



NATIONAL ETHNIC DISABILITY ALLIANCE

Inquiry into the DDA

**Conducted by the Productivity
Commission**

Submission from the:
National Ethnic Disability Alliance

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INTRODUCTION

It has been estimated that 19 per cent of the Australian population have a disability. The National Ethnic Disability Alliance (NEDA) represents the 25 per cent of people with disability who come from a non-English speaking background (NESB).

At this point in time, Australia does not have a Bill of Rights and there are no rights-based declarations within our current constitution. For people with disability, the Disability Discrimination Act (DDA) is a crucial tool to ensure that rights are not only protected but enhanced.

People from a NESB with disability have broad range of needs which stem from having a disability and coming from a NESB. This submission outlines the key issues relating to the DDA and the needs of people from a NESB with disability and their families. NEDA has made 17 recommendations to the Productivity Commission which are documented in this submission.

NEDA is also willing to provide evidence to the public hearings that will be conducted by the Productivity Commission to ensure that the voice of people from a NESB with disability is heard.

If you require additional information on these issues, please contact NEDA's Executive Director Ms. Lou-Anne Lind on (02) 9687 8933 or 0407 878 933.

Yours sincerely



Diana Qian
PRESIDENT

SUMMARY OF RECOMMENDATIONS

- Recommendation 1** That HREOC receive adequate resources to work in partnership with NEDA to develop appropriate solutions to the issues facing people from a NESB with disability in relation to the DDA (HREOC does some work with NEDA but the resources of both organisations is very limited).
- Recommendation 2** That funds be provided to conduct a community education and information campaign to NESB communities to increase awareness about disability issues, rights and the DDA.
- Recommendation 3** That HREOC be provided with resources to develop concrete and relevant multilingual information and resources about disability, rights and the DDA.
- Recommendation 4** That an accredited Access & Equity audit be undertaken in relation DDA processes to develop and implement and appropriate Access & Equity plan for people from a NESB with disability.
- Recommendation 5** That the Access & Equity plan be monitored, evaluated and further researched in relation to its impact on the participation of people from a NESB with disability.
- Recommendation 6** That further research be conducted to identify the barriers to people from a NESB with disability using the DDA.
- Recommendation 7** That HREOC be adequately resourced to conduct community education about the social construct of disability.
- Recommendation 8** That the Act be made clearer in terms of what actually constitutes an unjustifiable hardship.
- Recommendation 9** That there be a much clearer separation and definitions of:
- discrimination
 - unjustifiable harder
 - reasonable adjustment
 - and the defence against making a reasonable adjustment of which unjustifiable hardship is but one type.
- Recommendation 10** That HREOC be adequately resourced to:
- manage complaints in a more timely manner
 - assist people from a NESB with disability in the formulation of complaints

- provide more education and accessible information to people from a NESB with disability about the DDA and its availability to those who have been discriminated against.

- Recommendation 11** That HREOC be resourced to initiate an Inquiry into the current exemption of the Migration Act from the DDA.
- Recommendation 12** For government to work together with NEDA to develop a more equitable process for people with disability wanting to enter Australia.
- Recommendation 13** That HREOC be adequately resourced to establish a meaningful and ongoing process to for developing quality Disability Action Plans and monitoring their implementation.
- Recommendation 14** That funding for the DDA Standards Project be significantly increased so that the Project can:
- conduct its work on researching and developing Standards
 - engage in more meaningful information provision and consultation
 - negotiate on an equal foot with industry who currently have large budgets to purchase expertise to lobby against the development of Standards.
- Recommendation 15** That a mandatory monitoring requirement be incorporated into all DDA Standards.
- Recommendation 16** That there be a on-gong process in place to review Standards once they are developed and implemented to ensure they continue to be appropriate for people with disability.
- Recommendation 17** That HREOC be adequately resourced to conduct its necessary work in combating discrimination against people with disability and providing additional assistance to people from a NESB with disability in recognition of the additional barriers faced by this group of people.

