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12th October 2009

**Joint Standing Committee on Migration
Review of Health Assessments
in light of Australia's Ratification of
Convention on the Rights of Persons with Disabilities**

**Mr. Michael Danby MP
Chairperson
Joint Standing Committee on Migration
Parliament House
Canberra Australia**

Dear Michael,

The Australian Federation of Disability Organisations is the National voice of People with Disability formed in 2003 and we represent the interests of all people with disability across Australia. The mission of AFDO is to champion the rights of people with disability in Australia and help them participate fully in Australian life.

We are a cross-disability human rights organisation and comprise of key National diagnostic and State disabled peoples organisations.

- Blind Citizens Australia
- Brain Injury Australia
- Deaf Australia
- Deafness Forum Limited
- National Association of People living with HIV/Aids
- National Council on Intellectual Disability
- National Ethnic Disability Alliance
- Physical Disability Australia
- Women with Disabilities Australia
- Disability Resources Centre
- People with Disabilities (Western Australia)
- Access for All Alliance

- **The Australian Mental Health Consumer Network have dissolved and are currently reforming a national network of mental health consumers.**

At the World Assembly of Disabled Peoples' International in Korea October 2007, the Australian DPI Membership was transferred to AFDO to continue the excellent International work of previous representatives. In June 2008 the AFDO Board appointed new International Representatives, Dr David Webb and Ms Samantha French who both have extensive disability rights involvement both here in Australia and internationally.

AFDO and our members participated in the development of the Convention on the Rights of Persons with Disabilities here in Australia and at the United Nations in Bangkok and New York. Our members have been very active in the International Disability Caucus (IDC) which coordinated the activities of Disabled Peoples Organisations at the Convention Adhoc meetings and between meetings. A key element of the IDC's and AFDO's activities is the full implementation of Human Rights for People with Disability.

During the development of the Convention from 2001-2006 AFDO conducted a series of national consultations for Federal Government to ascertain the views of Australians with Disability. From 2003-2006 our member the Disability Australia conducted a series of 28 workshops on the development of the Convention across Rural Victoria and Metro Melbourne. At the beginning of 2008 we again consulted the Australian Disability community for Government regarding the National Interest Analysis for Australia's ratification of the Convention. Further our members have contributed to the recent Hearings of the Joint Standing Committee on Treaties.

At all these consultations of the Australian Disability Community overwhelming participants called for a paradigm shift in Australia's approach to disability from a medical/charity/welfare model to a human rights framework where exemptions and limitations are no longer tolerated. In February 2008 at the National Consultations for CRPD Ratifications held in Melbourne, Brisbane and Sydney and the online submissions were unanimous in their call for Australia to ratify the Convention and Optional Protocol and fully implement all the rights prescribed. Further in their submissions to JSCOT Hearings on ratifying the Convention all our members called for the removal of all exemptions in Australian law as they directly conflict with this human right convention, particularly the migration exemption to the Disability Discrimination Act.

The Centre on Human Rights for People with Disabilities Ireland commissioned this report by Dr Jean Allain, Reader in Public International Law in the School of Law, Queen's University Belfast, on Treaty Interpretation and the UN Convention on the Rights of Persons with Disabilities 2009.

This Report is aimed at increasing understanding of:

- the principles underlying;
- the implications of;
- possible methods of working with

“Article 31(1) of the Vienna Convention on the Law of Treaties reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

“. . . the requirements to interpret a treaty ‘in context’ creates a unique situation where the CRPD is concerned. Interpreting ‘in context’ requires that one read the specific provision in light of the overall treaty. Where the CRPD is concerned, its unique character mandates an approach which turns to the ‘object and purpose’ as these are given voice, in part, through Article 3 which set out the Convention’s ‘General Principles’, as follows:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;”

“Affirmation of Rights

The Convention on the Rights of Persons with Disabilities affirms a number of rights already recognised through established human rights instruments, including:

- the right to life (Art. 10);
- equality before the law (Art. 12);
- liberty and security of the person (Art. 14);
- freedom from torture (Art. 15);
- freedom of movement (Art. 18);
- freedom of expression (Art. 21);
- right to privacy (Art. 22);
- education (Art. 24);
- health (Art. 25);
- housing (Art. 26);

- work (Art. 27);
- adequate standard of living (Art. 28);
- political participation (Art. 29).”

