti-discrimination law, there is a mix of expiation penalties (i.e. fines) and imprisonment.

If you experience this, you can make a complaint of victimisation (in addition to a complaint of discrimination).

Victimisation is a serious complaint that requires careful consideration of and attention to how that complaint is put together. This is an area where having legal advice is particularly beneficial and highly recommended.



# FEDERAL COMPLAINTS PROCESS



# 3

## Complaints

**M**aking a disability discrimination complaint is the practical outcome of discrimination law (see Chapter 2). This is how the “discriminator” (the person, organisation, or service alleged to have discriminated against a person with disability) is held to account. Therefore, it is important to know when and how to make a complaint and what to expect during the process. This chapter will go through the process and give you tips on keeping yourself safe during a discrimination complaint.

### Who do you make a complaint to?

Who you make a complaint to depends on which law you use.

To make a complaint under the Federal *Disability Discrimination Act 1992* (Cth), you will make a complaint to the Australian Human Rights Commission. Complaints under State or Territory discrimination laws will be made to your local Equal Opportunity Commissioner (or Anti-Discrimination Commissioner). For example, in South Australia, complaints made under the *Equal Opportunity Act* are made to the Equal Opportunity Commissioner.

If you are unsure who to make the complaint to, you can call and ask the Australian Human Rights Commission or your local Equal Opportunity Commission. They are very helpful and able to provide some initial guidance. Alternatively, you can ask a disability rights lawyer.

### What support do I need to make a complaint?

You do not need a lawyer or an advocate to make a complaint. Complaints can be lodged by the person affected (or their parent in the case of a child), and you can represent yourself throughout the process if you feel comfortable doing so.

You may choose to get legal advice on when to make a complaint, how to draft the complaint or seek representation at the conciliation. A disability advocate may also be able to support you through the process.

The decision of whether to get a lawyer or advocate involved comes down to what will help you the most with your complaint. If you feel you can do it alone, that is fine. But there is no harm in reaching out for help. For some people, getting help at the start gives them enough support to feel comfortable writing the complaint themselves or even going to the conciliation on their own. Others may feel entirely OK with lodging the complaint but, when they receive the response from the other side, they feel it is time to get legal or advocacy assistance.

A good reason to consider getting a lawyer's help is if the conciliation process is not going well. You may consider taking the matter to court (see a detailed description of the complaints process below). In the case of a complaint to the Australian Human Rights Commission, there is a limited period (60 days) to start proceedings in court, so it is helpful to get legal advice as soon as possible.

## When do I make a complaint?

Complaints must be made within a certain timeframe after the most recent occurrence of discrimination. Some discrimination will persist for months (even years), so it is important to note that the period only starts from the last time you experienced the discrimination. For complaints made to the Australian Human Rights Commission under the *Disability Discrimination Act*, this period is **six months**. In states and territories, the timeframes vary. For example, to make a complaint to the South Australian Equal Opportunity Commissioner under the *Equal Opportunity Act 1984 (SA)*, there is a 12-month period.

It is recommended that you lodge a disability discrimination complaint as soon as possible and provide reasons for the delay if it is outside the time period. The Commission receiving the complaint will let you know if they can hear your complaint in those circumstances.

It is critical to note that if you need immediate intervention in a situation because you are at risk, the sooner you make a complaint, the better. In this situation, you should speak to your disability rights lawyer about any legal action that can be taken to provide immediate intervention, such as an interim injunction to maintain the status quo.<sup>15</sup> For example, students at school who are being prevented from learning due to discrimination

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15 *Australian Human Rights Commission Act 1986 (Cth)*, s46PP.

and face missing time at school will need immediate intervention to avoid interrupting their graduation from school with their peers.

## Outside the complaint process

When discrimination occurs, some people with disability or their families will want to speak to the discriminator directly. They may wish to have a meeting or write to them to try and work out what has happened. It is OK to do this, as long as there is a safe space to have those conversations. Coming to a practical outcome rather than pursuing legal options is a positive thing. However, having such a conversation is not mandatory, so do not feel obliged to try this if you do not feel comfortable. If you decide to, but the conversations are not productive or feel like you are not being heard, cease the interaction.

When you make your complaint to the AHRC or local Equal Opportunity Commission, you can tell them about any such conversations to show that you have tried to work it out. Then, the Commission considering your complaint will convene a safe space for you and the discriminator to work through the issues.

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***It is critical to know that it is never OK for the discriminator to tell you whether you have been discriminated against.***

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If you engage in preliminary discussions about what has been happening and the discriminator says anything to the effect of: "I am not required to do that by law" or "discrimination law does not apply here," go and seek advice from your disability rights lawyer.

# The complaint process

*The complaint process typically follows these steps:*

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1

Complete a **complaint form**:

- a) *What happened*: Be clear, include specific dates and facts where possible. Try to keep it to the facts.
  - b) *When it happened*: Provide a date or identify a key time (i.e. around Christmas or the start of the school year).
  - c) *What outcome you are seeking*: Be practical; tell the Australian Human Rights Commission or State-based Commission what you need to happen to make the discrimination stop.
- 

2

The Commission will **accept or decline** the complaint. If accepted, they send your complaint to the discriminator. In the complaints process, the discriminator is called “the **respondent**”.

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3

The respondent is given an opportunity to provide a written response. If they do so, the Commission will give the response to you to consider.

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4

You may provide a **further response** to their response if you wish.

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5

**Conciliation**: You and the respondent discuss the issues in your complaint with the assistance of an independent conciliator. The Commission provides conciliators who are specially trained to help parties work through their concerns respectfully and productively.

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## 6

The conciliation will either be **successful or unsuccessful**:

- a) *Conciliation successful*: If you and the respondent can agree on the outcome of your complaint at the conciliation, you will sign a settlement agreement. The terms of the settlement agreement are open to the parties and can include almost anything you both agree to be necessary. The Conciliator will draft the agreement and ensure you both sign it properly.
- b) *Conciliation unsuccessful*: If the complaint cannot be resolved at conciliation, the Commission will terminate the complaint, and the next step may be to take the matter to court. At this stage, a finding of whether discrimination has occurred will not be made. The process when conciliation is unsuccessful differs under State, Territory, and Federal laws, and the conciliator will let you know the next steps. For complaints made to the Australian Human Rights Commission under the *Disability Discrimination Act*, you can take your complaint to the Federal Court or Federal Circuit Court. For some complaints, you will need to seek the permission of the court to have your complaint heard.

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## 7

**Court process**: If you are considering taking your complaint to court, it is strongly recommended that you seek legal advice and representation before filing any court documentation. There are time limits to start a court action, so it is good to get a lawyer involved as soon as possible. There are also significant risks of having to pay the other side's costs if you lose. We recommend that you talk to a lawyer talk about those risks. Also, be aware that court processes are lengthy and complex. A lawyer will assist you in mapping the process and identifying the key legal issues and chances of success of your complaint.

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If you have submitted a complaint in your State or Territory Commission (e.g. the South Australian Equal Opportunity Commission) and the complaint does not resolve, the next step is to take the complaint to an administrative tribunal such as the South Australian Civil and Administrative Tribunal. You should get legal advice on this process as soon as possible, but the risks are much lower in Tribunals because they are less costly and less formal than the Federal Court.

## Outcomes

If you go through the complaints process, what can you expect to get out of it? This is a topic that everyone wants to know the outcome of before they start!

At the **conciliation stage**, you can expect a practical outcome. The process is aimed at stopping the discrimination and allowing the person with disability to participate equally. That may be a specific change in the environment for the person or could be a change to policies or procedures. The respondent may apologise or even pay some compensation, although compensation amounts are usually nominal.

For guidance on outcomes at conciliation, including compensation amounts, you can access the Australian Human Rights Commission Conciliation Register<sup>16</sup> or speak to your disability rights lawyer.

Outcomes at the **court stage** are more formal and will decide whether discrimination has occurred. Each complaint at the court stage will offer different potential outcomes, as discussed earlier in this chapter. It is incredibly important to have legal help to pursue a disability discrimination complaint before a court, given the legal complexities, time pressures, and costs involved.

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16 Australian Human Rights Commission, 'Conciliation Register' (Web Page)  
< <https://humanrights.gov.au/complaints/conciliation-register> >

## Keeping safe

Being discriminated against is awful and speaking out against it is hard. It is important that you seek mental and emotional support if you need it when you experience discrimination and if you want to make a complaint. If possible, seek support from your family, friends, and allies. Do not feel you have to go through this alone.

You may also wish to reach out to a support service. Here are some details:

- Lifeline – 13 11 14 or [www.lifeline.org.au](http://www.lifeline.org.au)
- Beyond Blue – 1300 22 4636 or [www.beyondblue.org.au](http://www.beyondblue.org.au)
- Kids Helpline – 1800 55 1800 or [www.kidshelpline.com.au](http://www.kidshelpline.com.au)



# 4

## Making Decisions

To make legal decisions for yourself as an adult, you must have **“capacity”**. Capacity is a legal word used to describe a person’s ability to think through a decision and be responsible for that decision. For example, a person may decide where they want to live and, in making that decision, commit to paying rent or a mortgage, ensure that it is near their work and that the house suits their needs. To make that decision, you must have the ability to think it through, consider the risks, and make a decision factoring in all those considerations. The word “capacity” can have a harsh connotation for some people and using this word can be offensive. This chapter focuses on the ability of people to make decisions, so it will refer to **“ability”** rather than capacity.

Laws that govern situations where a person does not have the ability to make decisions are different in each State and Territory. For this chapter, the focus is on South Australian law. However, it would help if you spoke to your disability rights lawyer about your situation, no matter where you live.

### The starting position

The starting position is that everyone has the ability to make decisions for themselves unless it is proven otherwise. If there are concerns about someone’s ability to make decisions, a doctor or medical professional will need to assess that person and advise on whether they can make decisions. To assess a person’s capacity, the doctor will meet with the person and ask them a series of questions. The doctor will then complete a report called a “capacity assessment report”. It is important to know that your disability does not, in and of itself, ever remove your ability to make your own decisions. For example, if you have an intellectual disability, you have the ability to make your own decisions unless it is proven that you cannot.

If a person cannot make their own decisions, the law says that another person can be appointed to make decisions for them. For example, a guardianship order is required to appoint a guardian for decisions about accommodation, health, and lifestyle. For decisions about financial or legal affairs, an administration order is required to appoint an administrator. Guardians or administrators may be known to a person with disability or could be a government authority (e.g. the Public Advocate). Each State and Territory has laws for the appointment of guardians and administrators. For example, in South Australia, guardians and administrators are appointed under the *Guardianship and Administration Act 1993* (SA).

## Informal supports

For some people with disability, their family or close friends help them make decisions and have been doing so for their whole lives. These “informal arrangements” may have been working for a long time and can be used in various circumstances, such as organising disability support services or making some medical and dental treatment decisions. It can be OK for decisions to be made this way. (For more on supported decision making, where a person is supported to take part in the decision-making process, read the section below titled “A note on Supported Decision Making”.)

If there are concerns about how those arrangements are working, including if the person with disability is not happy about how decisions are being made, a formal order may be needed. A formal order appoints a “**decision maker**” (known as a guardian or administrator) to make the decisions for you. In addition, some institutions such as banks require a formal order to be in place before they are prepared to act on decisions made by the support person.

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*You should exercise caution in relying on informal arrangements for making decisions in some situations. These would relate to those such as managing money, using restrictive practices, or making serious medical decisions.*

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There is no hard-and-fast rule as to when a guardianship or administration order may be necessary. The situation can change

throughout a person's life depending on what decisions need to be made and the person's ability to make those decisions. If you are unsure whether the informal arrangements are working or whether you are capable of making legal decisions, speak to your disability rights lawyer.

## **Areas of legal decision making**

When considering a formal order to appoint a guardian or administrator, the order can cover specific areas of legal decision making.

### ***Decisions about lifestyle, health, or accommodation (guardianship orders)***

Everyone needs to make decisions about their medical care (health), where they live (accommodation), and how they live their life (lifestyle). If you do not have the ability to make these decisions for yourself, a guardian may need to be appointed.

A guardian can be a family member or someone you trust. If no one is suitable in your current networks, the Public Advocate is a government authority who can be appointed as a guardian.

The guardian must act in your best interests and consider what your wishes and preferences would be in the circumstances. For example, say that you ate only vegetarian food because that is an important value in your life and you later sustained a brain injury. Although the brain injury may impair your decision-making function, your guardian would be expected to respect that you would prefer vegetarian meals.

It is important to note that if you cannot make decisions in one area, the guardian will only have the legal power to make decisions for that area. So, for example, if a person cannot make decisions about their medical treatment, they can still make decisions about where they live if they have the decision-making ability to do so.

### ***Decisions about money or legal affairs (administration orders)***

Opening a bank account, managing your weekly pay, or entering a contract are all decisions that require you to have the ability to make those decisions. If you cannot make these decisions for yourself, an administrator may need to be appointed to make those decisions.

An administrator can be someone you know and trust or the Public Trustee (a government authority with the power to make financial decisions). It is important that the person appointed is good with money

and can make decisions that reflect your wishes and preferences. For example, if you like to donate \$10 every month to a dog rescue charity and have regular income to support that donation, your administrator should act accordingly.

## How is a guardianship or administration order put in place?

To have a guardian or administrator appointed, a Civil and Administrative Tribunal needs to consider the case and make that legal order. If you or someone you care about needs to have a guardianship or administration order put in place, the process generally follows these steps:

1. Make an application to the Tribunal and include any documents about the person's ability to make decisions (e.g. medical reports) and documents that relate to the decision to be made.
2. The Tribunal will consider the case and hold a hearing to receive the opinions of people involved in the life of the person who does not have the ability to make decisions.
3. A legal order is then made for a certain time period and specifies what decisions the guardian can make for the person.

Each State and Territory has laws that determine this process, and you can get more information on these websites:

- South Australian Civil and Administrative Tribunal [www.sacat.sa.gov.au/](http://www.sacat.sa.gov.au/)
- Victorian Civil and Administrative Tribunal [www.vcat.vic.gov.au/](http://www.vcat.vic.gov.au/)
- NSW Civil and Administrative Tribunal [www.ncat.nsw.gov.au/](http://www.ncat.nsw.gov.au/)
- State Administrative Tribunal (Western Australia) [www.sat.justice.wa.gov.au/](http://www.sat.justice.wa.gov.au/)
- Northern Territory Civil and Administrative Tribunal [www.ntcat.nt.gov.au/](http://www.ntcat.nt.gov.au/)
- Queensland Civil and Administrative Tribunal [www.qcat.qld.gov.au/](http://www.qcat.qld.gov.au/)
- Guardianship and Administration Board (Tasmania) [www.guardianship.tas.gov.au/](http://www.guardianship.tas.gov.au/)
- ACT Civil and Administrative Tribunal [www.acat.act.gov.au/](http://www.acat.act.gov.au/)

You can seek help with making an application or advice on when to make an application from your disability rights lawyer.

## Removing the order

When a guardianship order or administration order is in place, the order needs to be removed or reviewed if:

- You are not happy with how decisions are being made.
- You no longer need the decisions to be made.
- Circumstances have changed.

If the order needs to be reviewed or removed, you should speak with your disability rights lawyer.

## A note on supported decision making

At the time of writing this Handbook, “supported decision making” was not part of guardianship laws in South Australia or consistently across the States and Territories. Supported decision making is about respecting people’s dignity, autonomy, and independence while supporting them to make their own decisions, where such support is needed.<sup>17</sup> While the current law does not formally require supported decision making to be used where a person may need some help to understand the decision-making process, if you do need some help with understanding a decision it is important that you ask for it. Recognising that the law on this may change soon after the publication of this Handbook,<sup>18</sup> please contact your disability rights lawyer for more information on supported decision making in your situation.

## Decision making and the NDIS

The NDIS is a big part of life for many people with disability and can involve many decisions about your lifestyle and accommodation (see more on the NDIS in Chapter 5). This might make you think you need a guardianship order if you are not able to make decisions about those topics. But making decisions about the NDIS is different from the decisions discussed in this chapter.

If you cannot make decisions about your NDIS Plan, you will not necessarily need a guardianship order. The NDIS has a process where

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17 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) 1.1.

18 Per *Guardianship and Administration (Miscellaneous) Amendment Bill 2021* (SA).

“nominees” can make decisions for people with disability when you cannot make decisions about your Plans. NDIS nominees are legally different from guardians, but an NDIS nominee and a guardian can be the same person.

For further information on nominees, speak to the National Disability Insurance Agency or your local disability advocate.

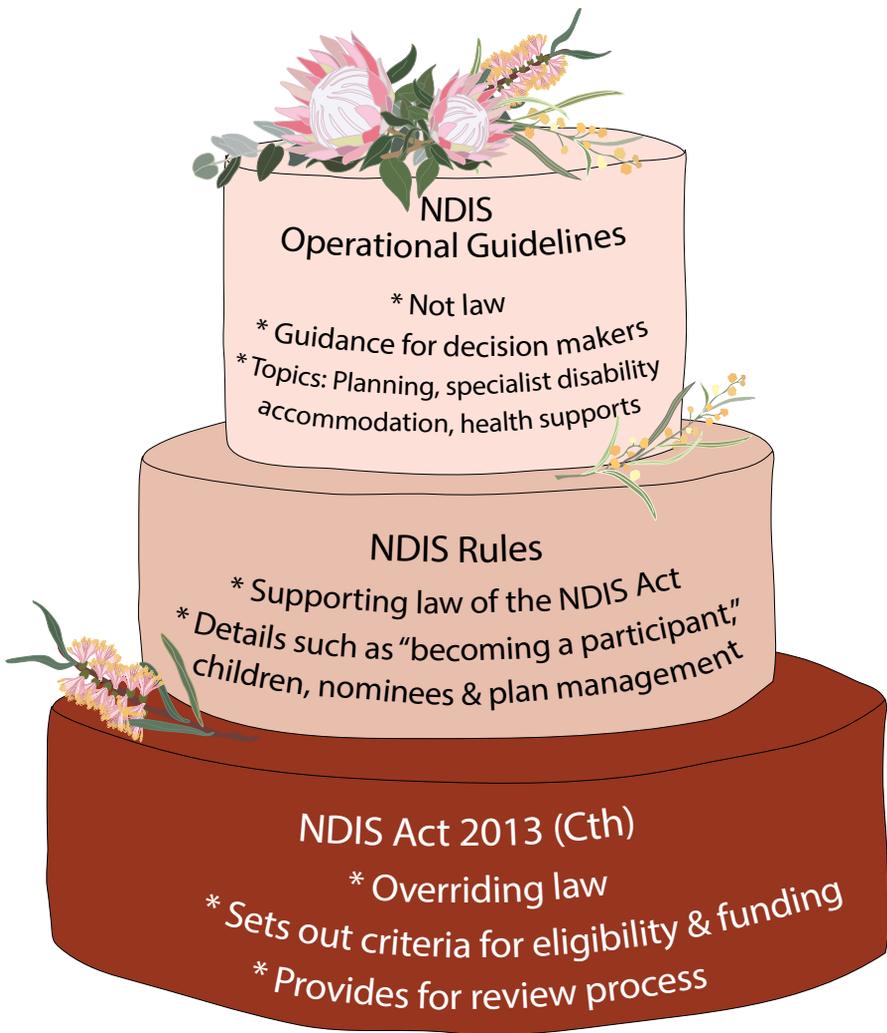
## Safeguards

If you have a person making your decisions for you as a guardian or administrator, it is important you feel safe. Their decisions should not make you feel at risk or as if you are not getting what you need out of life.

When these concerns arise, you can reach out to a trusted family member or friend to seek their support in addressing the concerns. If you do not feel safe doing so, contact your lawyer or advocate for further advice.

All guardianship and administration orders are subject to regular reviews by the Tribunal that originally made the order. The order will say when the review date is. These reviews are a good chance to raise any concerns about how the order is operating. However, do not wait for a review if you have concerns. Your safety is paramount, and you deserve to live the life you want so, if you need help, reach out to someone you trust.





# 5

## The National Disability Insurance Scheme

The National Disability Insurance Scheme (NDIS) provides funding to people with disability who need disability-specific services and supports. The NDIS is a national scheme and is available to all eligible Australians with disability. The NDIS aims to increase the social and economic participation of people with disability. This NDIS funds services, equipment, and supports that assist people with disability to achieve their goals and aspirations.

The NDIS replaced State Government disability funding and has shifted the focus to the choice and control of people with disability to decide what they need support with to achieve whatever their goals are. The NDIS can fund a range of supports and services, including personal care, assistive technology, home modifications, and transport. When a person with disability is accepted into the NDIS, they are referred to as a “participant”.

### The law

The NDIS legal framework is complex. The key instruments that work together to inform how the NDIS operates and how the National Disability Insurance Agency makes decisions are:

- **National Disability Insurance Scheme Act 2013 (Cth) (NDIS Act):** This law is the foundation of the entire system and sets out the criteria for eligibility, how funding is determined to be reasonable and necessary, and the process to seek a review of a decision by the National Disability Insurance Agency.
- **National Disability Insurance Scheme Rules:** The Rules provide detail on the operation of the scheme. The Rules include topics such as becoming a participant, children, nominees, and plan management.
- **National Disability Insurance Scheme Operational Guidelines:** The Guidelines are not law but contain key operational information. Decision makers will use the Guidelines to perform their functions

## NDIS: ARE YOU ELIGIBLE?



- aged 0-65 years
- live in Australia
- Australian citizen / permanent or special category visa
- have an impairment or condition which is permanent and substantially reduces capacity to undertake communication, social interaction, learning, mobility, self-care or self-management
- have a disability which affects capacity for social or economic participation
- need lifetime support

## NDIS MEETING TO FORMULATE PLAN



### Plan Part 1 - Statement of goals & aspirations

What you want to achieve in the short, medium & long term.  
How you will achieve those goals.  
Context on living arrangements, community supports, social life, & work.

### Plan Part 2 - Statement of Supports

Detail specific funding for supports required to achieve goals and aspirations.



**LIVE  
YOUR  
LIFE!**

under the NDIS Act. You can refer to the Guidelines when challenging a National Disability Insurance Agency decision or if you want to know more about how decisions are made. Like the Rules, the Guidelines can change from time to time but, currently, there are Guidelines on planning, Specialist Disability Accommodation, and disability-related health supports.

Speak to your disability rights lawyer about how the Act, Rules, and Guidelines apply to your situation.

## How does the NDIS work?

To become a participant, you need to be eligible. The eligibility criteria are a bit legalistic in language, but it is worth including them for your reference. If you need a hand working through it, give your disability advocate or disability rights lawyer a call.

*To be eligible for the NDIS, you must:*

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1 Be aged 65 years or younger.

---

2 Live in Australia as an Australian citizen or hold a permanent or special category visa and have a disability.

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3 Meet the disability requirements, which are to:

- a) identify an intellectual, cognitive, neurological, sensory or physical impairment or psychiatric condition;
- b) have an impairment or condition which is likely to be permanent and substantially reduces capacity to undertake communication, social interaction, learning, mobility, self-care or self-management;
- c) have a disability which affects capacity for social or economic participation; and
- d) need support for their lifetime, even if their disability varies in intensity.

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The NDIS also funds **early intervention supports** if you have an intellectual, cognitive, neurological, sensory, or physical impairment that is permanent or if a child has a developmental delay. The early intervention supports must likely reduce your future needs for support concerning your disability and offer an opportunity to improve your functional capacity (which is your ability to do things) or prevent the deterioration of functional capacity. Early intervention supports can also offer the opportunity to strengthen the long-term sustainability of your informal supports, including through building the capacity of your carer.

### ***Making an Access Request***

An Access Request is when you ask to become a Participant of the NDIS. If you are eligible for the NDIS, you can make an Access Request by calling the National Disability Insurance Agency on 1800 800 110. When making an Access Request, you will need to provide evidence of your disability. That evidence can be recent reports from your doctor or treating specialist. The report should confirm your primary disability and explain how it impacts the different areas of your life. Any treatment given in the past or future treatment planned should also be included.

### ***NDIS planning meeting and Plan***

Once your Access Request is accepted, you will attend a “planning meeting”. At the planning meeting, you will go through the goals that you wish to achieve through having support. This could be a goal that is usual for you, like going to work or living independently. Or it can be a goal that is brand new, and you have not explored, such as driving a car.

The evidence you have provided with your Access Request, and any further evidence required to justify the funding you need, will also be discussed at the planning meeting. You can have a support person or advocate attend the planning meeting with you.

