

Access to the NDIS - The disability requirements

8. The disability requirements

A prospective participant will meet the disability requirement if they meet each of the following requirements:

- the prospective participant has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments *or* to one or more impairments attributable to a psychiatric condition (section 24(1)(a));
- the prospective participant's impairment/s are, or are likely to be, permanent (section 24(1)(b));
- the prospective participant's impairment/s result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following relevant activities :

a. communication;

b. social interaction;

c. learning;

d. mobility;

e. self-care; or

f. self-management (section 24(1)(c));

- the prospective participant's impairment/s affect their capacity for social or economic participation; (section 24(1)(d)); and
- the prospective participant is likely to require support under the NDIS for their lifetime (section 24(1)(e)).

For the above purposes, impairments that vary in intensity may be permanent and a prospective participant may still require support under the NDIS for their lifetime despite the variation (section 24(2)).

If a prospective participant does not meet one or more of the above disability requirements, the NDIA will consider whether the prospective participant can become a participant in the NDIS under the early intervention requirements instead.

For all children under 7 years of age (except children diagnosed with a condition on List A of this Operational Guideline) the NDIA will first consider whether the child meets the early intervention requirements, before considering the disability requirements.

1. communication;
2. social interaction;
3. learning;mobility;
4. self-care; or
5. self-management (section 24(1)(c));

8.1 What is a disability attributable to impairment?

The NDIA *must* be satisfied that a prospective participant has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition (section 24(1)(a)).

The term "impairment" commonly refers to a loss of, or damage to, a physical, sensory or mental function ([Mulligan and NDIA \[2014\] AATA 374 at \[19\]](#)).

The term 'disability' is described in Article 1 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) as follows: "Persons 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."

For the purposes of becoming a participant in the NDIS the focus of 'disability' is on the *reduction or loss of an ability to perform an activity* which results from an impairment. The term 'impairment' commonly refers to a loss of, or damage to, a physical, sensory or mental function.

The narrower definition of 'disability' employed by the NDIS seeks to target those people with disability who have a significant impairment to their functional capacity. This functional definition of disability focuses on outcomes for people with disability that are in the most need (Explanatory Statement to the Becoming a Participant Rules.).

The NDIA *must* be satisfied that a person has a disability that is attributable to one or more impairments which results in a reduction or loss of an ability to perform certain activities.

It is important to note that a person may have a disability without meeting all, or even any, of the disability requirements. For example, a person may have a temporary disability, or a permanent disability that has a minimal effect on functioning.

For the purpose of determining access, the NDIS Act is not concerned with what caused a person's disability. All people with disabilities who meet the access criteria can be participants, whether the disability came about through birth, disease, injury or accident (see [Mulligan and NDIA \[2015\] FCA 44 at \[16\]](#)).

Whether a prospective participant has a disability attributable to an impairment is a question of fact to be determined on the balance of available evidence, including their diagnosis.

If a prospective participant has multiple impairments, the NDIA will consider all impairments together when considering whether the person satisfies this disability requirement.

8.2 When is an impairment permanent or likely to be permanent?

The NDIA *must* be satisfied that a prospective participant's impairment/s are, or are **likely** to be, permanent (i.e. likely to be lifelong) (section 24(1)(b)).

The following principles provide guidance:

- an impairment is, or is likely to be, permanent only if there are no known, available and appropriate evidence based treatments that would be likely to remedy (i.e. cure or substantially relieve) the impairment (rule 5.4 of the Becoming a Participant Rules);
- an impairment that varies in intensity (for example, because the impairment is of a chronic episodic nature) may be permanent despite the variation (section 24(2));
- an impairment may be permanent notwithstanding that the severity of its impact on the functional impact of the person may fluctuate or potentially improve (rule 5.5 of the Becoming a Participant Rules);
- an impairment is, or is likely to be, permanent only if the impairment does not require further medical treatment or review in order for its likely permanency to be demonstrated (rule 5.6 of the Becoming a Participant Rules).
- In this context, an impairment may be permanent notwithstanding that it may continue to be treated and reviewed after its permanency, or likely permanency, has been medically demonstrated; and
- if an impairment is of a degenerative nature, the impairment is, or is likely to be permanent if medical or other treatment would not, or would be unlikely to improve the condition (rule 5.7 of the Becoming a Participant Rules).

If a prospective participant has multiple impairments, the NDIA will consider each impairment separately and determine whether each impairment is, or is likely to be permanent. However, the NDIA only needs to be satisfied that at least one of a prospective participant's impairments are, or are likely to be permanent.

Where there is a possibility of medical treatment (such as surgery) to treat the prospective participant's condition, and the treatment has some prospect of success, the NDIA should not conclude that the impairment is permanent but should wait until the outcome of the treatment is known ([Mulligan and NDIA \[2015\] AATA 974 at \[71\]](#)).

