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8 August 2005

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
CANBERRA ACT 2600

Re: Inquiry into the administration and operation of the *Migration Act 1958*

The Multicultural Disability Advocacy Association of NSW (MDAA) is a community organisation which aims to promote, protect and secure the rights and interests of people from a non-English speaking background (NESB) with disability, their families and carers in NSW.

The National Ethnic Disability Alliance (NEDA) is the national peak consumer organisation representing the rights and interests of people from (NESB) with disability, their families and carers across Australia.

The attached submission is based on the experiences of NEDA's and MDAA's members and consumers. Our submission includes examples of the difficulties people and families from a NESB with disability face when they seek to migrate to and settle in Australia, including experiences in detention centres. We could provide more examples but have limited our comments to indicate the range of issues our members and consumers have raised.

Thank you for the opportunity to make this submission. We would be happy to provide additional information if you wish.

Yours sincerely

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Acting Executive Director (MDAA)

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NEDA
NATIONAL ETHNIC DISABILITY ALLIANCE

MDAA

Joint Submission to the Senate Inquiry into the administration and operation of the *Migration Act 1958*

8 August 2005

Joint Submission to the Senate Inquiry into the administration and operation of the *Migration Act 1958* - NEDA and MDAA

General comments

The Multicultural Disability Advocacy Association of NSW (MDAA) is a community organisation which aims to promote, protect and secure the rights and interests of people from a non-English speaking background (NESB) with disability and their families in NSW. MDAA is funded by the NSW and Commonwealth governments to provide advocacy assistance to people from a NESB with disability and their families, in accordance with the principles and objectives in the *Disability Services Acts* (Commonwealth and State) and the *Disability Discrimination Act 1992* (Commonwealth).

We do this through:

- individual advocacy, assisting individuals and families to resolve problems about housing, health, social security, immigration, education, criminal justice matters, etc;
- systemic advocacy, seeking to change policies and practices of government and non-government agencies;
- advocacy development to increase the knowledge and skills of individuals with disability and communities about disability and culture; and
- research, community education and training to increase the skills of government and non-government services to respond to the needs of the diverse community of NSW.

In the past two years we have assisted over 500 people each year to resolve individual issues, which included 180 issues relating to migration.

The National Ethnic Disability Alliance (NEDA) is the national peak consumer organisation representing the rights and interests of people from (NESB) with disability, their families and carers across Australia.

NEDA is funded by the Department of Family and Community Services (FaCS) to provide policy advice to the federal government and other agencies to secure equitable outcomes for people from NESB with disability, their families and carers. MDAA is the NSW member of NEDA.

Terms of reference: This submission addresses terms of reference A, C and D of the Senate Inquiry.

A. Administration and operation of the *Migration Act 1958*, its regulations and guidelines…with particular reference to the processing and assessment of visa applications, migration detention and the deportation of people from Australia.

1. Mixed messages from Commonwealth governments and agencies

One major difficulty faced by people from a NESB with disability and their families is the contradictory messages we receive from the Commonwealth government about the value of people with disabilities. People, including new and potential migrants, are confused by this contradiction.

On the one hand, successive Commonwealth governments have promoted the value of people with disability as individuals who can make a contribution to the community. For example, Senator Vanstone, previous Minister for Family and Community Services, when commenting on Australia's involvement in the development of the United Nations Convention on the Rights of People with Disability, said:

> *"The Commonwealth Government will continue to demonstrate its strong commitment to the rights of people with disabilities by participating in a meeting of the United Nations Ad Hoc Committee in New York … Australia's participation in this important meeting demonstrates the Government's commitment to ensuring participation of people with disabilities in all levels of society."*

When introducing the International Day of People with Disability Senator Vanstone said:

> *"The day will focus on activities which emphasise the skills, contributions and capacities of people with disabilities. We want to break down stereotypes, and show how people with disabilities are using their skills, expertise and knowledge."*

In the recent Federal budget the government introduced a $554.6 million reform package to increase employment opportunities for people with disability.

> *"Our current approach focuses too strongly on what people cannot do, rather than what they can do. This is not sustainable in the longer term ", the Minister for Workforce Participation, Peter Dutton said.*

The government's focus here is generally positive, assisting people to show what we can do rather than making assumptions about what we cannot do. Government agencies, through frameworks such as the Commonwealth Disability Strategy and Disability Discrimination Act, focus on the rights, skills and potential of people with disability so that we are able to make a positive contribution to society.

On the other hand, people with disability are consistently refused entry to Australia because of assumptions made about the cost of their disability to the Australian community. In our experience, the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) focuses on the negative aspects of disability, looking for easy reasons to reject migration applications rather than accept them. While it is obvious that many more people apply to migrate than DIMIA is authorised to accept, it is unfair and unreasonable that people with disability are rejected because of untested assumptions about future costs associated with their disability. In our experience, particularly at first instance, DIMIA does not consider the positive contribution people with disability and their families can make to the Australian community.

