

## WHAT DOES “DISABILITY” MEAN, AND WHO DECIDES?

### **Application of rule 5.1(b) of the NDIS (Supports for Participants) Rules 2013**

There are many improvements that can be made to the NDIA’s practices. However, this one particular issue is causing a significant and far-reaching impact, and despite our many attempts to resolve it, it persists. We appreciate the Review Panel dedicating their time to consider it. To assist the Review Panel’s consideration, we set out below:

- The issue
- The current practice – and its impact
- The proposed solution/s
- The law – legislation and case law (provided as an annexure)

### OUR RECOMMENDATIONS IN SUMMARY

- Follow the law.
- Train NDIA staff and LACs to follow the law.
- Apply best practice in relation to the law as it is interpreted.

## TERMS USED IN THIS DOCUMENT

<b>Term</b>	<b>Meaning</b>
AAT	Administrative Appeals Tribunal – the first layer of external appeal of NDIS decisions
Act	<i>National Disability Insurance Scheme Act 2013</i>
Agency	National Disability Insurance Agency
Condition	A diagnosed condition which causes impairment/s to function of the individual
Disability	According to the Federal Court decision in Mulligan “a descriptive concept for the overall effect of a person’s impairments on that person’s abilities to participate in all aspects of personal and community life.” <sup>1</sup>
Impairment	Not defined in the Act, but the term used to describe the reduction in functioning which is considered in relation to access to the NDIS
LAC	Local Area Co-ordinator
Mulligan	The Federal Court decision at <i>Mulligan v National Disability Insurance Agency [2015] FCA 544</i>
NDIS	National Disability Insurance Scheme
Participant	A participant of the NDIS from the day referred to in s 28 of the Act
Plan	A plan which includes the Statement of Participant Supports under s 33 of the Act
Support Rules	National Disability Insurance Scheme (Supports for Participants) Rules 2013
TSP	Typical Support Package

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<sup>1</sup> [51]

## THE ISSUE

*It is clear from the legislative scheme that the decision whether a person is or is not a participant is the threshold decision under the scheme, and the decision which enables access to the majority of benefits and funding available under the NDIS. However, what benefits and supports are provided, and how they are funded is subject to a separate decision-making process.<sup>2</sup>*

Despite the very clear interpretation of the Federal Court that access and planning are separate and distinct decision making processes, the Agency currently superimposes an extra layer over the access decision, and then carries that through to the planning decision.

The current practice of the Agency in relation to funding in a participant's plan is to rely on the 'impairment' which the Agency assessed as meeting the access criteria for the Scheme. In practice, and in our experience, this approach has a significant impact on what the Agency says it can or cannot fund.

There are significant issues with this approach and in our view is incorrect at law, including:

- The access decision is a threshold one. Once access has been met for any condition, the Agency often does not consider other conditions despite the evidence provided.
- There is no transparency about the Agency decision to limit access to a specific condition (in fact until recently, participants were not told what impairment was 'accepted').
- There is no mechanism in the legislation to formally add impairments (or for the Agency to remove impairments) and no appeal rights in either case.

Many participants have multiple impairments the impact of which cannot be separated, and this approach results in funding only being provided for certain elements of the person's support needs.

The approach taken by the Agency is failing participants. The narrow interpretation fails to account for the supports a person needs in relation to their whole disability and across their lifetime. In our view it is also incorrect at law.

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<sup>2</sup> Ibid, [34].

## THE CURRENT PRACTICE – AND IMPACT

### The “disability” in planning decisions

At the point of access, the access met letter does not specify that access is granted in relation to a specified impairment.<sup>3</sup> Once access is granted, the Agency prepares a plan which details the supports to be funded.

In our experience there is a heavy reliance by the Agency on the typical support packages (TSP) which are defined by the “primary disability” as recorded by the Agency. If a participant is seeking a support that does not, obviously, relate to the “disability” listed within the Agency’s database (as either primary or secondary), the support will be refused.

“Primary disability” is not a term in the Act, it is a term used solely by the Agency to separate participants into categories for their purposes.

The refusal of supports often shows a clear lack of understanding at the Agency level of support that can be effective and beneficial to a person and related to their disability.