NESB-DISABILITY ISSUES

General Issues

Discrimination occurs on an individual and a systemic level. Due to the high level of social control experienced by people with disability, the discrimination faced is often institutional.

People from NESB, in particular those with a disability and recent migrants, experience highly regulated environments where much of the discrimination is systemic.

There are many barriers facing people from NESB with disability including:

- lack of accessible information and knowledge about rights, essential services and supports
- lack of culturally appropriate services and supports
- myths, misconceptions and negative stereotypes about disability and ethnicity in both the NESB and Anglo-Australian communities
- prejudice against people with disability from both NESB and Anglo-Australian communities
- government's emphasis on 'mainstreaming' without acknowledgement of the inequities that exist in relation to ethnicity
- NESB people often do not understand concepts used to describe their situation
- ethnic communities often do not have the capacity to advocate for their needs.

Two areas are discussed in more detail below to help develop an understanding of NESB-disability in relation to this paper. For more information about NESB-disability issues, please visit the NEDA Website: www.neda.org.au.

Discrimination

It has been the experience of NEDA that discrimination relating to both ethnicity and disability is interdependent and does not follow any logical order of preference.

The prejudicial attitudes and misconceptions regarding disability that are present in mainstream society are equally evident in NESB communities. Whilst there are differences in the perception of disability amongst different ethnic groups, the relative degree of stigma attached to disability appear similar across NESB and English-speaking communities.

By and large, NESB communities have missed out on education campaigns about people with disability because those conducting these campaigns have failed to seek out or consult with NESB communities. At the same time there have been consultations with people from NESB with disabilities, but those consultations have not resulted in concrete strategies.

Discrimination on the basis of ethnicity is also a reality. If ethnicity did not play a role in the provision of services to people with disability, the figures of service usage in relation to ethnicity would be comparable to those in the general community. The fact that there are so many Anglo-Australians and so few people from NESB in services shows that ethnicity does matter.

Access to Services & Information

Objective 5 of the *Disability Services Act*, 1986 states that:

Programs and services should be designed and administered so as to meet the needs of people with disability who experience a double disadvantage as a result of their sex, ethnic origin, or Aboriginality.

However, in Australia, **three out of four** people from a NESB with disability miss out on receiving Commonwealth funded disability services. This is in addition to the current unmet need for people with disability in general (see NEDA website for more information).

This figure stands despite genuine efforts made by many to redress this situation. This figure points towards the need to seek systemic solutions to the whole disability services system, involving all stakeholders.

Access to information is often the first step towards people participating in the community. Access to information means, in effect, access to opportunities and therefore choices to participate in the community.

Like all people from NESB, people from NESB with disability and their families and carers experience increased difficulties in accessing services because of the lack of resources made available for interpreters and translations.

Services such as the Translation and Interpreting Service (TIS) and the Ethnic Affairs Commission language services have increasingly adopted the user pays principle, severely restricting the number of free or subsidised on-site and telephone interpreting sessions available to people and non-profit service providers.

The costs for language services are mostly unbudgeted, resulting in:

- a reduction in community services for people with disability from NESB
- the provision of inappropriate information
- the overall increase in the use of family members and other relatives as interpreters, in violation of standards such as confidentiality, dignity, privacy, etc.

The DDA

Generally, people from a NESB with disability are reluctant to use the DDA due to:

- the complexity of the process involved – high degree of English literacy and comprehension of the Australian legal and service system is required
- fear of reprisal – a very real fear for those who originally come from countries under harsh dictatorships
- cultural perspectives of making complaints
- the associated costs – by and large, people from a NESB with disability are poorer than their Anglo-Australian counterparts.
- the adversarial nature of making complaints.
- the burden of proof that rests on the complainant
- not all people have to or are offered the services of an advocate to support them through the process.

