



**NEDA Response to the Consolidation of Commonwealth
Anti-discrimination Laws Discussion Paper**

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Introduction

This paper is the response of the National Ethnic Disability Alliance (NEDA) to the Commonwealth Attorney-General Department's Consolidation of Commonwealth Anti-Discrimination Laws (September 2011 - Discussion Paper). The paper focuses on issues that impact on people from non-English speaking backgrounds with disability and makes four recommendations that would assist this cohort when making complaints under a consolidated antidiscrimination law.

NEDA's recommendations are:

Recommendation 1:

Full application of the Disability Discrimination Act (DDA) 1958 to the new consolidated antidiscrimination act.

Recommendation 2:

NEDA recommends that a consolidation of antidiscrimination laws should ensure the protection of all people residing in Australia, regardless of the time they have spent in the country, provided that they are legally permitted to reside in Australia.

Recommendation 3:

NEDA recommends that intersectional discrimination be explicitly covered by the consolidation bill.

Recommendation 4:

NEDA recommends that the number of commissioners is not diminished as a result of the consolidation of the anti-discrimination laws.

The National Ethnic Disability Alliance (NEDA) is the national peak organisation representing the rights and interests of people from non-English speaking background (NESB) with disability, their families and carers throughout Australia.

NEDA is funded by the Commonwealth Department of Families, Community Services and Indigenous Affairs (FACSI) to provide policy advice to the Australian Government and other agencies on national issues affecting people from NESB with disability, their families and carers.

NEDA actively promotes the equal participation of people from NESB with disability in all aspects of Australian society.

NEDA manages a range of projects relating to NESB and disability communities and works closely with its state and territory members to ensure that its policy advice reflects the lived experiences of people from NESB with disability. In states and territories where no NESB-disability advocacy agency exists, NEDA undertakes development work to establish a structure that can support people from NESB with disability, their families and carers.

Definitions

- NEDA uses the term Non-English Speaking Background in preference to Culturally and Linguistically Diverse Background as those from an English speaking background are encompassed by the latter term and they are not part of NEDA's constituency. NEDA contends that coming from a linguistic and cultural background other than Anglo-Australian can be a great social barrier and a source of discrimination in Australia. The intention of using NESB is not to define people by what they are not but to highlight the inequity people experience due to linguistic and cultural differences.
- NEDA also uses the term people from NESB with disability rather than people with disability from NESB as we consider cultural background (not disability) an appropriate means of developing social identity.
- NEDA maintains that disability is a social construct and arises when a society's infrastructure is not developed to ensure all individuals, regardless of capacity or impairment, can fully participate in society. Thus NEDA refers to people with disability rather than people with disabilities to underline that disability is not a characteristic of an individual but a consequence of a society designed (whether consciously or inadvertently) to exclude many of its citizens from equal participation.

Treatment of People with Disability in the Australian Migration System

The submission of the Australian Federation of Disability Organisations (AFDO) mentions important areas that are protected by the United Nations Convention on the Rights of Persons with Disability (CRPD) but not by the Disability Discrimination Act (DDA). These areas include the right to life for a person with disability and the sterilisation of women and girls with disability. NEDA supports AFDO in its call to align the proposed antidiscrimination law with the CRPD and draws particular attention to Australia's non-compliance with Article 18 of the CRPD – Liberty of Movement and Nationality.

In 2008 NEDA sought legal advice on the consistency between the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) and key issues affecting refugees and migrants with disability. The advice was provided by human rights barrister Dr Ben Saul, Director, Sydney Centre for International Law.

The advice found that the:

- 1. Health requirements under migration law are permissible under human rights law in order to safeguard scarce medical resources.*
- 2. However it is clear that the current health assessment may give rise to unjustifiable indirect discrimination against refugees and migrants with disability.*
- 3. Indirect discrimination against refugees and migrants with disability may occur because the threshold of the health test is set too low to adequately balance the interests of non discrimination against people with disability with the preservation of scarce health resources. The threshold is set at*

\$21,000, which is a very low level, and arguably not threatening to the health system over the lifetime of the individual.

4. Indirect discrimination against refugees and migrants with disability may also occur because the evidentiary requirements are not sufficiently strong, for example in relation to quantifying the future costs to the community of illness or disability.

5. Finally, indirect discrimination against refugees and migrants with disability may occur by inadequate procedures to take into account an applicant's ability to pay for the costs of their own disability or illness.

The Australian government has lodged an interpretive declaration under the UN CRPD stating that it should be able to refuse migrants entry into Australia on the basis of disability. However, in the 'Enabling Australia' report commissioned by the Joint Standing Committee on Migration (JSCOM) released in June 2010, following its enquiry into the treatment of people with disability in the migration system, this committee has recommended that:

"... as part of its proposal to amalgamate Australian discrimination law, the Australian Government review the Disability Discrimination Act 1992 (Cth) with particular reference to section 52 migration exemption, to determine its legal implications for migration administration and conduct expert consultations on its impact on people with a disability".

