

Inquiry into migration treatment of disability

Submission to the Joint Standing Committee on Migration

Submission by the NSW Young Lawyers Human Rights Committee

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This submission of the NSW Young Lawyers Human Rights Committee ("NSWYLHRC") will make a few general comments and observations about the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (Cth) from a human rights and international law perspective.

1. At the outset, it is worth noting that the National Human Rights Consultation recommended in its report that the Federal Government should conduct a priority audit of immigration laws to ensure their compliance with Australia's human rights obligations.¹ This recommendation was made in light of the numerous submissions which raised concerns about the exemption of the *Migration Act 1958* (Cth) from the *Disability Discrimination Act 1992* (Cth).
2. On 17 April 2008 Australia ratified the *Convention on the Rights of Persons with Disabilities*² ("Disabilities Convention"). The *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) inserted an explicit reference to the Disabilities Convention in s 12(8)(ba) of the *Disability Discrimination Act* (Cth) ("DDA"), thus incorporating the Disabilities Convention into Australian domestic law.³
3. The purpose of the Disabilities Convention is

¹ National Human Rights Consultation (2009), *National Human Rights Consultation Report*. Accessed on 4 October 2009 from:

http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Report_NationalHumanRightsConsultationReportDownloadas#pdf.

² Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008). Australia ratified the *Convention on the Rights of Persons with Disabilities* on 17 July 2008 and it entered into force for Australia on 16 August 2008.

³ Schedule 2 pt 1 item 20 of the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth).



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

This is in line with the Australian Government's espoused policy of social inclusion.⁵

4. In supporting the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008, the Honourable Bill Shorten, Parliamentary Secretary for Disabilities and Children's Services, noted:

What ... disables people with impairment are the attitudes within the community at large which focus solely upon a person's impairment and not upon a person's ability. I believe, and the Rudd government believes, that this sits badly in our democracy I do not think it is too much to ask that people with an impairment be given a fair go.... Prejudice against people with an impairment is born of ignorance and a lack of empathy with the experiences of others.⁶

5. In his Second Reading speech, speaking of the Coalition's support for the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, Senator Fifield stated:

A person with a disability has the entitlement to participate in the community and the workforce. And a person with a disability,

⁴ *Convention on the Rights of Persons with Disabilities*, Article 1, accessed on 4 October 2009 at: <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

⁵ The Hon Bill Shorten, The House of Representatives, *Second Reading Speech Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, 11 February 2009 at 974 accessed on 4 October 2009 at: http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2009-02-11/0085/hansard_frag.pdf;fileType=application%2Fpdf.

⁶ The House of Representatives, *Second Reading Speech Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, 11 February 2009 at 974 accessed on 4 October 2009 at: http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2009-02-11/0085/hansard_frag.pdf;fileType=application%2Fpdf.

with the right support, can make full use of their skills, their talents and their capacities.⁷

These comments are significant as they reiterate the importance of full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities.

6. Submissions made to the Joint Standing Committee on Treaties regarding the Disabilities Convention were said to be overwhelmingly supportive of ratification, noting this would "promote human rights for persons with disabilities."⁸ Concerns were raised about the exemption of the *Migration Act 1958* (Cth), all regulations made under that Act and the administration of that Act from the DDA.⁹
7. In ratifying the Disabilities Convention on 17 July 2008, Australia made a number of declarations including:

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.¹⁰

In giving evidence at a public hearing of the Joint Committee on Treaties, the Attorney-General's Department stated:

⁷ The Senate, *Second Reading Speech Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008*, 25 June 2009 at 4314 accessed on 4 October 2009 at: http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2009-06-25/0191/hansard_frag.pdf;fileType%3Dapplication%2Fpdf.

⁸ HREOC Submission cited in Joint Standing Committee on Treaties, *Report 95: Treaties Tabled on 4 June, 17 June, 25 June and 26 August 2008*, paragraph 2.27 accessed on 4 October 2009 at: <http://www.aph.gov.au/house/committee/jsct/4june2008/report1/fullreport.pdf>.

⁹ Section 52 *Disability Discrimination Act* (Cth). See *Report 95*, Note 4, paragraph 2.34 ff.

¹⁰ See: <http://www.un.org/disabilities/default.asp?id=475> accessed on 4 October 2009.



[w]e consider that we do comply with those obligations under the convention. The process of immigration procedures apply equally to all applicants. They are also based on legitimate objective and reasonable criteria and our view is that they would not constitute discrimination in international law.¹¹

8. In 2008, Dr Bernhard Moeller's family's application for permanent residency was refused by the Department of Immigration and Citizenship. A Commonwealth medical officer assessed that Dr Moeller's 13-year-old son, Lukas, would incur significant public health and community care costs due to his Down Syndrome. This decision was upheld on appeal by the Migration Review Tribunal. Senator Evans was then asked to intervene and granted the family permanent visas because of the valuable contribution they were making in their local community.¹²
9. In a joint press release with the Honourable Bill Shorten, Senator Chris Evans acknowledged:

this family's case highlighted concerns that the health requirement only considers the estimated cost to the public health system along with state-related costs such as special educational needs and community care and does not recognise a person's ability or what they can contribute to the community.¹³
10. These are concerns that have been raised by others on several occasions.¹⁴ Mr Shorten also stated "it was important that immigration policies did not adversely impact on people with disabilities."¹⁵

¹¹ Mr Peter Arnaudo, cited in *Report 95*, Note 7, footnote 42.