Example: A person with a vision impairment had their physiotherapy reduced substantially despite evidence to show that the vision impairment caused physical pain due to holding a leaning posture.

### Who controls the data?

This approach is leaving participants who have multiple impairments (often physical and psychosocial impairments are intrinsically linked) to seek to have all their impairments listed within the Agency’s system.

Participants have no real control over what is and isn’t listed within the Agency’s database.

The Agency may also, at any-time, remove a participant’s impairment from its database to refuse supports that relate to that impairment.

Example: A person who was receiving supports for a physical and psychosocial disability was told at a plan review that their physical disability did not meet the access criteria and had therefore been removed from their record. The new plan was significantly reduced with supports deemed by the Agency to be related to the physical disability removed.

### Review rights

If the Agency refuses to recognize a person’s impairment either at the point of access or some later time, there is no process for challenging this decision.

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<sup>3</sup> However, the Agency has started to include reference to the person’s impairment on which they relied to gain access where access has been agreed via consent at the AAT. For example:

*The terms of the agreement are: (a) the internal review decision of [date] under s100(6) to confirm the reviewable decision of [date] under s20, is set aside and in substitution, it is decided that the Applicant meets the access criteria pursuant to s21, on the basis that they meet: i. the age requirements pursuant to s22; ii. the residence requirements pursuant to s23; and iii. the disability requirements pursuant to s24, with respect to their diagnosis of autism spectrum disorder (level 2).*

Even where a participant has secured help from our advocacy organizations to convince the Agency to recognize and record their impairments within their database (often as a notation within consent terms), there is no guarantee the Agency will respect this outcome at a later point in time.<sup>4</sup>

### **The policy of the Agency**

Despite the law establishing two distinct steps concerning access and planning, the Agency has taken a different view, which is reflected in its Operational Guidelines.

The [Fair supports for your disability needs | NDIS](#) page provides:

*“When we make decisions about which supports we can fund, we consider whether a support is reasonable and necessary for you and apply the NDIS funding criteria. Sometimes, you might ask for supports to help with impairments that were not part of your Access eligibility assessment. When this happens, we need to make sure the support will help you address needs that arise from an impairment that meets the same eligibility criteria we consider at Access .*

*You don’t need to make a new Access request if you ask for supports to help with an impairment that was not part of your Access eligibility assessment. We will work out if you need the support you have asked for to address an impairment that would meet our Access criteria. We may ask you to provide evidence to help us work this out. We will decide if the requested support is reasonable and necessary. We will apply the NDIS funding criteria based on the impairments that would meet our Access criteria.*

*By funding the right disability supports for your permanent impairments that meet our Access criteria, we are ensuring the system is fair for everyone, and that the NDIS remains financially sustainable.”*

Following the McLaughlin decision<sup>5</sup> we brought the discrepancy between the operational guidelines and the law to the attention of the NDIA’s community engagement team. They responded by saying:

*“The ‘fair supports for your disability needs’ principle referred to in Our Guidelines represents Government policy. It appears this specific policy was not considered by the AAT in the McLaughlin decision<sup>6</sup>. Our Guidelines are the single source of truth for Agency decision makers. Our Guidelines have been developed through extensive stakeholder consultation and have been approved by our Legal branch and the CEO. In light of this, the principle of ‘fair supports for your disability needs’ outlined in Our Guidelines remains the source of truth for how Agency decision makers consider supports related to an impairment for which the participant did not gain access to the NDIS.”*

It should be noted that the Agency did not appeal the decision in McLaughlin to the Federal Court. The NDIA’s lawyers routinely take a position at the AAT that is consistent with the Guidelines above, insisting that participants provide further evidence. This is a significant contributor to the delays at the AAT.

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<sup>4</sup> See Commonwealth Ombudsman complaint, and evidence to the Joint Standing Committee for further information.

<sup>5</sup> See attachment for case law summary

<sup>6</sup> Discussed below

We note a recent development in the Agency’s lawyers relying on ss 24 and 25 of the Act:

*when approving a statement of participant supports under section 33(2) of the NDIS Act, the Tribunal is limited to approving NDIS funded reasonable and necessary supports for impairments attributable to disabilities that meet the disability requirements under section 24 of the NDIS Act.*

Their argument on this basis from relies heavily on the 2011 Productivity Commission Report *Disability Care and Support*,<sup>7</sup> an approach which the Federal Court has stated is inappropriate.

