

Submission No 23

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27 OCT 2009
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**Submission to the inquiry
of the Joint Standing Committee on Migration
into immigration treatment of disability**

24 October 2009

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ADEC acknowledges the significant research and drafting assistance provided on a pro bono basis by law firm **Maddocks** in the preparation of this submission. In particular, we acknowledge the contribution of **Mimi Marcus** of Maddocks. We also gratefully acknowledge PILCH's contribution to arranging for this collaboration.

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Part A – Executive summary & recommendations

1. Executive Summary

- 1.1 The Joint Standing Committee on Migration (**Committee**) has announced its inquiry into immigration treatment of disability (**Inquiry**).
- 1.2 The Inquiry's terms of reference are to inquire into the assessment of the health and community costs associated with a disability as part of the health test undertaken for the Australia visa processing, namely:
- (1) Report on the options to properly assess the economic and social contribution of people with a disability and their families seeking to migrate to Australia.
 - (2) Report on the impact on funding for, and availability of, community services for people with a disability moving to Australia either temporarily or permanently.
 - (3) Report on whether the balance between the economic and social benefits of the entry and stay of an individual with a disability, and the costs and use of services by that individual, should be a factor in a visa decision.
 - (4) Report on how the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment.
 - (5) Report on comparative analysis of similar migrant receiving countries.
- 1.3 In this submission, the Action on Disability within Ethnic Communities Inc (**ADEC**) addresses the Inquiry's third and fifth terms of reference.

2. Recommendations

- 2.1 ADEC submits that the Committee should consider making the following recommendations:
- that Australia lift its reservation to the Convention on the Rights of Persons with Disabilities;
 - that the *Migration Act* and the *Migration Regulations*, migration polices and practices are audited to ensure compliance with international human rights obligations;
 - that the health requirement is specifically reformulated to bring it into line with Australia's international human rights obligations; and
 - that measures are introduced to ensure the principles of natural justice are observed (such as transparent and fair admission procedures) and procedural safeguards (such as the rights of appeal and access to effective legal remedies).

Part B – About this submission

3. About ADEC

- 3.1 ADEC is an incorporated not-for-profit association whose primary purpose is to empower people with disabilities from ethnic backgrounds, their carers and their families to fully participate as members of the Victorian community.
- 3.2 Incorporated in 1982, ADEC operates within an ethical and culturally sensitive framework and aims to be an effective advocate for individuals. ADEC initially found that the overwhelming majority of ethnic families did not have information in their own language about disability and did not know about the range of services available to them in Australia. ADEC now facilitates a two-way awareness between ethnic families, communities and service providers by providing services and programs that cater for people with disabilities from ethnic backgrounds and their families.

3.3 ADEC is primarily funded by grants made by the state and federal government, and is administered by a Board of Management that comprises ethnic parents or carers of children who have a disability, ethnic people with a disability and interested community members with experience or interest of disability and/or ethnicity.

4. Scope of this submission

4.1 ADEC's focus in this submission is to examine the changes and reform which should be made to the health requirement to bring Australia into line with its international human rights obligations.

4.2 ADEC considers a shift is required from considering a disabled person's value in the 'welfare model' to a social model that looks beyond the individual's personal needs and capabilities to their contribution as a whole to a diverse and progressive society.

4.3 The submission is structured as follows:

- (1) Part C considers Australia's human rights obligations under international law;
- (2) Part D considers Australia's obligations domestically under the Federal Government's migration regime and future obligations under an imminent National human rights instrument;
- (3) Part E considers equivalent health requirements in four other jurisdictions, being Canada, New Zealand United Kingdom and the United States of America;
- (4) Part F sets out ADEC's submission that the health requirements should comply with Australia's international human rights obligations; and
- (5) Part G sets out ADEC's recommendations.

