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| November 2022 |
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# Context

Responsibility for funding disability services and supports rests with the National Disability Insurance Scheme (NDIS). However, there remains a small number of programs for people with disability which are outside the scope of the NDIS and for which the Victorian Government retains responsibility. Disability services funded by the Secretary, Department of Families, Fairness and Housing (the department) include services and supports for: people with disability who do not meet the Australian residency requirements for access to the NDIS; and people with cognitive disability involved in the criminal justice system who require access to specialist forensic support and treatment. In this document they are referred to as disability services provided by the Secretary, funded or contracted service providers. They are also referred to as department funded disability services for ease of understanding.

## Department funded disability services

The *Disability Act 2006* (the Act) provides the legislative requirements for accessing department funded disability services. This policy should be read in conjunction with the relevant department funded disability services guidelines which detail the eligibility requirements specific to each funded program. These are:

* Forensic Disability Services – for people with cognitive disability involved in the criminal justice system who require access to specialist forensic support and treatment or who require additional supports to enable them to benefit from mainstream forensic services.
* Victorians Ineligible for the NDIS Due to Residency Status (VIN) Program – provides disability support to Victorians ineligible for the NDIS based solely on their residency status.

# Objective

The objective of this policy is to:

* provide an overview of Sections 3, 6, 8 and 49 – 51 of the Act
* provide department staff with guidance about their roles and responsibilities in relation to considering a person’s access to disability services provided by the Secretary (department funded disability services)
* describe the process for determining priority for access.

# Key Policy Elements

## Who can access disability services provided by the Secretary (department funded disability services)?

To access department funded disability services, a person must:

Have a disability as defined by the *Disability Act 2006*

AND

Be considered a priority for access to services

AND

Meet any specific eligibility requirements of the department funded disability service they are seeking to access.

### 3.1.1 Priority for access to services

The Act provides a definition of disability. People who meet this definition may be considered for access to department funded disability services if they are defined as a priority for access and if the department funded disability service is considered to be the most appropriate provider of supports and if they meet the program specific eligibility requirements (refer 1.1 above).

Section 8 of the Act states that one of the functions of the Secretary is to publish information about how priority for access to services is determined.

## How does a person make a request for department funded disability services?

As stated in Section 49 of the Act, a person with a disability or a person on behalf of a person with a disability (with the consent of the person for whom the request is being made) may request the Secretary to provide access to disability services from the Secretary.

Requests for access are to be made in accordance with the guidelines for the relevant program (listed in 1.1 above) for consideration by the Secretary’s delegate.

### Information gathering

Where a person with a disability or a person on their behalf has made a request for access, information is gathered to determine:

the appropriateness of the disability service system to provide support

if a person is within target group as defined by the Act

the types of supports required

if a person is considered a priority for access to services.

If a person has made a request on behalf of a person with a disability, then the Secretary’s delegate must ensure, where appropriate, that the person with a disability agrees to the request.

## Definition of disability as defined by the Act

Section 3 of the Act provides the following definition of disability:

**S3 Disability** in relation to a person means –

* + 1. a sensory, physical or neurological impairment or acquired brain injury or any combination thereof, which –

is, or is likely to be, permanent; and

causes a substantially reduced capacity in at least one of the areas of self-care, self-management, mobility or communication; and

(iii) requires significant ongoing or long-term episodic support; and

(iv) is not related to ageing; or

an intellectual disability; or

* + 1. a developmental delay.

Services for children under school age are provided by the NDIS, or by DET for children who do not meet the residency requirements for access to the NDIS.

### How is sensory, physical or neurological impairment or acquired brain injury determined?

In making a decision as to whether or not a person has a disability associated with a sensory, physical or neurological impairment, or an acquired brain injury, the existence of impairment or acquired brain injury, as well as the associated impact, must be considered.

The existence of impairment or acquired brain injury without impact, as described by the other criteria, does not meet the definition of a disability in the Act.

Appendices 1, 2 and 3 provide additional information to assist in making a decision as to whether or not a person has a disability under the meaning of the Act.

#### Definition

A sensory, physical or neurological impairment or acquired brain injury or any combination thereof, which

is, or is likely to be, permanent, and

causes a substantially reduced capacity in at least one of the areas of self-care, self-management, mobility or communication, and

requires significant ongoing or long-term episodic support, and

is not related to ageing.

#### Impact criteria

The following impact criteria must be met for a person to be within target group for disability services.