*There is no warrant for an approach ... which involves lifting other selected terms from a law reform proposal which may have led to the drafting of legislation, but neither accompanied nor was contemporaneous with the legislation as it was put to Parliament.*<sup>8</sup>

### **In practice**

Despite the Agency’s attempt to justify its narrow application of rule 5.1(b) in this way, when the Agency is challenged at the AAT to correctly apply the s34 reasonable and necessary supports criteria and Supports Rules, in our experience, the Agency eventually concedes – often after prolonged debate, further evidence from medical specialists and allied health professionals to revisit the access criteria and significant investment of our scarce advocacy resources – and approves funding for the previously refused support.

The Agency is therefore running a process which actively undermines the rights of certain participants to receive the supports they require, forcing them through internal and external review processes, but never lets any of these matters go to decision, or the Federal Court, to test their interpretation.

### **THE SOLUTION – A COMMON SENSE APPROACH IS REQUIRED**

*[Q]uestions of the construction and operation of the NDIS Act should be approached with a reasonable degree of common sense. The NDIS Act is beneficial and remedial legislation designed to operate in relatively high volume decision-making, in a pragmatic context, and in respect of people (and their families and carers) already facing great challenges in their daily lives. The NDIS Act’s construction and operation should not be beset by parsing, technicalities and distinctions which make the legislative scheme more difficult to comprehend and administer, including for first instance decision-makers and the Tribunal on review.*<sup>9</sup>

The Agency’s current approach fails to understand the complexity of disability, operates outside of the principles and objectives of the NDIS Act and also actively undermines the interpretation of the Federal Court and the AAT.

Once a person becomes a participant, there is no statutory pathway, procedural guidelines, transparent or common-sense reason to ‘reapply’ for access, because the purpose of an access request (to become a participant) would be redundant. The process to reassess a participant’s needs

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<sup>7</sup> Productivity Commission Inquiry Report No 54 dated 31 July 2011

<sup>8</sup> [National Disability Insurance Agency v Davis \[2022\] FCA 1002 \(29 August 2022\)](#)

<sup>9</sup> Justice Mortimer in the Federal Court decision of *National Disability Insurance Agency v Davis* [2022] FCA 1002 [142].

has been provided for through unscheduled plan reviews triggered under sections 47 and 48 of the NDIS Act and scheduled plan reviews.

We agree with the applicant in McLaughlin when she states:

*I also note that medicine is not advanced enough, and people are too complex, to be able to conclusively attribute specific impairments to specific conditions or causes. Often, in the case of anxiety for example, conditions can be primary disabilities, but they may also be impairments resulting from a separate primary disability. The difficulty in delineating these was evidenced in Doctor Flanagan's testimony, in which she stated no-one could definitively state what the cause of my cognitive impairment is. This is because CFS contributes to co-morbidities with depression and anxiety – all of which can cause cognitive impairments. These conditions and impairments may also be impacted by obesity, lack of exercise, diabetic management, and sleep apnoea. There is not a clear link between any of the conditions and which disabilities cause which. Attempting to delineate these links leads to false and potentially inaccurate constructions. Inaccuracy is particularly likely where these links are being drawn by lawyers with no medical training, against the advice of doctors who themselves state that definitive links cannot be drawn.<sup>10</sup>*

It would also become prohibitive for participants with degenerative conditions, or those who develop multiple co-morbidities or conditions, to go back through the access process for each new 'impairment'. Similarly, for people who become participants at a young age would require multiple access requests as their condition evolves with age and progression.

For participants with complex and interrelated conditions, it can often be the interaction of so-called individual conditions that give rise to a general functional physical or sensory impairment. A support sought might relate to several impairments simultaneously, and it may be impossible to dissect or apportion which part of a support relates to which impairment.

Where a participant has both physical and psychosocial impairments, the task would then become a difficult process of attempting to apportion what level of the support worker assistance would be funded depending on which impairment the person had relied upon to gain access to the scheme with and what the resulting functional need/s was.