NESB-Disability Intersection

People from a NESB with disability experience discrimination based on the basis of their disability **and** their ethnicity. It has been NEDA's experience that issues of ethnicity and disability are interdependent and one cannot be valued over the other or even separated out.

Given that people from a NESB with disability experience multiple layers of discrimination, it becomes difficult to separate the different forms of discrimination experienced, especially given that discrimination can take on very subtle forms.

Example:

A person from a NESB with a disability working in a Business Service is told to go into the Manager's office.

The Manager closes the door and then calls the person a '**crippled wog**'.

Has the person been discriminated against on the basis of their disability or their ethnicity?

Unfortunately, the DDA, like many other forms of Australian legislation, is unable to cope with the disability-ethnicity intersection.

DDA INQUIRY

The Inquiry

It is NEDA's understanding that this inquiry is seeking to examine the social impacts of the DDA on people with disability and on the community as a whole. Among other issues, the Commission is also required to assess the costs and benefits to the DDA and its effectiveness in achieving its objectives, which in summary are to:

- eliminate as far as possible discrimination on the grounds of disability
- ensure equality of people with disability before the law
- promote recognition and acceptance of the rights of people with disability.

This submission will consider the needs of people from a NESB with disability and their families in relation to the Terms of Reference mentioned above.

Importance of the DDA

NEDA supports the DDA in that it is the only legislation in Australia that actively seeks to promote equal rights and equal opportunities for people with disability and makes direct and indirect discrimination unlawful.

At present, the Federal court can order action to be taken to provide equitable access for a person with disability if a complaint of discrimination is upheld (subject to the provision of unjustifiable hardship).

The DDA not only has benefits for people with disability, but it has indirect benefits for other members of the community. For example, older people with mobility difficulties (keeping in mind that Australia currently has an ageing population), mothers with small children using prams etc. Therefore any advancement in equality made for people with disability using the DDA has positive repercussions for other members of the community thereby increasing the impact of the Act and further distributing costs.

NEDA does not support in any way initiatives or changes that will 'water down' the effectiveness of the Act. In fact, this submission will argue for initiatives needed to strengthen the DDA so that it can better meet the needs of people from a NESB with disability.

The Act has certainly been useful in achieving systemic change for people with disability. Examples include:

- **Public transport:** the system now accepts that people with disability are a part of the public needed to be serviced and changes are taking place to accommodate this. Standards for accessible public transport were passed by the parliament in 2002.
- **Building design:** initiatives in this area increasingly reflects the principle of universal access and a commitment that all aspects of design need to be accessible to people with disability.
- **Banking and finance:** there now exist voluntary industry standards for ATMs, EFTPOS, internet banking and telephone banking services.

- **Telecommunications:** this is a key area in society today and the decision in *Scott v Telstra* found that if Telstra provided telephone to people who could hear, it was also required to provide TTY's to people who are deaf.

These changes would not have taken place if it was not for the tireless campaigning by the disability sector and the existence of the DDA as an integral part tool for change.

Away from the issue of legal rights and responsibility and standards, the DDA is important as a tool which communicates what can of society Australia wants to be – a society that promotes inclusion and one that does not tolerate the exclusion of people with disability in areas of social, political and economic life.

NESB-Disability Access Issues

Information

Currently the DDA and its various processes are not accessible to people from a NESB with disability. The primary reason for this is that most of the information is produced in English. Unfortunately, many of the DDA processes are not known to people from a NESB with disability. *A User Guide to the Disability Discrimination Act* was produced in different community languages. Unfortunately, this document is no longer produced.

Also, a certain degree of English literacy is needed to understand the workings of the DDA. NEDA's constituents come from non-English speaking backgrounds and for some people from a NESB, developing English language skills takes time. Government funding in terms of English classes is extremely low and most of the time, these classes are not accessible to people with disability.