2. Disability discrimination in immigration

This negative attitude or culture within DIMIA is reinforced by the fact that the *Migration Act* 1958 is exempt from the provisions of the *Disability Discrimination Act* 1992 (DDA - section 52). This means that while disability discrimination is illegal when perpetrated by other agencies in Australia, it is a condoned, standard practice for DIMIA officials when dealing with potential migrants and refugees with disability.

There are many different visa categories under which people can enter Australia. Within some of these categories the fact that an applicant or family member has a disability is offset against the value a potential migrant or refugee and his/her family is judged to have for the Australian community. The following table sets out some of the main categories, what they mean for applicants generally and what they mean for applicants or family members with disability.

Migration category	**What this means in general**	**What it means for people with disability**
Skilled	Has work skills or abilities that will benefit Australia	Health and medical check: it appears that skills are offset against anticipated (assumed) cost of disability
Business	For people with proven success in business	Health and medical check: it appears that business record and skills are offset against anticipated (assumed) cost of disability
Employer nominated	Australian employers recruit specialists from overseas	Health and medical check: it appears that skills are offset against anticipated (assumed) cost of disability

Family migrants	A close relative residing in Australia can sponsor a relative; this also applies to relationships	Health and medical check: it appears that skills are offset against anticipated (assumed) cost of disability
Special eligibility	For former Australian residents and citizens	Unclear
Refugees/ humanitarian entrants	People who are recognised as refugees or eligible on other humanitarian grounds	Health and medical check: it appears that need for protection is offset against anticipated (assumed) cost of disability

Under almost all categories, people with disability are subject to stringent health assessments, based on the assumption that they will be a financial burden on the community. That assumption clearly contradicts the reality of many Australians with disability and it negates the positive contributions we make to the community including economic contribution. Many applicants with disability bring with them skills and qualifications that can potentially benefit the Australian community yet they are often ignored by DIMIA officials and medical assessors. Such practice can be seen as breaching the DDA. Although the *Migration Act* is exempt from the DDA it is our view that the administrative practice of DIMIA and health officials should still comply.

DIMIA and the Commonwealth Medical Service also fail to take into account the fact that all newly arrived immigrants, except for those who migrated on humanitarian grounds, have to wait two years before they are eligible to claim income support. *Migrants with disability have to wait* ***ten*** *years before being eligible for a disability support pension (DSP)*. Eligibility for this pension is the usual prerequisite for access to essential disability services such as post-school programs, including community participation and transition to work programs in NSW. Similarly, carers of newly arrived migrants with disability have to wait ten years before being eligible for income support. It should also be noted that the eligibility criteria for the DSP were tightened as a result of the recent Federal budget initiatives. It is wrong to assume that migrants with disability would be DSP recipients given that there is a ten year waiting period, their level of disability may not qualify and they may choose to participate in the workforce.

3. What does this system do to people with disability and their families?

The examples below illustrate the difficulties people from a NESB with disability experience due to the current operation of the *Migration Act*. This is a small selection of our consumers' experiences and while the facts are as described some details have been changed to protect the identity of the people concerned.

What these stories demonstrate is that the current operation of the migration law:

- separates people with disability from their families;

- frustrates people with disability and their families by putting their lives on hold or at risk, and
- compounds the effects of disability.

3.1 Family break up - financial and emotional difficulties

Families with a member with disability who apply to migrate to Australia face a very difficult choice. In our experience applications from people with disability are usually rejected in the first instance and families are told that everyone except the person with disability would be accepted. Faced with this dilemma some families decide they should migrate to Australia to start a new life for the benefit of most family members, even though it means leaving behind the family member with disability. They hope to be reunited eventually in Australia. Some families decide to stay, hoping to persuade the local DIMIA officials to change their decision and accept the whole family.

Forcing family break up is contradictory to the strong family values of the government and the Australian community. This is particularly unacceptable when a child or young person with disability is rejected entry and has to be left behind. The Convention on the Rights of the Child, to which Australia is a signatory, argues strongly the right of the child to grow up with they own family. DIMIA's practice seems to be in breach of the Convention.

People with disability whose initial application was rejected have to find the financial resources to get expert advice from migration agents and medical specialists and for the appeal procedures. People cannot usually afford to appeal and the expensive, drawn out procedures result in large debts that have to be paid off, often forcing families to sell whatever assets they have.