It would become a totally unworkable and impractical process. That cannot have been the intention of the Parliament.

Participants should be considered as a whole, and their support needs must be determined based on the overall effect of their impairments, not just the impairments for which they gained access.

## RECOMMENDATIONS

- Follow the law. Amend the Operational Guidelines so they comply with the legislation, case law, and intent of parliament.
- Train NDIA staff and LACs to follow the law. The practice is so entrenched at this stage that it will not change without retraining all staff.

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<sup>10</sup> [McLaughlin and National Disability Insurance Agency \[2021\] AATA 496](#) [60]

- Apply best practice in relation to the law as it is interpreted. We refer to the Australian Taxation Office online materials<sup>11</sup> which are regularly updated when the law is clarified by a Court or Tribunal.

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<sup>11</sup> [https://www.ato.gov.au/Business/Business-activity-statements-\(BAS\)/In-detail/Boosting-cash-flow-for-employers/?page=6#Court and Administrative Appeals Tribunal decisions](https://www.ato.gov.au/Business/Business-activity-statements-(BAS)/In-detail/Boosting-cash-flow-for-employers/?page=6#Court%20and%20Administrative%20Appeals%20Tribunal%20decisions).



## ANNEXURE A: THE LAW – LEGISLATION AND CASE LAW

### THE LEGISLATION

#### ***The Access decision***

When a person makes an ‘access request’, the CEO must decide whether the ‘prospective participant’ meets the ‘access criteria’.<sup>12</sup> Under subsection 21(1) a person meets the access criteria if:

- (a) *the CEO is satisfied that the person meets the age requirements (see section 22); and*
- (b) *the CEO is satisfied that, at the time of considering the request, the person meets the residence requirements (see section 23); and*
- (c) *the CEO is satisfied that, at the time of considering the request:*
  - (i) *the person meets the disability requirements (see section 24); or*
  - (ii) *the person meets the early intervention requirements (see section 25).*

Section 24 of the NDIS Act sets out the disability requirements in these terms:

- (1) *A person **meets the disability requirements** if:*
  - (a) *the person 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; and*
  - (b) *the impairment or impairments are, or are likely to be, permanent; and*
  - (c) *the impairment or impairments result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities:*
    - (i) *communication;*
    - (ii) *social interaction;*
    - (iii) *learning;*
    - (iv) *mobility;*
    - (v) *self-care;*
    - (vi) *self-management; and*
  - (d) *the impairment or impairments affect the person’s capacity for social or economic participation; and*
  - (e) *the person is likely to require support under the National Disability Insurance Scheme for the person’s lifetime.*
- (2) *For the purposes of subsection (1), an impairment or impairments that vary in intensity may be permanent, and the person is likely to require support under the National Disability Insurance Scheme for the person’s lifetime, despite the variation.*

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<sup>12</sup> See section 20 of the NDIS Act.

### ***The funded supports decision***

Once a person is a participant, the Agency must determine funded supports in accordance with the 'second step' in Chapter 3, Part 2 of the NDIS Act and the Supports Rules.

Section 34(1) provides the criteria to determine the "reasonable and necessary supports that will be funded". It provides:

*For the purposes of specifying, in a statement of participant supports, the general supports that will be provided, and the reasonable and necessary supports that will be funded, the CEO must be satisfied of all of the following in relation to the funding or provision of each such support:*

- (a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;*
- (b) the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation;*
- (c) the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;*
- (d) the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice;*
- (e) the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide;*
- (f) the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:
  - (i) as part of a universal service obligation; or*
  - (ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability.**

Support Rules also limit what can be funded by the Agency. In particular, rule 5.1 the relevant paragraph of which provides:

#### ***General criteria for supports***

**5.1** *A support will not be provided or funded under the NDIS if:*

- (b) it is not related to the participant's disability*

### **THE CASE LAW**

Since the Federal Court decision of Mulligan, there have been a number of AAT decisions considering whether the access decision flows through to the planning decision. All but one (VGCP) find that it does not.