The National Disability Insurance Agency will create an NDIS Plan, which has two parts:

- 1. Statement of goals and aspirations:** What you want to achieve in the short, medium, and long term and how you will achieve those goals. This will provide context to your living arrangements, community supports, social life, and work.
- 2. Statement of participant's supports:** This details the specific funding given for your supports.

The NDIS Plan will be in place for a specified timeframe, for example, 12 months. At the end of that time, the plan will automatically be reviewed (**scheduled review**). That review process can involve another planning meeting, and you can change your goals or support needs if required.

### *Reasonable and necessary supports*

The NDIS funds “reasonable and necessary supports”. To be reasonable and necessary, the support you have requested must:

- assist you to pursue the goals, objects and aspirations in your NDIS Plan;
- assist you to undertake the activities that facilitate your social and economic participation;
- represent value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;
- be effective and beneficial to you, having regard to current good practice;
- take into account what is reasonable to expect families, carers, informal networks, and the community to provide; and
- not be more appropriately funded by another system or be available as a reasonable adjustment.<sup>19</sup>

The National Disability Insurance Agency will determine whether your requested supports are reasonable and necessary. Yet, it is worth speaking with your treating specialists (physiotherapists, speech therapists, occupational therapists, etc.) to ensure that the support you need can be funded through the NDIS. While these criteria of reasonable

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<sup>19</sup> *National Disability Insurance Scheme Act 2013* (Cth), s34.

and necessary support are important, make sure you ask for the supports you need to achieve your goals. In addition, you can get help from your disability advocate or disability rights lawyer with the technical aspects of any supports that fit with the requirements of the NDIS.

## Reviews

### *Something has changed – Change of Circumstances Review*

While NDIS Plans are designed to last for a set period, life can change, and your goals or support needs might need to shift before the plan is due for a scheduled review. You can request a Change of Circumstances Review (also called an *Unscheduled Plan Review*) in these circumstances.<sup>20</sup> The National Disability Insurance Agency must determine a Change of Circumstances Review within 14 days. The result of the review is to prepare a new NDIS Plan to include the new supports.

If the new supports requested are denied, you can seek an internal review of that decision (see below).

### *Not happy with the decision by the National Disability Insurance Agency – internal review*

Specific decisions made by the National Disability Insurance Agency, such as whether you can access the NDIS or what supports you can have in your NDIS Plan, are reviewable. So, suppose the National Disability Insurance Agency decides that you cannot access the NDIS or have the supports you have requested. In that case, you have the right to ask for that decision to be reviewed by another National Disability Insurance Agency officer. This is called an “internal review”. You can request an internal review by calling the National Disability Insurance Agency, emailing them, or writing them a letter. If you need help with this, contact your disability advocate.

The National Disability Insurance Agency decisions that can be reviewed are:

- that a person does not meet the access criteria;
- where a period has not been specified;
- to revoke a person’s status as a Participant;
- to approve the statement of participant supports in the plan;

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<sup>20</sup> *National Disability Insurance Scheme Act 2013* (Cth), s48.

- not extending a grace period;
- not reassessing a Participant's plan;
- refusing to approve a person or entity as a registered provider of supports;
- revoking approval of a person or entity as a registered provider of supports;
- refusing to register a person as a registered NDIS provider;
- imposing conditions on a person's registration as a registered NDIS provider;
- varying, or refusing to vary, the registration of a registered NDIS provider;
- suspending the registration of a registered NDIS provider;
- revoking, or not revoking, the registration of a person as a registered NDIS provider;
- giving a compliance notice to an NDIS provider;
- varying, or to refusing to vary or revoke, a banning order;
- making, or not making, a determination in relation to a person;
- not to make a determination that provisions in relation to who can do things for or in relation to a child who is an NDIS Participant do not apply;
- making, or not making, a determination that a person has parental responsibility for a child;
- appointing a plan nominee;
- appointing a correspondence nominee;
- cancelling or suspending the appointment of a nominee;
- giving a notice to require a person to take reasonable action to claim or obtain compensation;
- refusing to extending a period for a compensation claim;
- taking action to claim or obtain compensation;
- taking over the conduct of a claim;
- giving notice that the CEO of the National Disability Insurance Agency proposes to recover an amount;
- not treating the whole or part of a compensation payment as not having been fixed by a judgment or settlement;

- not writing off a debt;
- that the CEO is not required to waive a debt; and
- not to waive a debt.<sup>21</sup>

For help working out whether a decision can be reviewed, speak to your disability rights lawyer. Importantly, **when you ask for a review, you need to be clear about the supports you want but which are denied, or which supports you would like to be increased.** For example, suppose you do not raise the specific support you were denied at the internal review. In that case, you may not be able to bring up that support in the external review before the Administrative Appeals Tribunal (more on that below).

Be aware that internal reviews can take some time. If you need support during this time, reach out to your disability advocate.

### ***Review by the Administrative Appeals Tribunal – external review***

If you are not happy with the internal review, you can go to the Federal Administrative Appeals Tribunal for an external review. For help taking your case to the Administrative Appeals Tribunal, legal assistance is available for free through your local Legal Aid Commission. Alternatively, you can engage a private disability rights lawyer.

You can seek an external review via the Administrative Appeals Tribunal website,<sup>22</sup> using a hardcopy application form available from the Administrative Appeals Tribunal registry,<sup>23</sup> or writing a letter to the Tribunal. A Tribunal Member who is independent of the National Disability Insurance Agency will hear the external review.

When you request a review, the National Disability Insurance Agency is required to provide all the documents it holds about the decision (called “T-documents”). You and the National Disability Insurance Agency then need to attend a case conference where a Tribunal officer will help you and the National Disability Insurance Agency come to a resolution. You should seek legal help with this process.

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21 *National Disability Insurance Scheme Act 2013* (Cth), s99.

22 <https://online.aat.gov.au/>

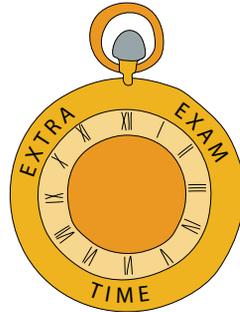
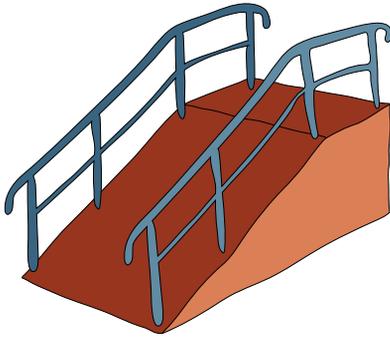
23 Call 1800 228 333 for information on your local registry.

If the issues cannot be resolved at the case conference stage, the Administrative Appeals Tribunal may hold a hearing. This is a more formal setting where the Tribunal Member will hear both sides of the story. At the hearing, witnesses may give evidence about the issues in the case. For example, an occupational therapist may give evidence about why you need the support and how it fits within the scheme. Both you and the National Disability Insurance Agency will be given a chance to say why you and they believe the original decision of the National Disability Insurance Agency should or should not stand. Usually, both you and the National Disability Insurance Agency will be represented by a lawyer at a hearing.

The Administrative Appeals Tribunal will determine whether or not the decision was correct. If it was not correct, the Tribunal might direct the National Disability Insurance Agency to make a different decision. Say, for example, the National Disability Insurance Agency refused to fund 10 hours per week for you to attend physiotherapy to maintain your ability to transfer from your wheelchair to bed. The Tribunal could find that it was not the correct decision and direct that the National Disability Insurance Agency fund those hours of support.

While the process of an external review is daunting, make sure you reach out to your local Legal Aid Commission or disability rights lawyer to help. It is important that you receive the funding for supports you need to achieve your goals.

You can ask for reasonable adjustments in school, university, and all other educational institutions!



# 6

## Learning

The right to education is a universal human right. Every person with disability has a right to education.<sup>24</sup> That means that people with disability can and should go to school, university, or any learning place and participate on an equal basis with others.

Unfortunately, this has not been the case for many Australians with disability. Historically, people with disability have been educated separately from their peers without disabilities. Disappointingly, many people with disability have not had the chance to graduate from high school or complete tertiary education.<sup>25</sup>

International human rights law requires that people with disability have access to “**inclusive education**”. Inclusive education is where students with disability learn alongside those without disability and have their individual learning needs met.<sup>26</sup> Schools and other learning environments where people with disability learn separately from their peers without disability are not “inclusive education” and are inconsistent with international human rights law.

This chapter will identify what education might look like for people with disability right now and, more importantly, what it should look like. It covers practical advice on how to decide where to go to school. It also

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24 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, Preamble (e) (entered into force 3 May 2008) art 24.

25 32 per cent of people with disability aged 20 years or over have completed Year 12, compared to 62 per cent of people without disability. Fifteen per cent of people with disability aged 20 and over have a Bachelor degree or higher, compared to 31 per cent of people without disability (per Australian Institute of Health and Welfare, *People with disability in Australia 2019: in brief*, (September 2019) <<https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia-in-brief/contents/how-many-are-studying>>)

26 Committee on the Rights of Persons with Disabilities, *General Comment No. 4* (2016) on the right to inclusive education (CRPD/C/GC4), 11.

addresses how to ask for what you need in a learning environment. Finally, the chapter includes the next steps for you to follow for those who do not get what they need.

## Types of education in Australia

“Education” can cover education delivered in various environments, including schools, universities, vocational training, and adult learning programs. The way that people with disability have been able to access these educational settings has changed over time.

For students with disability at school (those typically under the age of 18, completing compulsory schooling), there are three main ways in which education is currently offered:

- 1. Special schools:** Schools that are set up to provide education to people with disability. The school is a separate campus from other schools and does not accept enrolments from students without disability.
- 2. Disability-specific units within mainstream schools:** A student with disability will be enrolled in the mainstream school but receive their education in a “disability-specific unit” in the school. The unit is usually on the same campus as the mainstream school. Students with disability may be able to interact with their peers during breaks and some subjects (usually non-academic), but they learn in a separate environment.
- 3. Mainstream schooling (with some reasonable adjustments made):** A student with disability is enrolled in a mainstream school and learns alongside students without disability. The school may remove barriers to the learning environment, such as physical barriers, or use alternative communication methods to ensure that they can learn effectively in the mainstream environment. These are types of “reasonable adjustments”. However, it is mostly the expectation in these environments that the student with disability will fit into the offered environment as it is currently. This type of education is often referred to as “integration” in international law, which is different from “inclusion”.<sup>27</sup>

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27 Committee on the Rights of Persons with Disabilities, *General Comment No. 4* (2016) on the right to inclusive education (CRPD/C/GC4), 11.

For adult students, education through university, TAFE, or vocational training is available to everyone in the community, but the participation of students with disability is likely to require reasonable adjustments. In addition, these learning environments were not set up assuming that people with disability will attend, so “retrofit” adjustments are often needed for students to access learning in that environment.

## The goal: Inclusive education

Despite different models being available to students with disability in schools, and the existence of examples of “inclusive practices” in some schools and classrooms, for the most part, inclusive education as a model of education delivery is not available to students with disability in Australia.

International human rights law tells us that inclusive education is:

1. A fundamental right of all students. The right is held by the individual learner, including children themselves.
2. A principle that values the wellbeing of all students, respects their inherent dignity and autonomy and acknowledges individuals’ requirements and their ability to be effectively included in and contribute to society.
3. A means of realising other human rights. It is the primary means by which people with disability can lift themselves out of poverty, obtain the means to participate fully in their communities and be safeguarded from exploitation. It is also the primary means of achieving inclusive societies.
4. The result of a process of continuing and proactive commitment to eliminating barriers impeding the right to education, together with changes to culture, policy, and practice of traditional schools to accommodate and effectively include all students.<sup>28</sup>

Practically speaking, inclusive education assumes that students learn and function differently and ensures that education is delivered to enable all students to access and participate in learning equally and without discrimination.

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28 Committee on the Rights of Persons with Disabilities, *General Comment No. 4* (2016) on the right to inclusive education (CRPD/C/GC4), 10.

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*In Australia, we must strive toward offering education to students with disability on an equal basis to other students.*

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Systemic change is needed rather than individual adjustments or educating students with disability in separate settings. Students with disability learning in classrooms alongside their peers without disability should not be an “add on”. Rather, it should be the standard education experience. Making this change is everyone’s responsibility, but especially falls to government, schools, and advocacy organisations that represent people with disability and their families.

A good (and modest) example of inclusive practice in education is ramps. The humble ramp can be found in nearly every school in Australia. Ramps provide access for people with physical disability to enter buildings and spaces that have steps. It has become nearly universal for ramps to be built into the school environment. It is an adjustment that is now embedded in building codes that schools must use. Having ramps available in the school environment means that students with physical disabilities can access all areas of the school, as can students without physical disabilities. Another less common example is the use of images alongside text to facilitate access to content. Images can be part of the range of practices used to enable students with learning disabilities to access the curriculum.

## **School: Asking the right questions and knowing your human rights**

This part of the chapter applies just to schools. As mentioned above, schools currently adopt different models to educate students with disability. Within those models, approaches and attitudes can also vary from school to school.

The goal is inclusive education. The authors do not endorse the models currently available for students with disability because they fail to meet the international human rights standard. However, we do recognise that children with disability and their families are faced with the challenge of navigating the current system and the inferior models available in Australia.

Students with disability, with the support of their families, need to decide where they go to school. However, it is important to acknowledge that, in practice, widespread “**gatekeeping**” and other forms of discrimination by schools can significantly limit what options are available for students with disability. Gatekeeping is the formal or informal denial of access to, or discouragement of, students with disability attending mainstream schools.

In considering a particular school and the model of education the school operates, **students and families should ask questions** about:

- The delivery of education and access to the curriculum
- Social supports
- Accessibility and the built environment
- Participation in extra-curricular activities (such as excursions and camps)
- Behaviour management approaches
- Student safety and wellbeing, including bullying
- Attitudes of school leaders to disability and difference
- Any other relevant matters.

Examples of questions could include:

- How will the student be supported to access the curriculum?
- Does the school understand its obligation to provide reasonable adjustments?
- Does the school have high expectations for all students, regardless of disability?
- Are students with disability segregated from the mainstream classroom to learn with other students with disability?
- Are students “pulled out” of their classroom based on their disability?

As discussed, some school models are based on separating students with disability from peers without disability. In contrast, other school models may separate students with disability some of the time or not at all. Apart from segregation being a violation of human rights, more than 40 years of strong and consistent research comparing education outcomes for students with disability in segregated “special” versus regular education environments has found no evidence of better outcomes from the

practice of segregation.<sup>29</sup> The evidence shows that when students with and without disability learn together, they all do better.<sup>30</sup> Unfortunately, students and families are not always provided with this information.

The **attitudes of the leadership and staff** of the school play a role in access to learning. For example, suppose staff at a school believe that a student with an intellectual disability could not learn at the school. In that case, they are less likely to provide the student with reasonable adjustments and support their right to participate fully in learning. They are also more likely to engage in gatekeeping. Such a school would not offer inclusive learning for a student with intellectual disability.

Many students with disability may also face additional barriers in **making friends and forming peer connections**. The school's approach to providing social supports for students at risk of being socially isolated (such as peer mentoring initiatives) may be especially important. A good question to ask in this respect is whether bullying is a significant issue at the school and, if so, how the school addresses bullying and victimisation of students. Bullying is a problem that occurs across all education models, and there is no evidence that students with disability in segregated settings are better protected.<sup>31</sup> It is best to try to get a sense of the school's culture and values and the attitudes of staff and students to disability and difference, including by speaking with other students and families who can share their experiences.

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29 Cologon, K. Towards inclusive education: A necessary process of transformation. Report written by Dr Kathy Cologon, Macquarie University for Children and Young People with Disability Australia (2019); De Bruin, K. (2020) 'Does inclusion work? In L J. Graham (Ed.), *Inclusive Education for the 21st Century: Theory, Policy and Practice* (1st ed., pp. 55-76), Allen & Unwin.; National Council on Disability, 'IDEA Series – The Segregation of Students with Disabilities (2018).

30 Grzegorz Szumski, Joanna Smogorzewska and Maciej Karwowski, 'Academic achievement of students without special educational needs in inclusive classrooms: A meta-analysis' (2017) *Educational Research Review* 33e54, 21; Todd Grindal et al 'A Summary of the Research Evidence on Inclusive Education' (2016). <[https://www.researchgate.net/publication/314288511\\_Academic\\_achievement\\_of\\_students\\_without\\_special\\_educational\\_needs\\_in\\_inclusive\\_classrooms\\_A\\_meta-analysis](https://www.researchgate.net/publication/314288511_Academic_achievement_of_students_without_special_educational_needs_in_inclusive_classrooms_A_meta-analysis)>

31 Chad A. Rose, Lisa E. Monda-Amaya, and Dorothy L. Espelage, 'Bullying Perpetration and Victimization in Special Education: A Review of the Literature' (2011) *Remedial and Special Education* 32 2 114-130, 125; See also Chad A. Rose, Dorothy L. Espelage, Steven Aragon and John Elliott, 'Bullying and victimization among students in special education and general education curricula' (2011) *Exceptionality Education International* 21, 2-14

The policies and strategies adopted concerning **students' behaviour** can also matter greatly. It would help if you asked questions such as whether the school punishes or excludes students to manage their behaviour. Does the school use "restrictive practices" (i.e. restraint and seclusion)? These types of strategies can cause physical, social, and emotional harm, and their impact may be greater for students with certain disabilities, who are at greater risk of being perceived by schools as having "challenging behaviour", such as students with communication or learning disabilities. Many schools nowadays are moving towards more positive approaches to supporting student behaviour.

For students with physical access needs, the school's built environment will be a big factor in their access to education. For example, will the student be able to access all classroom, play spaces, and social environments?

In many cases, the school's track record in supporting other students with disability will be helpful. For example, suppose a mainstream school has supported students with physical disability or sensory impairment successfully in the past. In that case, they are more likely to have acquired the knowledge and skills to support a student with a similar disability or impairments. This may make choosing that school an obvious choice. However, the attitude of the principal and school leadership to disability may be just as important. Schools may not always have all the skills needed because the support needs of students, regardless of their disability, will vary from student to student, and reasonable adjustments are individualised. However, a "can do" attitude can make a big difference to how well the student is supported. In addition, a school that respects diversity and values is more likely to welcome and support the student and their family genuinely.

To work through these questions, remember that you do not have to do it alone. You can ask for information from the school or the Department of Education (for State schools). You can also reach out to your local disability advocacy organisation for more insights or referrals to active community organisations knowledgeable in this space.

Hopefully, in future editions of this Handbook, there will only be one model of education, an inclusive model, and an inclusive standard will apply across all schools. But until then, be guided by the principle of **equal participation in education**.

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*Keep asking: In what environment would the student be best able to learn the material and advance their knowledge like everyone else?*

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### ***Discrimination in education***

It is unlawful for a school, university, or education provider to treat a person with disability unfavourably because they have a disability. Protection against this treatment is found in the *Disability Discrimination Act 1992* (Cth) and discrimination laws in the States and Territories.

When the law talks about “unfavourable treatment,” it doesn’t just mean that a reasonable adjustment was not provided. The concept is that a person without disability would not have been treated that way in those circumstances.

A person with disability may face discrimination in education by:

- The educational institution refusing or failing to accept admission on the ground of a person’s disability.
- The terms and conditions on which the educational institution is prepared to admit the person as a student.
- Denying access or limiting access to any benefit provided by the educational institution.
- Expelling the student on the basis of their disability.<sup>32</sup>

Educational providers are also not allowed to develop curricula or training courses with content that will exclude the person with disability from participating or cause detriment to that person.<sup>33</sup> For example, suppose a student with disability who lived in the local area was refused enrolment to the school. Yet, all the other students from their neighbourhood were enrolled at the school. In that case, the student with disability may be facing discrimination. It does not matter what the school’s motive was in declining the student’s enrolment – if it was declined on the basis of their disability, you should talk to your disability rights lawyer about this.

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<sup>32</sup> *Disability Discrimination Act 1992* (Cth), s22.

<sup>33</sup> *Disability Discrimination Act 1992* (Cth), s22(2A).

While the legal protections for disability discrimination are available in federal, State, and Territory laws, there are some key differences. For the disability discrimination complaints process, please refer back to Chapter 2 on discrimination complaints.

### ***Disability Education Standards***

Importantly, under the *Disability Discrimination Act*, there are the *Disability Standards for Education 2005* (**Disability Education Standards**).

The Disability Education Standards are to be read alongside the *Disability Discrimination Act*. Together, they provide a better understanding of what key concepts under the *Disability Discrimination Act* mean for education. For example, the Standards provide information on what reasonable adjustments should be made, how the school, university or education provider will ensure the student can participate, or how the student will be consulted. This provides a process to be followed to ensure a student with disability is receiving an equal education.<sup>34</sup>

When working with your school or education provider, you may wish to use the Standards in your discussion with the staff or use them as a guide to set up processes to ensure the student can participate equally. If you do need to bring a complaint against the education provider, the Standards can form part of the complaint. You can talk to your disability rights lawyer for help with this.

### **Ask for reasonable adjustments**

Across all school and tertiary education models, you can ask for reasonable adjustments if you need them. “Reasonable adjustments” were discussed earlier in this Handbook, so feel free to refer back to Chapter 2 to refresh yourself on the concept.

Reasonable adjustments refer to what individual changes need to be made to the learning environment for the student with disability to participate equally. They are things that do not exist for other students (but would equally not impose on the learning of other students) and would allow the student with disability to learn equally. Reasonable adjustments may be a ramp to a building, extra exam time, Auslan interpretation, alternative formats for reading material or regular break times to assist with thought processing.

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<sup>34</sup> *Disability Standards for Education 2005*, p. iii.

The reasonable adjustments that a student needs can be discussed with the school at any time. For some students, their needs will be known at enrolment and put in place when they start school. For other students, reasonable adjustments will not be obvious until they get into the school environment and start learning. That is OK! The reasonable adjustments can be requested as they are identified. For example, a student who is neuro-divergent may not know what reasonable adjustments they need to process the sensory environment of a classroom before they are in it. That student may go to school and find that their classroom is too noisy for them to learn. The student or their family may request that a reasonable adjustment be made for their class to have “quiet time” for learning so that the noise level and activity for the classroom is reduced for agreed periods of time. They may ask to use noise-cancelling headphones in the classroom at other times. Again, it is fine for the student and their family to request that adjustment after enrolment to ensure the student can learn equally with others.

The school is required, by law, to consider those reasonable adjustments and do their best to make the adjustments available. As you will remember from the earlier chapter on disability discrimination, reasonable adjustments do not have to be made if they will cause “unjustifiable hardship”. Unjustifiable hardship does not mean “it’s too hard” or “the school can’t be bothered doing that”, or “we can’t do that just for one student”. According to the law, unjustifiable hardship does include financial and resource constraints but balances such considerations against a requirement that the hardship is greater than the benefit to the person with disability.<sup>35</sup> In practice, it can be difficult for government schools, in particular, to argue financial or resource limitations as a basis for unjustifiable hardship. While schools often tell students and families that they don’t have enough funding (and this can be a way of gatekeeping), the courts look beyond school budgets and departmental funding for the student to the resources available to the government.

If a school or education provider tells you that the reasonable adjustment you have requested cannot be made or advises that providing such would cause unjustifiable hardship, seek legal advice.

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35 *Disability Discrimination Act 1992 (Cth)*, s6.

## **I have been discriminated against in education; now what?**

If you have been discriminated against at school or in any other educational setting, you can make a disability discrimination complaint. In addition, some schools and education providers may have an internal complaints process that you can follow before making a disability discrimination complaint. Refer back to Chapter 3 on complaints about how to make a disability discrimination complaint and reach out to your disability rights lawyer if you need help.

# your right to SOCIAL PROTECTION



# 7

## Earning an Income – Work and Centrelink Payments

Income is the money that we all use to pay for the necessary and luxury items in life. Whether it covers the rent or mortgage or paying for smashed avocado at brunch on Sunday, having access to an income is vital to how we live. People receive income through work or social security benefits. Centrelink payments (also called “income support payments” or “social security benefits”) are government pensions or allowances, including the Disability Support Pension. In Australia, the main income of 56 per cent of people with disability is Centrelink payments.<sup>36</sup> On the other hand, salary and wages (including from their incorporated businesses) were the main sources of income for 24 per cent of people with disability, compared to 71 per cent of people without disability.<sup>37</sup>

People with disability have an alternative type of work in “supported employment”, which is not “employment” as the broader community understands it. Supported employment (previously known as “sheltered workshops” or “Australian Disability Enterprises”) are not focused on providing people with disability an income (that comes from social security payments) but are an important part of the conversation about types of work available to people with disability. The chapter also touches on your rights if you are employed in supported employment. Yet, the focus of this chapter is on ways that people with disability earn an income and how they can protect and promote their rights to do so. If you are in supported employment, this is still a good chapter for you because moving toward open employment is an important step to recognising your human rights.