#### Permanence or likely permanence of impairment or acquired brain injury

A decision regarding target group status will be made when it is clear that a person’s recovery is complete and their condition is stable (their condition is such that no further improvement is likely to occur or a person has reached their full recovery potential).

This may often occur as a person reaches their final stage of rehabilitation. Decisions regarding target group status are made when it is clear that the condition a person is presenting with is permanent and stable. These decisions are often made collaboratively with health care providers.

#### Impact of impairment or acquired brain injury on capacity

A substantially reduced capacity inhibits day-to-day functioning and is determined in relation to the person’s capacity compared to the general population. Information must be gathered which outlines the person’s capacity to carry out activities that relate to everyday functioning at home and within the community.

A person is considered to have a substantially reduced capacity when they can no longer perform tasks of daily living without a high level of assistance or supervision.

#### Significant ongoing support or long-term episodic support

The impairment must require ongoing support or regular episodic support. In making a decision regarding whether a person has a disability as defined by the Act, the type, frequency and intensity of supports that are required must be explored.

#### Ageing

The Secretary’s delegate must be able to determine that the disability support needs a person is presenting with are not related to ageing. Consideration also needs to be given to the suitability of the disability service system to meet a person’s needs.

Where the Secretary’s delegate is satisfied a person meets impact criteria for a sensory, physical or neurological impairment or acquired brain injury, or any combination thereof, and the impairment is not related to ageing, the person is within the target group for disability services.

To access disability services a person must be considered to be within target group and a priority for access.

### How is intellectual disability determined?

#### Definition

Intellectual disability

For a person to access disability services on the basis of having an intellectual disability they must:

* be over the age of five years, and
* have significant sub-average general intellectual functioning, and
* have significant deficits in adaptive behaviour

with the latter two manifesting before the age of 18 years.

### Specific considerations

When trying to determine whether or not a person has a disability, further consideration and information gathering may be required in some circumstances, for example, if there are mental health issues or chronic health needs.

#### Mental health needs

When a person is referred with a known or suspected mental health issue, this must be considered when making decisions related to a person having a disability, particularly an intellectual disability.

Cognitive testing that is undertaken must be able to distinguish between the impact of the disability and associated mental health issues. It is advisable to include at least one practitioner during the assessment period that has expertise in the area of mental health.

Consideration should also be given to the timing of any testing and decision making. Where a person is experiencing an acute mental health episode, any decision should be delayed until this has stabilised.

#### Chronic health needs

At times it may be difficult to determine if a person is presenting with needs that relate to a chronic illness or a disability. In such cases, developing collaborative relationships with relevant medical professionals will assist when making a determination regarding target group status.

A decision must be made if a person’s support needs are related to chronic illness or a disability as defined by the Act. The outcome of the decision will ensure that the appropriate supports are put in place.

## How is a decision made that a person has a disability?

Following a request for access to disability services, the Secretary’s delegate must gather required information to form the view that:

* the person does have a disability - advise the person of this and consider further information gathering to continue to identify their support needs, or
* the person does not have a disability - advise the person of this and refer, or support, them to access an appropriate generic service. This decision constitutes a refusal for service and the person must be notified in accordance with Section 3.6.2 of this policy, or
* it is unclear whether the person has a disability or not - advise the person of this situation and explain that further information gathering will be required.

Following a review of the supporting evidence, the Secretary’s delegate may decide that a formal assessment is required. If required, then a formal assessment must be commenced within 30 days of the Secretary’s decision that a formal assessment is required. The assessment may be deferred for up to 3 months however in circumstances where there are reasonable grounds to believe that any formal assessment completed before then is unlikely to establish reliably whether or not the person has a disability.

## When can a statement of intellectual disability be issued?

In some circumstances, courts or tribunals may seek clarification as to whether or not a person has an intellectual disability. If the Secretary is satisfied that a person has an intellectual disability as defined under the Act, the Secretary may provide a written statement of intellectual disability. This is stated in Section 6 of the Act.

## What are the outcomes of a determination of disability?

Following the consideration of a request to access, the Secretary (the Secretary’s delegate) either accept the person is within the target group for disability services or refuse the request based on the person not having the disability.

A decision by the Secretary that a person has a disability does not itself entitle the person to the provision of disability services.

### Accept the person is within the target group for disability services

Agreeing that a person is within the target group does not mean the person will be able to access the requested disability service. Following a decision that a person is within the target group, they must also meet the program specific eligibility requirements and be considered a priority for access.