Case	Finding
<a href="#">Bradley and National Disability Insurance Agency [2022] AATA 2884</a>	<p>Not a final decision, but noting that Tribunal member’s view that the Act does not stipulate revisiting access criteria for the purposes of funded supports.</p> <p><i>[T]he Tribunal notes that the statute does not impose any express requirement, or indeed any mechanism, under Chapter 3 Part 1 or Chapter 3 Part 2 of the NDIS Act, by which a participant, having accessed the NDIS on the basis that the access criteria have been met, must re-establish those access criteria in order to access supports for impairments that were not considered at the time access was granted. However, it is open to the Respondent to make these submissions at the substantive hearing.”<sup>13</sup></i></p>
<a href="#">Goodliff and the National Disability Insurance Agency [2021] AATA 5022</a>	<p>The AAT cannot review an Agency decision about what the “disability” is.</p> <p><i>This is because of the way in which the NDIS operates. There is essentially a two-step process. In the first instance an applicant must be accepted as a ‘participant’ and thereafter the participant and the Agency must agree upon a Participant Plan.<sup>14</sup></i></p>
<a href="#">McLaughlin and National Disability Insurance Agency [2021] AATA 496 (12 March 2021)</a>	<p>“Disability” for planning purposes is not linked to access, but encompasses the disability as presently experienced by the participant.</p> <p><i>Furthermore, nothing in ss 20, 21 or 24 envisages that a decision on a person’s access to the NDIS must be referenced back to a particular impairment. The decision required by s 20(1)(a) is whether or not a person meets the access criteria. Accordingly, any findings on specific impairments are merely part of the reasons of the decisionmaker for being satisfied that the disability requirements in s 24 are met. If it were intended that subsequent decisions under the Act – including the question of reasonable and necessary supports under s 33 – were intended to be governed by the specific impairments that had been determined to meet the requirements of s 24 in the access decision, one would expect that to have been made clear in this Part by way of specific nomenclature that was then employed in subsequent areas of the Act.<sup>15</sup></i></p> <p><i>It would be impractical if the supports that a participant can obtain through the NDIS were limited to supports which related to the impairments which qualified them for access to the NDIS under s 24. After all, one can expect that over a lifetime a person’s impairments</i></p>

<sup>13</sup> [9]

<sup>14</sup> [8]

<sup>15</sup> [46]

Case	Finding
	<p><i>may change, whereas their application for access to the NDIS occurs once, at a particular point in time.</i><sup>16</sup></p> <p><i>Similarly, there is no basis in the text, context or purpose of the Act to warrant reading the term disability in rule 5.1(b) as being subject to any implied limitation that it cannot encompass impairments beyond the “inner circle” of impairments that met the s 24 criteria for access to the Scheme. On a proper construction of the Act and Rules, the broad approach is to be preferred.</i><sup>17</sup></p>
<p><i>Mulligan v National Disability Insurance Agency [2015] FCA 544.</i></p>	<p>Is the lead Federal Court Decision on the structure of the NDIS Act. The Court states:</p> <p><i>It is clear from the legislative scheme that the decision whether a person is or is not a participant is the threshold decision under the scheme, and the decision which enables access to the majority of benefits and funding available under the NDIS. However, what benefits and supports are provided, and how they are funded is subject to a separate decision-making process [34].</i></p>
<p><a href="#">VGCP and National Disability Insurance Agency [2020] AATA 5107</a></p>	<p>Also not a final decision, but noting the Tribunal member’s view that supports are linked to access.</p> <p><i>[F]or the purpose of specifying a statement or participant supports, s 34 of the National Disability Insurance Agency Act 2013, reasonable and necessary supports are determined by reference to any impairment or impairments in relation to which a participant meets the disability requirements under s 24 or the early intervention requirements under s 25.</i><sup>18</sup></p>

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<sup>16</sup> [53]

<sup>17</sup> [59]

<sup>18</sup> [47] Villamanta Disability Rights Legal Service Inc. acted for the Applicant in that case and notes that this decision resulted from an interlocutory hearing in which the issue in dispute had already been resolved. The parties did not put their positions to the Tribunal, rather the Tribunal published what is extensively a lengthy opinion piece and not a decision based on the facts of a matter before the Tribunal