Part C – Australia's Human Rights obligations at International Law

5. Introduction to Australia's Human Rights obligations

5.1 The principle of non-discrimination is central to protecting the human rights of all people including migrants with disabilities. This principle of non-discrimination features in all of the key international human rights instruments.

5.2 Migrants with disabilities can assert their right to freedom from discrimination on various grounds under the following instruments, all of which Australia has ratified:

- (1) Article 2(1) of the International Covenant on Civil and Political Rights (**ICCPR**) guaranteeing the rights recognised in the ICCPR without *distinction* of any kind and article 26 guaranteeing equal protection of the law without any *discrimination*;
- (2) Article 2(3) of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) guaranteeing the rights in the ICESCR without *discrimination* of any kind;
- (3) Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**) prohibiting *discrimination* based on race, colour, descent, or national or ethnic origin;
- (4) Article 2(2) of the Convention on the Rights of the Child (**CRC**) guaranteeing the rights in the CRC without *discrimination* of any kind;
- (5) Article 2 of the Convention on the Rights of Persons with Disabilities (**CRPD**) guaranteeing the rights in the CRPD without *discrimination* of any kind;
- (6) Article 3 of the Convention relating to the Status of Refugees guaranteeing the rights in this Convention to refugees without *discrimination* as to race, religion or country of origin; and
- (7) Article 3 of the Convention relating to the Status of Stateless Persons guaranteeing the rights in this Convention to stateless persons without *discrimination* as to race, religion or country of origin.

- 5.3 Only in exceptional circumstances (such as war or public emergency threatening the life of the nation) does international law allow States to temporarily restrict the scope and application of specific human rights. As a matter of fact, derogation from specific human rights obligations may only occur in strictly prescribed circumstances¹.
- 5.4 The UN Human Rights Committee's recent Concluding Observations on Australia recommended Australia establish a mechanism to consistently ensure the compatibility of domestic law with the ICCPR and establish appropriate procedures to implement the views and recommendations of the Human Rights Council in individual cases².
- 5.5 During 2009, both the UN Human Rights Committee and UN Committee on Economic, Social and Cultural Rights recommended that Australia adopt federal legislation 'covering all grounds and areas of discrimination to provide comprehensive protection to the rights of equality and non-discrimination'³.
- 5.6 We address in further detail below relevant obligations contained in the Convention on the Rights of the Child and the Convention on the Right of Persons with Disabilities, two key instruments of relevance to this Committee's Inquiry.

6. Australia's Human Rights obligations under the Convention on the Rights of the Child

- 6.1 On 2 September 1990, the United Nations Convention on the Rights of the Child (CRC) entered into force. Australia ratified the CRC on 17 December 1990.
- 6.2 In forty-one substantive articles, the CRC recognises the human rights of children, defined as persons up to the age of 18 years. It calls on Australia (and other State Parties) to take all appropriate measures to ensure children's rights are protected from all forms of discrimination⁴, including the right to a name and nationality⁵, freedom of expression⁶ and thought⁷, access to healthcare⁸ and education⁹.
- 6.3 Children's rights should be implemented without discrimination of any kind, with all actions and policies guided by the best interests of the child. The participation of children should always be sought and all actions should aim at the promotion of the survival and development of children.
- 6.4 There are a number of rights in the CRC relevant to children with disabilities, including:
- Article 22 – obliging State Parties to take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee receives appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the CRC.
 - Article 23 – obliging State Parties to ensure that a mentally or physically disabled child enjoys a full and decent life.

¹ See, for example, Article 4 of the *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 and 1057 UNTS 407 (entered into force 23 March 1976).

² United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee - Australia*, UN OHCHR, UN Doc CCPR/C/AUS/CO/5 (2009) at paragraph 8.

³ United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee - Australia*, UN OHCHR, UN Doc CCPR/C/AUS/CO/5 (2009) at [8]; and United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by State Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights – Australia*, UN OHCHR, UN Doc E/C.12/AUS/CO/4 (2009).

⁴ Article 2 of the *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁵ *Ibid*, Article 7.