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36 Australian Institute of Health and Welfare, *People with Disability in Australia 2020 Report*, 297.

37 Australian Institute of Health and Welfare, *People with Disability in Australia 2020 Report*, 297.

## Work

People with disability have the right to work, free from discrimination.<sup>38</sup> Currently, 48 per cent of people aged 15 to 64 with disability are employed, which is very low compared to 80 per cent of those without disability.<sup>39</sup> Alarming, one in five people with disability who reported disability discrimination in 2019–20 experienced discrimination by their employer.<sup>40</sup>

To properly examine your right to work, this chapter goes through:

1. Getting into work (applying for jobs and going to interviews).
2. Starting a job (getting adjustments put in place, disclosing your disability).
3. Discrimination that arises while you are at work.

Across all three steps, you have the right not to be treated unfavourably because of your disability. However, if that happens, there are avenues you can follow.

### *Getting into work*

The typical process for getting a job is that you see an advertisement, provide a written application, go to an interview, and have the prospective employer tell you whether you are the person best suited to the job. Significant barriers to this typical process can arise in simply getting the job advertisement in an accessible format or getting into the building where the job interview is being held. It can also be tricky to know whether and, if so, when to disclose your disability.

Not everyone will be able to choose whether or not to disclose their disability for the entire duration of the process of applying for a job because for some, such as those with a physical disability, it will be obvious when they get to the interview stage. However, most people have the choice at the initial point of applying for a job as to whether they mention that they have a disability. This is a personal preference, and you are not legally required to disclose your disability in that initial application. Some job application processes will ask you a series of questions, including whether you have a disability. It is important that you are honest and do not make false representations about your

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38 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 27 (entered into force 3 May 2008).

39 Australian Institute of Health and Welfare, *People with Disability in Australia 2020*, 254.

40 Australian Institute of Health and Welfare, *People with Disability in Australia 2020*, 128.

disability. If you have concerns about disclosing your disability when asked in an application form, contact your disability rights lawyer.

Throughout your job application, it is up to you whether you disclose your disability and how much you disclose about your disability. For example, if you are a wheelchair user, the prospective employer will know when you arrive at an in-person interview. However, you do not have to answer intrusive questions such as how you go to the toilet or come to work. The conversation about what adjustments you need at work must happen respectfully and safely. If you have concerns about the questions you are asked or the impact of those questions on the assessment of your suitability for the job, contact your local disability advocate for support.

Disability discrimination laws discussed in Chapter 2 apply to the recruitment process of getting a job. You could bring a complaint against the prospective employer if they treated you unfavourably because of your disability. Head back to Chapter 3 for more information on that process. It can be tricky to work out if you have been discriminated against when applying for a job, especially if you go to an interview and get the feeling your disability has affected their assessment of your suitability for the job but have no concrete evidence. If you are concerned that you have been discriminated against but are not sure, contact your disability rights lawyer.

### *Starting a job*

Successful applicants with disability might start work not having had a conversation about what adjustments they require at work or even disclosing their disability. Deciding whether you disclose your disability at work continues to be your choice when you start a job. You may feel more comfortable waiting until you know your colleagues better or have settled into the role. If holding off disclosing your disability does not disadvantage your ability to perform the job, that is a good approach.

For many people with disability, **adjustments in the workplace** are necessary for them to do their jobs. Adjustments may include physical access requirements such as ramps, access to the toilet, or a hearing loop, or sensory, such as lower lighting, quiet spaces, or written communication instead of verbal instruction. Unfortunately, many employers do not understand what people with disability need in the workplace or how to approach requests for adjustments. However, there are funding programs available to pay for necessary adjustments, such

as JobAccess<sup>41</sup> or the Employment Assistance Fund.<sup>42</sup> You may also be able to use parts of your National Disability Insurance Scheme (NDIS) funding to have help at work, for example, receiving personal care to go to the toilet during the workday.

If you need help with requesting adjustments in the workplace, contact your disability advocate for support. If you are told that adjustments cannot be made, contact your disability rights lawyer.

### ***At work***

Once you have started a job, you might uncover certain aspects of the role for which you need adjustments. For example, you may not have anticipated how loud the work environment would be. As a person with a hearing impairment, you find it difficult to hear people in conversation with you due to the background noise. Or you may not have realised that all team meetings are held upstairs, and there is no elevator, so as a wheelchair user you are excluded from those meetings.

You continue to have the right to work, free from discrimination throughout your employment. Therefore, if you need adjustments to participate equally (even though you did not mention them when you started), you can raise them at any point. However, the legal requirements on the employer to make reasonable adjustments available still apply.<sup>43</sup> If your request is declined, or you are terminated from your employment after making this request, contact your disability rights lawyer.

## **Alternatives to work**

Historically, and even to an extent at the time of writing this Handbook, people with disability have been denied their right to work due to discrimination and barriers to getting a job or accessing the workplace. Many have been shut out of open employment due to physical barriers and because some in the broader community do not believe that people with disability can work on an equal basis to those without disability. This entrenched community attitude led public policy and practice to

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41 Australian Government, *Job Access Driving disability employment* (Web Page) <<https://www.jobaccess.gov.au/home>>

42 Australian Government, *Employment Assistance Fund* (Web Page) <<https://www.jobaccess.gov.au/employment-assistance-fund-eaf>>

43 *Disability Discrimination Act 1992* (Cth), s15.

create alternative programs in place of work for people with disability. This includes sheltered workshops or Australian Disability Enterprises, which are places where people with disability are required to perform tasks, such as manufacturing or assembly, and working in a team. They may have an employment contract and be required to comply with conditions. The key difference between this work and everyone else's work is that the person with disability does not receive minimum wage. This is sometimes referred to as "**supported employment**".

At the time of writing this Handbook, some readers with disability will work in supported employment. While this type of work looks a bit different, you still have the right to be free from discrimination. If someone at work or your employer treats you differently, then refer back to Chapter 2 on disability discrimination and talk with your disability rights lawyer about it.

Unique to supported employment workplaces, there may be a connection between your work and your NDIS Plan if there is funding for your supported employment in your Plan. You may have concerns about how your funding is being used for your supported employment or what will happen if you run out of NDIS funding. Speak to your specialist support coordinator or disability lawyer to learn more about your rights in these specific circumstances.

## The right to social security

For 56 per cent of Australians with disability, accessing government pensions and allowances (also known as "Centrelink payments") is how they receive income to pay for what they need in life. In Australia, this can be referred to somewhat derogatively as "welfare" and is administered through the government administrative body Services Australia (also called Centrelink). If you are not working or cannot work, you should apply for Centrelink payments to help cover your expenses.

### *Centrelink payments*

As a person with disability, you may be eligible for many types of Centrelink payments. Particularly, it is worth considering.<sup>44</sup>

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44 Australian Government, *Payments for people living with illness, injury or disability* (Web Page) <<https://www.servicesaustralia.gov.au/individuals/subjects/payments-people-living-illness-injury-or-disability>>

- **Disability Support Pension:** For a person who has a permanent physical, intellectual or psychiatric condition that stops them from working.
  - **Youth Disability Supplement:** If you are aged under 21, Centrelink will automatically give you the Youth Disability Supplement on top of your Disability Support Pension.<sup>45</sup>
- **JobSeeker Payment:** For a person who does not have a job and is looking for a job or is doing approved activities to find a job. This is also for people who are temporarily unable to work or study due to illness or injury and have a job or study to return to.
- **Mobility Allowance:** For a person with disability who needs help with travel costs for work, study, or looking for a job and cannot use public transport without substantial help.

To see what payments you may be eligible for, visit the Centrelink website.<sup>46</sup> To receive a Centrelink payment, you must apply. This can be done online or at your local Centrelink office.

With most Centrelink payments, but particularly for the Disability Support Pension, there are complicated rules about whether you are eligible and what documentation you need to provide with your application. For general information on the Disability Support Pension, visit the Centrelink website.<sup>47</sup> Do not hesitate to seek the help of your disability advocate to prepare the application and work through the rules – they are tricky! If your application is declined, seek advice from your disability rights lawyer. There are also lawyers who specialise in Centrelink issues and can help. You can find their contact details on the Economic Justice Australia website.<sup>48</sup>

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45 Australian Government, *Youth Disability Supplement* (Web Page) <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/youth-disability-supplement>>

46 Australian Government, *Payment and Service Finder* (Web Page) <[https://www.centrelink.gov.au/custsite\\_pfe/pymtfinderest/paymentFinderPage.jsf?wecappid=pymtfinderest&wec-locale=en\\_US#stay](https://www.centrelink.gov.au/custsite_pfe/pymtfinderest/paymentFinderPage.jsf?wecappid=pymtfinderest&wec-locale=en_US#stay)>

47 Services Australia, *Disability Support Pension* (Web Page) <<https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension>>

48 Economic Justice Australia, *Legal help with Centrelink* (Web Page) <<https://www.ejaustralia.org.au/wp/legal-help-centrelink/>>

## Reviews

Decisions made by Centrelink about your application for a Centrelink payment, the amount you get, or if you owe a debt are subject to a review process. Here is the process, but talk with your disability rights lawyer about whether you should seek a review and work out with them what help you need to seek a review.<sup>49</sup>

1. Ask for a formal review by phone, in person (at a Centrelink office) or by completing a Review of Decision Form. For most payments, you should lodge the request within 13 weeks of the decision to protect your right to full backpay if your appeal is successful and you are entitled to backpay. You can still request a review after 13 weeks, but any backpay will only be paid from the date you requested a review if your review is successful.
2. An Authorised Review Officer will review the decision and make a new decision or confirm that the decision was correct.
3. If you disagree with the Authorised Review Officer, you can appeal to the Administrative Appeals Tribunal. For most payments, you should lodge the request within 13 weeks of the decision to protect your right to full backpay if your appeal is successful and you are entitled to backpay. You can still request a review after 13 weeks. However, if your review is successful, any backpay will only be paid from the date you requested a review.
4. The Administrative Appeals Tribunal will conduct a “first review” of the decision. If you are not happy with that decision, you can seek a “second AAT review” within 28 days of the first decision.

There are no fees to seek a review from an Authorised Review Officer or the AAT. You can choose to represent yourself, but having legal help is a good idea. When you speak with your disability rights lawyer, ask them about any free legal services available (for example, a community legal centre<sup>50</sup> or a grant of legal aid).

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49 Australian Government, *Review and appeals of a Centrelink decision* <<https://www.servicesaustralia.gov.au/individuals/topics/reviews-and-appeals-centrelink-decision/34671#a1>>

50 Legal services available can be found at the Economic Justice Australia website: <<https://www.ejaustralia.org.au/wp/legal-help-centrelink/>>

# how to find the right home for you

## HOUSING TYPE

Supported accommodation  
Private rental  
Private ownership  
Community Housing

## PEOPLE

With housemates  
Solo

## HELP SEARCHING

Families & supporters  
Housing providers  
NDIA  
Disability advocate

## FUNDING

NDIS (daily supports)  
SDA (building & design)  
SIL (skills development)  
Rent assistance (Services Australia)  
Medical heating & cooling



choose where

choose who

get support with logistics

it's your right

# 8

## Living

It is your right to choose where you live and who you live with. You have the right to live independently,<sup>51</sup> have an adequate standard of living which includes housing,<sup>52</sup> and to have privacy when at home.<sup>53</sup>

Historically, people with disability were housed in institutions. They were removed from their families and the community and lived in buildings that housed many other people with disability. However, in the late 1970s to early 1980s, after pressure from the disability rights movement, the Government decided that this was not an appropriate way for people with disability to live. People with disability were moved out of institutions into the community. Many people were moved to “supported accommodation,” such as group homes or cluster sites with multiple units or apartments housing people with disability on one block of land.

Today, there are more **housing options** available for people with disability. Some people live in large dwellings (six or more people with disability) with disability support provided on-site. Others live in community housing, private rentals, or own their home. However, there remain significant barriers to private rentals, including lack of funding for in-home supports and low housing stock availability. So, it is important to know your rights when looking for a house and your rights in the home when you have a house.

### Choosing who you live with and where you live

If you live in a group home (with six or more residents), chances are you did not get to choose who you live with, and your service provider or

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51 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 19 (entered into force 3 May 2008).

52 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 28 (entered into force 3 May 2008).

53 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 22 (entered into force 3 May 2008).

family chose for you. If you like who you are living with, that is great! But if you do not like who you are living with or would like to live somewhere else and decide who you will live with, you should speak to your disability advocate about your options.

When you decide where to live, you might find that there are **barriers to private rentals**, such as physical access, or that you cannot afford to buy a house because you are not working at the moment. It is worth speaking to your disability advocate in the first instance about the barriers you are facing. If you face barriers, such as being rejected as a tenant because of your disability, you may need a disability rights lawyer.

If you are in a situation where you have not been able to decide where you live or who you live with, and you would like to make those decisions, here are some key steps for you to take to work towards that:

### ***1. Be part of the conversation about your housing***

You and any chosen supporters, such as your family or trusted friends, need to have a conversation about your housing with housing providers and, if you need paid support, the National Disability Insurance Agency. Housing providers could include community organisations (Community Housing Providers) that offer properties, private rental landlords, or real estate agents.

If you are having difficulty with making your views known, consider writing them down or recording a short video of you saying what you want in a house. You can have your disability advocate assist with those conversations to help you work through the options and understand the risks.

### ***2. Know the funding models available***

Some people with disability will need and are eligible for funding help to get a home or live independently. There are various funding models available that can be used, depending on what you need. Your disability advocate will be able to help you navigate the available models. But to get you started in having that conversation and knowing what you can receive financial help with, here are some of the key models:

- **NDIS funding:** Available to cover the cost of your everyday support needs to ensure you can live independently and safely in your own home.

- **Specialist Disability Accommodation (SDA):** NDIS funding for people with extreme functional impairment or very high support needs. The funding for the building and design of the home goes into your NDIS Plan. However, the NDIS Rules are quite complicated, so have a look at the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020* and talk with your disability rights lawyer if you need advice on whether this applies to you. Specialist Disability Accommodation does not fund the support services you require to live independently.
- **Supported Independent Living (SIL) funding:** NDIS funding for you to receive help with daily tasks to develop the skills to live as independently as possible. SIL funding can be provided to you regardless of property ownership and can be in a shared or individual arrangement.<sup>54</sup>
- **Individual Living Options (ILO) in your NDIS Plan:** An Independent Living Option can be put into your NDIS Plan so that you can design a flexible package of supports that takes your needs and preferences into account. An Independent Living Option can consider alternatives such as co-residency, where a support person resides in your existing home, that you live alone, or live with other people of your choice.

### 3. *Work out how you will pay for living expenses*

Whether you live in a rental property or own your home, it is important to consider how you will pay your living expenses. Chapter 7 noted that only 24 per cent of people with disability receive a salary or wages. Earning an income is essential to pay for the expenses of living independently in your own home (whether rented or owned). You may live independently while receiving the Disability Support Pension or other social security payment, but it can be difficult. When deciding where to live and who to live with, you should consider how you will pay for the expenses. There are some subsidises and relief which can help:

- **Rent assistance** is available from Services Australia (also called Centrelink), which covers a portion of your rent (though not all of it).
- Community Housing Providers offer **subsidised rent payments** based on your Disability Support Pension or other social security benefits.

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54 National Disability Insurance Scheme, *Providing Supported Independent Living* (Web Page) <<https://www.ndis.gov.au/providers/housing-and-living-supports-and-services/supported-independent-living>>

- **Medical, heating and cooling concessions** are available to people with health conditions who use more electricity to keep their houses at the right temperature. Each State and Territory has different rules on this, so contact your State or Territory Government for further information.

If you are looking to move into a house or apartment and have concerns that you cannot afford it, contact your disability advocate for tips and information on current assistance schemes.

## **Discrimination at home**

Being treated unfavourably because of your disability may happen when looking for a place to live or where you live somewhere already. If you think you have been discriminated against, you can seek help from your disability rights lawyers to protect your rights (see Chapter 3 on complaints).

### ***Discrimination when house hunting***

When you apply for a rental property, you have the right to be treated like anyone else. Landlords, including private landlords and Community Housing Providers, cannot decline a rental application because you have a disability.

That said, you must be careful that you apply for houses that are accessible for you and meet your needs. You are the best judge of that. It is not for the landlord to say whether the property suits your needs. For example, a person using a wheelchair should not apply for a rental property that has a staircase to the front door without first confirming that the owner would be willing to make adjustments to the property, such as putting in a ramp.

A significant barrier to private rentals is the attitudes of landlords. Some landlords may think that you will not be a good tenant because of your disability or that they cannot provide you with adequate housing. This is unacceptable. If a landlord declines your application without proper reason, you should talk with your disability rights lawyer about whether you have a discrimination case.

### ***Discrimination in residential tenancies***

Renters with disability may be subject to discrimination if their landlord requires them to do something that a person without a disability would

not have to. However, the law around discrimination in this context is complex, and it is worth seeking legal advice from your disability rights lawyer. You should make that call if you are being treated differently from a renter without disability and that treatment is disadvantaging you.

For example, a landlord might hold routine inspections of a property with seven days' notice.<sup>55</sup> For a renter with a cognitive impairment, more notice may be required to prepare for the disruption in the daily routine to allow that inspection. You may request that the landlord provide an annual schedule of when inspections will be conducted. If that request is refused, you should contact your disability rights lawyer.

Another example would be if a landlord said you have to pay an additional \$50 every fortnight on top of your rent to cover "wear and tear" to the property because you use a mobility aid. This is very concerning, and you should seek legal advice from your disability rights lawyer.

The individualised nature of rental properties is unique in that it will usually require the renter with disability to advise the landlord what they need. Public premises have laws, policies, and guidelines that tell owners baseline features the premises should have to make them accessible. By contrast, private property owners are people who might not have considered the needs of people with disability when offering their property for rent.

If you are a renter with disability and feel as though your landlord is treating you differently and that what they are doing is not right, contact your disability rights lawyer for advice on what can be done.

## **A note on home ownership**

Home ownership is a goal for most Australians, including those with disability.

Buying a house – or dreaming of buying a house – is very individual. What suits you might not suit someone else. However, here are some of the key barriers and recommended solutions to get your thinking started:

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55 There are different notice periods in States and Territories (NSW, Vic, Qld, ACT, NT: 7 days, SA, WA: 7-14 days, WA: 7-14 days, Tas: 24 hours)

**Table 3 Key Barriers to Buying a House**

<b>Barrier</b>	<b>Solution</b>
All the houses I look at are not built for people with disability!	Indeed, most existing houses are not accessible because they were not built according to universal design principles. But you might be able to modify the house with NDIS funding or other grants that may be available in your local area.
Houses are expensive; I could never afford that!	Having a stable, ongoing job that pays you the amount you need to live in a house you want is the key! Refer back to Chapter 7 on earning an income to consider career planning options.
I have never signed a big contract like this (e.g. sale or mortgage) before!	If the person with whom you are entering the contract tells you that you cannot sign it because of your disability, read Chapter 4 on decision making and capacity. Then consider talking with a disability rights lawyer.

If you need any advice on buying a home or have concerns about why you think you cannot pursue buying your own home, first speak with your disability advocate.





When it comes to your health, it is your right to:

-  make your own decisions
-  access community facilities
-  have support to perform the activities that make you healthy and happy

# 9

## Being Healthy

**H**health is a broad concept and can cover your physical, mental, and psychological health and wellbeing. Being in “good health” means you feel well and able to live a good life. Keeping in good health is different for everyone; it can mean having habits that keep your body and mind feeling good, or it can be about accessing healthcare services or programs when you need them. **Healthcare services** include your General Practitioner (GP) or hospital. A **healthcare program** might be a sex education program offered by a local organisation. People with disability have the human right to access healthcare services, programs and enjoy good health on an equal basis.<sup>56</sup>

In the past, people with disability have been thought of as “sick” and in need of a cure. This Handbook does not adopt that thinking at all. This chapter is not about curing someone’s disability; it is about attaining good habits and accessing the healthcare which will support you to be your healthiest you.

### Good healthy habits

Many people keep habits that help them to live a healthy lifestyle. For example, some people might go to the gym, eat lots of vegetables, or meditate. Good healthy habits can help someone with their mental, physical, or psychological health and wellbeing. These habits are very individual, and there is no set rule about what you need to have a healthy lifestyle. Individual choice is important here, so this chapter doesn’t go too far into what habits lead to healthy outcomes.<sup>57</sup> Instead, the focus is on what your rights are to make good habits work.

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56 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 25 (entered into force 3 May 2008).

57 For further information on healthy habits for healthy outcomes visit: <https://www.healthdirect.gov.au/healthy-lifestyle> or NSW Council for Intellectual Disability, *Healthy Lifestyles* (Fact Sheet) <[https://www.ideas.org.au/uploads/resources/233/Healthy%20Lifestyles\\_Fact\\_Sheet.pdf](https://www.ideas.org.au/uploads/resources/233/Healthy%20Lifestyles_Fact_Sheet.pdf)>

The Australian Institute of Health and Welfare conducted a study in 2019 to collect data on various aspects of the lives of people with disability, including health.<sup>58</sup> This study found that people with disability have difficulties in some of the core habits of living a healthy life. For example, compared to people without disabilities, more people with disability do not eat enough fruit and vegetables each day, do not do enough physical activity for their age, and smoke more tobacco than people without disability.

One reason for these discrepancies is that there can be barriers to developing good healthy habits. Barriers may include not being able or allowed to make decisions, having equal access to public places such as gyms, and accessing supports to help you form those habits. However, from a legal perspective, there are some fundamental concepts you should be aware of when developing good healthy habits:

### ***1. You can make your own decisions***

Decision-making ability was covered in Chapter 4. However, it is important to remember that, even if you do not have the ability to make decisions in other areas of your life, such as finances or accommodation, you may still have the ability to make decisions about your regular healthy habits. For example, you may have a guardian who decides where you live because you cannot decide for yourself. Still, you can consider going for a daily walk with your dog to get some exercise and understand the risks. You can make decisions about healthy habits if you have the ability to do so.

### ***2. Accessing healthy habits in the community***

Community facilities such as gyms, swimming pools, and exercise classes need to be inclusive for people with disability. For example, if you are not going to the gym because you physically cannot get in, go back to Chapter 2 on discrimination. You have the right to access businesses (including gyms), programs, and services like everyone else.

### ***3. Having support to perform healthy habits***

For some people with disability, a barrier to healthy habits lies in needing support to perform the task. For example, a person with a physical disability may find it difficult to peel and chop vegetables for dinner.

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<sup>58</sup> Australian Institute of Health and Welfare, *People with disability in Australia* (Report, 2020).

A person with a cognitive impairment may need help to schedule daily exercise. Support is available and is an important part of your legal right to attaining good health. If you need support with healthy habits, read Chapter 5 on the National Disability Insurance Scheme to see what funding models are available.

## Doctors, hospitals, and healthcare services

Everyone needs to go to the doctor or hospital at some point. We visit the GP for everyday issues such as a rash or getting the flu shot. When we are sick, hospitals are available to give us the healthcare we need. For people with disability, the Australian Institute of Health and Welfare reports that the experience of going to the doctor or visiting a hospital looks different and can be more difficult than for people without disabilities. In 2019, the Australian Institute of Health and Welfare found that key barriers to health services (such as the doctor or hospital) were:

- waiting times to see a doctor;
- cost;
- accessibility of buildings;
- discrimination by health professionals; and
- lack of communication between different health professionals treating them.<sup>59</sup>

Legally, a person with disability should access healthcare services on an equal basis with others. Not being able to get into the building or facing discrimination from GPs, nurses, or hospital staff is unlawful. If you face this when trying to access healthcare, go back to Chapters 2 and 3 on discrimination and complaints, and speak with your disability rights lawyer.

It is also a human right to receive the same quality of healthcare as people without disabilities. A doctor cannot refuse to treat a person because they have a disability or recommend a less effective treatment because that person is disabled. For example, if a person with a vision impairment presents to the GP with an eye infection that would threaten the eye health of that person, it is unlawful for the GP to refuse

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59 Australian Institute of Health and Welfare, *People with disability in Australia* (Report, 2020), 5.

healthcare treatment on the basis that the person is blind. It is also important to know that **you have the right to privacy when you receive healthcare**. Unless there is a guardianship order covering healthcare in place (see Chapter 4), your healthcare information should be shared directly with you. The doctor, nurse, or other medical professionals should ask you if you want your information shared with your support person. It is your choice whether or not the support person stays in the room while receiving health-related information.