“Prescribed Obligations

The CRPD is unique as a human rights treaty in the manner in which it prescribes the obligations which States Parties are to undertake. Those obligations, in general terms, are spelled out in Article 4, but are then given voice through the provisions of the Convention. While leaving it to States to take ‘appropriate measures’, the Convention calls on States Parties to:”

Among other requirements to

“repeal legislation (Art. 4(1)(b) – General Obligation);”

This is particularly important regarding the migration exemption from the Disability Discrimination Act which denies all checks and balances in applying any assessments.

In November 2008 AFDO was engaged by FaHCSIA to consult on the National Disability Strategy. Our members and the participants of the National Consultations were particularly concerned about “Migration law and the discriminatory restrictions on persons with disability migrating to Australia, and the denial or restriction of social security benefits and support services to migrants with disability.”

The participants cited an extensive range of benefits of ratification of the CRPD without discriminatory interpretations, and these included:

- The CRPD is a comprehensive statement of the human rights of persons with disability; it illustrates how human rights are to be applied in relation to persons with disability; it recognises social development needs as comprehensively as it does civil and political rights;
- The CRPD encapsulates a paradigm shift away from a conceptualisation of persons with disability as objects of pity, subjects of welfare systems, and burdens on the community, to right bearers with equal status to others;
- The CRPD will make the human rights of persons with disability more visible to government and the community, improving the social status of persons with disability;
- The CRPD will raise awareness of human rights among persons with disability, enhancing their self-concept and self-esteem;

- **The CRPD will promote the inclusion and participation of persons with disability in Australian society; it will promote social cohesion;**
- **The CRPD provides a new level of national and international accountability on governments and the community to respect, protect and fulfil the human rights of persons with disability;**
- **The CRPD will bring a new and more positive human rights based focus on persons with disability by governments and the community – one that is not restricted to arguments about funding and services, which tend to diminish the dignity and status of persons with disability;**
- **The CRPD must stimulate a major review and reinvigoration of disability policy, and policy compliance, in Australia;**
- **The full implementation of the CRPD without exemptions or interpretation will assist Australia to resume its position as an international leader in the recognition and respect of human rights, which has been compromised over the past decade. In particular, it will assist Australia to reposition itself as a leader in human rights in its immediate region;**
- **The CRPD will result in higher levels of disability policy and program cooperation and integration, and greater equity in lived experience, across all Australian jurisdictions;**
- **The CRPD will improve the self-concept and self-esteem of persons with disability, by interpreting them as right bearers and full citizens, rather than as objects of pity and charity, the subjects of welfare, and burdens on their families and communities; it also challenges the ‘medical model’ of disability and asserts the much more positive and empowering ‘social model’ of disability;**
- **The CRPD will result in more positive attitudes towards persons with disability in the community generally; in the eradication of prejudice and stereotypes; and in increased appreciation of the actual and potential contribution of persons with disability to community life;**

Any interpretation that the Convention can continue to allow discriminatory assessments by Migration medical personnel as to the extra cost of disability is a breach of human rights. These medical personnel have no specialist expertise in the provision of disability services and its costs other than the outdated stereotype that all persons with disability are a burden on society and must be locked away in institutions. These medical personnel do not make their assessments available to the people they are assessing or to Advocacy

Organisations supporting these person. In fact there is doubt that a comprehensive assessment detailing the extra cost of disability compared to the cost to the community of a non-disabled person is ever undertaken.

In their submission to the JSCOT Hearings on ratification of the CRPD the National Ethnic Disability Alliance (NEDA) (a founding member of AFDO) is the peak National Organization representing people of Ethnic heritage, presented the following arguments against the continued discriminatory assessments on the grounds of the supposed financial burden of persons with disability to Australian Society.