⁶ *Ibid*, Article 13.

⁷ *Ibid*, Article 14.

⁸ *Ibid*, Article 24.

⁹ *Ibid*, Article 28.

- 6.5 In the light of the CRC, children are no longer envisaged as mere recipients of services or beneficiaries of protective measures. Rather, they are subjects of rights and participants in actions affecting them. They need to be respected in their individuality and in their evolving capacity to influence decisions relevant to their lives.
- 6.6 In 2006, the Committee on the Rights of the Child stated that children with disabilities are still experiencing serious difficulties in fully enjoying their rights enumerated in the CRC. The committee emphasised that the obstacle to full enjoyment is not the disability itself, but a combination of social, cultural, attitudinal and physical barriers that children with disabilities face every day¹⁰.
- 6.7 Relevantly, children with a disability often fail the health requirements under the *Migration Act 1958 (Cth)* (**Migration Act**), particularly in circumstances where the disabled child is a dependent or member of a family.
- 6.8 ADEC submits it is contrary to Australia's obligations under the CRC to discriminate against children with a disability. Furthermore, assessing a child's economic worth without considering the contribution of the family or the child's development leads to unjust decision making.

7. Australia's Human Rights obligations under the Convention on the Rights of Persons with Disabilities

- 7.1 On 18 July 2008, Australia ratified the United Nation's Convention on the Rights of Persons with Disabilities (**CRPD**). This treaty identifies the rights of persons with disabilities together with the obligation of State parties to the CRPD to 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'¹¹.
- 7.2 Australia submitted an interpretative declaration¹² concerning the immigration health requirements when it ratified the CRPD in the following terms:

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.

- 7.3 The CRPD does not create any new human rights. Rather, it expresses existing rights in a manner addressing the needs of people with a disability. It also establishes universal minimum standards applying to every person with a disability together with a coherent framework for action.
- 7.4 The CRPD marks a 'paradigm shift' from a 'welfare model' to a 'social model' for persons with a disability. This model envisages 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'¹³.
- 7.5 The CRPD 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.
- 7.6 Article 1 of the CRPD sets out a non-exhaustive list of persons with disabilities who are covered.
- 7.7 Article 5 of the CRPD:

¹⁰ United Nations Human Rights Committee, *Report of the Committee on the Rights of the Child*, UN OHCHR, UN Doc A/61/41(SUPP) (2006).

¹¹ Article 4(1)(b) of the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 (entered into force 3 May 2008).

¹² Declarations and Reservations to the *Convention on the Rights of Persons with Disabilities* opened for signature 30 March 2007 (entered into force 3 May 2008).

¹³ Preamble to the *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 (entered into force 3 May 2008).

- recognises that all persons are equal before the law;
- requires State 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.

7.8 ADEC submits that Australia's current immigration law and policy is in conflict with article 5 of the CRPD to the extent that the health requirement, in application, indirectly discriminates against certain persons with disabilities.

7.9 Other relevant articles in the CRPD include:

7.9.1 Article 6 – Women with disabilities, which:

- recognise women and girls with disabilities are subject to multiple discrimination;
- imposes obligations on State Parties to take measures to ensure that women and girls enjoy full and equal enjoyment of all human rights;

7.9.2 Article 7 – Children with disabilities, which imposes obligations on State Parties:

- to take all necessary measures to ensure children with disabilities have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children;
- to take the best interests of the child (as a primary consideration) in all actions concerning children with disabilities; and
- to ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right;

7.9.3 Article 8 – Awareness-raising, which includes an obligation on State Parties to promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market;

7.9.4 Article 12 – Equal recognition before the law, which includes the following obligations on State Parties:

- reaffirms persons with disabilities have the right to recognition everywhere as persons before the law;
- recognises persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life;

7.9.5 Article 13 – Access to justice – which includes the following obligations on State Parties:

- ensuring effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages; and
- ensuring effective access to justice for persons with disabilities;