If you do not receive adequate healthcare from a doctor, nurse, or hospital staff because you have a disability, seek the support of someone you trust and contact your disability rights lawyer about the legal avenues that may be available.

Similarly, principles of medical negligence apply equally to people with disability. If you undergo treatment or a procedure and it makes you sicker or is not performed well, contact your disability rights lawyer to discuss whether medical negligence has occurred. Incidents of medical negligence are very serious, and there is a limit on the time in which you can act. Ensure that you contact a lawyer as soon as possible after the event.

## Consent to medical treatment

Before a doctor or any medical professional can provide you with medical treatment, **you must give consent**. Performing medical treatment without your consent is unlawful. When consenting to medical treatment, you must provide “informed consent,” which means you have been given all the information on the risks and outcomes of the medical treatment and understand the information provided in deciding to go ahead. Suppose you cannot provide informed consent because you do not have decision-making ability for medical decisions (see Chapter 4). In that case, a guardian will need to make these decisions for you. You may have informal support people who can make these decisions for you but read Chapter 4 for the detail on those arrangements.

It is important to be aware that when a guardian is making decisions for you, they must follow your wishes and preferences. While the guardian may better understand the risks and implications of the proposed medical treatment and decide whether it will go ahead, their decision must still reflect what you would want.

For example, if a young woman with an intellectual disability who did not have decision-making ability had decided to have a child in the next five years. Her doctor wants her to have a hysterectomy (removing her reproductive organs). The young woman's guardian would need to weigh up the medical reasons for the proposed hysterectomy with the woman's wishes to have a child. In that scenario, it would be expected that unless the young woman faced life-threatening risks without the hysterectomy, it would not be conducted until after she had children, if at all.

If you have any concerns about medical decisions being made about you, contact your disability advocate or disability rights lawyer for support.

## Healthcare and disability-related health supports

Some people with disability will need health services specifically because of their disability. Access to health services in these circumstances is a human right.<sup>60</sup> Health services include medical treatments, visiting the hospital, and medical procedures. For example, a child with spina bifida may need an operation to address spinal concerns to increase the chances of that child walking and moving independently later in life. Concerns may arise if you cannot access health services required for your disability that maintain your current quality of life or if you cannot access the required health services in time to prevent your disability from degenerating.

The most appropriate legal avenue to enforce this right will depend on the barrier to accessing the health service when needed. If you are denied the health service on the basis of your disability, then contact your disability rights lawyer for possible next steps.

In addition to health services, a person with disability may require health supports in everyday life due to their disability to keep healthy. For example, a person with cerebral palsy may have dysphagia and not be able to swallow properly. That person may need thickened fluids to drink safely. Health supports needed in everyday life related to a person's disability are often called "**disability-related health supports**". Disability-related health supports can be funded through the NDIS. For a more in-depth understanding of the NDIS and your rights, go to Chapter 5.

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60 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 25(b) (entered into force 3 May 2008).

In addition, funding is available for the following supports:<sup>61</sup>

- Contenance
- Diabetic management
- Dysphagia
- Epilepsy
- Nutrition
- Podiatry and foot care
- Wound and pressure care

Accessing disability-related health supports that ensure your wellbeing through everyday life is critical in realising your human rights. If you cannot access the disability-related health supports you need, contact your advocate or disability lawyer for advice.

## When things do not go right

This chapter notes when legal advice should be sought in treating a person with disability in a healthcare setting, be it in the community or a hospital.

However, legal action is not always possible when people with disability are treated poorly in a healthcare setting. It is also important to recognise that not everyone wants to go and speak with a lawyer as soon as something goes wrong. Several independent bodies are responsible for overseeing the way people access and are treated in the healthcare space. They may be a Commissioner or an independent government officer. Most jurisdictions have variations of the following:

- **Community Visitor Scheme:** Visits and inspects facilities that provide services to people with disability, including mental health treatment facilities and hospitals.
- **Health and Community Complaints Commissioner:** Receives complaints about health and community services.
- **Ombudsman:** Investigates complaints about government agencies, including State and Territory health agencies.

Most hospitals and healthcare facilities will also have an internal complaints system where you can report concerns or incidents that arise.

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61 NDIS *Disability-related Health Supports Operational Guideline*.

You can bring your concerns to the attention of the Nurse Unit Manager or consumer adviser in the hospital while you are an inpatient so that you can get the right care when you need it. For more information on those systems, contact the hospital or facility directly. If you need assistance to do so, ask a trusted supporter or disability advocate.

If you want to pursue a complaint, you can choose to have a lawyer assist you with preparing the complaint and speaking with the relevant independent body, or you can directly contact the independent body. You should speak with your disability rights lawyer about how their involvement could assist you.

## A note on mental health and wellbeing

Being healthy includes having good mental health and getting help when it is needed. Most people with disability (an estimated 70 per cent) self-report high levels of psychological distress.<sup>62</sup> It is as important to maintain positive mental health practices as it is your physical wellbeing. This can look different for everyone – and some people may find it effective to have regular exercise, downtime, or less screen time. Other people might need more comprehensive strategies in place, such as routine counselling or psychological assistance. Whatever the approach, it is vital that you access what you need to maintain good mental health.

Several Australia-wide mental health and wellbeing services are available free of charge. Don't hesitate to reach out to one if you need it:

- Beyond Blue <https://www.beyondblue.org.au/>
- Lifeline <https://www.lifeline.org.au/>
- Kids Helpline <https://kidshelpline.com.au/>

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62 The Kessler Psychological Distress Scale uses a set of 10 questions to measure non-specific psychological distress. The questions are about negative emotional states that the person may have experienced in the four weeks leading up to their interview (per Australian Institute of Health and Welfare, *People with disability in Australia* (Report, 2020), 48)



# 10

## Going Out

Being out and about in the community is at the heart of Australian life. Going to the pub, playing sport, visiting a local shopping mall, or going to the cinema is routine and unremarkable for most Australians. However, for people with disability, these social activities have been, and continue to be, coupled with significant barriers to participation. Over the past 10 years, public policy and law have focused on creating “accessible and well-designed communities with opportunity for full inclusion in social, economic, sporting and culture life”.<sup>63</sup> Yet, while some public spaces, places and community activities are inclusive and accessible to people with disability, overall, there is a long way to go.

It is critical for people with disability, their families, and supporters to know their rights in public places, spaces, and community activities and how to respond if those rights are not respected.

### Your rights in public

When accessing goods, services, and public places, you have the right to be treated the same as everyone else. That is, you should be able to purchase goods, receive services, and access places on offer to everyone else. Goods, services, and places should not be denied or unavailable in whole or part to you because you have a disability. If you are not treated the same, then discrimination laws protect you and offer a legal avenue to uphold your rights (see Chapter 2).

Let’s start with what goods, services, and public places are:

- **Goods:** Products that are available for purchase, such as mobile phones, clothes, or cars.

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63 Commonwealth Government, *National Disability Strategy 2010 – 2020* (2011) 29.

- **Services:** Banking, insurance and superannuation, entertainment, recreation or refreshment, transport or travel, telecommunications, professional or trade services, and government services.<sup>64</sup>
- **Public places:** A structure, building, aircraft, vehicle, or vessel.<sup>65</sup>

For example, a café is a public place, a T-shirt is a good, and a plumber provides a service. There are endless examples, and if you are not sure if the good, service or public place is protected by discrimination law, contact your disability rights lawyer.

Sometimes, when going out, it can seem like the good, service, or public place is simply not available because no one has considered that someone with your disability would be trying to access it. This can create confusion about what your legal rights are. For example, if you use a wheelchair and go to see a movie at a cinema but there is no elevator to the level where the theatres are. That might feel like it was just the way the cinema was designed and, while it's annoying that you cannot see your movie, no one said anything about you not being able to be allowed to go in. So was it discrimination? Yes, most likely. The *Disability Discrimination Act 1992* (Cth) requires that goods, services, and facilities are available to all people with disability.<sup>66</sup>

Every case will be different, but if you cannot access or experience the place, good, or service the same as people without disabilities, there is likely to be a problem.

Another scenario where it is difficult to work out whether you are being discriminated against based on disability is when you cannot access a publicly available service. For example, say you have a vision impairment and want to book the local electrician to come and fix your kitchen light, but you are told that bookings can only be made on the website, which does not have accessible features. As a result, you will not be able to access the service that is available to everyone. Again, that is not OK and may give rise to protections under the *Disability Discrimination Act*.

The issue to look out for is where **you are being treated differently from other people accessing the place, buying the good, or acquiring the**

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64 *Disability Discrimination Act 1992* (Cth), s 4.

65 *Disability Discrimination Act 1992* (Cth), s 4.

66 *Disability Discrimination Act 1992* (Cth), s24.

**service** because you have a disability. Chat to your disability rights lawyer if you are unsure.

### *My access needs have not been met; now what?*

You can take a simple step before you lodge a discrimination complaint or speak to a disability rights lawyer when you know that your access needs have not been met or you have been treated differently from someone without a disability. In this instance, you can **talk with the person or organisation discriminating against you**. However, this can be difficult, so here are some tips to get you started:

1. **Explain what happened:** Being clear about what happened by explaining where it happened, how it happened, and when it happened is important. Some people and organisations might not have any experience with your disability or what access needs you have. You do not have to take on the burden of educating them, but this will mean that you cannot assume they have any prior knowledge. For example, in the earlier cinema example, you might explain, “because there are only stairs to the theatres, I could not access the cinema in my wheelchair. An elevator or ramp is needed for me to be able to go to your cinema”.

It can be helpful to talk about the incident with a trusted person or even write it down to clarify your thoughts before going to the discriminator.

2. **Identify the discriminator:** When you are in public or dealing with services, it can be difficult to know who is responsible for respecting your rights. Usually, it is the organisation or business owner. So, if you are in a café and the barista refuses to serve you coffee because you have an assistance dog, you would not necessarily have to raise the issue with the barista but would instead approach the café owner.

You can often find out who owns or runs the business with an internet search of the business. Alternatively, if you feel comfortable, ask the business who is the owner.

3. **Decide when to have the conversation:** It is up to you! Some people want to have the conversation sooner rather than later. Others appreciate having some time to collect their thoughts and consider what happened. There is no set rule on this, so just be mindful of any time limits that may apply to a future discrimination complaint (see Chapter 2).

**4. Start the conversation:** There are two ways to approach the discriminator. First, you can contact them and explain what happened. You may do this via phone, visiting the premises again, or in writing. If you explain what happened, they may want to go away and think about what you have told them or may be able to give you a response straight away. For example, suppose you were not provided with a hearing loop in a public lecture, and you contact the organiser to explain that it should have been provided. In that case, the organiser may tell you the reasons they did not have one.

Second, you can request a time to speak with them about what happened. Again, you can do this by phone or in writing. You can discuss with the organiser how to have that conversation. For example, some business owners might be happy to meet you for coffee and chat about what happened and how they can do better. Others might like to have a phone conference.

No matter which approach you take, you can have a support person such as a friend, advocate, or lawyer involved in the discussion.

While it is open to you to speak to the person in charge of the situation in which you feel you are being discriminated against, you do not have to. If you do not feel comfortable or would prefer to think about making a discrimination complaint, that is fine and is your right. Refer to Chapters 2 and 3 for further information or talk with your disability rights lawyer.

## Disability Access and Inclusion Plans

Disability Access and Inclusion Plans are policy documents written by organisations to identify and address barriers to access and inclusion for people with disability in their service or business. Some organisations will register an “Action Plan” with the Australian Human Rights Commission under the *Disability Discrimination Act*. You can access all of those plans on the Australian Human Rights Commission website.<sup>67</sup> In some States and Territories, laws are now in place to require State and local government and other bodies to have Disability Access and Inclusion Plans, such as the *Disability Inclusion Act 2018* (SA) or *Disability Inclusion Act 2014* (NSW).

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67 Australian Human Rights Commission, *Home* (Web Page) <<https://humanrights.gov.au/>>

A Disability and Inclusion Plan or Action Plan will identify areas where access and inclusion barriers exist for people with disability and explain how the organisation will address those barriers. For example, South Australia has a State Disability Inclusion Plan that covers many areas, including promoting Universal Design principles through South Australia's built environments.<sup>68</sup> Over time, as the South Australian government builds new infrastructure, it will consider adopting Universal Design principles, making buildings accessible and inclusive of people with disability.

### ***Private organisations and disability access***

Some private organisations may have a Disability Access and Inclusion Plan. For example, McDonald's has a Disability Action Plan, which sets out how they will provide equal opportunity in employment for people with disability and ensure all buildings comply with the Building Code of Australia Disability Discrimination Act guidelines.<sup>69</sup> Typically, if an organisation has a Disability Access and Inclusion Plan, it is available on its website. If you cannot find it, contact the organisation for further information.

### ***Public events and shows***

For public events and shows, there may be information available on their websites if there is not an Action Plan. For example, the Royal Adelaide Show has a section of its website<sup>70</sup> dedicated to providing information on accessible aspects of the show, from disabled parking to finding the Quiet Zone if you need relief from sensory stimulation. In 2020, the Adelaide Fringe provided an Access Guide<sup>71</sup> for artists and audiences with disability on access to shows and events. The Access Guide provides important information on Key Access Symbols to show what accessibility features are available at an event. In addition, the Guide showed that

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68 Inclusive SA, *State Disability Inclusion Plan* (Web Page) <<https://inclusive.sa.gov.au/resources/state-disability-inclusion-plan>>.

69 Disability (Access to Premises – Buildings) Standards 2010.

70 Royal Adelaide Show, *Accessibility* (Web Page) <<https://www.theshow.com.au/plan/accessibility/#:~:text=All%20areas%20of%20the%20venue,Mobility%20scooters%20and%20Wheelchair%20Hire>>.

71 Adelaide Fringe, *Access Guide 2021* (Web Page, 22 January 2021) <[https://issuu.com/adelaidefringe/docs/2021\\_accessguide\\_digital\\_02](https://issuu.com/adelaidefringe/docs/2021_accessguide_digital_02)>.

alternative formats were available and introduced Access Champions at venues and events to support people with access requirements.

### ***Why are these Plans important to me?***

You may be wondering why you would care that an organisation has a Disability Access and Inclusion Plan when you want to buy a takeaway or see a show. These Plans are a great way for you to learn about what accessibility features have been put in place to ensure you can participate equally. Checking out an organisation's Disability Access and Inclusion Plan is also a good indication of their commitment to people with disability accessing their services or products.

However, even if an organisation has a Disability Access and Inclusion Plan and you cannot access their premises, goods, or services like everyone else because you have a disability, your rights can still be upheld. Everything in this chapter (and in Chapters 2 and 3) continues to apply!



# YOUR RIGHTS

WHO CAN HELP

State Govt. Agency  
Media outlet  
Advocate  
Lawyer

State Govt. Agency  
Advocate  
Lawyer

Advocate  
Lawyer

WHAT YOU SHOULD GET

Auslan interpreters  
Easy Read formats  
Appropriate language

Disability & healthcare services

Being allowed to go to the same places as everyone else

HUMAN RIGHT

Access to Information

Access to Services

Freedom to Move Around

## IN TIMES OF EMERGENCY

# 11

## Bushfires, Disasters, and National Emergencies

**P**eople with disability have the right to be protected and safe in situations of risk and humanitarian emergencies.<sup>72</sup> In Australia, our national emergencies are usually related to climate events such as bushfires, cyclones, and floods. But we may also experience other emergencies such as global health pandemics or terrorism. When a national emergency occurs, there is often a quick change in life for the affected community or even the whole country. Services may not be available or living in our homes may not be possible for some time. In these scenarios, people with disability face particular risks that may leave them unsafe or unsure of what is going on. You need to know what your rights are and where to go for help.

National emergencies are unpredictable, and so the response and support services available in any given situation may differ. This chapter deals with rights in an emergency or disaster that affects a community or the nation. During such times, check with your State or Territory government for updates or, if you need specific advice, contact your disability rights lawyer or local disability advocate.

### **A little bit about national emergencies**

Legally, the States and Territories are responsible for responding to most national emergencies, such as a health pandemic, terrorist attack, or climate event. In a national emergency, it is important to know what the rules and responses are where you live because they may be different in each State or Territory. For example, in 2020, all of Australia was affected by the COVID-19 (Coronavirus) pandemic. While there was a national direction, each State and Territory had different rules about social distancing and restrictions in public places. For example, when there was an outbreak of COVID-19 in Victoria, there were restrictions on receiving

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<sup>72</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 11 (entered into force 3 May 2008).

disability support in the community. However, at the same time, those restrictions did not apply in other States and Territories that were not experiencing an outbreak. In addition, rules and restrictions about how people could move about, receive services, or access personal protective equipment (PPE) changed during the pandemic. Locals needed to know where they could go and how many people they could be around.

During a national emergency, contact your State or Territory government for more information on the event.

## How could this affect me?

People can be affected by national emergencies in several ways. Even if you are not living where the disaster or emergency has occurred, it is still important for you to access information about the event.

Assuming that you live in a place affected by a national emergency, you may experience:<sup>73</sup>

- Information and news broadcasts that are not in accessible formats.
- Essential services such as daily assistance with meals, toileting, and showering not being as readily available due to constraints on people moving around in the community.
- Difficulty accessing food and meeting nutritional requirements because essential supplies run low or support workers and family cannot help access and prepare food.
- Challenges in accessing healthcare due to unconscious bias, discrimination, and practical difficulties.
- Higher risk of infection or displacement (depending on the emergency) for those living in closed facilities such as prisons or group homes.
- Financial stress due to additional requirements for medication, transport, or therapy. People with disability may also find that changes to the work environment in response to an emergency may not be accessible, resulting in them not working.
- Changes in education settings such as school buildings or remote learning options may not be accessible to all students with disability.

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73 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Issues Paper – Emergency Planning and Response* (15 April 2020), 4-7.

- A reduction in permissible visits from family and friends for those living in segregated settings such as group homes and reducing safeguards and oversight.
- Potential inability to participate in the community and greater risk of social isolation if there is no access to the internet, telephones, or computers.

## Your rights and where to go for help

In the event of a national emergency, you continue to have the same rights as everyone else, and if those rights are altered for everyone, they will be altered for you. It is important to be aware, though, that you do not have any fewer rights than anyone else because you have a disability. For example, during a bushfire, everyone will have access to a safe, public area such as a community hall when they must flee their homes. You should be able to access that facility like everyone else.

Some fundamental rights are critical in these events for keeping you safe and protected. Here is a short guide to your rights during a national emergency:

**Table 4 Guide to Your Rights During a National Emergency**

Your right	What you can expect	Who to speak to if something is not OK
<p><b>Access to information</b></p> <p>News broadcasts and updates on the situation should be available in accessible formats.</p>	<p>Auslan interpreters, Easy Read formats, disability-appropriate language, and other alternative formats of accessible print.</p> <p>See more examples in the Australian Institute for Disaster Resilience's Handbook on <i>Community Engagement for Disaster Resilience</i>.<sup>74</sup></p>	<p>State government agency</p> <p>Media outlet responsible for the content</p> <p>Advocate</p> <p>Disability rights lawyer</p>

74 Australian Disaster Resilience Knowledge Hub, *Handbook Collection – Community Engagement for Disaster Resilience Handbook* (Handbook, 2020) <<https://knowledge.aidr.org.au/resources/handbook-community-engagement/>>

Your right	What you can expect	Who to speak to if something is not OK
<p><b>Access to services</b></p> <p>Disability services (including receiving in-home support) and healthcare services must be provided to you as you require them.</p>	<p>People with disability still need to access essential disability services during a national emergency. Your State or Territory government should have information on what is available at the time of the emergency. If you receive NDIS funding, the National Disability Insurance Agency may provide information as well.</p>	<p>State government agency</p> <p>Advocate</p> <p>Disability rights lawyer</p>
<p><b>Freedom to move around</b></p> <p>You can still move around freely and go to places where everyone else can go.</p>	<p>There will be times in a natural disaster or national emergency where movement may be restricted. If this applies to everyone affected, it will also apply to you. But be cautious that the restrictions are not imposed on you differently from other people.</p>	<p>Advocate</p> <p>Disability rights lawyer</p>

## Examples

### *Your right to move around*

You always have the right to move freely and to enjoy the right to liberty.<sup>75</sup> During the COVID-19 (Coronavirus) pandemic, everyone in Australia was required to stay home except to do essential tasks such as grocery shopping or exercising. What we saw during the pandemic was people living in group homes and segregated care being locked in their homes with no planned way to get out. People not in those living settings were also stuck at home but would leave to do their grocery shopping or some light exercise when they chose. People living in group homes and segregated care should have been afforded the same choices.

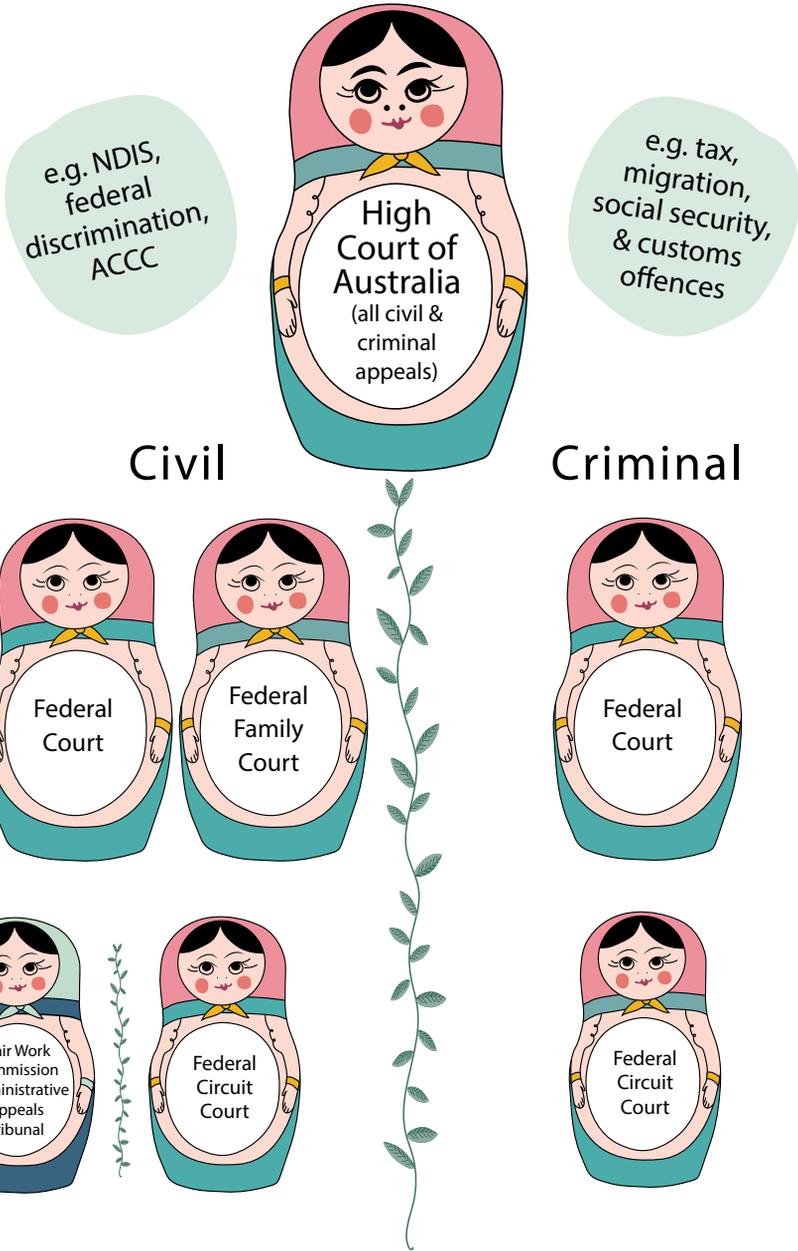
### *Access to information*

During the 2019-20 summer bushfires, State and Territory governments primarily updated the public via media conferences televised and broadcast on the radio. Those broadcasts had Auslan interpreters and closed captioning available. This is essential for people who are Deaf or hearing impaired to access the updates. In addition, receiving these updates in real-time gives people the best opportunity to keep safe during an emergency.

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<sup>75</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 14 (entered into force 3 May 2008).

