

A. INTRODUCTION

1. I contracted poliomyelitis at the age of 6 in the 1950s polio epidemic, resulting in lifelong paralysis of both legs. That required the permanent use of crutches and callipers (leg braces), as seen in the image above.
2. Hence my disability significantly pre-dates my 65th birthday.
3. My disability is one normally eligible for coverage by the National Disability Insurance Scheme ("NDIS").
4. However, under the National Disability Insurance Scheme Act 2013, in particular section 22, persons with a disability over the age of 65 are banned from coverage by the NDIS.
5. Moreover such persons are precluded even from applying for NDIS coverage.
6. As a result of the foregoing I have been banned from applying for NDIS coverage, even though the condition is explicitly recognised by the NDIS as an eligible disability.
7. The ban arbitrarily and unfairly deprives me of necessary aids and equipment which others with a like disability receive.
8. I contend that exclusion from coverage under the National Disability Insurance Scheme ("NDIS") of me and other polio survivors over the age of 65 is abusive, unlawfully discriminatory, and is in breach of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD). It denies the victims of the discrimination ("the victims") full and equal access to disability insurance coverage that they would otherwise share with all other Australian citizens, which runs diametrically counter to the promotion of a more inclusive society.
9. That discrimination is flagrant, explicit, and systemic, and constitutes potentially life-threatening ongoing neglect of an entire category of disabled persons, including myself.
10. It is exploitative in that the victims are mulcted for large sums of money for necessary equipment and treatment which would otherwise be provided without cost if the victims were not excluded from coverage under the NDIS.
11. Victims who cannot afford to pay for such necessary equipment and treatment suffer abuse and neglect in that they are deprived of the same to the risk of health, safety and life itself.
12. In particular, it is abhorrent that I and other victims are subjected to a demeaning "welfare" model of assistance for disabilities, which involves attempting to "retrofit" ad hoc

Aged Care Packages not primarily designed for addressing disability, whereas all other age groups among disabled persons have the benefit of an "insurance" model of assistance under the NDIS. NDIS assistance is tailored to the requirements for a given disability, whereas the welfare model is not tailored for disability and involves an arbitrary fixed amount with no heed to actual individual requirements.

Inevitably, therefore, requirements are not met and the result is neglect.

13. The foregoing circumstances undeniably constitute an abuse of my human rights.

14. I contend that infringement of a person's human rights on a deliberately permanent basis is automatically unacceptable.

The NDIS exclusion is permanent and inflexible: there is no sunset clause, and no provision for discretion to mitigate hardship.

15. In an additional infringement, the Age Discrimination Act 2004 was amended by insertion of an exemption in Section 41 (1) (fba), intentionally to forestall complaints against the exclusion from the NDIS, which is a further violation of victims' rights.

B. VIOLATION OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

1. The Preamble to the Convention includes the clause:

"(i) *Recognizing further the diversity of persons with disabilities.*"

2. The NDIS exclusion violates that clause in that it fails to recognise the diversity of ages among disabled persons.

3. Article 1 of the CRPD states :

"Purpose

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by ALL persons with disabilities, and to promote respect for their inherent dignity."

4. Manifestly, the purpose of the Convention is breached by exclusion of an arbitrary category of disabled persons including myself from coverage under a national insurance scheme specific to disabled persons.

5. Article 3(b) specifies non-discrimination as one of the Principles of the CRPD.

6. The exclusion complained of is intrinsically discriminatory and a violation of the Article.

7. Article 5 ("Equality and non-discrimination") provides:

1. *States Parties recognize that all persons are EQUAL before and under the law and are entitled without any discrimination to the EQUAL protection and EQUAL benefit of the law.*

2. *States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities EQUAL and effective legal protection against discrimination on ALL grounds.*

8. In breach of Article 5(1), myself and other polio survivors are deliberately excluded by legislation and I am self-evidently not treated as equal before and under the law.

9. In breach of Article 5(2), I am excluded from an otherwise nationally available benefit by legislation and hence am not guaranteed equal and effective legal protection against discrimination on all grounds.

10. Under Article 25(b) ("Health")

States Parties shall :

(b) Provide those health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;

11. In breach of Article 25(b) I am not provided with those health services needed specifically because of my disability or with services designed to minimize and prevent further disabilities, including among older persons.

C. ADMISSIONS OF INFRINGEMENT OF HUMAN RIGHTS

1. In its Conclusion, the Explanatory Memorandum to the NDIS Bill 2012 states:

"To the extent that it limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long term integrity and sustainability of the National Disability Insurance Scheme."

Hence the statement expressly concedes that the exclusion "limits human rights", with an alleged justification. The validity of that justification is contested hereinbelow. In particular, the Parliamentary Joint Committee on Human Rights (2013) considering the NDIS Bill repeatedly queried the discrimination.

