



FOR GENERAL DISTRIBUTION

United Nations Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD) is an international treaty that identifies the rights of persons with disabilities as well as the obligations on States parties to the Convention to promote, protect and ensure those rights. The Convention aims to ensure that persons with disabilities enjoy human rights on an equal basis with others.

The Convention and its Optional Protocol were adopted by the United Nations General Assembly in December 2006. Australia was one of the first nations to sign the convention when it opened for signatures on the 30th March 2007. The current Australia government ratified the convention on 18th July 2008, making it one of the first the first nations to ratify the convention.

The Convention also establishes two implementation mechanisms: the Committee on the Rights of Persons with Disabilities, established to monitor implementation, and the Conference of States Parties, established to consider matters regarding implementation. States that ratify the Convention are legally bound to respect the standards in the Convention. For other States, the Convention represents an international standard that they should endeavour to respect.

Australian support for the convention has been strong, both from the previous and current government. Despite being an active participant and leader in the development of the convention, Australia has attracted criticism for its decision to submit an interpretive declaration in relation to the immigration health requirement when it ratified the convention on July 18 2008.

Optional Protocol

The Optional Protocol establishes two procedures aimed at strengthening the implementation and monitoring of the Convention. The first is an individual communications procedure allowing individuals to bring petitions to the Committee claiming breaches of their rights; the second is an inquiry procedure giving the Committee authority to undertake inquiries into grave or systematic violations of the Convention.

Purpose of the Convention

The convention does not create any new human rights, but rather expresses existing rights in a manner that addresses the needs of people with a disability. The convention specifies the practical obligations that States Parties are required to implement in order to afford people with disability their pre-existing substantive human rights on an equal basis with others.

Article 5 (Equality and non-discrimination) – recognizes that all persons are equal before the law; requires States Parties to prohibit all discrimination on the basis of disability; and guarantees to persons with disabilities equal and effective legal protection against discrimination on all grounds. It has been suggested that this Article may be in conflict with current Australian immigration policy.

Other Articles in the convention include: Article 6 (Women with disabilities) – highlighting the multiple discrimination faced by women and girls with disabilities, Article 7 (Children with disabilities), Article 8 (Awareness-raising), Article 13 (Access to justice), Article 19 (independence and social inclusion) and Article 25 (Health).

Most of the rights described are covered in existing laws, such as the Disability Discrimination Act. However, Article 18, the right to freedom of movement and nationality, suggests that rejecting immigration applications from people solely on the basis of their disability or HIV status could be challenged. In Australia, and particularly for people with HIV in other countries without broad human rights protections, this is a significant change.

Definition of Disability within CRPD - 'A Paradigm Shift'

The convention marks a 'paradigm shift' by utilising a 'social model' of disability. This model sees disability as 'an evolving concept' resulting from 'the interaction between persons with impairments and attitudinal and environmental barriers that hinders full and effective participation in society on an equal basis with others.'¹

The Convention defines disability as including: 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.' Article 1 includes a brief but broad list of the types of persons with disabilities who are covered by the Convention. This list is 'non-exhaustive', meaning that there are no restrictions on the Convention being applied to additional persons with disabilities, e.g. those with temporary or intermittent disabilities or chronic illness, such as HIV.

The Australian Migration Act and Exemption from the Disability Discrimination Act and CRPD

The Migration Act 1958 is currently exempt from the Disability Discrimination Act 1992 (as per section 52 of the DDA), and thus refugees and migrants with disability are not offered the same protections from discrimination that apply to other areas of Australian law. This exemption was implemented as a safeguard against 'excessive social and economic costs' that could result from a non-discriminatory immigration policy.

Potential migrants and refugees to Australia are subject to a health assessment in order to determine their eligibility. Migrants and refugees with disability are routinely refused entry to Australia as a result of an assessment of the potential health costs associated with their illness (including HIV) or disability. This also means that many families supporting people with disability make a difficult decision to leave behind a partner or other family member in order to build a life in Australia.

Migrants with disability granted visa status (except for those immigrating on humanitarian grounds) must also wait ten years before being eligible for the Disability Support Pension (DSP). Eligibility for DSP affects eligibility for other programs, such as essential disability services and equipment. As a result, migrants with disability are unable to access appropriate financial support, or a range of services and support that are available to other Australian residents with disability.