¹² "Terms of reference for migration and disability inquiry announced," 15/5/2009, accessed on 4 October 2009 at: <http://www.minister.immi.gov.au/media/media-releases/2009/ce09039.htm>.

¹³ Note 12.

¹⁴ *Report 95*, Note 7, paragraph, footnote 37; Productivity Commission, *Review of the Discrimination Act 1992 – Productivity Commission Inquiry Report*, Vol 1, Report No 30, 30 April 2004, Box 12.4 (at 421) accessed on 4 October 2009 at: http://www.pc.gov.au/___data/assets/pdf_file/0010/39655/dda1.pdf.

¹⁵ Note 12.

11. The NSWYLHRC strongly believes in the “full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and the promo[tion of] respect for their inherent dignity.” As stated in the preamble to the Disabilities Convention, “discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person.”¹⁶
12. The NSWYLHRC is strongly concerned by the expansive exemption of the *Migration Act 1958* (Cth) and all regulations made under that Act, as well as anything done by a person in relation to the administration of that Act from the operation of the DDA.¹⁷ As barrister and academic, Dr Ben Saul notes, citing the Productivity Commission’s Review of the Disability Discrimination Act, “a primary purpose of the DDA exemption is to ensure that the criteria for assessing visa applicants are not discriminatory under the DDA.”¹⁸ Such an expansive exemption has been repeatedly criticised¹⁹ and undermines the inherent dignity and worth of the human person. The NSWYLHRC calls for an end to this exemption.
13. In legal advice provided on the Disabilities Convention,²⁰ Dr Ben Saul notes that the Disabilities Convention “does not confer any right upon a disabled non-citizen to enter a foreign country, nor is such a right available under general international law.”²¹ However, “where a State chooses to legislate to provide for the entry and stay of non-citizens, such laws, (including health requirements as in the *Migration*

¹⁶ Note 3, Preamble (h).

¹⁷ Section 52 *Disability Discrimination Act 1992* (Cth).

¹⁸ Joint Standing Committee on Treaties, 4 June 2008, *Submission 17* at paragraph 2, accessed on 4 October 2009 at: <http://www.aph.gov.au/house/committee/jsct/4june2008/subs/sub17.pdf>.

¹⁹ See *Report 95*, Note 7, paragraph 2.34 ff.

²⁰ Joint Standing Committee on Treaties, 4 June 2008, *Submission 17*, accessed on 4 October 2009 at: <http://www.aph.gov.au/house/committee/jsct/4june2008/subs/sub17.pdf>.

²¹ Note 17 at paragraph 5.

Regulations 1994) must comply with the non-discrimination requirements of Article 5.”²²

14. In “General Comment 18: Non-Discrimination” the United Nations Human Rights Committee observes that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”²³
15. Some would argue that protection of scarce health resources within Australia is a legitimate policy aim. The NSWYLHRC does not support this argument. Australia is ranked second on the Human Development Index.²⁴ Furthermore, Australia has actively supported the ratification of the Disabilities Convention. To deny a visa because of an applicant’s hypothetical use of health resources is to undermine the purpose of the Disabilities Convention. Even if this could be said to be a legitimate purpose, whether the current health requirements in migration are in fact reasonable and objective is very doubtful.²⁵
16. Furthermore, Dr Saul also recognizes that “there is the countervailing public policy interest in ensuring that disabled persons are not treated adversely on account of personal characteristics (permanent impairment) which are beyond their control.”²⁶ This policy interest is consistent with the Government’s policy of social

²² Note 17 at paragraph 11; See United Nations Human Rights Committee, *General Comment 18: Non-Discrimination*, 10/11/89, paragraph 12, accessed on 4 October 2009 at:

<http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>.

²³ United Nations Human Rights Committee, *General Comment 18: Non-Discrimination*, 10/11/89, paragraph 13, accessed on 4 October 2009 at:

<http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>.

²⁴ UNDP, *Human Development Report 2009- Overcoming Barriers: Human Mobility and Development*, UNDP, New York, 2009 at 143, accessed on 4 October 2009 at:

http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf.

²⁵ For a detailed discussion see Dr Ben Saul’s advice on the *Disabilities Convention*, Note 17.

²⁶ Note 17 at paragraph 35.



inclusion. Other factors, such as the primacy of the best interests of the child also need to be considered.²⁷

17. Dr Saul argues that some cost in relation to health care and community services for persons with disabilities must be expected.²⁸ The NSWYLHRC argues that this should not only be expected but should also be accepted. The NSWYLHRC supports a rights-based approach to migration and disability and acknowledges the important contribution that persons with disability make within Australian society.
18. As far as reform to immigration policies are concerned, the NSWYLHRC also maintains that more disability interest groups should be consulted. Their advice will ensure that migration practices which are mindful of the unique circumstances regarding disability. Launching an inquiry is an important first step in providing such groups an opportunity to be involved in the process of reform in this area. But this is not enough. A more proactive approach is required. On this point, it should be kept in mind that the Convention considers "that persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies, programmes, including those directly concerning them"²⁹.

²⁷ Note 3, Article 7(2); Article 3(1) *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), ratified by Australia 16 January 1991, accessed on 4 October 2009 at: <http://www2.ohchr.org/english/law/crc.htm>.

²⁸ Note 17 at paragraph 49.

²⁹ *Convention on the Rights of Persons with Disabilities*, Article 1, accessed on 4 October 2009 at: <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.