8.3 Substantially reduced functional capacity to undertake relevant activities

The NDIA *must* be satisfied that an impairment results in substantially reduced functional capacity of a prospective participant to undertake one or more relevant activities (section 24(1)(c)).

The NDIA is required to consider whether any permanent impairment, or permanent impairments when considered together, result in substantially reduced functional capacity to undertake one or more of the following activities:

- **Communication:** includes being understood in spoken, written or sign language, understanding others and expressing needs and wants by gesture, speech or context appropriate to age;
- **Social interaction:** includes making and keeping friends (or playing with other children), interacting with the community, behaving within limits accepted by others, coping with feelings and emotions in a social context;
- **Learning:** includes understanding and remembering information, learning new things, practicing and using new skills;
- **Mobility:** this means the ability of a person to move around the home (crawling/walking) to undertake ordinary activities of daily living, getting in and out of bed or a chair, leaving the home, moving about in the community and performing other tasks requiring the use of limbs;
- **Self-care:** means activities related to personal care, hygiene, grooming and feeding oneself, including showering, bathing, dressing, eating, toileting, grooming, caring for own health care needs; or
- **Self-management:** means the cognitive capacity to organise one's life, to plan and make decisions, and to take responsibility for oneself, including completing daily tasks, making decisions, problem solving and managing finances.

The NDIA does *not* need to be satisfied that a person's impairment is 'serious', or more serious than another person's. Rather, access to the NDIS is based on a functional, practical assessment of what a person can and cannot do (see [Mulligan and NDIA \[2015\] FCA 44 at \[56\]](#)).

The NDIA will not need to consider whether a prospective participant's impairment results in substantially reduced functional capacity in relation to all of the relevant activities for every access request.

It is sufficient for a prospective participant to have **substantially reduced functional capacity in relation to one activity** (see [Mulligan and NDIA \[2015\] FCA 44 at 67](#)).

Which activity the NDIA will need to consider will depend on the circumstances and the evidence presented by the prospective participant. For example, if a prospective participant has an impairment which results in substantially reduced functional capacity to undertake mobility, but otherwise has full cognitive capacity, it may not be necessary for the NDIA to consider whether the impairment results in substantially reduced functional capacity to undertake activities related to cognition.

8.3.1 When does an impairment result in substantially reduced functional capacity to undertake activities?

An impairment results in substantially reduced functional capacity to perform one or more activities when:

- the person is unable to participate effectively or completely in the activity or perform tasks or actions required to undertake or participate effectively or completely in the activity, without assistive technology, equipment (other than commonly used items) or home modifications (rule 5.8(a) of the Becoming a Participant Rules); or
- the person usually requires assistance (including physical assistance, guidance, supervision or prompting) from other people to participate in the activity or to perform tasks or actions required to undertake or participate in the activity (rule 5.8(b) of the Becoming a Participant Rules); or
- the person is unable to participate in the activity or to perform tasks or actions required to undertake or participate in the activity, even with assistive technology, equipment, home modifications or assistance from another person (rule 5.8(c) of the Becoming a Participant Rules).

The following information provides further guidance in relation to determining when an impairment results in **substantially reduced functional capacity**:

By itself, reliance on commonly used items will not result in a substantially reduced functional capacity to participate effectively or completely in an activity. Commonly used items include glasses, walking sticks, non-slip bath mats, bathroom grab rails, stair rails, age appropriate child safety locks, simple adapted kitchen utensils and dressing aids.

In considering the role played by assistive technology, home modifications and equipment, the NDIA will consider specific needs arising from the prospective participant's impairment, and whether those needs are met (or need to be met) through the use of specialist disability aids and/or equipment.

Such items would generally be specifically designed to assist in increasing the functional capacity and participation of people with disability and be formally prescribed by a medical practitioner, specialist clinician or allied health professional such as an occupational therapist, physiotherapist or speech therapist.

When considering whether a person requires assistance from others to participate or perform tasks associated with an activity, the NDIA will have regard to whether a person's need for assistance is consistent with normal expectations of a person of a similar age. For example, children under the age of 2 will not necessarily have a substantially reduced functional capacity because they need assistance to provide for self-care needs.

A person will be considered to be unable to participate effectively or completely in an activity if they cannot safely complete one or more of the tasks required to participate in an acceptable period of time. Undertaking a task more slowly or differently to others will not necessarily mean a person cannot participate effectively or completely in an activity.

When considering whether a fluctuating or episodic impairment results in substantially reduced functional capacity to undertake relevant activities, the NDIA will consider the impact on the person's ability to function in the periods between acute episodes.

8.3.2 Additional considerations for children

When considering whether a child's impairment results in substantially reduced functional capacity to perform one or more activities, the NDIA will consider the functional impact on the child relative to other children of the same age. For example:

- the child requires more assistive technology, equipment (other than commonly used items such as glasses) or home modifications to participate in one or more of the activities than most other children of the same age; or
- the child usually requires more assistance than most other children of the same age to participate in one or more of the activities; or
- the child is unable to participate in activities that would usually be expected of most other children of the same age.