### Refuse the request for access

If the Secretary’s delegate refuses a request for access they must, within 14 days of deciding to refuse the request, advise in writing the person making the request that:

* the request has been refused; and
* if the reason is because the delegate is of the opinion that the person does not have a disability, that the person can have the Secretary decide whether the person has a disability under section 50.

After receiving a request to decide whether a person has a disability, the Secretary’s delegate must, within 14 days of making a decision as to whether a person has a disability, advise the person who made the request in writing of the decision and that the person can apply to VCAT for a review of the decision within 28 days.

## How does a person request a review from VCAT?

Under the Act, a person can request a review of the Secretary’s decision as to disability.

A person can contact VCAT and make an application. The application must be made within 28 days of the Secretary’s decision as to disability.

The Act states that on reviewing a decision VCAT may:

* confirm the decision of the Secretary
* return the matter to the Secretary for further consideration
* make its own decision as to whether the person has a disability.

# Priority of access

Following a decision by the Secretary or VCAT that a person has a disability, the person must be considered a priority for access to services before any requested disability supports can be provided.

Section 8 of the Act states that the Secretary must publish criteria about how decisions are made about who gains access to disability services, and that access must be determined in a fair manner.

For people who have a disability as defined by the Act, priority of access to services is determined by:

* reviewing the suitability of the disability services funded by the Secretary
* applying the eligibility criteria for the relevant service funded by the Secretary (these are outlined in section 1.1 above)
* applying priority indicators.

## Is the disability service system the most suitable response?

Where it has been determined that a person has a disability as defined by the Act, the department funded disability services program provider must discuss with the person their goals and needs and consider their current circumstances.

This will include a discussion about the current supports that may be in place for the person through mainstream services or informal networks, and options that could be explored to further develop these informal networks and community options.

This discussion may determine that the person’s needs can be best met with a response from outside department funded disability services.

## What are the priority indicators?

To provide assistance in making decisions about who gets access to department funded disability services, priority indicators have been developed.

In all circumstances, resource allocation decisions will balance the needs of the person with a disability and their family or carer in relation to the needs of others seeking support and in particular, those with similar needs or circumstances.

The allocation of resources must be efficient, equitable and maximise options for people with a disability to create independence and promote their participation in the community.

In all circumstances, department funded disability services are provided:

* to address the needs of a person that are directly related to their disability
* in response to needs identified through an individualised planning process appropriate to the department funded disability service being accessed (listed in 1.1 above).

When determining the priority of access, consideration must be given to the following priority indicators:

* the need to strengthen or support the role of the family, carer or person’s support network
* the need to provide support to ensure the safety and wellbeing of the person with a disability, their family or carer or the wider community
* the existence of multiple disadvantage within the person with a disability’s personal, social or community context
* the immediate and potential benefit of the support to reduce the likelihood for more intensive assistance in the future
* the impact on the individual’s wellbeing, living situation and quality of life should the disability service be unavailable
* the presence and availability of informal and generic supports to complement the department funded disability service (for example, ensuring the person is not able to access the support from the NDIS)
* the provision of support is a mandatory requirement (for example as part of a justice plan or condition of an order).

## What are program specific criteria?

In addition to the priority indicators above, program specific criteria for access to the specific department funded disability service being considered must be met. Department funded disability services are outlined in section 1.1 above.

# Appendix 1: Sensory, neurological impairment, acquired brain injury and intellectual disability

Description and supporting evidence for sensory, physical, neurological impairment, acquired brain injury and intellectual disability

| Type | Description | Supporting evidence |
| --- | --- | --- |
| Sensory | Impairment in hearing or vision (not related to ageing) | Report from a medical or paramedical specialist describing the diagnosis or nature of the person’s hearing or visual impairment. |
| Physical | Any loss or abnormality of body structure or function (not related to ageing) | Report from a medical or paramedical specialist describing the diagnosis or nature of the person’s physical impairment. |
| Neurological | Neurological and neuromuscular disorders (not related to ageing) | Report from a medical specialist or neurologist describing the diagnosis or nature of the person’s neurological impairment. |
| Acquired brain injury | Damage to the brain that occurs after birth and is not related to a congenital disorder or a degenerative disease.  Damage may be caused by a traumatic injury to the head or by a non-traumatic cause. | Report from a medical specialist, neuropsychologist or neurologist describing the nature of the person’s acquired brain injury. |
| Intellectual disability | Significant deficits in general intellectual functioning and  Significant deficits in adaptive behavior.  Both of which must be evident before 18 years of age | Report from psychologist or neuropsychologist of previous cognitive testing  Information about the person/child’s developmental milestones  Educational assessment  Specialist medical assessment  Developmental assessment   * Report from Early Childhood Intervention Services |

# Appendix 2: Questions to assist with determining sensory, physical, neurological impairment or acquired brain injury

Exploring these questions will assist to determine whether a person has a disability (impairment AND impact) related to a sensory, physical or neurological impairment or acquired brain injury.