Comprehension

Whilst English literacy can be an issue for people from a NESB, there is also an issue with comprehension – of the DDA, of disability rights of the Australian service system etc. Information provided to the community about these issues is not accessible (i.e. either the information is in English only or in formats not accessible to people with disability or is written in complex formats that are not accessible to anybody). To be able to use the DDA effectively, an individual must have at least a decent comprehension of Australian law, policies and services.

In addition, an individual must also have an understanding of rights, given that the DDA is a rights-based piece of legislation. For many people with disability, and especially for people from a NESB, the idea of disability rights is still very new.

Disability & Rights

By and large, NESB communities have missed out on education campaigns about disability because those conducting the campaigns have failed to target and reach NESB communities. At the same time, there have been consultations with people from a NESB with disability, but unfortunately the consultations have not resulted in the development of concrete strategies.

Given that NESB communities have not been targeted in terms of education about disability, the issue of disability rights is even less known about. This contributes to the high levels of discrimination and exclusion experienced by NESB people with disability and also to the low take up rate of DDA complaints.

Recommendation: That HREOC receive adequate resources to work in partnership with NEDA to develop appropriate solutions to the issues facing people from a NESB with disability in relation to the DDA (HREOC does some work with NEDA the resources of both organisations is very limited).

Recommendation: That funds be provided to conduct a community education and information campaign to NESB communities to increase awareness about disability issues, rights and the DDA.

Recommendation: That HREOC be provided with resources to develop concrete and relevant multilingual information and resources about disability, rights and the DDA.

Recommendation: That an accredited Access & Equity audit be undertaken in relation DDA processes to develop and implement and appropriate Access & Equity plan for people from a NESB with disability.

Recommendation: That the Access & Equity plan be monitored, evaluated and further researched in relation to its impact on the participation of people from a NESB with disability.

Recommendation: That further research be conducted to identify the barriers to people from a NESB with disability using the DDA.

The Act

Defining Disability

At this point in time, the DDA defines disability as:

- (a) 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) 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 judgement or that results in disturbed behaviour...*

Whilst this definition does reflect the 'medical' or 'deficit' model of disability as opposed to using a 'social' model of disability, it is a useful definition because it is an encompassing one and does not exclude any type of disability or impairment.

An issue associated with the medical definition of disability is that it does tend to locate the disability (and not the impairment) with the individual rather than reflecting the reality that it is society's inability to cope with difference. Together with a lack of understanding about disability in general, this particular model of disability can and does result in many social myths and negative social values being attached to people with disability.

However, from a pragmatic and legislative point of view the current definition of the DDA is useful because it does not exclude any body with a disability from being protected under the Act.

What would be useful is for HREOC to be adequately resourced to provide community education about the social model or construct of disability to combat the myths and stereotypes that exist around disability.

Recommendation: That HREOC be adequately resourced to conduct community education about the social construct of disability.

Unjustifiable Hardship

A fundamental criticism that has been made of the DDA is its provision for unjustifiable hardship which can, from a philosophical point of view, be viewed as contradicting the intent of the Act. This is because the concept of equitable citizenship does not sit comfortably with the notion of unjustifiable hardship.

It is NEDA's understanding that the DDA is the only anti-discrimination legislation existing in Australia that contains such a clause. Neither the Racial Discrimination Act 1975, nor the Sex Discrimination Act 1984, has such provisions.

Section 11 of the DDA contains the section about unjustifiable hardship. In determining what constitutes unjustifiable hardship, the Act specifies that... *all relevant circumstances of the particular case are to be taken into account including:*

(a) *the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and*

(b) *the effect of the disability of a person concerned; and*

(c) *the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and*

(d) *in the case of the provision of services, or the making available of facilities—an action plan given to the Commission under section 64.*

It is also NEDA's understanding that unjustifiable hardship was included in the Act to offer some protection to smaller companies or agencies who would not have the financial capability of absorbing the costs involved with making significant and expensive adjustments.

However, the Act is not terribly clear on what constitutes an unjustifiable hardship and in practice, unjustifiable hardship is used as a first line of defence against a complaint of discrimination. This does not result in discriminators being encouraged to think more innovatively about what they can do to provide access for people with disability in a reasonable way.