“The recent Australian ratification of the United Convention on the Rights of Persons with Disabilities (UN CRPD) has created an opportunity for positive reform of Australian law.

In some cases, forms of discrimination, direct or otherwise, are justifiable where community hardship – such as excessive social and economic costs – may result from the application of non discriminatory principles. This has previously been the justification for the exemption of the *Migration Act 1958* from the *Disability Discrimination Act 1992*. The final report of the 2004 Productivity Commission *Review of the Disability Discrimination Act 1992* thus argued that:

The criteria for Australia’s various visa entry categories are designed to address a wide range of health, labour market, social welfare, financial and other government policy considerations. They are, by nature and design, discriminatory. Some of these criteria may indirectly discriminate against some people with disabilities, in that they will be less likely to meet the criteria than people with no disability.

Our report provides a summary of potential inconsistencies between UN CRPD and current law and policy affecting refugees and migrants, based upon legal advice provided by Barrister Dr Ben Saul, Director, Sydney Centre for International Law sought by NEDA in early 2008.

The key findings of this legal advice are:

- a. That the current Australian migration health test is at odds with the equal protection obligation under Article 5 of UN CRPD, leading to unjustifiable indirect discrimination for some refugees and migrants with disability.

That the ten year waiting period for the Disability Support Pension under the Social Security Act 1991 (Cth) interferes with human rights under Articles 28, 25 and 15, relating to standard of living and social protection, health and inhuman or degrading treatment.”

We would request you study this comprehensive report located at [www.neda.org.au/page/refugees and migrants with disability.html](http://www.neda.org.au/page/refugees%20and%20migrants%20with%20disability.html)

NEDA has many examples of where this discrimination has had severe effects on individuals and families to the point of desperation and loss of live.

These cases have not only shocked the Australian Community who deeply believe in a “fair go” for all, but also the World Community which believes Australia to be a tolerant society. The negative approach to Human Rights of the Howard years has greatly impacted on our international reputation as a tolerant society and the Rudd Government needs to assert their leadership over a conservative bureaucracy which sees the implementation of a human rights framework as an impediment to their anonymity.

The Joint Standing Committee on Treaties in it’s Report 95 of 16th October 2008 notes;

“The Attorney-General’s Department informed the Committee that the Government has also made a declaration setting out Australia’s understanding of the interaction between the Convention and Australia’s immigration processes. The declaration clarifies that Australia’s immigration processes are in full compliance with the Convention.

Australia recognises 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.”

“The Attorney-General’s Department has assessed that Commonwealth, State and Territory legislation, policies and programs comply with Australia’s immediately applicable obligations and substantially implement the progressively realisable obligations in the Convention. These include: anti-discrimination legislation. Accordingly, there were considered to be no significant financial or regulatory obstacles to ratifying the Convention.”

“The Committee considers that in the light of the ratification of the Convention, it would be timely to carry out a thorough review of the relevant provisions of the Act and the administrative implementation of migration policy to ensure that there is no

direct or indirect discrimination against persons with disabilities. Ratification of the Convention provides an opportunity to resolve any inconsistencies and effect positive reforms.”

“The Committee has also recommended that binding treaty action be taken on the United Nations Convention on the Rights of Persons with Disabilities. The Convention obliges governments to eliminate discrimination against the disabled in a range of areas. The Committee recommends:

- that a review be carried out of the relevant provisions of the Migration Act, and the administration of migration policy, **to ensure that there is no discrimination against persons with disabilities in breach of the Convention.”**

It is obvious that the Committee, after examining the evidence detailed above from Non-Government Organisations and the statement from Attorney Generals that there are no significant financial costs, were sufficiently concerned with the discriminatory assessment of a supposed cost of disability on migrants and refugees with disabilities and their families to request this procedure be reviewed.