# FEDERAL JUSTICE SYSTEM



# 12

## Accessing Justice

So far, this Handbook has been about your rights according to the law. When things do not go well, there are government and independent bodies responsible for administering these laws. They may be the police, courts, prisons, or civil and administrative tribunal. In Australia, there is a criminal justice system and a civil justice system. People with disability have the right to access justice on an equal basis with others.<sup>76</sup> But in Australia, these systems were set up and evolved in times when the rights of people with disability were not recognised. Since Australia has started to recognise and realise the rights of people with disability, different parts of the State and Federal justice systems have become more accessible and inclusive. However, other parts continue to lag and present significant obstacles to people with disability being able to participate.

This chapter will go through how you participate in these systems. For specific details on the area of law that may be dealt with in a justice system, read the contents for the subject about which you want to know more.

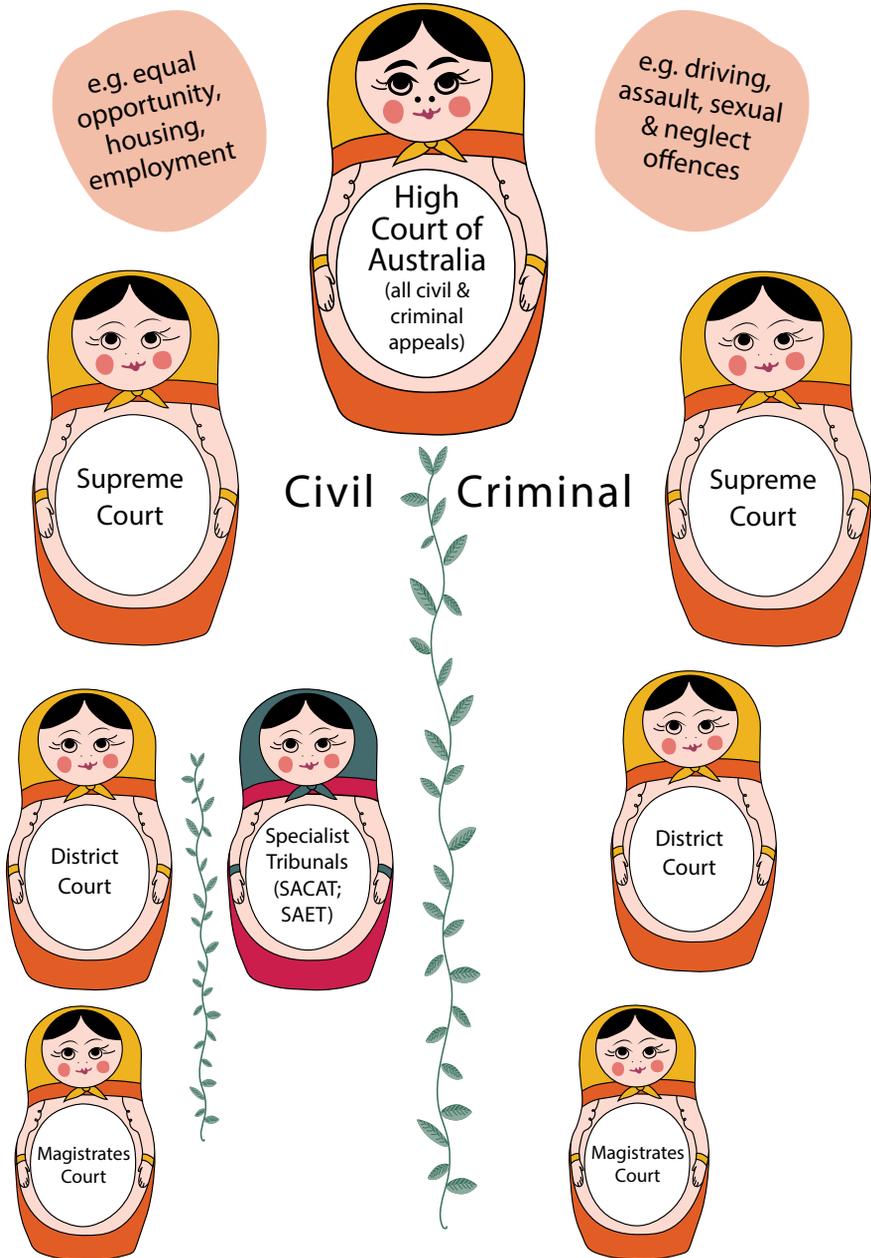
### What is a justice system?

There are two justice systems in Australia: criminal and civil. The Australian Constitution (the foundational document of the country's legal system) established two different levels of government: Federal and State. As a result, we have a Federal criminal justice system and a Federal civil justice system. In addition, each State (and, to an extent, Territory) has its own criminal and civil justice systems. The Constitution is the document that decides which level of government has the power to govern what and so determines whether a matter will be heard in the State or Federal system. In any given situation, it will depend on what

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<sup>76</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 13 (entered into force 3 May 2008).

# SOUTH AUSTRALIAN JUSTICE SYSTEM



laws are being administered as to whether it is a Federal or State matter. For example, the Administrative Appeals Tribunal (the AAT) will hear a National Disability Insurance Scheme (NDIS) case, and the AAT is a federal tribunal. This is because the *National Disability Insurance Scheme Act 2013* (Cth) is a Commonwealth law that applies to all Australians. In contrast, a guardianship and administration application will be heard by State Civil and Administrative Tribunals (such as the South Australian Civil and Administrative Tribunal (SACAT)) because each State and Territory has its guardianship laws that apply to people who live there. For this chapter, we discuss federal and state criminal and civil justice systems interchangeably, and we note their distinction where it is relevant.

## Criminal justice system

The criminal justice system will apply when a crime is committed. You may participate in the criminal justice system as a defendant, witness, or victim. Usually, a criminal case will have three stages:

1. An accusation of a crime is made.
2. The police investigate that accusation.
3. The case goes to court to determine if the person accused of the crime is guilty and, if they are, they will be sentenced accordingly.

## What happens to me if I am a defendant/witness/victim at each of these three stages?

### *What Happens to Me in the Justice System?*

#### **Defendant**

- When an accusation is made:
  - You are the person accused of the crime.
  - You may be asked by police or an investigator to speak to them.
- During the police investigation
  - The police may interview you to find out more about what happened.
  - You can have a lawyer present when interviews occur, and you have the right to remain silent.

- If the case goes to court
  - A lawyer will most likely represent you. You may or may not give evidence, depending on the legal advice you have received.
  - You will be found guilty or not guilty at the end of the case.

### ***Witness***

- When an accusation is made:
  - You are the person who saw the crime happen, or you know something about what happened.
- During the police investigation
  - The police will ask you to state what you saw or know. This is called giving a statement.
  - You can have a lawyer give you advice and attend the interview to give your statement. You may wish to have a support person with you, such as a close friend or trusted family member.
- If the case goes to court
  - You may be called to give evidence in the court case.
  - A lawyer representing the prosecution or defence will help you to prepare for court.

### ***Victim***

- When an accusation is made:
  - You are the person who was harmed by the crime. You have may or may not have an injury.
- During the police investigation
  - You may be the first person to report the crime to the police.
  - The police will ask you to give a statement about what happened.
  - You can have a support person or lawyer assist you.
  - There are specific support services for victims, such as the Victim's Rights Service in each State and Territory.
- If the case goes to court
  - You may need to give evidence in court or have a statement read on your behalf.

- The lawyer representing the prosecution will assist you in preparing for that. That lawyer will also connect you with Victim Support Services if needed. Victim Support Services can support you before, during, and after a court hearing.

### ***Being a participant with disability in the criminal justice system***

Theoretically, people with disability should participate in the criminal justice system like everyone else. However, it is well known that is not the reality for most people with disability. For example, people with complex communication needs, including those using communication devices, can face barriers to giving evidence in criminal trials.<sup>77</sup> Or a person with an intellectual disability charged with a criminal offence may not be provided with their legal rights (for example, to remain silent or receive advice from a lawyer in an accessible format).

You need to know your rights when participating in the criminal justice system and where you can go if your rights are not upheld.

### ***Reporting a crime***

Anyone can report a crime to the police. It does not matter if you do not usually make decisions in your life (see Chapter 4) or are unsure whether it is a crime; it is better to report it than not.

To report a crime, you need to contact the police. You can do this by calling or visiting a police station. When speaking to the police, you should feel respected, be able to communicate with them effectively and access their facilities.

The police may not know that you have a disability. For example, the police officer might not realise that you have a hearing impairment and may not communicate with you in an accessible way. This could affect making the report effectively. Alternatively, the police may assume that you cannot understand what they are saying or what they need because you have a disability.<sup>78</sup>

While it can be frustrating to tell people that you have a disability, if you are concerned that the police officer is not interacting with you equally or appropriately without that knowledge, you should let the police officer know what your disability is. You can also tell the police officer

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77 Australian Human Rights Commission, *Equal Before the Law* Report (February 2014), 23.

78 Australian Human Rights Commission, *Equal Before the Law* Report (February 2014), 20.

what assistance you need to make the report. For example, if you cannot read or write, you can ask the police officer how to make your report safely. The officer may have you give a verbal report and read back what they wrote down on the report form.

You may feel like the police officer is not recognising your disability or making the adjustments you need, affecting your ability to report a crime and seek assistance. You can ask a trusted person, such as a family member or friend, or contact a disability advocate. You can also report the incident to institutions that oversee the conduct of police officers, for example, the Office for Public Integrity.<sup>79</sup> Making this report would not necessarily address your circumstances but could change the behaviour of the police over time to improve the experience for other persons with disability.

### ***Participating in a police investigation***

The police may require you to participate in an investigation because you are accused of the crime or because you were a witness or victim. Usually, this will involve you speaking with the police and answering their questions. It is important to comply with a police investigation, but you have the right to feel safe in doing so, and you must be able to participate equally. To participate equally, you may need adjustments to be made. Some of these may be readily available; for example, a ramp to the interview room may already be available to people using wheelchairs. However, others may not be available but are essential to your equal and effective participation. For example, if you are accused of committing a crime, the police officer interviewing you may give you a written copy of your rights. You may need this in Easy Read format so that you can read it. In addition, the information that is given, and practices at the police interview, need to be accessible to you.

If you do not feel comfortable asking for adjustments that need to be made so you can participate in a police investigation, ask a trusted person or disability advocate to help you.

### ***Going to court***

A criminal case may end up being heard by a court. Which court the case ends up in will be different for different types of crime (a murder case will

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<sup>79</sup> Independent Commissioner Against Corruption, *Office for Public Integrity* (Web Page) <<https://icac.sa.gov.au/opi>>.

be handled differently from a traffic fine), but there are common barriers to access the court process across the different courts.

If you need to go to court as a defendant, witness, or victim, you will attend the courthouse on a given day and time. You may need to speak (in other words, give evidence) and may need to interact with various people such as lawyers, security guards, and other people going to court. If you are a defendant, you can choose to represent yourself, but it is good to get a lawyer because criminal cases can be complicated. In addition, the outcome can be significant (for example, going to gaol).

If you have a lawyer, they will tell you what is required of you. The lawyer needs to understand what you need to be able to participate. For example, if you need regular breaks to process information, you can ask your lawyer to arrange that. Or you might need to attend the courthouse before the case being heard to familiarise yourself with the environment. You can ask the lawyer to arrange that, too.

Different States and Territories have some laws that allow for special provisions for witnesses who are giving evidence in courts. For example, in South Australia, a witness, defendant, or victim with complex communication needs can receive communication assistance during the trial.<sup>80</sup> For example, a person who speaks with a cerebral palsy accent may use a speech-generating device to give answers in evidence.

It is important that you understand why you are in court, what is happening while you are there, and that you are heard.

### *Civil justice system*

The Federal and State civil justice systems cover all other everyday legal matters, such as residential tenancy or contract disputes through to consumer complaints. The many types of matters heard in the civil justice system means that there are different titles for roles you may have. The main ones are:

- Plaintiff/Applicant
- Defendant/Respondent
- Witness

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<sup>80</sup> *Evidence Act 1929 (SA)*, s14A.

For civil disputes heard by a court, the process will be:

- Preparation for the court hearing
- The court hearing

## **What happens to me in these various roles at each of the two stages?**

### ***What Happens to Me at Court?***

#### ***Plaintiff/Applicant***

- Preparing to go to court
  - You have initiated the legal action.
- At court
  - You will present the case to say why the law was breached (in other words, what happened that was wrong).

#### ***Defendant/Respondent***

- Preparing to go to court
  - You have to provide a response to the plaintiff/applicant.
- At court
  - You will present the case to say why the law was not breached (in other words, that what happened was not wrong).

#### ***Witness***

- Preparing to go to court
  - You may need to provide a written statement of what you saw or what you know about what happened.
- At court
  - You may need to give evidence, in person, during the court case.

## Being a participant with disability in the civil justice system

You have the right to access the civil justice system on an equal basis with others.<sup>81</sup> Civil cases can involve a dispute between two people or a person and a company (a “legal person”). For example, you may start legal action against your builder for not completing the build as promised in the contract. It is more likely that you will be involved in a civil case than a criminal case at some point in your life because civil law covers so much of our lives. It is also more likely that if you cannot participate in critical parts of the justice system, the case will not be seen through to its end (or even start!). For example, if your landlord refuses to kill cockroaches that have infested the kitchen in your rental property, you may want to take them to the Tribunal to get an order for them to do so. If you cannot access the process to start that legal action, the case might not start, leaving you with a kitchen full of cockroaches.

### *Representing yourself*

In civil cases, you can choose to represent yourself. However, in some cases, you must represent yourself unless the judge permits you to be represented by a lawyer. For example, in South Australia, cases that concern \$12,000 or less of damages (money being sought by the plaintiff) are called “minor civil claims”. These claims require that parties represent themselves unless you would be unfairly disadvantaged by not having a lawyer represent you.<sup>82</sup>

The reason for preferring people to represent themselves in minor civil cases is to keep costs down and re-focus attention on bringing parties together to resolve disputes. Our kitchen example would be quicker, easier, and cheaper to resolve if the landlord and tenant could talk and agree on how to get rid of the cockroaches. This would be preferable to having lawyers debate the issue before a tribunal or court. However, if the landlord is unreasonable, then sometimes that next step is unavoidable.

Even when you represent yourself, you can still get legal advice on your case or the steps you need to present your case to the court. Many

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81 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 13(1) (entered into force 3 May 2008).

82 *Magistrates Court Act 1991 (SA)*, s38(4).

people who represent themselves will see a lawyer before doing so. There are free legal advice services offered by legal aid commissions in all States and Territories. Some people with disability may need adjustments to be made to enable you to present your case on an equal basis with others. This is different from having a lawyer help you. For example, a Deaf person's first language may be Auslan, and they may wish to present their case in Auslan. To do so, an Auslan interpreter could be present throughout the proceedings. If you have adjustments to present your case but are not sure if it is OK to do so, contact the court or tribunal registry.

### ***Lodging complaints/initiating processes***

As the plaintiff or complainant, you will initiate the legal action. For most cases, this will involve lodging a complaint form or similar. Generally, you will write down who the parties are, what happened, when it happened, and what you want from the process. Some people will have a lawyer complete this form for them or do it themselves (see above).

Regardless of whether you have a lawyer represent you or not, there may be barriers to your participation, depending on your disability. Those barriers must be addressed so you can participate in this process. For example, most of the process of starting a complaint is written. If you need alternative formats of documentation such as Easy Read formats or for documents to be read aloud to you, discuss those requirements with your lawyer (if you have one) or ask the court or tribunal registry what arrangements can be made. The court or tribunal registry may refer you to a local support service that assists people with disability going through that particular legal issue (for example, the Tenants' Union in a residential tenancy case).

### ***Going to court***

Once the legal action has been initiated, and the defendant/respondent has provided their response, the parties go to court to have their case heard. In many civil cases that people with disability are involved in (for example, the NDIS and discrimination complaints), the first step at court is to attend a mediation or conciliation. Mediation or conciliation is an opportunity for the parties to sit down with an independent person to discuss the issues. The aim is to come to an agreement and not continue to a full court case. This is less costly and stressful for the parties. In addition, it can sometimes create better outcomes than can be achieved

when the case goes before a court because the parties can come up with the outcome.

When attending a mediation/conciliation or going to court, there may be physical access problems, communication problems, or sensory concerns. For example, a person with a physical disability may not be able to access the courtroom. Additionally, a person with a cognitive impairment may find it difficult to sit in a three-hour mediation session without breaks. It is important to acknowledge that **you have the right to access this process equally, and adjustments may be necessary to level the playing field**. If the adjustments you need to participate are not available, ask the court or tribunal registry for them to be provided ahead of time. If you have a lawyer representing you, they can make these requests. If you do not have a lawyer and do not feel comfortable asking for these adjustments, contact a disability advocate for assistance.

### *Giving evidence*

You may be called to be a witness by either the plaintiff/applicant or respondent/defendant in a case. You will usually describe what you saw or what you know about the issue/s in dispute between the parties.

For example, you are a witness in a civil case. You may face similar barriers to a plaintiff/applicant or respondent/defendant in accessing the courthouse or complying with a formal process. You will be required to give evidence on a set day and time, and failure to attend at that time can have serious consequences. If you have difficulty remembering dates and times or cannot be out in the community at certain times of the day due to your disability needs, meeting these demands might be difficult. These barriers need to be overcome by the court or tribunal understanding your disability and making the required adjustments. If you have any difficulty getting adjustments made, tell the lawyer asking you to be a witness (if there is one) or contact a disability advocate to help you communicate those barriers.

Like in criminal cases, evidence can be given in different ways in some States and territories. For example, the legal provision that witnesses with complex communication needs must be able to give evidence in alternative ways in South Australia applies to civil courts. This includes providing Communication Partners who facilitate evidence from people with complex communication needs. If a lawyer represents the parties and has asked you to give evidence, let them know what adjustments

you need. If that is not the case, and the parties are representing themselves but are not sure whether the adjustments you need can be made, contact the court or tribunal directly or seek the help of a disability advocate in the first instance.

## **What if I don't get the adjustments I need?**

Accessing the criminal or civil justice system is likely to require adjustments to be made to support your full participation. As such, you may have to ask for adjustments to be made. So, what happens if your requests for adjustments are ignored or refused? If you feel comfortable, reiterate to the person you are asking the adjustments that it is your right to participate on an equal basis with others and seek further clarification as to why the adjustments cannot be made. If you do not feel comfortable doing that, or the answer you get is not satisfactory, speak to your disability rights lawyer. The disability rights lawyer may facilitate the adjustments with the court/tribunal or other lawyers involved in the case. If the adjustments are unreasonably refused, you may have grounds for a discrimination complaint (see Chapter 2).



Your disability is not a crime.



If you have been charged with an offence that is the result of your disability, speak with a disability rights lawyer immediately.

# 13

## Criminal Law and Disability

Chapter 13 is about the laws that operate in the criminal justice system. While it talks about **what crimes** and **common offences** are, it also covers two important topics about how criminal laws interact with disability. The first is **where your disability is mistaken for a crime**. The second is where you committed a crime but could not help it or did not mean it because **your disability prevented you from understanding**. It is especially important that you know your rights in those circumstances.

At the outset, it is important to understand that **you have the right to remain silent**, and you are not obliged to answer any police officer's questions. This can be important to ensure that you do not prejudice your defence against any allegations made against you. While it can be a good approach to explain your disability in a minor matter to clear up a misunderstanding, if the situation is more serious it is important to get legal advice immediately. For example, if you have Tourette syndrome and have a tic in the middle of Woolworths and a police officer approaches you, you might feel OK explaining that you have a disability and were having a tic. On the other hand, if you are out on a Friday night and the police arrest you for allegedly punching someone in the face, you should seek legal advice immediately and remain silent.

We recommend that you read this chapter together with Chapter 12 to know what your rights are if you are required to participate in those laws as an offender, witness, or victim.

As we discuss in Chapter 12, there are Commonwealth criminal laws, and then each State also has its own set of criminal laws. **This chapter focuses on South Australian criminal law**. For further information on the laws of your State or Territory, please contact your disability rights lawyer.

## What is a criminal offence?

Criminal laws are important for keeping the community safe and making clear what behaviour is acceptable. A criminal offence is a behaviour that is prohibited by law and usually punishable by imprisonment, community service, and/or fines.

People with disability can be found guilty of criminal offences. Later, this chapter will talk about defences, including by reason of mental impairment, which can see a person with an intellectual disability or cognitive impairment indefinitely detained.

In South Australia, the criminal law<sup>83</sup> sets out various offences and what their punishments will be. The following table provides a brief overview of the types of offences contained in South Australia's main criminal law statute, the *Criminal Law Consolidation Act 1935* (SA):

**Table 5 Overview of Criminal Offences in South Australia**

Offence	Crime (behaviour)	Some examples
Offences against the person	<ul style="list-style-type: none"><li>• Murder</li><li>• Manslaughter</li><li>• Criminal neglect</li><li>• Unlawful threats</li><li>• Unlawful stalking</li><li>• Causing death or harm by use of a vehicle</li><li>• Assault</li></ul>	<ul style="list-style-type: none"><li>• Killing another person is murder.</li><li>• Hitting someone without their permission and hurting them is assault.</li><li>• Following someone on more than two occasions without their permission is unlawful stalking.</li></ul>

83 *Criminal Law Consolidation Act 1935* (SA), *Summary Offences Act 1953* (SA), *Crimes Act 1914* (Cth), and the common law.

<b>Offence</b>	<b>Crime (behaviour)</b>	<b>Some examples</b>
Sexual offences	<ul style="list-style-type: none"> <li>• Rape</li> <li>• Sexual exploitation of a person with a cognitive impairment</li> <li>• Access, possession, or dissemination of child exploitation material, including cartoons and stories</li> </ul>	<ul style="list-style-type: none"> <li>• Having sex with someone without their consent is rape.</li> </ul>
Offences against property	<ul style="list-style-type: none"> <li>• Theft</li> <li>• Robbery</li> <li>• Arson</li> <li>• Damage to property</li> <li>• Vandalism, including graffiti</li> </ul>	<ul style="list-style-type: none"> <li>• Stealing an item from someone's house or business is theft.</li> <li>• Setting fire to a property on purpose is arson.</li> </ul>
Offences against public order	<ul style="list-style-type: none"> <li>• Trespassing</li> <li>• Offences on public transport</li> <li>• Disorderly behaviour</li> <li>• Urinating or defecating in a public place</li> </ul>	<ul style="list-style-type: none"> <li>• Going onto someone's land without their permission is trespass.</li> <li>• Going to the toilet on the street is an offence.</li> </ul>
Traffic offences	<ul style="list-style-type: none"> <li>• Speeding</li> <li>• Driving without a licence</li> <li>• Breaching the road rules</li> </ul>	<ul style="list-style-type: none"> <li>• Driving above the speed limit is an offence.</li> <li>• Driving through a stop sign or ignoring the road rules is an offence.</li> </ul>

Offence	Crime (behaviour)	Some examples
Drug offences	Possession of a drug for personal use Possession or sale of drugs or equipment for consuming or manufacturing drugs Manufacture of a controlled drug	Having drugs such as cannabis in your house or on your person is an offence. Making a drug such as methamphetamine at home is an offence.

There are three levels of courts in South Australia in which criminal matters can be heard; the court in which a case is heard depends on the severity of the offence or stage of the proceedings:

- Magistrates Court
- District Court
- Supreme Court

The least serious offences are heard in the Magistrates Court, with more serious matters heard in the District Court. Finally, the most serious offences are heard in the Supreme Court.

If charged with an offence, the court in which you will appear depends on what type of offence it is. There are three types:

- The Magistrates Court hears a summary offence, and punishments can be fines or no more than two years' imprisonment. These offences are usually minor offences of violence or property damage, disorderly behaviour, traffic offences, and some dishonesty offences such as theft and Centrelink fraud, including claiming a carer's payment when not performing a carer's duties.
- The Magistrates Court will hear a minor indictable offence unless the defendant chooses to have the case heard by the District or Supreme Court. Offences include the basic offence of serious criminal

trespass,<sup>84</sup> stalking,<sup>85</sup> and property damage for more than \$2,501 but less than \$30,000.<sup>86</sup>

- A **major indictable offence** is heard by the District Court or Supreme Court and involves very serious crimes. The defendant will have the right to trial by jury, and the penalties can be very serious, including going to prison for life. Examples of these offences include serious offences of violence and dishonesty, robbery, sexual offences, and damage to property where the damage exceeds \$30,000.
- The Supreme Court will hear the most **serious major indictable offences** of murder, attempted murder, and treason.<sup>87</sup>

If you have been charged with a criminal offence, you should contact a criminal lawyer immediately. Getting immediate legal advice and being represented is essential in criminal matters, especially when you could be imprisoned.