Recommendation 1: NEDA recommends full application of the disability Discrimination Act (DDA) 1958 to any new consolidated antidiscrimination law.

Protection of Permanent Residents with Disability in Australia

People with disability who are granted entry into Australia continue to face systemic discrimination. In the first ten years of their residence in Australia, migrants with disability granted visa status (except for those immigrating on humanitarian grounds) are not eligible for the Disability Services Pension. NEDA understands that the DDA also does not apply to the Social Security Act (1999).

The nature of the waiting period does not meet equity principles as migrants with disability are placed in financial hardship and may not be eligible to access specific support services, aids and equipment.

NEDA has released a report entitled 'Migrants with Disability and the 10 Year Qualifying Residence Period for the Disability Support Pension; in which, Based on Australian Bureau of Statistics data, it estimates that there is unlikely to be more than 5000 migrants with disability in Australia who have been excluded from DSP entitlement as a result of the 10 year eligibility period. This is a small number: and represents a small proportion of the total expenditure by the Australian Government on the more than 700,000 Australians who currently receive the DSP.

Once again NEDA has also appealed to the CRPD to highlight discrimination here. Legal advice released by NEDA in July 2008 suggests that the ten year qualifying period for the Disability Support Pension is at odds with the obligations of the recently ratified United Nations Convention on the Rights of Persons with Disabilities. In NEDA's view, the ten year qualifying period for the DSP is both unfair and discriminatory.

A complaint has been lodged with the Australian Human Rights Commission claiming that the 10 year waiting period is in breach of Article 25 (health) and Article 38 (adequate standard of living) of the CRPD. Pending outcomes, the complaint may be accelerated to the United Nations.

Protection of Temporary Residents with Disability in Australia

People with disability who enter into Australia on temporary visas to study or work in Australia, or as dependents, are also ineligible for vital supports and services. They also face hardship due to Australia's systemic discrimination of people with disability and the protection of the new Consolidated Act should be extended to them.

Recommendation 2: NEDA recommends that a consolidation of antidiscrimination laws ensure the protection of all people residing in Australia, regardless of the time they have spent in the country, provided that they are legally permitted to reside in Australia.

Intersectional Discrimination

NEDA is aware of the excellent response to this consolidation project of Women With Disabilities Australia and Women With Disabilities ACT, in highlighting the issues of intersectional (or multiple) discrimination. NEDA joins WWDA/WWDACT in their call for "*Express recognition and inclusion of multiple discrimination*".

People from NESB with disability report that they are not taken seriously because of the interplay of their disability and ethnicity. When they try to explain their situation, people do not listen and don't understand. The limitations their disability has on them are not taken into consideration when taking part in activities, leaving them ridiculed and excluded. To exacerbate matters, because they look different, they are considered to be non-Australian and questions are asked about their ethnicity, despite the fact that they are Australian and have made significant achievements here.

Below is Jamil's story which demonstrates the points made in this paragraph.

"My name is Jamil and I'm Australian. I was born in the famous Jalalabad-Sylhet region of the erstwhile East-Pakistan which became Bangladesh on 16 December 1971. It was a harsh existence for me because I suffered from having Malaria fever, then Glandular Fever and I was neglected as a child and then growing up as an angry teenager in early 1970s ... So, probably due to the acute side-effects of those tropical illnesses, it gradually created physical exhaustion and disabilities in my growing stages. I have Fibromyalgia and Chronic Fatigue Syndrome. I suffered silently in my own family and outside of my family for being vilified and discriminated or being mocked and ridiculed for having those physical conditions of " Fibromyalgia and Chronic Fatigue Syndrome."

"I was desperately planning to Emigrate to a Better Country where Disabilities would not be hated and people with disabilities would get a fair go. I settled in Australia in the year 1998. Yes, I am very grateful that I get free healthcare through bulk billing and can see any specialists in the government run Hospitals here. Now, the discrimination factor If I apply for a job and quote that I only want " Part-Time " Position, then vilifications start. They find out that I happen to suffer from Muscular pain, spinal pain and its associated fatigue. Then Employers say " Sorry, you have got a disability, we do not want you." This attitude hurts me emotionally and destroys my ambition but I did never succumb to this situation."

“I also experience discrimination because of my ethnicity. Because I look different, people don’t understand that I’m an Australian citizen. They always question me about my ethnicity and why I moved to Australia.”

“When I was studying drama at university, I told my teachers that I have a disability and I can’t do too much physical activity. They didn’t accept me and tried to make me run around. When I couldn’t, they told me off and ridiculed me. The year 2008, I was also finalist in the Pride of Australia Medal for Peace Category, but none of the students and teachers acknowledged me for this. To them, I was a weak and unworthy alien man who just looked different.”