7.9.6 Article 14 – Liberty and security of the person – imposing an obligation on State Parties:

- to ensure that persons with disabilities, on an equal basis with others:
 - enjoy the right to liberty and security of person;

- are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty; and
 - to ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation;
- 7.9.7 Article 19 – Living independently and being included in the community – imposing obligations on State Parties to:
- recognise the equal right of all persons with disabilities to live in the community, with choices equal to others, and to take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
 - persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
 - persons with disabilities have access to a range of residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community; and
 - community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs;
- 7.9.8 Article 25 – Health – imposing obligations on State Parties to recognise that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. Australia must take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. Relevantly, State Parties must:
- provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons;
 - provide those health services needed by persons with disabilities specifically because of their disabilities; and
 - prevent discriminatory denial of health care or health services or food and fluids on the basis of disability.

Part D – Australia's obligations domestically

8. The Migration Act and Regulations

- 8.1 Under section 60 of the Migration Act, the Minister must require the applicant to 'visit, be examined by, a specified person, being a person qualified to determine the applicant's health, physical condition or mental condition ...'
- 8.2 The health assessment must be carried out by a Medical Officer of the Commonwealth (**MOC**) against the Public Interest Criteria (**PIC**) found in Schedule 4 (Part 1) of the Regulations.
- 8.3 PIC 4005 of Schedule 4 requires an applicant to be free of tuberculosis and any 'disease or condition', which would, during the applicant's proposed stay in Australia, be likely to:
- require health care or community services; or

- meet the medical criteria for the provision of a community service,
- and where providing such health care or community service would be likely to:
- result in a significant cost to the Australian community in the areas of health care and community services; or
 - prejudice the access of an Australian citizen or permanent resident to health care or community services.

8.4 These health requirements allow the decision maker to grant or refuse a visa on the basis of whether the health criteria has been satisfied. It applies to all applicants for visas to visit Australia¹⁴.

8.5 Under Schedule 4 of the Regulations, the Minister is empowered to waive the health requirements where:

- an employer undertakes to meet all costs related to the disease or condition; or
- the Minister is satisfied that granting the visa would be unlikely to result in undue cost to the Australian community or undue prejudice to the access to health care or community services of an Australia citizen or permanent resident¹⁵.

9. Relevant case law applying the health requirement and other relevant material

9.1 Australian courts have interpreted the health requirement as a consideration of what 'a person' who has the disease or condition suffered by the applicant would be likely to need, rather than requiring a consideration of the particular applicant's circumstances¹⁶.

9.2 In *Robinson v Minister for Immigration and Multicultural Affairs*¹⁷, Justice Siopis stated that the public interest criterion in 4005 requires the MOC to 'ascertain the form or level of condition suffered by the applicant in question and then apply the statutory criteria by reference to a hypothetical person who suffers from that form or level of the condition'¹⁸.

9.3 The Department of Immigration and Citizenship provides some guidance as to how the MOC is to assess what is considered a significant cost under 4005(c)(ii)(A) in its *Procedures Advice Manual* 3¹⁹. It provides that the MOC is to be guided by the annual per capita health and welfare expenditure for Australians and currently sets 'significant cost' at \$21,000²⁰.

9.4 There have been a number of cases demonstrating how the application of the health requirements can lead to unjust decision-making.

9.5 One such unjust decision was by the Department of Immigration and Citizenship who refused to grant a visa to Dr Bernhard Moeller on the basis that one of his three children, Lukas Moeller, who was a member of his family unit, did not satisfy the health requirements in the PIC. Lukas had undertaken a medical examination by a MOC who advised the Department that he was diagnosed with a significant intellectual disability secondary to Down's syndrome and required supported education.

9.6 On appeal, the Migration Review Tribunal was satisfied that the MOC had applied the statutory criteria by reference to a hypothetical person who suffers from that form or level of the condition.