Legal Advice: Conflict with the Migration Act and CRPD

Legal Advice that the National Ethnic Disability Alliance (NEDA) sought from Barrister Dr Ben Saul (Director, Sydney Centre for International Law) in May 2008 concluded that health requirements of the Australian Migration Act, while not expressly targeting people with a disability, present insurmountable obstacles to a large number of potential migrants whose disability, or chronic illness, requiring costly treatment. Such requirements could therefore be seen as impeding respect for their dignity and right to equal treatment at law, including under immigration law.

The findings of the advice are summarised below.

1. Health requirements under migration law are in principle permissible under human rights law in order to safeguard scarce medical resources.
2. However, the current health assessment may give rise to unjustifiable indirect discrimination against refugees and migrants with disability, and thus does not comply with the equal protection obligation under Article 5 of the UN CRPD.
3. Indirect discrimination against refugees and migrants with disability may occur because the threshold of the health test is set too low to adequately balance the interests of non discrimination against people with disability with the preservation of scarce health resources. Thus, in some cases the health assessment may lead to discrimination that is not proportionate to the policy objective of preserving health resources for all Australians.
4. Indirect discrimination against refugees and migrants with disability may also occur because the evidentiary requirements are not sufficiently strong, for example in relation to accurately quantifying the future costs to the community of illness or disability.

1. CRPD Preamble

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5. Finally, indirect discrimination against refugees and migrants with disability may occur by inadequate procedures to take into account an applicant's ability to pay for the costs attributable to their own disability or illness.
 6. The 10 year waiting period for the Disability Support Pension interferes with human rights to an adequate standard of living and to social protection under article 28 of UN CRPD, the right to health under article 25 of UN CRPD and may in certain circumstances be contrary to inhuman and degrading treatment provisions in article 15 of UN CRPD.

The legal advice makes a comparison between the Migration Act and Canadian law, where exclusion is permitted if a condition would cause 'excessive' demands on health or social services. In Australia exclusion applies to conditions that might impose 'significant cost' on healthcare and community services. The Canadian also scheme requires two or more concurring medical opinions, whereas Australia requires just one.

The Canadian health test is, therefore, more likely to satisfy the Disability Convention's requirement of an objective and reasonable justification for interference with equal protection, which provides the means for balancing the competing interests of non-discrimination against the disabled and the preservation of health resources in Australia.

Australia's Interpretive Declaration – 'A missed opportunity'

Australia's migration health requirement was the subject of some discussion prior to ratification. The Australian Government National Interest Analysis noted that despite the exemption of the health test requirements from the *Disability Discrimination Act 1992*, that "the processes apply to all applicants, are based on legitimate, objective and reasonable criteria and would not constitute discrimination under international law."²

However, the Australian Government eventually took the step of issuing an interpretive declaration in relation to the migration health requirement, when the UN CRPD was ratified. The wording of the declaration is as follows:

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.

NEDA has stated that "it remains unclear why a strongly worded declaration was needed if it were indeed the case that Australia's health requirements "would not constitute discrimination under international law." NEDA has described Australia's Interpretive Declaration as a missed opportunity for positive reforms that would improve opportunities and fairness for people with disability.

NEDA and the Federation of Ethnic Communities Councils of Australia (FECCA) have called for the Australian Government to commit to law reform in the areas of migration and social security policy affecting refugees and migrants, as part of the implementation plan for CRPD.³

Additional Resources

CRPD: <http://www2.ohchr.org/english/law/disabilities-convention.htm>

Optional Protocol: <http://www2.ohchr.org/english/law/disabilities-op.htm>

NEDA: http://www.neda.org.au/files/refugees_and_migrants_with_disability_and_un_crpjuly_2008_final_2.pdf

Guide to deciphering the CRPD: <http://www.icrpd.net/implementation/documents/en/ImplTK-Sec3dft5.pdf>

³ NEDA: Refugees and Migrants with Disability and the United Nations Convention on the Rights of Persons with Disabilities July 2008