“Now I run my own organisation, ‘Justice and Governance’, where I help other people in situations very similar to mine. My clients and I continue to face discrimination here. When I interpret for clients, sometimes I get yelled at for speaking a different language. Sometimes people even threaten to beat me up. When I complain to the police or anyone else, they say they can’t help me. Why?”

“I do not (have a) grudge against others but move forward and contribute for this great country of Australia. I think that the people should accept other people with the disabilities and so they should not discriminate or vilify others for having some disabilities and they might look different and talk different.”

Jamil’s story clearly demonstrates the impact of intersectional discrimination and the need to adopt laws that better address situations where a person is discriminated against on the basis of more than one ground. It is important to note too that recognition of intersectional discrimination can provide a more complete picture of the situation.

Recommendation 3: NEDA recommends that intersectional discrimination be explicitly covered by the consolidation bill.

Currently six commissioners preside over the anti-discrimination laws:

- Human Rights Commissioner
- Aboriginal and Torres Strait Islander Social Justice Commissioner
- Age Discrimination Commissioner
- Disability Discrimination Commissioner
- Race Discrimination Commissioner
- Sex Discrimination Commissioner

(http://www.humanrights.gov.au/about/publications/brochure/info_sheet2009.html)

All six commissioners are inundated and work tirelessly to advance human rights in Australia. NEDA is concerned that once the four anti-discrimination laws are consolidated, the number of commissioners would also be diminished. NEDA cautions that such a move would significantly hamper the work of Human Rights Australia:

- Human rights education and promotion

- Inquiring into discrimination and human rights complaints
- Human rights monitoring
- Policy development and legislative reform

(http://www.humanrights.gov.au/about/publications/brochure/info_sheet2009.html)

Recommendation 4: NEDA recommends that the number of commissioners is not diminished as a result of the consolidation of the anti-discrimination laws.

General Comments

NEDA is aware and generally supports the responses made by organisations representing the interests of people with disabilities, such as the Australian Federation of Disability Organisations (AFDO) and Women With Disabilities Australia/Women With Disabilities ACT.

Specific recommendations made by these organisations supported by NEDA include:

- *Express recognition and inclusion of intersectional (or multiple) discrimination*
- *Removal of the comparator test*
- *Introducing a shifting burden of proof in discrimination claims*
- *Clarification that special measures aim to achieve substantive equality*
- *extending the duty to make 'reasonable adjustment' to any actor with any attribute(s)*
- *making the positive duty to achieve substantive equality express*
- *including a non-exhaustive list of attributes upon which unlawful discrimination is prohibited*
- *broadening the definition of 'family' and 'carer'*
- *including 'domestic violence victim status' in the list of attributes upon which unlawful discrimination is prohibited*
- *adopting a general limitations clause*
- *establishing a no costs jurisdiction in discrimination law matters with the exception of vexatious complaints*
- *enabling courts to award systemic remedies as necessary and appropriate in successfully litigated matters*
- *providing for representative complaints*
- *enabling AHRC Commissioners to conduct an inquiry into systemic discrimination on receipt of reliable information that appears to contain well-founded indications that unlawful discrimination is being practiced*

- *Mandating a public authority to collect statistical and other relevant data particularly ethnicity and lack of English proficiency in order to monitor, implement and influence substantive equality outcomes.*

In addition, NEDA also advocates for:

- Protection of voluntary workers and
- A clear definition and protection of domestic workers from discrimination

Conclusion

In its response, NEDA has concentrated on the adoption of a law that would protect the rights of people from non-English speaking backgrounds with disability. Neda's first recommendation is to protect migrants with disability applying for a visa in Australia. The second recommendation covers people with disability who are in the first ten years of their Residency in Australia or who have acquired temporary residence. The third and fourth recommendations can protect anyone who is seeking redress for violation of their human rights. .

NEDA takes this opportunity to thank the Australian Government for providing the opportunity to comment on the Commonwealth Anti-discrimination Consolidation Law Discussion Paper and looks forward to viewing the exposure draft legislation.

References

NEDA Report: Refugees and Migrants with Disability and the United Nations Convention on the Rights of Persons with Disabilities

http://www.neda.org.au/page/refugees_and_migrants_with_disability.html

National Ethnic Disability Alliance 'No Right To Discriminate' -

www.aph.gov.au/house/committee/mig/disability/subs/sub001.pdf

Report of the Joint Senate Committee on Migration 'Enabling Australia' -

<http://www.aph.gov.au/house/committee/mig/disability/report.htm>

Migrants with Disability and the 10 Year Qualifying Residence Period for the Disability Support Pension http://www.neda.org.au/page/migrants_with_disability_and_social_security.html