¹⁴ *Migration Act* 1958 (Cth), s65.

¹⁵ See 4006A(2) and 4007(2) respectively.

¹⁶ See for example, *Robinson v Minister for Immigration* (2005) 148 FCR 182; *JPI & Ors v Minister for Immigration & Anor* (2008) 220 FLR 37; [2008] FMCA 970 (22 August 2008) at paragraph 44.

¹⁷ (2005) 148 FCR 182.

¹⁸ *Robinson v Minister for Immigration* (2005) 148 FCR 182 at paragraph 42.

¹⁹ Department of Immigration and Citizenship, *Procedure Advice Manual* 3, Schedule 4/4005-4007.

²⁰ *Ibid* at paragraph 114.2.

- 9.7 As a consequence, the Tribunal was bound to accept the final assessment of the MOC as correct. On this basis, the Tribunal had no discretion but to find that the secondary applicant, Lukas Moeller did not satisfy the PIC criterion.
- 9.8 Whilst the Tribunal affirmed the decision not to grant the primary applicant a visa, they were clear to point out that the case raised 'compelling and compassionate circumstances and had there been provision for a waiver of the public health criterion the Tribunal would have exercised that discretion in the applicant's favour'. This was because the primary applicant provided extensive evidence demonstrating:
- his own significant contribution to the community (in the area of health care);
 - his ability to provide for the secondary applicant; and
 - that his son was a valued member of his community with potential to develop skills and contribute to Australian society.
- 9.9 Ultimately, the Moellers were granted permanent residency by way of Ministerial discretion exercised by Senator Evans.
- 9.10 Despite the 'happy ending' for the Moellers, this case and others demonstrates that those who are unfairly discriminated against are not entitled to review.
- 10. Lawful discrimination of visa applicant's with a disability**
- 10.1 Section 52 of the *Disability Discrimination Act 1992 (Cth) (DDA)* exempts the anti-discrimination provisions of that Act applying to:
- the Migration Act and all regulations made under it; and
 - anything done by a person in relation to the administration of the Migration Act.
- 10.2 Accordingly, the exemption under the DDA applies to the health requirements for visa applicants in Schedule 4 (Part 1) of the *Migration Regulations 1994 (Cth) (Regulations)*.
- 10.3 The lawful discrimination of disabled people is justified by reason of public policy in minimising public health and safety risks to Australia, containing public health expenditure and maintaining access to health and community services for Australian residents²¹.
- 10.4 ADEC submits that Australia has failed 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities' under article 4(1)(b) of the CRPD.
- 11. Australia's National Human Rights Consultation Report**
- 11.1 On 10 December 2008, the Attorney-General the Hon Robert McClelland MP launched the National Human Rights Consultation (**Consultation**). The Consultation was designed to seek the views of the Australian community on how human rights and responsibilities should be protected in the future and whether or not Australia should adopt a national charter of rights.
- 11.2 On 8 October 2009, the Attorney-General, the Hon Robert McClelland MP released the National Human Rights Consultation Report, September 2009 (**Report**).
- 11.3 The Committee which was established to undertake the Consultation received many submissions advocating the protection and promotion of rights of people with disabilities and the rights of ethnic minorities to cultural and linguistic freedom and the right to non-discrimination.

²¹ Productivity Commission, *Inquiry Report, Report No. 30: Review of the Disability Discrimination Act 1992 (Cth)*, Commonwealth of Australia (30 April 2004) at pages 343-344.



- 11.4 Notably, the committee recommended that Australia should adopt a federal Human Rights Act. The Report also suggested that all existing federal legislation, policies and practices be audited to ensure compliance with international human rights obligations and that a statement of compatibility be attached to all future draft legislation.
- 11.5 Relevantly, the committee recommended (at Recommendation 4) that, in the conduct of the audit, the Federal Government should give priority to four areas including: anti-discrimination legislation, policies and practices; and immigration legislation, policies and practices.