If a child's impairment does not currently result in substantially reduced functional capacity but could in the future, the NDIA should consider whether the child meets the early intervention requirements.

8.3.3 Additional guidance for hearing impairments

Hearing impairments may result in reduced functional capacity to undertake communication, social interaction, learning and self-management activities.

Generally, the NDIA will be satisfied that hearing impairments of ≥ 65 decibels in the better ear (pure tone average of 500Hz, 1000Hz, 2000Hz and 4000Hz) may result in substantially reduced functional capacity to perform one or more activities. This audiometric criteria reflects the lower limit of what is likely to constitute a substantially reduced functional capacity to undertake relevant activities.

Hearing impairments < 65 dB decibels in the better ear (pure tone average of 500Hz, 1000Hz, 2000Hz and 4000Hz) in conjunction with other permanent impairments (for example vision or cognitive impairments), or where there is evidence of significantly poorer than expected speech detection and discrimination outcomes, may also be considered to result in substantially reduced functional capacity to undertake relevant activities.

8.4 When does an impairment affect a person's capacity for social or economic participation?

The NDIA *must* be satisfied that a prospective participant's impairment/s affect their capacity for social and economic participation (section 24(1)(d)).

The NDIA is required to *only* consider whether any permanent impairment, or permanent impairments when considered together, affect a person's social or economic participation.

For example, the NDIA *must* be satisfied that a prospective participant's permanent impairment/s affect their capacity to find or maintain work, play sport, go to the movies, perform voluntary work or travel.

This disability requirement does *not* require a person's impairment to reduce, substantially reduce or affect to any particular degree their social or economic participation. Rather, the impairment merely needs to *affect* the person's social or economic participation. Therefore, people who retain substantial capacity for social or economic participation may still satisfy this disability requirement (see [Mulligan and NDIA \[2015\] AATA 974 at \[140\]](#)).

8.5 When is a person likely to require support under the NDIS for their lifetime?

The NDIA *must* also be satisfied that the prospective participant is likely to require support under the NDIS for the rest of their lifetime (section 24(1)(e)).

If an impairment varies in intensity (for example, because the impairment is of a chronic episodic nature) the person may still be assessed as likely to require support under the NDIS for the person's lifetime, despite the variation (section 24(2)).

The NDIA is required to consider a prospective participant's overall circumstances and conclude that the person will require support under the NDIS for their lifetime. The purpose of this requirement seems to be to distinguish that subset of people with serious and permanent disabilities who are intended to be the beneficiaries of funded supports ([Mulligan and NDIA \[2015\] AATA 974 at \[153\]](#)).

For example, if a person's support needs arise from a health condition and are most appropriately provided through another service system (i.e. the health system) then the person will *not* require support under the NDIS for their lifetime. Rather, the person will require support under the health system.

When considering this criterion, the NDIA does not need to be satisfied that the support/s required for the person's lifetime meet the reasonable and necessary criteria. The reasonable and necessary criteria are relevant to whether funding is provided, *not* whether a person meets the disability requirements (see [Mulligan and NDIA \[2014\] AATA 374 at \[53\]](#) and [Mulligan and NDIA \[2015\] AATA 974 at \[146\]–\[150\]](#)).

8.6 Streamlined process for determining the disability access requirement

The NDIA has developed a list of conditions and state or territory disability programs which are designed to streamline the access process in certain cases.

Where a prospective participant has a condition included in List A or List B, or is an existing client of a disability program included in List C (attached to this guideline), the NDIA will be satisfied that the person meets one or more of the disability requirements.

8.6.1 'List A' Conditions

Where a prospective participant has been diagnosed with a condition/s on List A the NDIA will be satisfied that the person meets the disability requirements without further assessment. A person does not need to have a condition on List A to become a participant in the NDIS.

8.6.2 'List B' Conditions

Where a prospective participant has been diagnosed with a condition/s on List B the NDIA will be satisfied that the person has a disability attributable to one or more impairments that is, or is likely to be, permanent without further assessment.

For prospective participants diagnosed with a condition/s on List B, the NDIA will *only* need to assess whether the prospective participant:

- has an impairment/s that result in substantially reduced functional capacity to perform one or more activities;
- has impairment/s which affect the person's capacity for social or economic participation; and
- is likely to require support under the NDIS for the person's lifetime.

A person does not need to have a condition on List B to become a participant in the NDIS.

8.6.3 Existing clients of defined state or territory disability programs on 'List C'

Defined programs are disability programs that have disability requirements equivalent to the NDIS. Where a prospective participant is an existing client of a defined Commonwealth, state or territory disability program on List C, the NDIA will be satisfied that the person meets the disability requirements without further assessment.

A person does not need to be a client of a defined program on List C to become a participant in the NDIS.

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