## The intersection between a criminal offence and your disability

People with disability are overrepresented in the criminal justice system and face specific barriers due to their disability when charged with criminal offences.<sup>88</sup> Certain criminal offences can disproportionately impact people with disability who have certain behaviours or do not understand the effects of their behaviour. This can sometimes result in being arrested and even going to court.

### *The police said I was committing a crime, but I can't help that behaviour; what should I do?*

For some people with disability, their behaviour or approach to certain situations can be quickly misinterpreted as crimes. This risk is especially present in public places. Sometimes, the police may want to speak with a person with disability about their behaviour before realising that it is a result of their disability. If a police officer wants to talk with you about

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84 *Criminal Law Consolidation Act 1935 (SA)* ss 169, 170.

85 *Criminal Law Consolidation Act 1935 (SA)* s19AA.

86 *Criminal Law Consolidation Act 1935 (SA)* s85.

87 Legal Services Commission, *Summary Offences* (Web Page) <<https://lawhandbook.sa.gov.au/ch12s04s01.php>>

88 Australian Human Rights Commission, *Equal Before the Law* Report (February 2014).

your behaviour, that is OK. You should feel comfortable explaining that your disability can result in behaviour of concern. However, if the police arrest you because of that behaviour or treat you unfairly, you must immediately contact your disability rights lawyer.

It is very important that you carefully consider whether or not you should attempt to explain your disability to the police. While it may be useful to try to resolve a misunderstanding, it is highly recommended that you do not speak with the police about any serious allegations of criminal offending without first obtaining legal advice. This is particularly so if you are upset, angry, have taken medication, or are otherwise not feeling your best. Remember, **you do not need to sort the dispute out right there**. If there was a misunderstanding relating to your disability, it could be sorted out another time once you are calm and have support. At this point, it is most important that you do not harm your rights.

For example, a person with Tourette syndrome may shout involuntarily. In public, this could be misinterpreted as aggression directed at another person. The police may want to speak with the person who shouted about their behaviour. In this scenario, the person with disability should feel able to explain their disability and have the police's understanding. If that does not happen, you should contact your disability rights lawyer immediately.

### *I committed a crime, but I did not understand what I was doing*

Some people with disability may find it difficult to tell what behaviour is appropriate or when certain behaviour is required. This can make some people with disability more vulnerable to being charged with a crime and becoming involved in the criminal justice system. If this happens to you, contact your disability rights lawyer immediately to get legal advice on your situation, even if you do not need to be represented.

For example, a person with a psychosocial disability may, because of their disability, not realise that they must pay for groceries before they leave the shop. When caught by the security guard at the shop, the person with disability may be charged by the police with theft. It is critical that the police and court recognise the influence of your disability on your offending. Contact your disability rights lawyer immediately for help.

## **Specialist Disability Courts**

Some States and Territories have specialist courts that can consider some minor crimes alleged to have been committed by people with "mental

impairment”.<sup>89</sup> However, these courts are usually only available for minor crimes such as theft, minor offences of violence and property damage, or driving offences for which the person is pleading guilty.

In South Australia, the Treatment Intervention Court (part of the Magistrates Court) is available as “an alternative to detention for people in the criminal justice system who have behavioural conditions,” including those with mental health or mental impairment difficulties that contribute to their offending.<sup>90</sup> The Treatment Intervention Court aims to provide the person with rehabilitation to understand better what behaviour is leading to them offend and what they can do to prevent it from happening in the future.

A solicitor, police officer, magistrate, or person known to the individual can request that you be referred to the Treatment Intervention Court rather than having the matter progress through the court in the usual way. You (or your guardian) must consent to that referral.<sup>91</sup> If you do poorly on the program and are removed from it, this cannot be considered and used against you.<sup>92</sup>

The progress of a person undergoing the program for behavioural problems resulting from disability will usually be reviewed every four to eight weeks for six months.<sup>93</sup> At the end of the treatment program, the person is sentenced for the crime. The person’s progress in the program will be taken into consideration at sentencing. For further information on the Treatment Intervention Court, visit the Courts SA website.<sup>94</sup>

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89 For information on any specialist courts available in your State or Territory, contact your local disability rights lawyer.

90 Courts Administration Authority, *Treatment and Intervention Court* (Web Page) <<http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Magistrates-Court-Diversion-Program.aspx>>.

91 Courts Administration Authority, *Treatment and Intervention Court* (Web Page) <<http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Magistrates-Court-Diversion-Program.aspx>>.

92 *Sentencing Act 2017* (SA), s11(7).

93 Courts Administration Authority, *Treatment and Intervention Court* (Web Page) <<http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Magistrates-Court-Diversion-Program.aspx>>.

94 Courts Administration Authority, *Treatment and Intervention Court* (Web Page) <<http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Magistrates-Court-Diversion-Program.aspx>>.

## Defence: Mental impairment

For all offences, a person cannot be found guilty of having committed the offence if they were not mentally competent at the time; that is, they were suffering from a “mental impairment”. A mental impairment exists if the person:

- did not know the nature and quality of the conduct; or
- did not know that the conduct is wrong; that is, the person could not work out whether the conduct, as perceived by reasonable people, is wrong; or
- is unable to control the conduct.<sup>95</sup>

Similarly, due to a disability or other impairment, a person may be unfit to stand trial. A person is unfit to stand trial if they are:

- unable to understand, or to respond rationally to, the charge or the allegations on which the charge is based; or
- unable to exercise (or to give rational instructions about the exercise of) procedural rights (for example, the right to challenge jurors); or
- unable to understand the nature of the proceedings or follow the evidence or the course of the proceedings.<sup>96</sup>

It is important to remember that if either of these mental impairment defences applies, a person will not be “guilty” of the offence because the law recognises circumstances that make it inappropriate to treat them as an ordinary offender. However, in these situations where it is proved the person did engage in the conduct that would be an offence, the court will make a **supervision order** to assist the person to live safely with support while ensuring the community’s protection.

There may also be instances where these defences do not apply. Still, there are reasons related to a person’s disability that explain why the offending occurred or are relevant to the person moving forward. These circumstances are important for the court to know about to decide the appropriate way to deal with a particular charge.

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95 *Criminal Law Consolidation Act 1935 (SA)* s269C.

96 *Criminal Law Consolidation Act 1935 (SA)* s269H.

It is vitally important if you are charged with any criminal offending, but in particular serious offending, you speak with a lawyer about your disabilities. You also need to speak with your treating healthcare professionals about the charge. In this way, they are all aware of the circumstances and can help you achieve the best outcome.

## Legal advice and representation in criminal matters

If you are charged with a crime, you can choose your lawyer. In South Australia, the Legal Services Commission provides free representation to people who meet the eligibility criteria. This representation spans from when you are charged through to the case being heard and decided by the court. This is through a lawyer from the Legal Services Commission itself or the funding of a lawyer of your choice who is willing to accept a grant of legal aid. The eligibility criteria require you to pass a means test and that your case has merit. The full criteria are available on the Legal Services Commission website,<sup>97</sup> or you can call them on 1300 366 424 to discuss your situation.

If you prefer to have a private lawyer assist you with your criminal case, contact the Law Society of South Australia (or the relevant Law Society in your State or Territory) for a referral.<sup>98</sup>

### *Other support services*

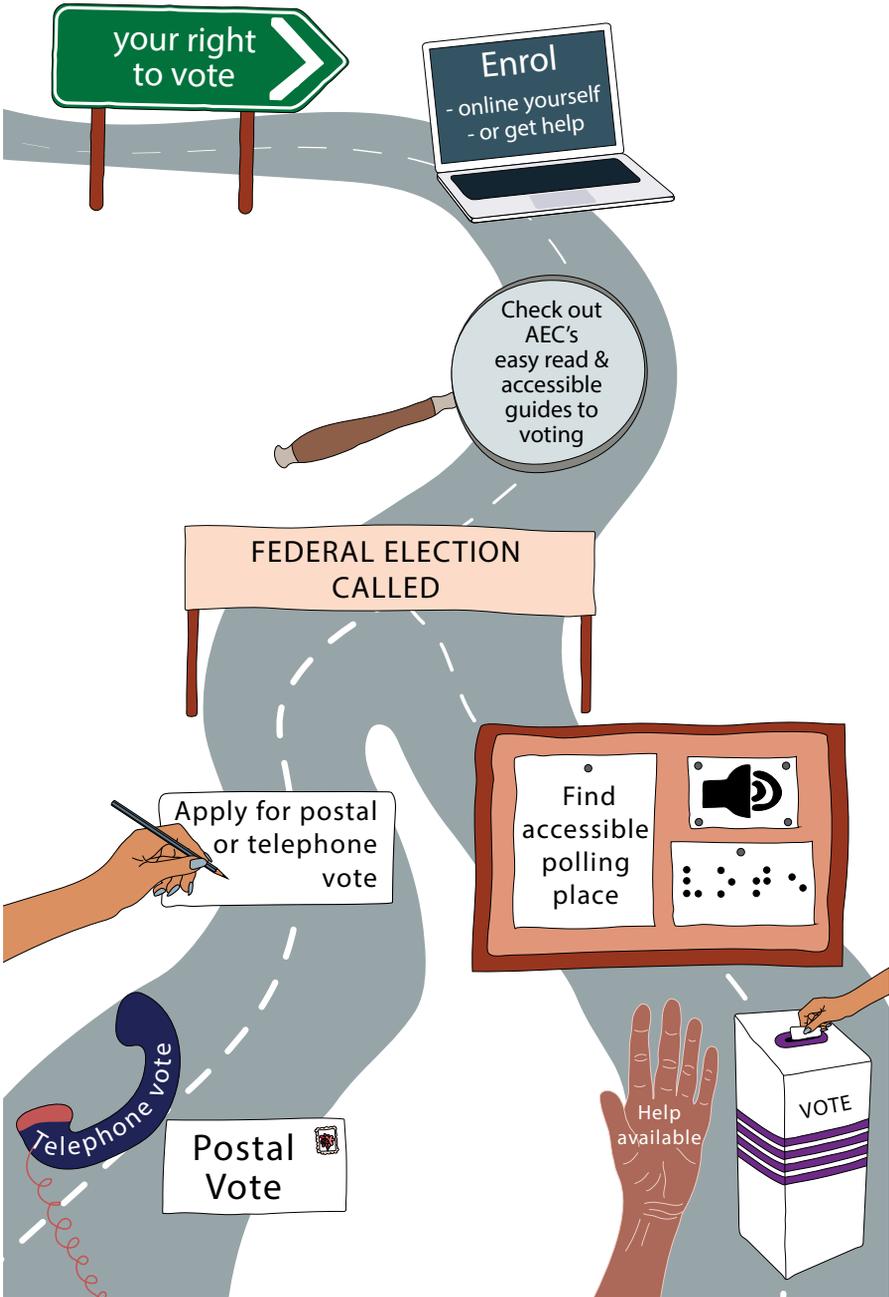
In addition to a lawyer, you may need to access other support services such as Bail Support Services, Mental Health Intervention Teams, Duty Lawyers, and Family Violence Services. For a list of these organisations (Australia-wide), visit the Australian Human Rights Commission website.<sup>99</sup>

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97 Legal Services Commission, *Eligibility* (Web Page) <[https://lsc.sa.gov.au/cb\\_pages/legal\\_aid\\_eligibility.php](https://lsc.sa.gov.au/cb_pages/legal_aid_eligibility.php)>

98 The Law Society of South Australia, *In Uncertain Times, Get the Right Advice* (Web Page) <<https://referral.lawsocietysa.asn.au/start>>.

99 Australian Human Rights Commission, *Programs and services that assist people with disability in the criminal justice system* (Web Page) <<https://humanrights.gov.au/our-work/disability-rights/programs-and-services-assist-people-disability-criminal-justice-system>>.



# 14

## Your Right to Vote

In Australia, people vote to elect the members of Federal, State, and local governments. After you turn 18, you can enrol to vote. It is compulsory to enrol and vote in Federal elections.<sup>100</sup> You must also vote in referendums.

For most Australians, voting is a routine part of life and is not given much thought. About every three (Commonwealth) or four (State) years, people go to their local school or church where a polling booth is set up, or they receive their ballot papers in the mail and cast their vote. Some people are enthusiastic voters and could tell you all the details of each political parties' policies. In contrast, other people are less politically involved and decide who to vote for on the day. Whatever attitude they take, the important thing is that they are enrolled to vote and can cast that vote.

People with disability are required to vote, in the same way as everyone else. People with disability have the right to effectively and fully participate in voting.<sup>101</sup> The *Convention on the Rights of Persons with Disabilities* says that the right to vote must include "ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use".<sup>102</sup> Your vote is secret unless you choose to disclose it and, if you request it,<sup>103</sup> you can be assisted in voting by a person of your choice.<sup>104</sup> However, in Australia, this is not always what voting looks like for a person with disability.

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100 Australian Electoral Commission, *Frequently Asked Questions* (Web Page) <<https://www.aec.gov.au/faqs/>>.

101 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 29 (entered into force 3 May 2008).

102 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 29(a)(i) (entered into force 3 May 2008).

103 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 29(a)(ii) (entered into force 3 May 2008).

104 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 29(a)(iii) (entered into force 3 May 2008).

While people with disability have the right to vote in Australia, some barriers to exercising the right arise. This chapter goes through legal and practical barriers that affect people with disabilities' right to vote and some practical guidance that can assist you in exercising your right to vote.

## Enrolling to vote

If you are an Australian citizen and aged 18 years or over, you are eligible and required to enrol to vote. You can enrol to vote online.<sup>105</sup> You must enrol and vote in all Federal elections, by-elections, and referendums for those eligible to vote.<sup>106</sup> To check if you are enrolled to vote, you can look online<sup>107</sup> or call the Australian Electoral Commission on 13 23 26.

It is important that if you are not enrolled when an election is called, you need to be enrolled within a certain timeframe to be allowed to vote. If you are not enrolled within that timeframe, you will not be able to vote.

If you are not able to sign your name due to a physical disability, a form can be completed to have someone else complete the enrolment form and sign it on your behalf. The forms are available on the Australian Electoral Commission's website.<sup>108</sup>

The law says that even if a person is eligible to enrol to vote, they cannot do so if they do not or cannot understand the nature and significance of enrolment and voting "by reason of being of unsound mind".<sup>109</sup> This law is old and inappropriately worded. It may also disproportionately impact people with intellectual disabilities and cognitive impairments who require alternative formats to understand the material provided at an election.<sup>110</sup> The Australian Electoral Commission has started to develop

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105 Australian Electoral Commission, *Enrol to Vote* (Web Page) <[www.aec.gov.au/enrol](http://www.aec.gov.au/enrol)>.

106 Australian Electoral Commission, *Enrol to Vote* (Web Page) <[www.aec.gov.au/enrol](http://www.aec.gov.au/enrol)>.

107 Australian Electoral Commission, *Check my enrolment* (Web Page) <<https://check.aec.gov.au/>>

108 Australian Electoral Commission, *Electors unable to sign their name due to physical incapacity* (Web Page) <[https://www.aec.gov.au/Enrolling\\_to\\_vote/Special\\_Category/Electors\\_unable\\_to\\_sign\\_their\\_name.htm](https://www.aec.gov.au/Enrolling_to_vote/Special_Category/Electors_unable_to_sign_their_name.htm)>

109 *Commonwealth Electoral Act 1918* (Cth), s93(8)(a).

110 Savery Jonathon, "Voting Rights and Intellectual Disability in Australia: An Illegal and Unjustified Denial of Rights" [2015] *SydLawRw* 14; (2015) 37(2) *Sydney Law Review*, 287.

a range of Easy to Read and accessible guides on voting to help people understand the importance of voting. This improves the participation of people with disability as citizens. Those publications are available on the Australian Electoral Commission's website.<sup>111</sup>

Suppose a person has enrolled to vote but can no longer understand the nature and significance of voting. Then, an Objection Form<sup>112</sup> can be lodged with the Australian Electoral Commission by a person who is also enrolled to vote. It is very serious to be removed from the electoral roll, and a medical professional must sign off on it. Take, for example, a person who enrolled to vote when they were 18 years old but at age 35 were diagnosed with early-onset dementia. They continued to vote throughout their life because their disability did not affect their ability to understand the nature and significance of enrolment and voting. However, by age 67, their disability advanced, and they were no longer able to understand the nature and significance of enrolment and voting. At that point, an Objection Form would need to be completed by another person who is enrolled to vote, usually their loved one or someone close to them.

If you are being told that you cannot vote because of your disability or someone objects to your enrolment, but you feel that you can vote, then seek advice from your disability rights lawyer.

## Casting a vote

Once you are enrolled, the next thing is physically casting your vote. This can look different for all people.

### *Getting the information you need to vote*

Leading up to an election, there is important information given out about how to vote and who the candidates are. This information is available in accessible formats for Federal elections, including braille, audio, and large print. For details on accessible information formats about a State or Territory election, contact your local Electoral Commission (such as the South Australian Electoral Commission).

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111 Australian Electoral Commission, *Information for people with disability or mobility restrictions* (Web Page) <<https://www.aec.gov.au/assistance/>>.

112 Australian Electoral Commission, *Objection claim that an elector should not be enrolled* (Online Form) <[https://www.aec.gov.au/Enrolling\\_to\\_vote/pdf/forms/objection/er005aw.pdf](https://www.aec.gov.au/Enrolling_to_vote/pdf/forms/objection/er005aw.pdf)>

## ***Voting at the polling place***

Typically, to cast a vote, a person will go to a polling place. Polling places are often hosted at local schools or community halls. At the polling place, you register your attendance with the staff running the polling place. They will give you the ballot papers, and then you move to a private booth and cast your vote in secret.

Attending a polling place and casting a vote can present barriers to people with disability, such as lack of wheelchair access or inaccessible formats of the ballot papers. The Australian Electoral Commission has introduced accessible features into the process of casting a vote to overcome some of those barriers:

- **Polling place accessibility:** When an election is announced, a list of polling places is made available to the public. Each polling place is given an accessibility rating. The ratings are:
  - wheelchair accessible;
  - assisted wheelchair access; or
  - not wheelchair accessible.<sup>113</sup>

While the rating system talks about “wheelchair access,” it is a good guide for anyone using a mobility aid or who has trouble with steps or challenging surfaces.

- **Assistance to vote at a polling place:** Polling place staff are trained to help people with disability cast their vote. Alternatively, you can nominate someone you trust, such as a friend or family member, to help you on the day. The assistance will only be physical assistance; you still have to decide what to put on the ballot paper. Polling place staff can help by explaining what each of the papers is for, by helping you write on the ballot paper if required or folding the papers up for you and placing them in the ballot boxes.

You can also go to a polling place and stay in your car if that is physically easier. If you do that, have someone with you to go in and tell the polling place staff that you need assistance. The polling official in charge will come and check that you cannot get out and, if they are satisfied that

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113 Australian Electoral Commission, *Information for people with disability or mobility restrictions* (Web Page) <<https://www.aec.gov.au/assistance/>>.

you cannot, will organise for one of the polling place staff to bring the ballot papers out to you.

Ideally, knowing what access features are available at your chosen polling place, including having assistance to overcome any barriers on the day, will enable you to vote in person at a polling place.

### ***If you can't get to the polling place***

Some people with disability may not be able to attend a polling place, for example, if you are homebound or bedbound. In such cases, you can apply to be a general postal voter to receive ballot papers in the mail for each Federal election.<sup>114</sup> You can apply online<sup>115</sup> or with a hard copy form available at your local Electoral Office or online (to print and return).<sup>116</sup>

A general postal voter will get their ballot papers in the mail when an election is on and send the papers back via post. If you need assistance with completing these forms, seek help from a family member or trusted support person.

### ***Voting by people who are blind or have low vision***

People who are blind or have low vision can vote by telephone. Information on how to do this is made available by the Australian Electoral Commission after an election is announced.<sup>117</sup>

### ***Hospitals or institutions***

If you are in hospital at the time of an election or living in an institutionalised environment, a mobile polling station may be set up on site. The Australian Electoral Commission will let voters know where mobile polling stations will be set up shortly after an election is announced.<sup>118</sup>

If you are unsure how to cast your vote for an election or need further information, contact your local Electoral Commission (for State

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114 Australian Electoral Commission, *Information for people with disability or mobility restrictions* (Web Page) <<https://www.aec.gov.au/assistance/>>.

115 Australian Electoral Commission, *General Postal Voters* (Web Page) <[https://www.aec.gov.au/Enrolling\\_to\\_vote/Special\\_Category/general-postal-voters.htm](https://www.aec.gov.au/Enrolling_to_vote/Special_Category/general-postal-voters.htm)>

116 Australian Electoral Commission, *General Postal Voters* (Web Page) <[https://www.aec.gov.au/Enrolling\\_to\\_vote/Special\\_Category/general-postal-voters.htm](https://www.aec.gov.au/Enrolling_to_vote/Special_Category/general-postal-voters.htm)>

117 Australian Electoral Commission, *Information for people with disability or mobility restrictions* (Web Page) <<https://www.aec.gov.au/assistance/>>.

118 Australian Electoral Commission, *Information for people with disability or mobility restrictions* (Web Page) <<https://www.aec.gov.au/assistance/>>.

and Territory elections) or the Australian Electoral Commission (for Federal elections).<sup>119</sup>

## Complaints

### *Australian Electoral Commission*

The Australian Electoral Commission is responsible for maintaining the electoral system and delivering polling services.<sup>120</sup> You can make a formal complaint to the Australian Electoral Commission if you have issues with any of the following:<sup>121</sup>

- The Commission (including one of their staff).
  - For example, if you attend a polling place and a polling place staff member says something offensive, such as “you can’t vote because you have a disability”.
- Possible breaches of, or offences under, the *Commonwealth Electoral Act 1918* (Cth), *Referendum (Machinery Provision) Act 1984* (Cth), or *Fair Work Act 2009* (Cth).
  - For example, if you were found ineligible to vote but you think that decision is wrong.
- Where the *Commonwealth Electoral Act 1918* may have been intentionally breached to obtain a benefit or cause a detriment.
  - For example, it is an offence for the proprietor or employee of a hospital or nursing home to do anything to influence the vote of a person who is voting from that location.<sup>122</sup>
- Suspected interference with an individual’s privacy by the AEC.
  - For example, if you thought the polling place officer was sharing your address with someone at the polling place.

When making a complaint, you can say what outcome you want. For example, you might want an apology or disability awareness training

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119 Australian Electoral Commission, *Contact the AEC* (Web Page) <[https://www.aec.gov.au/About\\_AEC/Contact\\_the\\_AEC/index.htm](https://www.aec.gov.au/About_AEC/Contact_the_AEC/index.htm)>

120 Australian Electoral Commission, *The AEC’s role* (Web Page) <[https://www.aec.gov.au/About\\_AEC/](https://www.aec.gov.au/About_AEC/)>.

121 Australian Electoral Commission, *Complaints Management Policy* (March 2018) <[https://www.aec.gov.au/about\\_aec/publications/policy/files/complaints-management-policy.pdf](https://www.aec.gov.au/about_aec/publications/policy/files/complaints-management-policy.pdf)>.

122 *Commonwealth Electoral Act 1918* (Cth), s 325A(1).

to be compulsory for all polling place staff. You do not need a lawyer to make a complaint to the Australian Electoral Commission. Still, you can seek the advice of your disability rights lawyer before lodging the complaint if you wish to.

If you are not happy with the decision made by the Australian Electoral Commission in response to your complaint or with how they handled the complaint, you can seek an internal review. In an internal review, a different officer will consider the complaint and make a new decision.

Finally, suppose the internal review is not satisfactory. In that case, you can take the complaint to an external organisation such as the Australian Human Rights Commission, Commonwealth Ombudsman, Administrative Appeals Tribunal, Special Minister of State, or the Australian Information Commissioner.<sup>123</sup> The most appropriate external organisation to consider your complaint will depend on what the complaint is about, so seek legal advice from your disability rights lawyer for guidance.

### ***State and Territory Electoral Commissions***

Like the Australian Electoral Commission, each State and Territory Electoral Commission has a complaints process that deals with your access to polling services and places.

In South Australia, complaints can be made via phone, email, or in person at the Electoral Commission of South Australia's office. For example, a complaint can be made about a process or practice conducted by the Commission, such as not accessing a polling booth or being mistreated by an electoral officer. Complaints can also be made for offences under the *Electoral Act 1985 (SA)*, such as election material being inappropriately distributed by a political party.