Recommendation: That the Act be made clearer in terms of what actually constitutes an unjustifiable hardship.

Recommendation: That there be a much clearer separation and definitions of:

- discrimination
- unjustifiable harder
- reasonable adjustment
- and the defence against making a reasonable adjustment of which unjustifiable hardship is but one type.

Complaints

The DDA is currently a complaints-based piece of legislation. This means that the onus is on the person with a disability to prove there was intentional discrimination against them by a provider, sometimes in a highly adversarial legal environment.

A more suitable model would have been a rights-based one which requires the provider to ensure that a service or program does not discriminate against potential users in the first place. The Americans with Disability Act adopts this particular model.

Whilst NEDA has concerns with a complaints based model in relation to its accessibility and appropriateness for people from a NESB with disability, we recognise that the threat of a DDA complaint can be extremely effective in achieving change. However, numerous cases have been resolved through consultation and conciliation and these cases do not result in the creation of case law and cannot be used as precedents.

The role of HREOC in relation to complaints is integral to ability of the legislation to remove discrimination against people with disability. Due to a lack of resourcing, the current waiting time for the processing of individual complaints is so excessive that many people with disability are deterred from even lodging a complaint. Others have felt that the onus of proof having to be so detailed and documented is also a barrier to preparing a case.

Recommendation: That HREOC be adequately resourced to:

- manage complaints in a more timely manner
- assist people from a NESB with disability in the formulation of complaints
- provide more education and accessible information to people from a NESB with disability about the DDA and its availability to those who have been discriminated against.

Exemptions

The issue of exemptions to the DDA is also a matter that has severely compromised its integrity since its introduction. For NEDA the most problematic exemption is the current exemption of the Migration Act (section 52) from the provisions of the DDA. People with a disability are often ineligible to immigrate to Australia because of their disability – visas are often rejected on the basis of a person's disability.

Specific sections within the Migration Act give the Australian Minister for Immigration and Multicultural Affairs discretionary power to grant admittance into Australia (see Appendix 2). It is NEDA's experience that this process does not allow for consistency or fairness and encapsulates the 'squeaky wheel' syndrome which means that sometimes the loudest or the most desperate, provided they are aggressive enough, get what they want, whilst others miss out.

The exemption of the Migration Act from the DDA epitomises the two-tiered value system afforded to people with disability living in Australia on the one hand, and potential migrants with disability on the other.

The rationale is that people with a disability would put an undue burden or hardship on the Australian community because our society does not have the necessary supports to reasonably expect people with a disability to be self supporting. The contradiction is that the Federal Government enacted the DDA to remove these very barriers and discrimination on the basis of disability.

This contradiction could be seen to portray at best a lack of understanding, and at worst a lack of commitment by government to the very objectives of the DDA.

It is NEDA's experience that the current immigration practices actually have their greatest impact on families. It is not uncommon for families to immigrate, leaving behind the family member with the disability with a relative. Once settled, they apply for this member to immigrate to Australia. This process is proving to be extremely traumatic for the family, especially for the individual who has been left behind.

Recommendation: That HREOC be resourced to initiate an Inquiry into the current exemption of the Migration Act from the DDA.

Recommendation: For government to work together with NEDA to develop a more equitable process for people with disability wanting to enter Australia.

Disability Action Plans

The DDA currently authorises HREOC to retain Disability Action Plans (DAPs) produced by State and Federal Department as well as other legal entities (i.e. Telstra) wanting to develop a partial defence against discrimination complaints.

Whilst the requirement to develop DAPs to address discriminatory practice has had a positive effect for people with disability, there is no process to ensure that Plans are developed of an acceptable quality or more importantly, that they are adequately monitored with suitable action taken if they are not adhered to. This risks the development of DAPs becoming some what of a token gesture in an attempt to avoid a DDA complaint.