Where families do split up by leaving the person with disability in the care of relatives, this disadvantages the most vulnerable members of the community, particularly children with disability, because they are left with little financial, emotional or psychological support. This leads to distress for both the ones left behind and those who move to Australia. Family members carry excessive financial and emotional burdens, having to send regular amounts of money overseas to support their family members with disability and dealing with feelings of guilt and the emotional distress both parties experience.

A family from Asia applied to migrate to Australia. One of the younger children has a physical disability and DIMIA indicated that the whole family would be refused a visa because she did not meet the health criteria. The family was in a dilemma and eventually decided to make the move to Australia, leaving the child in the care of relatives, and hoping to sort out her visa once they had arrived and settled in.

After a long separation from her family resulting from the lengthy immigration process, the young girl developed feelings of inferiority and very low self-esteem.

She felt abandoned by her parents and attempted suicide. When she finally arrived in Australia some years later she was very temperamental and aggressive towards her siblings. The family felt distraught about having to leave her behind and is now struggling to deal with the consequences.

Lengthy processing times, including for child visa applications, and the lack of support during that time, can result in despair and the untimely death of Australian family members, particularly after refusal to grant a visa to allow a dependent child to join the family in Australia.

In 2001 an Australian citizen from Pakistan poured petrol over himself and set himself alight in front of Parliament House in Canberra. He died as a result. He had waited six years for a visa to bring his family to Australia, including his daughter who has a disability. He had arrived in Australia in 1995 on a visitor visa and had then applied and been granted refugee status. He had tried to reunite with his family since 1995 but all his efforts had come to nothing, largely because DIMIA considered that his daughter would be ‘too much of a drain on the health system’. It was assumed that, because she had a disability, she would cost the community over $750,000 (*News Limited, 4/4/01*).

3.2 Lack of services and support

For most people from a NESB who come to Australia, including adults with disability, getting a job is one of our first priorities. People expect to find work in their chosen field within a short time after arrival but this can be frustrated if our qualifications and experience are not recognised here, if our English language skills need further development, or if employers focus on what we can’t do rather than what we can. Many people in these circumstances accept any job offered and some have difficulty finding a job at all.

Because of the lengthy and discriminatory waiting periods referred to above, people from a NESB with disability are not entitled to services or income support. There are also not enough services available to meet demand (see 3.3 below). This creates enormous financial and emotional strain for people with disability and their families and makes it very difficult for families to cope and get ahead.

A couple came to Australia seeking early intervention support for their young son who sustained a brain injury at birth. When a racially based ethnic conflict broke out in their country they applied for permanent residence in Australia but were rejected. They feared for their lives because they belonged to an ethnic minority and so applied for refugee status.

As all their assets in their country of origin had been frozen, they applied for and were granted an interim working visa. They are working and managing well enough, pending the outcome of their refugee application, but because of their residence status they cannot access any of the services available to people with disability. They are worried that their son's progress is being held back because he cannot get the early intervention support they came to Australia to obtain.

A woman arrived in Australia on a student visa and after some time began a relationship which resulted in the birth of a baby girl. The woman subsequently applied for refugee status for herself and her daughter who has an intellectual disability. The mother feared persecution because of her child's disability and their ethnic minority status. Because of their status they received no services in Australia and had to depend on charity to survive.

Even where services are available people with disability may prefer to apply for a carer visa for a family member to come to Australia to provide the support they need. One reason is that the services available do not always cater for the diverse needs of the population. In addition to unmet need, in NSW we estimate (and the NSW Department of Ageing, Disability and Home Care accepts) that three out of four people from a NESB with disability miss out on receiving Commonwealth or State funded disability services. While people from a NESB comprise 24% of the population, only 6% of disability service users are from a NESB. Until disability services develop the skills to respond to the needs of the whole community, people from a NESB with disability will continue to apply for carer visas because this is the only way to get the support we need. Having a carer who understands the person's cultural and disability needs can improve the quality of life for people with disability who would otherwise be left without any support at all.

One of the difficulties in applying for a carer visa, however, is that people experience long delays, with some applications on foot for up to ten years, including urgent carer visa applications.

3.3 Medical assessments of people from a NESB with disability

Commonwealth Medical Officers (CMO) who assess the potential costs of a person's disability appear to do so without any apparent knowledge of the disability rights movement in Australia and the increasing participation of people with disability in all levels of society. They continue to impose their negative and wrong assumptions about disability when making assessments and fail to take into account government policies such as the ten year waiting period for income support. In our experience the potential costs of medical intervention are exaggerated, with no assessment of the *likelihood* of a person with disability using the services available compared with their *eligibility* for those services. Just because a person with disability is eligible for a service does not mean we will need to use the service - or that it will be available even if it is needed. In NSW there is huge unmet need for services, and people with disability have to wait years for respite, home care, equipment, housing modifications and other services.