If you are dissatisfied with the outcome of your complaint, you can contact the Ombudsman SA on 1800 182 150 or visit [www.ombudsman.sa.gov.au](http://www.ombudsman.sa.gov.au) for further information.

For other State and Territory Electoral Commission complaints processes, visit their website or contact your local disability rights lawyer.

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123 Australian Electoral Commission, *Complaints Management Policy* (Web Page) <[https://www.aec.gov.au/about\\_aec/publications/policy/complaints-management.htm](https://www.aec.gov.au/about_aec/publications/policy/complaints-management.htm)>.

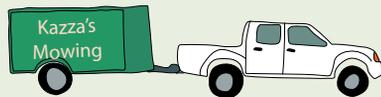
## Your rights under the Australian Consumer Law

1. You pay for a: good



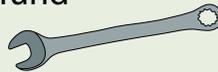
or

service

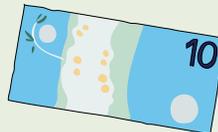


2. You have consumer rights which include (depending on whether a problem is minor or major):

Faulty good - fix, replace, or refund



Inadequate service - meet standard, refund, or compensate for difference in value



Fair treatment by all businesses



# 15

## Buying Goods and Services for Everyday Life

Everyone buys goods and services. Some purchases are small, such as a bus ticket, and others can be significant, such as a car. People with disability may use their National Disability Insurance Scheme (NDIS) funding to purchase goods and services. When you buy goods or services, including NDIS-funded goods and services, you are called a “consumer” and, as a consumer, you have legal rights. People with disability enjoy all these rights.

Buying goods and services is a legal transaction and requires you to understand the nature and consequences of your purchase. You must be able to understand how much something costs and the terms on which you are buying it. The terms include when payment is due and what warranties apply. If you cannot understand the nature and consequences of a purchase, you may need support to do so or have someone else buy things on your behalf. Some people will be able to make small purchases without any support but need support with bigger purchases where the consequences are more significant.

While most places that sell goods and services do the right thing and buying what they offer is OK, sometimes places do not describe their products or services accurately. As a result, you may buy something that may be different from what the seller advertised. Similarly, you may buy a good that turns out to be faulty or pay for a service that is not of the quality you were expecting. It is important to know what to do in those situations. You may need to make a complaint and will need to know how to do so.

This chapter will help you identify when you are a consumer, what your rights are, and what to do when something goes wrong.

## Who is a consumer?

Under Australian Consumer Law,<sup>124</sup> a consumer is someone who buys a good (for example, a TV, car, or table) or service (such as paying someone to mow your lawn, clean your house, or walk your dog) and:

- the good or service is worth no more than \$40 000; or
- the good or service is for personal use (rather than a business use); or
- if the item was a vehicle (such as a car) or trailer, where that item is mostly used to transport items on public roads.<sup>125</sup>

When you buy a good or service, it is important to understand what you have bought and the consequences of making the purchase. If you have difficulty understanding the purchase, you can ask someone you trust to help you. You should not go ahead with a purchase until you have understood the full nature and consequences of the transaction. If you cannot understand what the purchase involves, speak with a disability advocate about what options there are to get what you need.

### *Example: Understanding the transaction*

For example, you need to buy a car to travel to work. You see an advertisement for a car that costs \$20,000. You have \$5,000 in savings, and the car salesperson suggests that you borrow \$15,000 from the bank that they always work with that lends people money to buy cars. However, you have never had a loan from a bank, and you do not really know what that means.

The salesperson gives you a long document with Terms and Conditions for the loan. You do not understand the Terms and Conditions. When the salesperson tells you that you will need to make weekly repayments of \$500 for three years, you become worried because you do not have \$500 spare in your weekly income. You feel pressured to do what the salesperson says because you need a car, and they are saying it is easy and people do it all the time.

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124 *Competition and Consumer Act 2010* (Cth).

125 Commonwealth of Australia, *Your consumer rights – A guide for people with disabilities* (Report) <[https://www.accc.gov.au/system/files/1541\\_ACL%20Your%20Consumer%20Rights\\_FA3.pdf](https://www.accc.gov.au/system/files/1541_ACL%20Your%20Consumer%20Rights_FA3.pdf)> 3; *Competition and Consumer Act 2010* (Cth), Schedule 2, s 3(1)(c).

In this situation, you should not purchase the car until you have received financial advice on whether the loan for an expensive car is a good idea. Remember that the salesperson has their own interests in selling the car to you, which may not be your best interests. Make sure you have support from someone you trust, such as a family member, a close friend, or your disability advocate, to help you understand the purchase.

If you purchase a good or service and think afterwards that you did not really understand what the business was telling you or what you have bought, you are still considered a consumer and can rely on your consumer rights. In some instances, your purchase may even be void because you did not understand what you were purchasing. For help in that situation, contact your disability advocate or disability rights lawyer.

## What are my consumer rights?

The Australian Consumer Law protects you when buying a good or a service from an Australian business. This does not include purchases from individuals who do not sell items as a business, such as Gumtree or Facebook Marketplace. The law says that:

- If you buy a good and there is a problem with it, you have the right to take it back and ask for it to be fixed.
- If you pay for a service and it is not provided to an appropriate standard, you have the right to ask for the appropriate standard to be met.
- You have the right to be treated fairly by a business.
- If you pay for something that isn't of acceptable quality, what you asked for, ordered, or were told you would get, or is different to from its description, you are legally entitled to a repair, replacement, or refund.<sup>126</sup>

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126 Commonwealth of Australia, *Your consumer rights – A guide for people with disabilities* (Report) <[https://www.accc.gov.au/system/files/1541\\_ACL%20Your%20Consumer%20Rights\\_FA3.pdf](https://www.accc.gov.au/system/files/1541_ACL%20Your%20Consumer%20Rights_FA3.pdf)> 2; *Competition and Consumer Act 2010* (Cth), Schedule 2, Division 1, subdivision A – D.

## *Unsolicited consumer agreements*

Unsolicited consumer agreements are when an agreement is a result of:

- negotiations over the phone or at a location that is not the seller's place of business (such as a shopping centre foyer);
- a seller approaches you or calls you uninvited; and
- the total value is more than \$100 (or cannot be determined when the agreement is made).<sup>127</sup>

Common examples that lead to unsolicited consumer agreements are door-to-door selling, telemarketing, and being approached by a salesperson in a public place such as a shopping centre.<sup>128</sup>

There are specific rules that salespeople must follow when using sales methods for unsolicited consumer agreements, for example:

- Telemarketers cannot call on Sundays or public holidays before 9am or after 8pm on weekdays and before 9am and after 5pm on Saturdays.
- The salesperson must tell you their name, the name and address of the organisation they represent, and the purpose of the phone call or visit.
- A salesperson must tell you that you can ask them to leave and leave immediately if asked and not return for 30 days.

For a full list of your protections with unsolicited consumer agreements, visit the Australian Competition and Consumer Commission (ACCC) website.<sup>129</sup>

Generally, if you purchase something through an unsolicited consumer agreement and decide that you do not want it, you can seek a full

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127 Australian Competition and Consumer Commission, *Unsolicited consumer agreements* (Web Page) <<https://www.accc.gov.au/consumers/sales-delivery/telemarketing-door-to-door-sales/unsolicited-consumer-agreements>>.

128 Australian Competition and Consumer Commission, *Unsolicited consumer agreements* (Web Page) <<https://www.accc.gov.au/consumers/sales-delivery/telemarketing-door-to-door-sales/unsolicited-consumer-agreements>>.

129 Australian Competition and Consumer Commission, *Telemarketing & door-to-door sales* (Web Page) <<https://www.accc.gov.au/consumers/sales-delivery/telemarketing-door-to-door-sales>>.

refund within 10 days.<sup>130</sup> If a salesperson that leads you to agree to an unsolicited consumer agreement has not followed the rules around selling goods and services (such as those described above), you may have a longer time period in which to seek a full refund.<sup>131</sup> Speak with your disability rights lawyer about this.

### **Online Shopping**

Shopping online is a popular way for people to buy goods and services, from clothes to cars. Online businesses selling goods and services must comply with rules, including:

- Products and services must meet Australian safety regulations.
- They must not mislead you or hide costs or details from you.
- They must give you an automatic guarantee with the right to ask for a repair, replacement, refund, cancellation, or compensation if there is a problem.<sup>132</sup>

The ACCC recommends some great tips for protecting your rights when shopping online, such as:

- Checking terms and conditions carefully before buying so that you know what you are buying and there are no hidden costs or restrictions.
- Never buying from sellers who ask for your PIN or password.
- Keeping copies of all documents, including item descriptions, emails, and receipts, if there is a problem later.

You can read more of the ACCC's advice for online shoppers on their website.<sup>133</sup> If the information about a good or service is not accessible or you feel you cannot understand all the information needed to make the purchase, speak to a trusted person or your disability advocate for assistance.

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130 Commonwealth of Australia, *Your consumer rights – A guide for people with disabilities* (Report) <[https://www.accc.gov.au/system/files/1541\\_ACL%20Your%20Consumer%20Rights\\_FA3.pdf](https://www.accc.gov.au/system/files/1541_ACL%20Your%20Consumer%20Rights_FA3.pdf)> 9; *Competition and Consumer Act 2010* (Cth), Schedule 2, ss 82(3)(a) and (b).

131 *Competition and Consumer Act 2010* (Cth), Schedule 2, s82.

132 Australian Competition and Consumer Commission, *Shopping Online* (Web Page) <<https://www.accc.gov.au/consumers/online-shopping/shopping-online>>.

133 Australian Competition and Consumer Commission, *Shopping Online* (Web Page) <<https://www.accc.gov.au/consumers/online-shopping/shopping-online>>.

## When do consumer rights apply, and how do I enforce them?

Your consumer rights apply as soon as you pay the money to the person selling the good or service. You may pay with cash, credit, or bank transfer. Suppose you consider making a purchase and notice that the product is not what it seems. In that case, you can report the business to the independent regulator of Australian Consumer Law, the ACCC, without actually making the purchase.<sup>134</sup> However, the focus of this chapter is on when a consumer purchases the product or service.

If your consumer rights have been breached, you can also make a complaint to the ACCC. For more information on this process, visit the ACCC's website<sup>135</sup> or contact your disability rights lawyer for assistance.

For further information on your rights as a consumer with disability, read the ACCC's *Guide for People with Disabilities*.<sup>136</sup>

## Entering into contracts

As a consumer, you might enter into a contract. Contracts may be written or spoken. Either way, they are legally binding. The contract will say what the business will provide you with and what you must do when receiving the good or service.

For example, if you have a support worker come to your house to help you make dinner and do the washing, you will have a contract with the organisation that employs the support worker. The organisation will provide you with a contract setting out the terms and conditions of the service, including how much it will cost, when payments are to be made, and how to terminate the contract.

It is important that you understand all contracts before you sign them. If you do not understand a contract, including if it is not presented to

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134 Commonwealth of Australia, *Your consumer rights – A guide for people with disabilities* (Report) <[https://www.accc.gov.au/system/files/1541\\_ACL%20Your%20Consumer%20Rights\\_FA3.pdf](https://www.accc.gov.au/system/files/1541_ACL%20Your%20Consumer%20Rights_FA3.pdf)>.

135 <https://www.accc.gov.au/consumers/complaints-problems/make-a-consumer-complaint> accessed on 7 June 2020.

136 Commonwealth of Australia, *Your consumer rights – A guide for people with disabilities* (Report) <[https://www.accc.gov.au/system/files/1541\\_ACL%20Your%20Consumer%20Rights\\_FA3.pdf](https://www.accc.gov.au/system/files/1541_ACL%20Your%20Consumer%20Rights_FA3.pdf)>.

you in an accessible format, do not sign it. Signing a contract that you do not understand can be very dangerous and may mean you are required to do something you cannot do, such as make fortnightly payments that you cannot afford. Not making those payments will be a breach of the contract and may result in legal action against you.

If you feel pressured or are forced to sign a contract you do not understand, or that was not presented to you in an accessible format, contact your disability rights lawyer.

### ***A note on contracts for NDIS Participants***

Many services you pay for using your NDIS funding will require you to enter into a contract with the service provider. Even though you are using your NDIS funding, the contract will be between you and the service provider. You will be legally responsible for what you have agreed to do under the contract. It is important that you understand the contract before you sign it and that you have the NDIS funding in place to pay for the services before you sign the contract.

For example, you want someone to help walk your dog twice a week. You contact the local dog walking business and sign a contract for two walks per week for the next year. It will cost \$5,000 for the whole year. You then contact the National Disability Insurance Agency (NDIA) and ask for more funding to cover the dog walking services. The NDIA declines to fund the services. You may still have to pay the dog walking business the full \$5,000, depending on what the contract specifically says.

The other issue that may arise in contracts for services funded by the NDIS is when your funding changes. NDIS Plans do change, and your funding may change. It is important that you stay up to date on the funding you can access to pay for the contracts you have in place. If you have an existing contract for services and your funding changes, meaning that you can no longer meet the payments for that service, speak to your service provider immediately about terminating the contract. If the service provider does not allow you to terminate the contract, speak with your disability rights lawyer immediately.

For example, you have a contract for your daily support needs at home for \$80,000 per year. You get a new NDIS Plan which only allows \$50,000 per year for daily support needs. You should immediately contact the service provider and explain that you no longer have the funding to pay

the existing contract and need to change the contract to reflect your funding arrangement. The service provider says that is not possible, and they will require you to continue to pay the contract at \$80,000 per year. Contact your disability rights lawyer immediately.

## Discrimination in purchasing goods and services

If you have a problem with your goods or service quality, you can make a consumer complaint. However, if you are treated unfairly when accessing goods or services because you have a disability, you can make a disability discrimination complaint.<sup>137</sup> It is unlawful for a person or organisation to refuse you access to the good or service in the terms and conditions on which the service is ordinarily provided. It is also unlawful for a person or organisation to provide a service or good if how that service or good is provided is unfavourable because of your disability. For example, if you contact the local lawn mowing business and ask that they come to mow your lawns, but they refuse because you have a disability, that is unlawful.

If you feel that you have been treated unfairly because of your disability when accessing or receiving goods and services, refer to Chapters 2 and 3 on disability discrimination and complaints, and speak with your disability rights lawyer about taking further action.

## How do I get help if something goes wrong?

If something goes wrong when you have purchased a good or service or entered into a contract, you can contact:

- The **ACCC** or your State or Territory **Consumer and Business Affairs Bureau** for complaints about the quality of a good or service or the behaviour of an organisation providing goods or services.
- The **Australian Human Rights Commission** or State or Territory **Equal Opportunity Commissioner** for complaints if you are discriminated against when receiving goods and services.

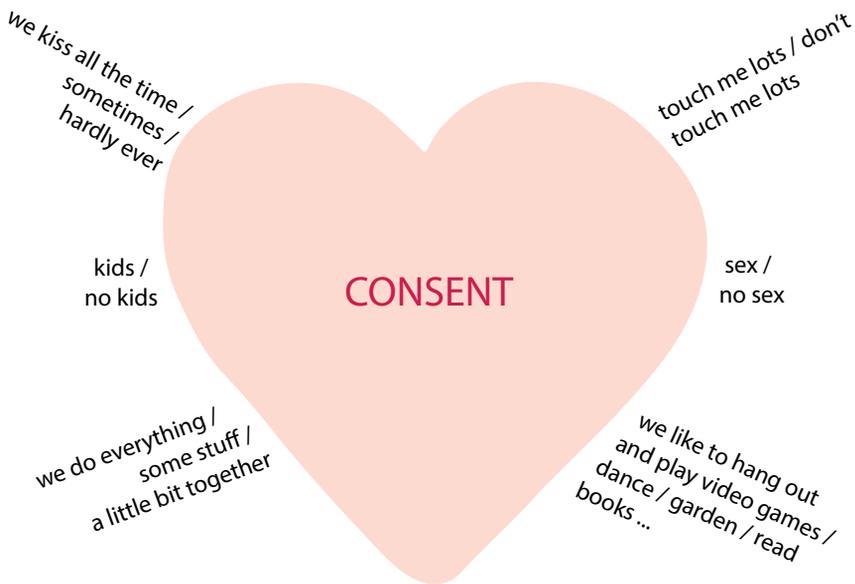
For initial advice or help to pursue a complaint, contact your disability rights lawyer.

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<sup>137</sup> *Disability Discrimination Act 1992* (Cth), s24.



## it's up to you how your relationship looks



# 16

## Personal Relationships and the Right to Family

Falling in love, getting married, and having children is a part of most people's life. While some people might choose to skip the getting married part or not have children, everyone has the right to choose to do or not do any of these things. People with disability also have this right, but it has often been a different experience for people with disability, with some having been denied the right to marry or start a family.

Relationships and having a family look different for everyone. While the focus of this chapter is on disability rights, it is important to note that people with different experiences of gender and sexuality can face yet another layer of challenges in realising their right to relationships, marriage, and family. When we discuss relationships, marriage, or family we refer to all people regardless of gender or sexual orientation. For information on your rights where they intersect with your disability and gender or sexual orientation, visit Equality Australia.<sup>138</sup>

This chapter goes through the legal aspects of falling in love, getting married, and having children if you are a person with disability.

### Family

Being a member of a family is a special part of life. All families look different. The *Convention on the Rights of Persons with Disabilities (CRPD)* states that children with disability should not be separated from their parents against their will unless it is in their best interests (as determined by a court).<sup>139</sup> Similarly, children with or without disability should not be removed from their parents because their parents have a disability.<sup>140</sup> In the past, children with disability were separated from their parents and

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138 Equality Australia, Home page <<https://equalityaustralia.org.au/>>

139 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 23(4) (entered into force 3 May 2008).

140 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 23(4) (entered into force 3 May 2008).

sent to live in large institutions. It was thought that parents could not or should not have to provide the care needed by their children with disability. That is no longer the practice (although it does still happen for some families). Instead, parents and children should be supported to live in a family environment. Support can include community networks or funding through the National Disability Insurance Scheme (NDIS). For more information on these supports, contact your disability advocate.

There will be rare circumstances, for some families, where children with disability cannot stay at home with their parents. In this situation, if it is possible, the child may live with the extended family.<sup>141</sup> If that is not possible, there are specialist housing options available in the community. These situations will be rare and complex. If you or someone you know is not coping with the care of their child with a disability and/or alternative living arrangements need to be put in place, contact your disability advocate for advice and assistance.

## Relationships

People with disability are free to choose who they are in a relationship with. Some people will benefit from having support or guidance from a trusted person in choosing a partner and staying safe in their relationship.

Being in a relationship is different for everyone, but it may include a sexual relationship for many people. In the context of disability rights, two key issues come up in the conversation on sexual relationships:

- Consent to sex
- Using sex workers to have a safe sexual experience

### *Consent to sex*

The age of consent is determined by State and Territory legislation. The laws are slightly different in each State and Territory, so this chapter focuses on the laws of South Australia by way of example. If you live in a different State or Territory, speak with your disability rights lawyer for more information.

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141 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 23(5) (entered into force 3 May 2008).

In South Australia, you must be 17 years old to consent to sex. Consent must be given at both the start of and during sex or a sexual act. To give consent, you must “freely and voluntarily agree to the sexual activity”.<sup>142</sup> Sexual activity can include kissing and touching right through to having penetrative sex. A person can change their mind part-way through and not want to continue having sex. If that is not respected, a criminal offence has been committed, and the police should be contacted immediately.

Everyone involved in the sexual act is responsible for checking in with the other person or people involved to make sure that consent is willingly given. Consent should be an enthusiastic “yes!” **If you do not hear a yes, then it is a no.** Consent is not valid if the person is not sure about what is happening. It is important to understand what is happening and what you are saying yes to. If you are not sure, you can and should say no. Your sexual partner must respect that.

While every person, regardless of their disability, has the right to a sexual relationship, it is important to know that current criminal laws can impact people with intellectual disabilities and cognitive impairments when having sex. In South Australia, if a person is affected by a physical, mental, or intellectual condition that impacts their ability to agree freely or voluntarily to sex, they cannot consent.<sup>143</sup>

Suppose a person with a mental illness is unwell and cannot consent to sex at that time. They and their sexual partner should wait until they both can freely and voluntarily agree to sex.

Similarly, suppose a person who wants to have sex with someone knows that because of that person’s intellectual disability they cannot understand the nature or consequences of sexual intercourse. In that case, that person should not have sex with them. If they do have sex with them, they could be found guilty of an offence.<sup>144</sup> This law specifically mentions a person with an intellectual disability. Still, it is important to note that the focus is on the person’s ability to understand the nature or consequences of sexual intercourse. So even if the person does not have a diagnosed intellectual disability or does not identify as having one,

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142 *Criminal Law Consolidation Act 1935 (SA)*, s46.

143 *Criminal Law Consolidation Act 1935 (SA)*, s46(3)(e).

144 *Criminal Law Consolidation Act 1935 (SA)*, s49(4)(6).

not understanding the nature and consequences of sexual intercourse should cause alarm for both parties considering having sex.

While people will usually pick sexual partners from within their social networks, sometimes people might consider having sex with their support worker or teacher or someone else who provides a service to them. In South Australia, it is a criminal offence for a person to have sex with someone who has a cognitive impairment by using “undue influence”. This law protects people with disability who may be vulnerable to a person who provides them with a service from using that position of power to get the person to have sex with them. For example, say a support worker says to a person with autism spectrum disorder that the person must have sex with them and, if they do not, the support worker will not help them go to the local library each week. If the person with autism spectrum disorder consents to have sex with them on this basis, the act of having sex is likely to be a criminal offence, and the support worker should get in trouble.<sup>145</sup>

**The key point when having sex, no matter who you have it with, is that everyone can freely and voluntarily agree. It is everyone’s responsibility to make sure that all people involved in the sexual act consent the whole time.**

If you need more information on whether you or your sexual partner can consent to sex, contact your disability advocate. If someone has sex with you and you did not consent, contact the police and your disability rights lawyer immediately.

### *Sex services*

Everyone has sex differently. For some people with disability, using sex services is an important way for them to have a safe and fulfilling sex life. People may use sex services as a single person or as a couple. For example, a couple may choose to use a sex service to equip them with skills to have sex, taking their abilities into account.

Where paid sex services are legal, it is open to a person with disability to use them. However, in recent years, people with disability have sought to use their NDIS funding to pay for a sex service. Currently, the (National Disability Insurance Agency (**NDIA**)) has said that they will not pay for

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145 *Criminal Law Consolidation Act 1935 (SA)*, s51.

a sex service. They will pay for a support worker to help a person with disability to visit a sex service or fund other services around enabling the person to access the service. Still, the NDIS funding will not cover the sex service itself. In considering this position, the Federal Court has said that the NDIA is incorrect. Where the sex service is reasonable and necessary and aligns with the person's Statement of Goals and Aspirations in their NDIS Plan, it should be funded.<sup>146</sup> At the time of publication, the NDIA was considering its response to this ruling. There may be changes to the *National Disability Insurance Scheme Act 2013* (Cth) and *National Disability Insurance Scheme Rules*, which affect the ability of people with disability to access sex services through the NDIS.

If you need to access sex services because of your disability and would like to pursue having that funded through your NDIS Plan, refer back to Chapter 5 on the NDIS and speak with your disability rights lawyer.

## Keeping safe and domestic violence

You have the right to feel equal and safe in your relationship. You cannot be forced to stay in the relationship if you want to leave. You must have open access to your money, be able to choose what you do for work, how you spend your free time, and who you spend time with. You should never be subjected to physical violence such as hitting or punching, sexual violence such as rape, or verbal assault, such as yelling or name-calling. If you experience any of this in your relationship and need help, contact:

- In an emergency, 000 for police or ambulance.
- 1800 RESPECT (1800 737 732).
- Lifeline on 13 11 14 or visit [lifeline.org.au](http://lifeline.org.au)
- If you're aged under 25, Kids Help Line on 1800 551 800 or visit [kidshelpline.com.au](http://kidshelpline.com.au)

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<sup>146</sup> *National Disability Insurance Agency v WRMF* (2020) FCAFC 79

## Going the distance: Marriage and de facto relationships

A couple's relationship can be recognised through marriage or as a de facto relationship, from a legal perspective. It is important that you know your legal rights if you find yourself in a de facto relationship or decide to get married.

### *Marriage*

In Australia, people over the age of 18 can get married.<sup>147</sup> People with disability have the right to marry.<sup>148</sup> Legally, this is upheld in Australia, and people with disability can marry who they wish under the *Marriage Act 1961* (Cth).