2. The amendment of the Age Discrimination Act 2004 by the insertion of Section 41(1)(fba) to prevent claims arising from the NDIS exclusion is inherently an admission of discrimination, being effectively a "pardon in advance"

D. INVALIDITY OF ALLEGED JUSTIFICATIONS

1. No supporting particulars are given of how exclusion of persons with a disability over the age of 65 ensures "the long term integrity and sustainability of the NDIS".

2. The Attorney-General's Department has issued **Guidelines on Permissible Limitations to Human Rights** ("the Guidelines")^{1[1]} stating inter alia:

The limitation must be aimed at achieving a legitimate objective and also be reasonable, necessary and proportionate. This means the limitation:

- *must be necessary to achieve a legitimate objective*
- *adopt a means that is rationally connected to that objective*
- *those means must be no more restrictive than required to achieve the purpose of the limitation.*

3. In fact, there is not a scintilla of evidence adduced that:

(a) the exclusion limitation is necessary to ensure the long term integrity and sustainability of the NDIS; or

(b) banning me from access to NDIS coverage is necessary to ensure the long term integrity and sustainability of the NDIS.

4. Not a scintilla of evidence is adduced that:

(a) the exclusion is rationally connected to the objective of ensuring the long term integrity and sustainability of the NDIS; or

(b) banning me from access to NDIS coverage is rationally connected to the objective of ensuring the long term integrity and sustainability of the NDIS.

5. Since poliomyelitis survivors are among those to whom the exclusion applies, it is self-evident that the exclusion is more restrictive than required to ensure the long term integrity and sustainability of the NDIS. Many poliomyelitis survivors' disability dates from childhood, being referred to at the time as "Infantile Paralysis", so that they are a cohort of disabled persons whose disability pre-dates by several decades the introduction of the NDIS. Their disability has no origin from or inherent connection with the age of 65. Their numbers are limited and dwindling with time, so that for them to be included under the NDIS could not possibly adversely affect the long term integrity and sustainability of the NDIS.

6. In particular, banning me from NDIS cover is a limitation to my human rights more restrictive than required to ensure the long term integrity and sustainability of the NDIS.

7. In the Guidelines a number of questions are set out for assessing whether a measure limiting a right is reasonable, necessary and proportionate, inter alia:

- *Does a less restrictive alternative exist, and has it been tried?*

^{1[1]} <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>

- *Is it a blanket limitation or is there sufficient flexibility to treat different cases differently?*
- *Has sufficient regard been paid to the rights and interests of those affected?*
- *Does the limitation destroy the very essence of the right at issue?*

7. (a) *Does a less restrictive alternative exist, and has it been tried ?*

A number of less restrictive alternatives to the exclusion exist, including coverage for, inter alia:

- (i) My disability arising from poliomyelitis suffered in the epidemic of the 1950s
- (ii) Disabilities arising from poliomyelitis suffered in the epidemic of the 1950s;
- (iii) Disabilities dating from childhood;
- (iv) Disabilities arising in young adulthood prior to the introduction of the NDIS;
- (v) Disabilities arising prior to the introduction of the NDIS.
- (vi) Disabilities not related to the ageing process.

In fact, none of the foregoing have been tried.

(b) *Is it a blanket limitation or is there sufficient flexibility to treat different cases differently?*

The over 65 exclusion is a blanket limitation, with no exceptions, no allowance for particular circumstances, and no provision for appeal.

(c) *Has sufficient regard been paid to the rights and interests of those affected?*

No regard whatsoever has been paid or is contemplated to be paid to my rights and interests, or of those affected by the blanket ban.

(d) *Does the limitation destroy the very essence of the right at issue?*

Self-evidently in the premises the limitation destroys the very essence of the rights at issue, namely my right to EQUAL protection and EQUAL benefit of the law without discrimination.

9. In 2013 a Parliamentary Joint Committee on Human Rights (PJCHR), chaired by Mr Harry Jenkins, MP, assessed the NDIS Bill and was severely, repeatedly, and insistently critical of both the exclusion itself and the exemption from complaints in relation to it.

The PJCHR addressed its detailed concerns to the then Minister responsible for NDIS, the Hon Jenny Macklin MP.

PARTICULARS of the PJCHR's concerns

Seventh Report of 2013, tabled 5 June 2013

"Information sought by the committee

3.16 The National Disability Insurance Scheme Legislation Amendment Bill 2013 amended the National Disability Insurance Scheme Act 2013 to, among other things, exempt the scheme from the operation of the Age Discrimination Act 2004. The committee sought clarification of why a general exemption from the provisions of the Age Discrimination Act 2004 was justified.

3.20 In the *First Report of 2013*, the committee outlined its concerns that the National Disability Insurance Scheme Bill 2012, which established the framework for the NDIS, limited access to the NDIS to people under 65 years old. The statement of compatibility suggested that this limitation was in accordance with 'the broader intent of an integrated system of support operating nationally and providing seamless transition through different phases of life'.⁵ The committee, however, was concerned that the aged care system may not be designed with the same comprehensive and holistic approach to disability that would underpin the NDIS.