Recommendation: That HREOC be adequately resourced to establish a meaningful and ongoing process to for developing quality Disability Action Plans and monitoring their implementation.

DDA Standards

The DDA allows for the development of Standards in several areas, such as education, employment, transport, access to the built environment and the administration of Commonwealth laws and programs.

The debate that has occurred within the disability sector about the potential advantages and disadvantages associated with Standards and the rights of people with disability has been rigorous.

It has been argued that Standards are problematic for the following reasons:

- **Complaints-based nature of the DDA:** there appears to be no legal compulsion for a provider to comply with a DDA Standard once it is adopted and the obligation will still remain with the individual to prove a Standard has not been met.
- **Lack of clarity around unjustifiable hardship clause:** the fact that unjustifiable hardship clause has been retained within Standards and is not clearly defined within the Act creates a real risk that they become meaningless for people with disability.
- **Diminishing the rights of people with disability:** the Act as it stands without Standards does an individual to lodge a complaint. The introduction of Standards will allow a provider to be monitored for compliance against the Standards and to avoid any action if meet the minimum conditions despite the disadvantage felt by the person with

a disability. NEDA believes that every care taken to ensure the protection provided by the Standards is to the advantage of people with disability and not providers.

- **Development progress:** developing Standards has been a painfully slow process with only one Standard adopted and appended to legislation to date, the Accessible Transport Standard in October 2002.
- **Collective bargaining:** the resource imbalance between industry and the disability sector means that it is not an equal bargaining arrangement and there is a risk that Standards developed will actually reflect the interests of industry interest and not the rights of people with disability.

It has also been argued that there are a number of benefits associated with Standards:

- **Setting a minimum guideline:** once adopted and appended to the legislation, Standards provide a minimum guideline that a provider has to meet in order to protect them from a discrimination complaint. It is therefore crucial that effective and rigorous monitoring takes place in order to ensure that providers to meet the set guidelines and that the rights of people with disability are protected.
- **Unlawfulness:** once adopted it becomes unlawful for any provider to contravene a Standard.
- **Providing clarity:** a Standard has the ability to confirm rights and clarify responsibilities by providing more definitive benchmarks for access and equality than what is currently provided.
- **Collective bargaining:** the development of a Standard is akin to a collective bargaining process and offers the opportunity for industry and the disability sector to achieve consensus.

NEDA sits on the Steering Committee of the DDA Standards Project (DDASP) and has been involved in this area of work. From its involvement with this Project, NEDA's position is the DDASP needs be adequately funded to conduct its work researching and developing Standards in conjunction with people with disability, and in particular people from a NESB with disability. It is also imperative that a process be in place to continually review and monitor standards once they are developed and implemented to ensure that their appropriateness in overcoming barriers for people with disability.

Recommendation: That funding for the DDA Standards Project be significantly increased so that the Project can:

- conduct its work on researching and developing Standards
- engage in more meaningful information provision and consultation
- negotiate on an equal foot with industry who currently have large budgets to purchase expertise to lobby against the development of Standards.

Recommendation: That a mandatory monitoring requirement be incorporated into all DDA Standards.

Recommendation: That there be a on-going process in place to review Standards once they are developed and implemented to ensure they continue to be appropriate for people with disability.

Resourcing & the Role of HREOC

At present the DDA is administered by the Human Rights and Equal Opportunity Commission. NEDA believes that the DDA is appropriately placed with HREOC. However, since 1996, HREOC has lost 55 per cent of its funding thereby severely reducing its ability to conduct its work in the area of disability discrimination.

The role that HREOC plays is fundamental to effectiveness of the DDA in combating discrimination and it is NEDA's position that the Commission needs to have its funding increased to ensure that people with disability can enjoy the protection offered to the by the DDA.

Recommendation: That HREOC be adequately resourced to conduct its necessary work in combating discrimination against people with disability and providing additional assistance to people from a NESB with disability in recognition of the additional barriers faced by this group of people.