Part E – Comparative studies in other jurisdictions

12. Canada's position

- 12.1 Australia's health requirements are not unique.
- 12.2 An equivalent provision was contained in section 19(1)(a)(ii) of Canada's *Immigration Act*²² referring to whether a person 'would cause or might reasonably cause excessive demands on social services'. Section 19(1)(a)(ii) requires a medical officer, concurred by at least one other medical officer's opinion, to assess the nature, severity and probable duration of an individual's medical condition and to consider what services the person is likely to require because of that condition if admitted into Canada.
- 12.3 There are few cases dealing directly on the issue of lawful discrimination on the basis of disability arising in migration decisions under that Act.
- 12.4 The most recent applicable case considering section 19(1)(a)(ii) is the decision of Supreme Court of Canada in *Hilewitz v Canada (Minister for Citizenship and Immigration)*; *De Jong v Canada (Minister for Citizenship and Immigration)* [2005] 2 SCR 706, 2005 SCC 57.
- 12.5 In this case, H and J both applied for permanent residence in their name and in that of their families. Both H and J qualified, but were denied admission because the intellectual disability of a dependent child 'would cause or might reasonably be expected to cause excessive demands on ... social services'.
- 12.6 On judicial review, the judge in H's case set aside the visa officer's decision, determining that financial circumstances were relevant in determining whether the admission of H's sons to Canada would cause excessive demands on social services.
- 12.7 In J's case, a different judge upheld the visa officer's decision determining that the willingness of J to pay for private schooling for his daughter was irrelevant.
- 12.8 The Federal Court of Appeal restored the visa officer's decision in H's case and dismissed J's appeal. It determined that non-medical factors, such as the availability of family support and the ability and willingness to pay, were irrelevant considerations.
- 12.9 The Supreme Court of Canada allowed both appeals. They determined that 'H and J's ability and willingness to attenuate the burden on the public purse that would otherwise be created by their intellectually disabled children are relevant factors in determining whether those children would reasonably be expected to cause excessive demands on Canada's social services'²³.

13. New Zealand's position

- 13.1 Similar and equivalent health requirements exist in New Zealand's migration regime.
- 13.2 Similarly, the health requirements are imposed to protect public health in New Zealand, to ensure that people entering New Zealand do not impose excessive costs and demands on the health and special education services

²² Section 19 (1)(a)(ii) of the *Immigration Act*, R.S.C 1985, c. 1-2 now been replaced by section 38(1)(c) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 which has a similar provision dealing with medical inadmissibility.

²³ *Hilewitz v Canada (Minister for Citizenship and Immigration)*; *De Jong v Canada (Minister for Citizenship and Immigration)* [2005] 2 SCR 706, 2005 SCC 57 at page 5.

and where applicable, ensure that applicants for entry to New Zealand are able to undertake the functions for which they have been granted entry²⁴.

- 13.3 All persons included in an application for residence in New Zealand must meet the health requirements or qualify for a medical waiver. The application for residence may be declined if any person included in that application fails to meet the necessary health requirements and does not qualify for a medical waiver²⁵.
- 13.4 An applicant will be deemed to have an unacceptable standard of health and may have their application for residence declined if they are:
- likely to be a danger to public health;
 - likely to impose significant costs or demands on New Zealand's health services or special education services; and
 - unable to perform the functions for which you have been granted entry.
- 13.5 Each applicant for residence must complete a Medical and Chest X-ray Certificate. This includes each member of a family entering New Zealand including children²⁶.
- 13.6 If an immigration officer is not initially satisfied that an applicant for residence has an acceptable standard of health, they must refer the matter for assessment to an Immigration New Zealand medical assessor. If, in the opinion of a medical assessor, there is a relatively high probability that the applicant's medical condition will require health services costing in excess of \$25,000, the requirement that an applicant for residence must be unlikely to impose significant costs on New Zealand's health services will not met.
- 13.7 Applicants who are assessed as having not met an acceptable standard of health and whose applications meet all other requirements for approval under the relevant Government residence policy may be considered for the grant of a medical waiver. However, the applicant will not be eligible for that medical waiver if the applicant:
- requires dialysis treatment;
 - has active pulmonary tuberculosis;
 - has severe haemophilia; or
 - has a physical incapacity that requires full time care.
- 13.8 Significant differences between the operation of Australia's health requirements and that of New Zealand's is as follows. In New Zealand:
- the immigration officer cannot decline an application on the basis that the applicant does not meet an acceptable standard of health *without* first obtaining comment from the applicant on the medical report provided by the medical assessor;
 - there is avenue to seek a further medical opinion on the medical condition or disability of the applicant and in such cases, the immigration officer must refer this to a New Zealand Immigration medical assessor before deciding whether or not to decline the application;
 - where the further medical opinion is different to the original medical opinion, the recommendation arising from the second medical assessor's assessment is final;

