28 April 2014

Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

via email: legcon.sen@aph.gov.au

Dear Senators

Inquiry into the Migration Legislation Amendment Bill (No. 1) 2014

The National Ethnic Disability Alliance (NEDA) and the Federation of Ethnic Communities' Councils of Australia (FECCA) thank the Senate Legal and Constitutional Affairs Legislation Committee for the opportunity to make a submission to the above inquiry.

NEDA is the national peak organisation representing the rights and interests of people from non-English speaking background (NESB) living with disability, their families and carers throughout Australia. FECCA, the national peak body representing Australians from culturally and linguistically diverse (CALD) backgrounds, has a dedicated Disability Advisory Committee. FECCA and NEDA collaborate in promoting issues on behalf of people from NESB or CALD backgrounds to the Commonwealth Government and the broader community.

We refer to the amendments that seek to clarify the limitations for further visa applications under sections *48, 48A and 501E*, for "*a non-citizen who has previously been refused a visa for which an application was made on the non-citizen's behalf, even if the non-citizen did not know of or did not understand the nature of the application due to a mental impairment or because they were a minor".*

Attachment A to the Explanatory Memorandum, *Statement of Compatibility with Human Rights*, notes that Article 5(1) of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD), ratified by Australia in 2008, is engaged by the amendment.

CRPD requires States parties to *"prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds"* with no exceptions, in which it also specifically refers to

"immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement".[1]

The explanatory memorandum argues that the treatment is not prohibited, notwithstanding that it is discriminatory, if it is *"based on reasonable and objective criteria and to achieve a legitimate purpose"*.

Although the argument of *"reasonable and objective criteria"* is consistent with Australia's interpretative declarations on Articles 12, 17 and 18 of CRPD, the Committee on the Rights of Persons with Disabilities, at its last session in October 2013, expressed its concern that Australia had not yet brought its legislation in line with CRPD. The Committee further recommended that Australia incorporate all rights under CRPD into domestic law and that it review its interpretative declarations on Articles 12, 17 and 18 with a view to withdraw them.

CRPD's definition of discrimination on the basis of disability (Article 2) includes any distinction that has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise of rights. The definition also includes denial of reasonable accommodation to ensure to persons with disability the enjoyment or exercise of rights on an equal basis with others.

While noting that the purpose of the amendment is to ensure that the provisions apply equally to all non-citizens, we are of the view that such an amendment is premature without proper assessment of whether an express mention would result in denial of reasonable accommodation or would have an effect of impairing enjoyment of rights.

In this regard, Article 12 on equal recognition before law should also be considered as engaged by the amendment. We note that the Australian Law Reform Commission has been recently commissioned to inquire into barriers to equal recognition before the law and legal capacity for persons with disability. We further note that migration law has not been included in the scope of the review.

NEDA and FECCA believe that the said amendment is premature and misconceived, unless a comprehensive review of the Commonwealth migration law and its impact on the recognition of people with disability before the law on an equal basis with others is undertaken, with a view to ensuring the Commonwealth law does not discriminate against migrants with disability. Recognition of a person's evolving or fluctuating legal capacity should be given specific consideration in this regard.

Australia's current migration regulations continue to explicitly discriminate disability, or any type of conditions associated with a disability.

The objectives of the *Disability Discrimination Act 1992* are as follows:

> (a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
> (i) work, accommodation, education, access to premises, clubs and sport; and
> (ii) the provision of goods, facilities, services and land; and
> (iii) existing laws; and
> (iv) the administration of Commonwealth laws and programs; and

[1] http://www.un.org/disabilities/convention/conventionfull.shtml

(b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and

(c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

The Committee on the Rights of Persons with Disabilities, in its concluding observations of 2013, has expressed its concern that the scope of the protected rights and grounds of discrimination in the *Disability Discrimination Act 1992* is narrower than that provided for under CRPD and does not provide the same level of legal protection to all persons with disability.

The *Migration Act 1958* is exempt from the majority of discrimination provisions under section 52 of the *Disability Discrimination Act 1992*. Australia is at odds with its international obligations in relation to the application of the migration health assessment under the *Migration Act 1958*.

Migration Act 1958 is inconsistent with CRPD that recognises the rights to equality and non-discrimination towards individuals with disability, and commits Australia to ensure and promote the full realisation of human rights, including non-discrimination, for all persons with disability. This obligation does not distinguish between citizens and non-citizens, or make exceptions for governments administering a migration scheme, as persons with disabilities are entitled to be protected from discrimination on the basis of disability, particularly discrimination by public authorities, regardless of whether they are a citizens of Australia or not.[2] Further, in June 2009, the United Nations Committee on Economic, Social and Cultural Rights recommended that "*the Migration Act 1958* and the *Disability Discrimination Act 1992* be amended to ensure that the rights to equality and non-discrimination apply to all aspects of migration law, policy and practice".

While the Commonwealth Government has committed to a reform process in order to ensure fairer outcomes for people with disability, the failure to apply the *Disability Discrimination Act 1992* fully to migration assessment means that the process of migration in the Australian system continues to be discriminatory towards persons with disabilities, as well as families with a person or a child with a disability.

Late last year the plight of Dr Enamul Kabir and his family were brought to the public's attention via social media. NEDA engaged the Kabir family and offered some support and advocacy in trying to avert their pending deportation. Both Enamul and his wife hold PhD's one as a statistician and the other as biomedical researcher, both hold jobs and pay taxes; they reside in Queensland.

In July last year their application for a skilled resident visa was rejected due to the fact that their child Srijon has a very mild form of autism (ie: Srijon did not satisfy the health requirement with regard to migration) with the family now facing possible deportation.

NEDA and FECCA feel that this situation is incongruous given the changes that occurred last year when the Commonwealth Government promised to adopt the "Net Benefit Approach" (NBA) - a process where an individual's health costs can be offset by the benefit they or their family bring to the Australian community

Under the NBA, in case of a family with a child who has a very mild form of Autism and two parents with high levels of education, i.e. both with PhDs and gainfully employed in sectors

[2] http://www.hrlrc.org.au/files/Migration-and-Disability-HRLRC-Submission.pdf

of the community that require highly skilled staff, the assessment process would take into account the situation as a whole. ***(Kabir family post script as of April 24, 2014) On April 24th the Kabir family were granted permanent residency; this was a direct response to requests made on their behalf to the Minister by both change.org and NEDA and others who supported the family and engaged with key stakeholders via social networking and direct lobbying of the Government.***

NEDA and FECCA are concerned that disability is seen as a social cost and the fault of the person with the disability as opposed to a person who lives with a disability. Living with a disability does not form them as a person, and they are more than a person that lives with some form of compromise. All people contribute to the fabric of Australian life and the evolving of our culture.

NEDA and FECCA continue to advocate for a fairer migration system and assessment process for persons living with a disability migrating to Australia. We urge the Commonwealth Government to ensure a full application of the *Disability Discrimination Act 1992* to the *Migration Act 1958* and its regulation in order to remove any existing discrimination within the Australian migration system against potential migrants with disability.

Yours sincerely

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