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Disability Royal Commission

Post Polio Victoria Inc.

Submission Against the Exclusion of Polio Survivors from the NDIS

Section 22 of the National Disability Insurance Scheme Act 2013 ("the NDIS Act") excludes disabled persons over 65 from coverage under the National Disability Insurance Scheme ("NDIS"). They cannot even apply for NDIS coverage.

Many poliomyelitis survivors' disability dates from childhood, during the Polio Epidemic of the 1950s. It was labelled "Infantile Paralysis", being a disability specific to a very young age, totally unrelated to the age of 65.

For those historical reasons many polio survivors were over 65 when the NDIS was introduced, but their disability pre-dates by several decades the introduction of the NDIS.

Accordingly, it is inappropriate and illogical to ban such polio survivors from the NDIS, given that their disability is not related to older age, and in particular has nothing to do with the age of 65.

PPV submits that the exclusion of those polio survivors from the NDIS is abusive, unlawfully discriminatory, and violates the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD). The exclusion 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.

That discrimination is flagrant, explicit, and systemic, and constitutes potentially life-threatening ongoing neglect of an entire category of disabled persons.

It is exploitative in that the victims have large sums of money extracted from them for necessary equipment and treatment which would otherwise be provided without cost if the victims were not excluded from coverage under the NDIS.

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.

In particular, it is abhorrent that the victims are subjected to a "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.

The ban imposed on polio survivors undeniably constitutes an abuse of their human rights.

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.

PPV submits that the ban is unlawful in that it violates the letter and the spirit of the CRPD, as instanced in the Articles below.

Article 1 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."

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

Article 3(b) specifies non-discrimination as one of the Principles of the CRPD. The exclusion complained of is intrinsically discriminatory and a violation of the Article.

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.

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

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

In fact, the breach of human rights is formally and explicitly admitted in the Conclusion of the Explanatory Memorandum to the NDIS Bill 2012:

"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 justification is invalid, as pointed out extensively and repeatedly in the Parliamentary Joint Committee on Human Rights (2013) when it analysed the NDIS Bill.

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

PPV notes that in the Explanatory Memorandum 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".

The Attorney-General's Department has issued Guidelines on Permissible Limitations to Human Rights ("the Guidelines") stating inter alia that:

"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. "*

In fact, no evidence has ever been produced that the exclusion limitation is necessary to ensure the long term integrity and sustainability of the NDIS.

No evidence has been produced that the exclusion is rationally connected to the objective of ensuring the long term integrity and sustainability of the NDIS.

Further 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:

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

In fact, none of the foregoing have been tried.

(2) *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.

(3) *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 the rights and interests of those affected.

(4) *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 the right to EQUAL protection and EQUAL benefit of the law without discrimination.

Conclusion

It is undeniable that the exclusion of polio survivors from the NDIS is harshly discriminatory.

The exclusion is moreover unlawful in that it flagrantly violates the provisions of the United Nations *Convention on the Rights of Persons with Disabilities*.

It is not reasonable, necessary or proportionate, and hence the violation is not justifiable.

Further, the exclusion is unconscionable and abusive in that it imposes severe unnecessary hardship upon polio survivors through no fault of their own. It is especially mean-spirited given that the polio survivors affected 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 apparently condemns as a burden is clearly unacceptable conduct.

Accordingly, Post Polio Victoria calls for :

- A. Polio survivors to be eligible for NDIS coverage without any age limits.
- B. Amendment of the NDIS Act to remove the age requirement for NDIS coverage
- C. Repeal of Section 41(1)(fba) of the Age Discrimination Act.

Drafted by Dr P Freckleton
On behalf of
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