²⁴ Department of Labour, *Immigration New Zealand Operational Manual*, (27 July 2009) Administration Chapter at A4.1.

²⁵ *Immigration Regulations 1999* (NZ) regulations 4(1)(f) and 19(1)(h).

²⁶ Pregnant women and children under the age of 11 years are not required to submit the Chest X-ray certificate unless a special report is required.



- any decision to grant a medical waiver must be made by an officer with delegated powers (not by the Minister); and
- when determining whether to grant a medical waiver, the delegated officer is empowered to consider the circumstances of the applicant to decide whether those circumstances are compelling enough to justify allowing entry to and stay in New Zealand. Factors which may be taken into account include:
 - the objectives of the health requirements policy;
 - the degree to which the applicant would impose significant cost and/or demands on New Zealand's health or education services;
 - whether the applicant has immediate family lawfully and permanently resident in New Zealand and the circumstances and duration of that residence;
 - whether the applicant's potential contribution to New Zealand would be significant; and
 - the length of intended stay.

13.9 Relevantly, section 149D of New Zealand's *Immigration Act* 1987 (NZ) excludes the jurisdiction of New Zealand's Human Rights Commission in respect of government immigration policy and individual decisions giving effect to immigration policy. The principle reason for this was to prevent the Human Rights Commission becoming involved in complaints about substantive immigration law and policy by bringing or intervening in proceedings before the Human Rights Review Tribunal²⁷.

13.10 In April 2006, New Zealand's Minister of Immigration sought submissions and released a Discussion Paper on the review of New Zealand's Immigration Act.

13.11 A number of submitters expressed reservations about the inclusion of health grounds in New Zealand's Immigration Act. Submitters considered that care needed to be taken not to discriminate against people with disabilities and to recognise that those with health problems may still contribute to New Zealand. Many comments reflected the submission of New Zealand's Human Rights Commission which read:

The intention to include requirements permitting exclusion if a person is not of an "acceptable standard of health" in legislation is concerning – particularly if this means a family is refused entry because of the health status of a child or dependent family member. Although the proposal contemplates exceptions to the exclusion rule, there is no guarantee that a person with a disability who meets all the other requirements for entry will be permitted to enter the country. This may constitute indirect discrimination on the grounds of disability and contravene both Art 2 ICCPR and s19 NZBORA.²⁸

14. UK's position

14.1 The Immigration Rules of the United Kingdom²⁹ (**Immigration Rules**) govern entry to the United Kingdom (**UK**) and are administered by the UK Border Agency (**UKBA**).

14.2 The Immigration Rules provide the requirements for 'leave to enter' and 'leave to remain' as well as an authority for refusing leave to enter or leave to remain.

14.3 Paragraph 36 of the Immigration Rules states that any person intending to remain in the UK for more than 6 months should be referred for a medical examination. However, paragraph 36 of the Immigration Rules allows an Entry Clearance Officer to use their discretion to refer any other person for an examination if necessary.