It is worth noting, though, that a marriage will be void if a party "was incapable of understanding the nature and effect of the marriage ceremony," and so their consent to the marriage was not "real consent".<sup>149</sup> This law could disproportionately impact people with cognitive impairments, including those with an intellectual disability. For example, a couple wanting to get married may be given written material on what it means to get married and the implications of that decision. There may not be a Plain English version of that material. Suppose one or both of the people wanting to get married do not have an existing knowledge of what marriage legally means and its implications and cannot access that written material. In that case, the marriage may be void if it was later realised that they did not understand what a marriage was.

Getting married is very serious, and it is important that you understand what it means to get married and what will happen at the ceremony. Being married is a legally binding agreement between two people to the exclusion of all others voluntarily entered into for life.<sup>150</sup> This is a big commitment and has many implications for how you continue life with that person. The person you marry will become your next of kin, meaning they can make healthcare decisions for you if you are in an accident or no longer can make those decisions for yourself. They may

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147 *Marriage Act 1961* (Cth), s11.

148 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 23(1)(a) (entered into force 3 May 2008).

149 *Marriage Act 1961* (Cth), s23(1)(d)(iii).

150 *Marriage Act 1961* (Cth), s5, "marriage".

also have rights to your property if you die. Suppose you are being asked to marry someone and don't have access to the information you need to understand what that means and what the implications are fully. You should seek help from a disability advocate or speak with your disability rights lawyer in that case.

### ***De facto relationship***

When a couple does not get married but lives together for more than two years, they can be considered to be in a "de facto relationship".

De facto relationships create certain legal rights and obligations that are important to keep you safe, both in the relationship and if the relationship breaks down. For example, if you live with someone for 10 years as partners and have bought a house together, you each own half of that property as a de facto couple. If your relationship breaks down, you can seek to receive half of the property.

Legally speaking, a de facto relationship is when you live together on a genuine domestic basis as a couple for two years without separation.<sup>151</sup>

Whether you are in a de facto relationship will depend on your circumstances, and factors such as:

- The duration of the relationship.
- Whether a sexual relationship exists.
- The nature and extent of your common residence.
- Any financial dependence or interdependence on each other.
- Owning property together.
- Care and support of children.
- The reputation and public aspects of the relationship.

To sum up, to be considered to be in a de facto relationship you need to genuinely be a couple, sharing your lives. It is not enough to simply live together or be having an ongoing sexual relationship. For example, if you live in a group home with one other person with disability and share support services, you might have a lot to do with each other over a long time (sometimes decades) but this is not a de facto relationship.

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151 *Family Law Act 1975 (Cth)*, s4AA

If someone tells you that you are in a de facto relationship and you are surprised by that or do not agree because that was not your intention, contact your disability rights lawyer immediately.

Like all relationships, de facto couples can break up, or your partner might die. If this happens to you, you should seek help from your disability rights lawyer about your rights to the property, superannuation entitlements, or working through the care of any children. You should not be told that you must leave with nothing or that the other person can take your money or property. Getting that specialist legal advice early on is important if you are leaving a de facto relationship.

## Parenthood

Becoming a parent can look different for everyone. People with disability have the right to “decide freely and responsibly on the number and spacing of their children”.<sup>152</sup> This means that it is up to you when and how many children you have. To make this decision, it is important that you access information on having children if and when you need that information.<sup>153</sup> There are some great resources available online for parents with disabilities, including tailored resources for specific disabilities such as intellectual disability or physical disability,<sup>154</sup> including written resources from the Australian Parenting Website<sup>155</sup> and podcasts such as *We’ve got this: Parenting with a Disability*.<sup>156</sup>

An important aspect in deciding whether or when to have children is when to fall pregnant. You can exercise this choice by using **contraception**. Contraception choices include over-the-counter options such as condoms or prescribed medications like the pill. If you would like a prescribed contraceptive, visit your doctor to discuss your options.

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152 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 23(1)(b) (entered into force 3 May 2008).

153 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 23(1)(b) (entered into force 3 May 2008).

154 Raising Children Network (Australia), ‘Grown Ups: Family Diversity’ (Web Page) <<https://raisingchildren.net.au/grown-ups/family-diversity>>

155 Raising Children Network (Australia), ‘Grown Ups: Family Diversity’ (Web Page) <<https://raisingchildren.net.au/grown-ups/family-diversity>>

156 ABC, ‘We’ve Got This: Parenting with Disability’ (Podcast) <<https://www.abc.net.au/radionational/programs/lifematters/features/weve-got-this-parenting-with-a-disability/>>

For general information, contact your local or State family planning organisation, such as Shine SA.<sup>157</sup> It is important that, as a person with disability, you have access to all appropriate contraceptive methods available and that these are not denied to you on the basis of your disability. You also have the right to choose whether or not to take contraception. If you feel pressured to take contraception or cannot access contraception when you want it, contact your disability advocate for help.

It is a human right of people with disability to “retain their fertility on an equal basis with others”.<sup>158</sup> Being fertile or having fertility means you can have a child. There are State and Territory laws which permit people with disability to have their fertility removed if they are subject to guardianship orders, either through contraception or surgical intervention. These are rare cases and require an independent Tribunal (such as the South Australian Civil and Administrative Tribunal) to make orders to allow this to happen. If you are concerned about this for yourself or someone you know, contact your disability rights lawyer immediately.

Sometimes, people will fall pregnant and not want to continue with the pregnancy. Women and pregnant people wanting to end their pregnancy can have an **abortion**. Each State and Territory has different laws about abortion, and it is recommended that you seek the advice of your local pregnancy advice clinic for further information on those laws. Women and pregnant people with disability have the right to choose to have an abortion like anyone else and should be given all the information they need to make that informed decision. If a woman or pregnant person cannot consent to the abortion (see Chapter 4), then, in South Australia, the *Guardianship and Administration Act 1993* (SA) does permit the South Australian Civil and Administrative Tribunal to order that the abortion take place under strict conditions. This is very serious, and if you or someone you know is facing this situation, contact a disability advocate or disability rights lawyer immediately to make sure what is happening should be happening.

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157 Shine SA, 'Contraception' (Web Page) <<https://www.shinesa.org.au/health-information/contraception/>>

158 *Convention on the Rights of Persons with Disabilities*, opened for signature on 30 March 2007, 2515 UNTS 3, art 23(1)(c) (entered into force 3 May 2008).

It is critical that women and pregnant people with disability are not pressured to have an abortion because they have a disability. People with disability can parent on an equal basis with others and encouraging abortion because a woman has a disability is unacceptable. If you feel pressured to have an abortion and are unsure what that means or if you want to go ahead with it, call a disability advocate or your disability rights lawyer for help.

Some people with disability will need assistance to carry out their parenting duties. For example, a parent with a physical disability might need help to give their baby a bath, or a parent with an intellectual disability may need alerts for regular feeding times. Some parenting supports, including disability-specific training programs for parents, can be funded through the NDIS (see Chapter 5).<sup>159</sup>

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159 National Disability Insurance Agency, 'Family Support' (Web Page) <<https://www.ndis.gov.au/understanding/ndis-and-other-government-services/family-support>>.





In memory of Ann-Marie Smith.

# 17

## Violence, Abuse, Neglect, and Exploitation

A life free from violence, abuse, neglect, and exploitation is a fundamental right of all people, including people with disability. However, in Australia, that is not a human right that is well recognised or protected. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (**Royal Commission**) is specifically tasked with inquiring into Australia's history of treatment of people with disability. In January 2020, the Royal Commission noted that 74 per cent of people with disability reported incidents of violence, abuse, neglect, and exploitation that had occurred since 2010.<sup>160</sup>

Keeping safe from violence, abuse, neglect, and exploitation by preventing it from happening, and knowing how to respond when it does happen, is fundamental to people with disability living safely in the community. This chapter goes through what violence, abuse, neglect, or exploitation may look like and where you can get help when you need it.

### What is violence, abuse, neglect, and exploitation?

There is no legal meaning of these words, and the incidents themselves can feel different for everyone. However, the Royal Commission has explained these terms, so they are easier to understand, and this Handbook adds some examples.

#### *Violence and abuse*

Violence and abuse cover a range of behaviours towards people with disability. These could include assault, sexual assault, constraints, restrictive practices (physical and chemical), forced treatments, forced interventions, humiliation and harassment, financial and economic abuse, and significant violations of privacy and dignity on a systemic or individual basis.

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<sup>160</sup> First Progress Report, p. 13 (<https://disability.royalcommission.gov.au/system/files/2020-05/First%20Progress%20Report.pdf>)

### ***For example***

- In response to challenging behaviours at school, the teacher locks a student with autism in a cupboard for “quiet time”. That is abuse.
- A support worker takes a client into the community for lunch and hits the client while walking back to the car. That is violence.

### ***Neglect***

Neglect includes physical or emotional neglect, passive neglect, or wilful deprivation. Neglect can be a single significant incident or a systemic issue that involves depriving a person with disability of the necessities of life, such as food, drink, shelter, access, mobility, clothing, education, and medical care and treatment.

### ***For example***

- A parent does not give their child with disability regular food, and the child gets sick or even dies. That is neglect.
- A person with disability cannot access new clothing as they need it because the person with control over their money will not let them buy clothes. That is neglect.

### ***Exploitation***

Exploitation is when a person takes advantage of someone else. This could include improper use of another person or the improper use of or withholding another person’s assets, labour, employment, or resources, including taking physical, sexual, financial, or economic advantage.

### ***For example***

- A person with memory loss is convinced by their brother to give their house to him and make legal changes to the house title while experiencing difficulties with their memory. That is exploitation.
- A friend says to a person with a cognitive impairment that if the person with disability has sex with them, they will pay them \$50 each time. That is exploitation.

## What if I know something bad is happening to a person with disability?

In South Australia, there was a devastating situation where a woman with disability, Ann-Marie Smith, was found in awful conditions and sadly died from the injuries resulting from her living conditions.<sup>161</sup> She lived in a private house and received regular support. Ann-Marie's case raises many questions about what abuse and neglect look like in the community and what all people can do to stop it from happening.

Everyone in the community must recognise that people with disability are no different from anyone else and should be part of our local neighbourhoods, schools, and workplaces. If we notice that a person with disability who lives in our local area has not been involved in those activities, or we see them around and something seems not right, approach them, and ask how they are going. For professional advice and assistance, contact the services listed at the end of this chapter.

Keeping people with disability safe in our community is everyone's responsibility.

## What if I am treated badly by someone I know?

People with disability may be abused by someone they know, such as a family member, friend, or support worker. It is never OK for another person to treat you badly, even if you know or are related to them.

Some examples of abuse, violence, neglect, or exploitation that may happen when you know the person are:

- You are an adult, and your mum controls your money because you do not have the ability to make financial decisions (see Chapter 4). Your mum uses your money to buy herself a flight to Paris. That is abuse and exploitation.
- You go to school, and the teacher says that you are not allowed to play with the other students at lunch. Instead, they say you will be locked in the art room. That is abuse and neglect.

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161 ABC News, *Ann Marie Smith was surrounded by privilege but died in squalor – and her life remains a mystery* (News article, 23 May 2020) <<https://www.abc.net.au/news/2020-05-23/little-is-known-about-the-life-of-ann-marie-smith/12275658>>.

- Your support worker says that you cannot see your family or friends and can only speak with them on the telephone. That is abuse.

## What if I was treated badly and didn't say anything at the time?

Sometimes it is really hard to call out abuse, especially when the person treating you badly is someone you know and trust. If you have experienced violence, abuse, neglect, or exploitation, it is never too late to ask for help. The sooner you report the incident, the quicker you will get help and be safe, but if you were abused some time ago and did not know you had the right not to be treated in that way, seek help now. See below for available support services.

If you have ever been treated badly by someone, reach out to any of the following:

### *In an emergency*

- Phone **000**

### *Counselling and emotional wellbeing support*

- **Beyond Blue** – information and support to anyone in Australia who needs it to improve their mental health; <https://www.beyondblue.org.au/> or 1300 224 636
- **Lifeline** – 24-hour crisis support and suicide prevention; <https://www.lifeline.org.au/> or 13 11 14
- **1800 RESPECT** – national sexual assault, domestic family violence counselling service; <https://www.1800respect.org.au/> or 1800 737 732

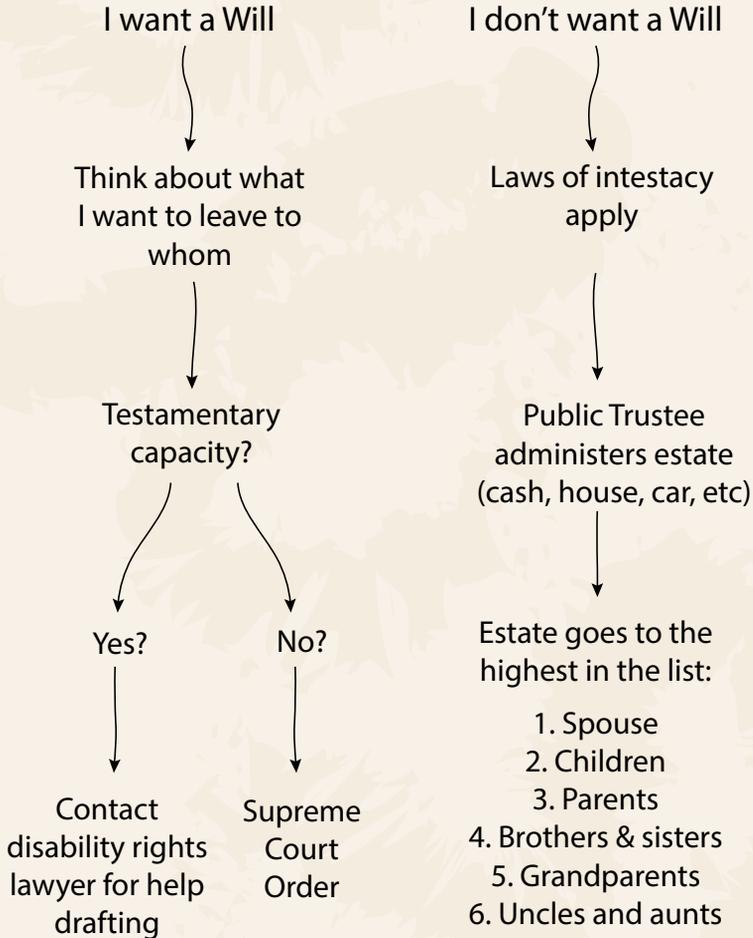
### *Reporting violence, abuse, neglect, or exploitation*

- **The National Disability Abuse and Neglect Hotline:** Free, independent, and confidential service for reporting abuse and neglect of people with disability; <https://www.jobaccess.gov.au/complaints/hotline> or 1800 880 052
- **NDIS Quality and Safeguards Commission:** An independent agency established to improve the quality and safety of NDIS supports and services; <https://www.ndiscommission.gov.au/> or 1800 035 544
- **Health and Community Services Complaints Commissioner (SA only)** – free, independent complaints mechanism for concerns that arise about a health service or community service; <https://www.hcsc.sa.gov.au/> or (08) 8226 8666

### *Professionals who can help*

- Child protection agencies (if a child is involved)
- Police
- Your disability rights lawyer
- Your GP or healthcare professional
- Your local disability advocate

## What happens to my things when I die?



# 18

## When You Die

There is nothing more certain in life than your death. While the actual timing of most of our deaths will be unexpected, legally, there is still much that we can do to prepare for this eventuality. A **Will** is a legal document that provides for what you want to happen when you die. It appoints someone to carry out your wishes, such as selling your house or giving your money to your children, and sets out on paper what you want to happen to your body and who is to care for your loved ones (for example, if you have children under the age of 18).

Without a Will, your “estate” (which is everything you own) will be administered according to an area of law called “**intestacy**”. However, this law may not reflect what you wanted to happen on your death. For example, you may want your daughter to get your vintage car or your brother to get \$10,000 cash because he looked after your pets while you had cancer treatment. Still, in an intestacy, your assets will get sold and divided up amongst family members in a certain way (discussed further below).

Everyone lives a remarkable life and having a Will in place allows what you have worked hard for during your life to be dealt with in the way you would wish.

In this chapter, because Wills and estates are an area of law that falls under State jurisdiction, the focus is on the law in South Australia and uses the following legal terms:

- **Administration and Probate Act:** The South Australian *Administration and Probate Act 1919 (SA)*; for details on other States, contact your local disability rights lawyer or local probate registry.
- **Estate:** Everything you own when you die.
- **Next of kin:** The person most immediately related to you when you die. For example, your husband or wife or your children.

- **Will:** Legal document that sets out your wishes for your estate when you die.
- **Intestacy:** The area of law that will determine how your estate will be administered if you do not have a Will.

For people with disability and their families, planning for the future can look different, depending on whether you are the person with disability or the parent of a person with disability. This chapter considers future planning from both the perspective of a person with disability and of parents of a child with disability.

## Planning for the future: People with disability

Every person with disability who wants a Will should have one. If you think you do not need or want a Will, you should consider the risks of not having a Will and run that decision by a disability rights lawyer to make sure it is the best decision in your situation.

### *What happens if you die without a Will?*

If you do not have a Will, your estate (your cash, house, car, etc.) will go to your “next of kin” in the order set out in Part 3A of the *Administration and Probate Act*,<sup>162</sup> which usually means the following people:

1. Spouse (husband/wife or de facto partner)
2. Children
3. Parents
4. Brothers and sisters
5. Grandparents
6. Uncles and aunts

Without a Will, the law will not consider the actual involvement those people have had in your life – your assets will just pass to the available next of kin in the order and proportions set out in the *Administration and Probate Act*. If you leave absolutely no surviving relatives, the South Australian Public Trustee will administer your estate, and your assets will go to the State Government. For information on what happens outside South Australia, contact your disability rights lawyer.

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<sup>162</sup> *Administration and Probate Act 1919*, Part 3A

Having a Will in place also helps those left behind to administer your estate more easily after your death. It specifies who you want to administer your estate and who will get your assets when you're gone. You can also specify, in some respects, how they will receive the assets. For example, you may not want your grandchildren to receive their inheritance until they are 21, or you may leave a sum of money specifically for a child or grandchild's education expenses or for your daughter to pay off her mortgage.

### *Testamentary capacity*

To make a Will, you must have "testamentary capacity". That means that you must understand what assets you own and the nature and consequences of making a Will. Most people with disability have testamentary capacity. However, it may be called into question if you have disability, such as a developmental disability or acquired brain injury, which impacts your ability to understand what assets you own and the nature and consequences of making a Will. It is important that you speak with your disability rights lawyer about making a Will, what you understand a Will to be, and what you want your Will to say.

Suppose your disability rights lawyer has concerns about your testamentary capacity. In that case, they may seek the opinion of your doctor or a psychologist or other expert to evaluate your understanding of and capacity to give instructions to put a Will in place.

If you do not have testamentary capacity, the law in South Australia enables the Supreme Court to make an order for a Will to be made for you in specific terms approved by the Court.<sup>163</sup> This provision is important because it can be used to protect you from relatives who have not had anything to do with you during your life and who may otherwise benefit from your estate under the laws of intestacy. In addition, you may have other interests, such as animal welfare, that you would prefer to benefit from your estate if you were legally able to make a Will yourself. The Court can also make an order for that type of provision.

People who are subject to administration orders governing their financial affairs (see Chapter 4) may have a condition included in the Administration Order that their Will only be made following the conditions written in the Administration Order. For example, a common

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<sup>163</sup> *Wills Act 1936* (SA), s7(1).

condition is that the Will be made in the presence of and with the consent of the Public Trustee. However, suppose there is no such direction in the Administration Order. In that case, there is nothing to prevent a person who is capable of making a legal Will, even where the Public Trustee administers a person's finances. To get your Will drafted, contact your disability rights lawyer.

## **Planning for the future: Parents of people with disability**

Planning ahead when you have a child with disability can be difficult. The question "what will happen to my (adult) child after I die?" is often on the minds of ageing parents, especially if their child is vulnerable or has a severe disability that affects their ability to communicate, understand complex concepts, or live independently.

Deciding how to plan for the future will depend on many factors, including your family, the size and complexity of your estate, and the capacity of your child with disability to manage money or to live independently. Again, getting expert advice from a disability rights lawyer will be important.

While the options will differ depending on the relevant factors, some common options for parents planning their estate where one of their children has a disability include:

- Appointing a guardian.
- Leaving property directly to the person with disability.
- Creating a Trust.

### ***Appointing a guardian***

Appointing a guardian for your minor child will be effective for that child until the age of 18.<sup>164</sup> That guardian will usually be someone you know and trust who will take on your child's care requirements.

### ***Leave property directly to person with disability***

Property can be left directly to the person with disability. The executor of the Will can apply to the South Australian Civil and Administrative Tribunal after your death for an administrator to be appointed for your

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<sup>164</sup> *Guardianship of Infants Act 1940 (SA)*, s13.

child with disability if they are not legally or financially able to manage the property.

### ***Create a Trust either before you die or in your Will***

If you wish to benefit your child with disability and do not want to leave money or assets directly, you can create a Trust. You can create the Trust during your life or in your Will. You may wish to create the Trust because your child is vulnerable or do not or will not have the ability to manage those finances or arrangements.

Under the Trust, the trustee you appoint will hold the money or assets on behalf of your child. The trustee is obliged to use the property, investments, and the income derived from that property or those investments for the benefit of your child during their life. The trustee must follow your instructions as set out in your Will or the trust document.

### ***A note on Trusts***

For some families with children with disability, putting a Trust in place is the most appropriate protective mechanism to retain the benefit of the estate for the lifetime of the child with disability. Such a Trust is sometimes known as a “**protective trust**” or, if set up in your Will, a “**testamentary discretionary trust**”. This type of Trust is relatively simple, but the terms should be drafted by a lawyer experienced in the area.

If you or other family members are in the position to make substantial provision for your child, a useful alternative is a **Special Disability Trust**. Special Disability Trusts can be set up before your death or in your Will. Such trusts must be for the specific purpose of providing for the care and accommodation of the person with disability. To be eligible for a Special Disability Trust, the person with disability must qualify as having a “severe disability” under the *Social Security Act 1991* (Cth). The great benefit of using a Special Disability Trust to provide for your child’s future is that the trust can include a home of any value for occupation by your child and significant other assets or investments without affecting your child’s entitlement to a Disability Support Pension. The asset value limit of \$694,000 (indexed annually on 1 July) and income from the trust may be disregarded for the purposes of the principal beneficiary’s (in other words, your child’s) income support payment. Assets above that limit are added to the assessable assets of the principal beneficiary when calculating pension entitlements.

While Special Disability Trusts can be the ideal fit for some family situations, they are complex arrangements and legal advice should be sought before committing to such an arrangement.

For more resources and assistance on planning a safe future, visit:

- **Future Living WA**<sup>165</sup> and their Safe and Secure resource provide detailed insight into the planning process before contacting your lawyer.
- **Community Living Project SA**<sup>166</sup> provides support and assistance to families and people with disability who want to set up arrangements that can ensure a person (or group of people) can check in on the person with disability and help them make good decisions when their parents have died.

### *A note on guardianship for your adult child*

A key question facing some parents of adult children is: “who will make decisions for them when I am gone?” For some families, parents continue to make decisions for the whole of their adult child’s life without having any formal legal orders in place. However, if the parents die while their adult child with disability is still alive, someone will need to take over making those decisions. That person is likely to need a Guardianship Order or Administration Order in place to do so (see Chapter 4). If you have concerns about decision making for your adult child when you can no longer do so, contact your disability rights lawyer for advice.

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165 Future Living, *Home* (Web Page) <<https://www.futureliving.org.au/>>.

166 Community Living Project Building A Good Life, *Home* (Web Page) <<https://communitylivingproject.org.au/>>



DISABILITIES RIGHTS IN RELIEF MATERIALS BY ANNE BULLMAN

Thanks to funding from the Law Foundation of South Australia, Natalie Wade has rewritten what was the out-of-print *Justice for All* handbook. With key concepts explained through illustrations by collaborator Anna Bulman, this groundbreaking new handbook brings international human rights law into your home.

*Disability Rights in Real Life* is the mantra by which disability rights activist Natalie Wade pursues her life and career as a lawyer.

This handbook is packed with important legal concepts that Natalie and Anna hope will help you protect and promote your disability rights in Australia.

*“Justice for all cannot be achieved without the recognition that impairment can no longer be the basis for denying the rights of people with disability. It is only this social transformation that will achieve equality.”*

*Rosemary Kayess, Chair UN Committee on  
Rights of Persons with Disabilities, Sydney NSW*



Cover illustrations: Anna Bulman