CONCLUSION

In conclusion, NEDA believes that the DDA has had a significant impact on the lives of people with disability over the past ten years. In terms of people from a NESB with disability, it has had a very limited impact and more work needs to be done to ensure that the rights of NEDA's constituency are protected to the same degree as anybody else with a disability. We have therefore made a number of recommendations to this inquiry that we believe will assist people from a NESB with disability to receive an equitable level of protection.

However, NEDA believes that people from a NESB with disability to receive outcomes under the DDA, the Human Rights and Equal Opportunity Commission must be adequately resourced to be able to conduct this work and implement the recommendations listed in this submission.

APPENDIX 1: NEDA

The National Ethnic Disability Alliance (NEDA) is the national consumer-based peak body for people from a non-English speaking background (NESB) with disability, their families and carers.

The overarching aim of NEDA is to advocate at a federal level, for the rights and interests of people from a NESB with disability, their families and carers

All activities undertaken by NEDA include strong consumer involvement and are based on the following Objectives:

1. Represent the rights and interests of people from NESB with disability, their families and carers.
2. Advocate on issues impacting on people from NESB with disability, their families and carers.
3. Work towards securing equitable outcomes for people from NESB with disability, their families and carers.
4. Co-ordinate policy advice to the Federal government and relevant peak bodies on the impact of policy and legislation on people from NESB with disability, their families and carers.

NEDA, because of its cross-sector role (disability and ethnicity) aims to collaborate with and work across a broad range of organisations to represent the interests of people from a NESB with disability

NEDA is governed by a Council, the majority of who are people from a NESB with disability. For more information, please log onto www.neda.org.au.

APPENDIX 2: MINISTERIAL DISCRETION

The following information comes from Immigration News No. 59/60 issued by the Immigration Advice and Rights Centre (IARC Sydney).

On 31 March the Minister for Immigration and Multicultural Affairs signed new guidelines outlining circumstances where it may be in the public interest for the Minister to exercise this discretion.

These guidelines are found in Migration Series Instruction no: 225, dated 4 May 1999. The following circumstances may be considered “unique and exceptional” such that the Minister may intervene:

- 4.2.1** Particular circumstances or personal characteristics that provide a sound basis for a significant threat to a person’s personal security, human rights or human dignity on return to their country of origin including:
 - persons who may have been refugees at time of departure from their country of origin, but due to changes in their country, are not now refugees; and it would be inhumane to return them to their country of origin because of their subjective fear. For example, a person who has experienced torture or trauma and who is likely to experience further trauma if returned to their country; or persons who have been individually subject to a systematic program of harassment or denial of basic rights available to others in their country, but this treatment does not constitute Refugee Convention persecution as it is not sufficiently serious to amount to persecution or has not occurred for a Convention reason;
- 4.2.2** Substantial grounds for believing a person may be in danger of being subject to torture if required to return to their country of origin, in contravention of the International Convention Against Torture (CAT);
- 4.2.3** Circumstances that bring Australia’s obligations as a signatory to the Convention on the Rights of the Child (CROC) into consideration;
- 4.2.4** Circumstances that may bring Australia’s obligations as a signatory to the International Covenant on Civil and Political Rights (ICCPR) into consideration;
- 4.2.5** Circumstances that the legislation could not have anticipated;
- 4.2.6** Clearly unintended consequences of legislation;
- 4.2.7** Intended, but in the particular circumstances, particular unfair or unreasonable, consequences of legislation;
- 4.2.8** Strong compassionate circumstances such that failure to recognise them would result in irreparable harm and continuing hardship to an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident) or an Australian citizen;
- 4.2.9** Exceptional economic, scientific, cultural or other benefit to Australia;
- 4.2.10** The length of time the person has been present in Australia (including time spent in detention) and the level of integration into the Australian community;
- 4.2.11** The age of the person; or
- 4.2.12** The health and psychological state of the person.