3.22 The committee had, therefore, understood that there would be some equivalence in the forms of assistance and support available between the NDIS and the aged care system, and was accordingly satisfied that the scheme was unlikely to raise significant concerns with regard to the rights to equality and non-discrimination. However, it has since been brought to the committee's attention that the types and level of supports and services provided by DisabilityCare may be inadequately reflected in the aged care system, even taking into account the recent reforms to the system.⁶ These concerns are further exacerbated by the amendments introduced by the National Disability Insurance Scheme Legislation Amendment Bill 2013 to exempt the NDIS from the *Age Discrimination Act 2004*.

3.23 In its *Seventh Report of 2013*, the committee expressed concern about this blanket exemption and asked the former Minister to explain why such an exemption was necessary. In her response, the former Minister acknowledged the committee's concern in relation to the breadth of a general exemption. The response stated that the 'government considered whether a more limited exemption would achieve its policy objective but considered that it would not and chose instead to seek a general exemption from the Age Discrimination Act'. The response did not provide any information as to the nature of the other exemption(s) that were considered.

3.25 The committee accepts that temporary age-based restrictions for the purpose of establishing launch sites are likely to be consistent with the rights to equality and non-discrimination. However, the committee is concerned that the amendments instead introduce a *general and permanent* exemption from the Age Discrimination Act, which is not restricted for the temporary purpose of establishing launch sites. It is also not clear to the committee why the existing provisions in the Age Discrimination Act which enable the Australian Human Rights Commission to determine exemptions on a case by case basis would not be an appropriate and less restrictive alternative to the approach of exempting the Age Discrimination Act in its entirety.

3.26 The committee intends to seek clarification from the Minister as to whether the government had considered this option and if so, why it was not considered suitable.

3.27 The response does not explain whether the government considers that a general exemption from the Age Discrimination Act is necessary to ensure that the exclusion of over 65-year olds from accessing the NDIS does not constitute unlawful age discrimination under the Act. The committee accepts that the NDIS needs to be financially sustainable to be workable and that the government intends for there to be a 'seamless transition' between the NDIS and the aged care system. The committee is, however, concerned, in light of the information received, that there may be substantial differences between the supports provided to individuals in the aged care system compared to those on the NDIS, which could result in the inequitable treatment of people over 65 years old who acquire a disability."

10. In her letter of response to the Committee's criticisms the Minister failed even to attempt any justification for the exclusion. Insofar as she adverted to it, she stated that " The general exemption from the Age Discrimination Act only applies to acts done in direct compliance with the NDIS Act", without providing any reasons for the exemption.

E. CONCLUSION

In the premises the exclusion from NDIS is unjustifiably discriminatory and unlawful.

The irrationality of the exclusion is illustrated by the logical inconsistency evinced by "justifications" occasionally advanced. For example, it is simultaneously argued that

- (i) it would be too expensive to include in the NDIS polio survivors and other disabled persons over 65; and
- (ii) the Aged Care programme provides a "seamless transition" with respect to NDIS coverage, implying a form of equal treatment.

But if it is really true that it saves a significant sum of money to exclude over 65s and confine them to Aged Care, then over 65s must be getting much less disability assistance than they would if covered by NDIS.

Therefore the claimed "seamless transition" between Aged Care and the NDIS must be false.

In fact, I have direct experience of the inadequacy of the Aged Care system in respect of resources for equipment and treatment for my disability.

On the other hand, if indeed the Aged Care programme provides a "seamless transition" with respect to NDIS coverage, then it would not save a significant sum of money to exclude over 65s NDIS and confine them to Aged Care.

In any event, it is now acknowledged that the cost of covering people with a disability pre-dating the age of 65 is affordable, and would not affect the sustainability of the NDIS.

Specifically, I contend that allowing me access to NDIS coverage would have no significant effect on the sustainability of NDIS.

Further, the exclusion is unconscionable in that it imposes severe unnecessary hardship upon me and other polio survivors in particular through no fault of their own. It is especially

mean-spirited given that polio survivors are a numerically limited closed set of persons, a dwindling cohort in fact. For government to "wait them out", banking on mortality over time to rid it of people it unfairly condemns as a burden is clearly unacceptable conduct.

F. REMEDIES SOUGHT

- (1) I be allowed coverage under the NDIS.
- (2) I be assessed for NDIS coverage solely on the basis of my disability
- (3) I be assessed for NDIS coverage with no regard to age or any other discrimination.
- (4) The National Disability Insurance Scheme Act 2013 be amended to remove the exclusion of persons over the age of 65; or
- (5) The National Disability Insurance Scheme Act 2013 be amended so that polio survivors over the age of 65 are eligible to apply for coverage under the National Disability Insurance Scheme; or
- (6) The National Disability Insurance Scheme Act 2013 be amended so that persons with a disability over the age of 65 are eligible to apply for coverage under the National Disability Insurance Scheme; or
- (7) Polio survivors be entitled to apply for NDIS coverage and be assessed on a case-by-case basis; or
- (8) Persons with a disability over the age of 65 be entitled to apply for NDIS coverage and be assessed on a case-by-case basis.

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