More recently the UK Parliamentary Joint Committee on Human Rights reported;

“64. There is nothing in the Convention which would grant additional rights to people with disabilities in respect of the right to enter or remain in the United Kingdom. The only positive requirement of the Convention is that State Parties shall recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others (Article 18, emphasis added). This may include a requirement to make reasonable accommodation for people with disabilities, including making appropriate modification and adjustments not imposing a disproportionate burden on the State if needed in a particular case, to ensure to persons with disabilities the equal enjoyment of the right to liberty of movement. However, in our view, the obligation to make reasonable adjustments is one familiar to all public authorities in the United Kingdom. Adjustments or modifications do not create new rights, but enable disabled people to exercise the same rights as everyone else without discrimination.

65. We are particularly concerned about the Government's proposal that this reservation may be necessary in order to deal effectively with public health emergencies. We agree with a number of our witnesses that the Government already has broad powers to deal with public health emergencies and to control entry into the United Kingdom for the purposes of protecting public health.[61] We considered these powers

most recently in our scrutiny of the Health and Social Care Act 2008, which provided for the wide-spread reform of the Government's powers to deal with risks to public health.[62] These powers apply to all people, regardless of whether they have disabilities or not. In our view, there is nothing in the Convention which would require an amendment to the existing law or which could limit its effectiveness. We agree with a number of witnesses who wrote to tell us that this amendment appeared to conflate disability with the risks posed to public health by disease. We consider that this approach illustrates an unfortunate lack of awareness of the rights of people with disabilities.

68. We are concerned that the Government is pursuing a broad, general reservation related to immigration control. The Government has not provided an adequate explanation of its view that the proposed reservation is necessary. In any event, we consider that there is nothing in the Convention or in domestic law which could justify a reservation of the breadth proposed.

69. Read literally, this reservation could disapply the Convention in its entirety in so far as its protection might relate to people subject to immigration control. In our view, this is incompatible with the object and purpose of the Convention and does not constitute a valid reservation.

70. We recommend that the Government abandon this reservation. We consider that it is both unnecessary and inconsistent with the object and purpose of the Convention."

<http://www.publications.parliament.uk/pa/jt200809/jtselect/jtrights/70/7002.htm>

Decisions by the Australian Government to reject the Visas of Dr Mueller and Dr Abdi breach Articles 5 Equality and Non-discrimination and Article 18 Liberty of Movement of the United Nations Convention and we should hang our heads in shame for such discriminatory actions. It seems we haven't learnt from the previous Immigration blunders as we still making the same discriminatory mistakes.

Last year the Australian Government attended the first Conference of State Parties for the Convention in New York and presented itself as a world leader in human rights for people with disabilities, yet we still force people to leave Australia because of their disability.

Since the Disability Discrimination Act was created in 1992, all Federal Governments have continued to exempt migration from the protection of this Act. This exemption has continued so Government has not had to prove that if there are any extra costs that this would subject the Federal Government to "unjustifiable financial hardship".

Progressive Federal and State Government Policy since the mid 1970's including State Equal Opportunity Acts, the Disability Discrimination Act and it's Standards on Transport, Education and Communication and now the Convention on the Rights of Persons with Disabilities have

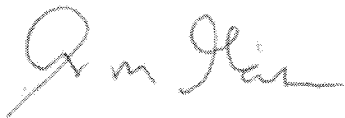
thrown out the notion of segregation, institutionalised living and services. In fact society now expects people with disabilities to have opportunities to go to their local school, High School, University, to get a job, live in the local community and raise families. Any people with disability who come to Australia through the migration process are seamlessly integrated into Australian Society as very small part of the 20 percent (4 million) of the Australian population who have a disability.

Therefore we demand that these assessments in the Migrations Act, Regulations and Procedures must be immediately removed.

Thank you for your time. If you need any further information please contact me 03 9662 3324.

We look forward to hearing from you.

Yours Faithfully,

A handwritten signature in cursive script, appearing to read 'Lesley Hall', written in dark ink.

Lesley Hall
CEO
Australian Federation of Disability Organisations