In addition, CMOs appear to assess the level of potential medical costs at the high end of the spectrum, without looking closely at the person's medical history. Significant costs for people with disability are defined as 50% above the average per capita health care and community services costs for Australians for five years. This amount is estimated at $16,000 over five years, with 65% likelihood of using services. Evidence shows that these figures are found to be exaggerated when the individual's circumstances are finally considered in detail during their appeal.

The inconsistency between disability assessment criteria and rating percentages also creates confusion and difficulty. To receive a disability support pension, for example, a person needs to demonstrate 20% incapacity, whereas to apply for a carer visa for a relative to come to Australia the person with disability must demonstrate that they have 30% incapacity. Having to demonstrate 30% incapacity rather than 20% means the person with disability has to spend more money on getting specialist assessments - money we cannot usually afford.

3.4 Additional costs

On preferential or other sponsored family applications, for example, to sponsor a child, there are usually additional costs for people with disability. The sponsor may be asked to lodge a discretionary assurance of support which takes into account the sponsor's income and may be hard to meet. If an assurance of support is required, payment of a bond (refundable after two years) involves $3,500 for the principal applicant and $1,500 for each adult over 18 years included in the visa application. A second visa application charge of $960 per person, a non-refundable health services charge (medicare levy) and an English language levy are also required. If the health services charge is really intended to cover health costs, we would be interested to know why DIMIA retains it rather than transferring it to the Department of Health.

In other instances, people who are receiving income support such as a disability support pension are deemed financially incapable of providing an assurance of support for their spouse or other family members and are therefore not eligible to provide one. If people in these circumstances have no other relatives or friends who can provide an assurance of support on their behalf, they have extreme difficulty in getting a waiver if one is required, and this results in their applications being rejected.

A refugee with mild intellectual disability married a woman from his country and applied to sponsor her to live in Australia. He was asked for an assurance of support. He receives a disability support pension and his uncle who sponsored him to Australia is now elderly and also receives income support. As they are very isolated and have no social support networks, they were unable to secure an assurance of support and DIMIA rejected the man's application to sponsor his wife. He is in despair as he feels he will never have his wife join him here in Australia.

3.5 Documentary evidence required

Evidentiary requirements are difficult for refugees who have fled from their countries (no passports, birth certificates, medical history, etc). This makes the process long and frustrating for the person with disability and family members.

C. Adequacy of health care, including mental health care, and other services and assistance provided to people in immigration detention

Delay is the most common difficulty people in immigration detention centres tell us about in receiving health care for physical problems. People wait for a doctor to visit before they can get a headache tablet; they wait weeks for dental treatment, even for acute problems such as an abscess; some people with documented medical conditions wait many months for assessment by a medical specialist unless they have the money to pay for the assessment themselves.

A family which included members with disability arrived by boat seeking asylum and were taken to a detention centre. They remained in detention for several years until their refugee application was finally determined in their favour. The young boys with intellectual disability did not have access to school for a long time and had difficulty getting medication for some medical conditions.

Our experience of people from a NESB who have a mental illness before they are put in detention is limited but it indicates that treatment is a low priority in detention. As the following example illustrates, DIMIA's first priority appears to be to find a way to deport (remove) a person, rather than to provide medical assistance.

A man who had a mental health problem was refused a resident visa and was detained in an immigration detention centre, pending the determination of his appeal against DIMIA's decision. His mental health was not assessed and he was not offered any treatment.

There was a riot at the detention centre one night and the man was very frightened by the noise of the rioters and the guards running up and down outside his room. Because of his mental illness he did not understand what was happening and thought the people in the centre intended to hurt him.

When the guards ran in to get him out of his room he became very agitated and distressed. To escape the harm he feared was about to happen to him he told the guards he wanted to go back to his country. DIMIA staff were informed and the man was deported that night, despite the fact that he had an appeal pending and was obviously very frightened and not thinking rationally.

We have been advocating with DIMIA in a particular matter relevant to this term of reference for the past two years. The matter is also being investigated by the Commonwealth Ombudsman. The main issue is the Minister's refusal, based on DIMIA's advice, to reconsider a decision to cancel the residence visa of a person from a NESB with disability. DIMIA's policy is that the Minister should not reconsider a decision that was lawfully made. Our view is that this policy should not be rigidly applied where there is strong evidence that the decision was made in the absence of important information that may well have resulted in a different outcome, particularly where the effects will have life threatening consequences for the person concerned. We last wrote to the Minister in April 2005 and are awaiting a response.

D. Outsourcing of management and service provision at immigration detention centres

Outsourcing the management of immigration detention centres and the services provided there makes it difficult to hold medical services accountable. We are not aware how they are being monitored by DIMIA and it is not clear whether they have a multi-disciplinary medical team or whether particular services are purchased from different providers.