1. Does the person have impairment or acquired brain injury?
2. Does the person have a diagnosis? If so, is there documentation to support this?
3. How long has the person had the impairment or an acquired brain injury?
4. What is the person’s prognosis? Is there documentation to support this?
5. Does the person use any aides, equipment or assistive devices because of their impairment or acquired brain injury? Have they minimised the impact of the impairment or acquired brain injury?
6. How does the impairment or acquired brain injury affect the person’s capacity in the area of self-care?
   * for example, eating, bathing, showering, dressing, personal hygiene, toileting
7. How does the impairment or acquired brain injury affect the person’s capacity in the area of self-management?
   * for example, expressing emotions, behaviour, understanding safety issues, understanding the passage of time – days, weeks, seasons
8. How does the impairment or acquired brain injury affect the person’s capacity in the area of mobility?
   * for example, to undertake personal, domestic and community activities
9. How does the impairment or acquired brain injury affect the person’s capacity in the area of communication?
   * for example, can the person effectively communicate their needs, opinions and feelings, follow and give instructions, request assistance from familiar and unfamiliar people?
10. Is the person accessing any community-based supports that relate to their impairment or acquired brain injury?
    * Which services, how often and have they minimised the impact?
11. Is the person receiving support from family, friends or other informal networks?
    * What type of support is being provided?
    * By whom?
    * Is this sustainable?
12. Are the person’s needs related to ageing?
    * At what age did they first develop the impairment or acquired brain injury?
    * Is the diagnosis related to something that is common to people who are ageing, such as dementia?

**Supporting documentation may include**:

A report or letter from a medical specialist or allied health professional describing the nature of the person’s impairment or acquired brain injury AND information describing the person’s reduced capacity and support needs.

Following consideration of these questions, if you believe a person has a disability related to a sensory, physical or neurological impairment or acquired brain injury based on the definition of disability related to a sensory, physical or neurological impairment or acquired brain injury in the Act, they can be considered within the target group for disability services.

# Appendix 3: Questions to assist with determining whether a person has an intellectual disability

Exploring these questions will assist to determine whether a person has an intellectual disability

1. Is the person over the age of five years?
2. What is the person’s developmental history?
   * Description of their behaviour in their first 12 months (for example, settled, unsettled, difficulty feeding)?
   * At what age did the person talk, walk, become toilet trained?
   * Did the person attend kindergarten or other pre-school group?
   * Which primary and secondary school did the person attend and what educational level was achieved?
   * Has the person gained employment? What do they do?
   * Does the person have friends and other meaningful relationships?
3. What is the person’s cognitive capacity? For example, can the person:
   * tell the time, understand the passage of time and/or understand schedules and timetables?
   * tell the value of money? Would they know how much money to give or how much change they should receive?
   * read? At what level? What type of books?
   * write? Do they copy written words or write independently? What words can they write?
   * follow simple or more complex instructions?
   * understand safety issues such as road safety and other hazards?
   * respond to visual signs such as a stop sign, pedestrian lights, male or female toilet sign?
   * remember names, days of the week, anniversaries. What is their long term and short-term ability to retain information?
4. What is the person’s capacity in areas of daily living? For example, can the person:
   * cook a meal? Follow a recipe?
   * dress themselves appropriately for the weather? If it were hot, would they take off their jumper?
   * shower or bath, attend to personal hygiene matters independently?
   * perform domestic duties such as cleaning, laundry and grocery shopping?
   * use public transport independently?

**Supporting documentation may include**:

* Report from psychologist or neuropsychologist of previous cognitive testing
* Information about the person’s developmental milestones
* Educational assessment
* Specialist medical assessment
* Developmental assessment
* Report from Early Childhood Intervention Services

Following consideration of these questions, if you believe a person has an intellectual disability based on the definition of intellectual disability in the Act, they can be considered within the target group for disability services.