14.4 Paragraph 320(7) of the Immigration Rules provides that, in relation to medical requirements, entry clearance or leave to enter the UK can be refused where:

²⁷ *Human Rights Amendment Bill* 2001(NZ), Explanatory Note.

²⁸ New Zealand Human Rights Commission, Human Rights Issues in the Review of the Immigration Act submitted to the New Zealand Ministry of Labour, *Immigration Act Review Discussion Paper* (2006).

²⁹ HC395.

save in relation to a person settled in the United Kingdom or where the Immigration Officer is satisfied that there are strong compassionate reasons justifying admission, confirmation from the Medical Inspector that, for medical reasons, it is undesirable to admit a person seeking leave to enter the United Kingdom.

- 14.5 Entry will normally be refused³⁰ where the applicant refuses to provide medical documentation or undergo a medical examination as requested by the Immigration Officer.
- 14.6 The UKBA is empowered³¹ to refuse leave to enter even where an entry clearance was lawfully issued if 'refusal is justified on grounds of restricted return ability; on medical grounds... or because exclusion would be conducive to the public good'.
- 14.7 The UKBA also has the right to cancel leave to enter³² in the following circumstances:
- save in relation to a person settled in the United Kingdom or where the Immigration Officer or the Secretary of State is satisfied that there are strong compassionate reasons justifying admission, where it is apparent that, for medical reasons, it is undesirable to admit that person to the United Kingdom;
- 14.8 The UKBA publishes Entry Clearance Guidelines to instruct visa staff on the handling of entry clearance and visa applications made outside the UK. These guidelines state that the objective of the medical examination and recommendation is:
- to prevent the entry of, or bring to notice, persons who if admitted to the UK might:
- endanger the health of other persons in the UK; or
 - be unable for medical reasons to support themselves and/or dependants in the UK; or
 - require major medical treatment (for which an entry clearance application has not been made).
- 14.9 The Medical Officer conducting the assessment will normally recommend refusal where the applicant suffers from, among other things, a 'mental disorder' or 'any disease, physical defect, bodily deformity or fits of any kind which would prevent them from supporting themselves or their dependants'.

15. USA's position

- 15.1 Under US immigration law, an individual is inadmissible on medical grounds where the Secretary of Health and Human Services determines an individual has a physical or mental disorder causing them to behave in a way that may pose a threat to the property, safety or welfare of themselves or others.³³ The person will also be inadmissible where the harmful behaviour has ceased but is likely to recur or lead to other harmful behaviour.³⁴ However, mere presence of a physical or mental illness does not mean a person poses a significant risk.³⁵
- 15.2 The US legislation also deems a guardian to be inadmissible when accompanying an applicant inadmissible on health grounds. This provision is purportedly designed to ensure applicants with mental or physical disabilities have their guardian assist them in departing the country.³⁶
- 15.3 The health grounds can be waived upon application to the Department of State under regulation 212.7(b) of Title 8 of the Code of Federal Regulations. The Department of State cannot find an applicant inadmissible without a medical report from an approved physician.³⁷

³⁰ Paragraph 320(8A) or 320(17) of the Immigration Rules of the United Kingdom.

³¹ Paragraph 321(iii) of the Immigration Rules of the United Kingdom.

³² Paragraph 321A(3) of the Immigration Rules of the United Kingdom.

³³ Section 1182(a)(1)(a)(iii), Title 8 of the United States Code.

³⁴ Section 1182(a)(1)(a)(iii), Title 8 of the United States Code.

³⁵ Regulation 34.4(b), Title 42 of the Code of Federal Regulations.

³⁶ Section 1182(a)(10)(B), Title 8 of the United States Code.

³⁷ See US Department of State *Foreign Affairs Manual*, Title 9, Notes (Medical grounds) at section 40.11.

- 15.4 Perhaps of more interest is the inadmissibility of an applicant who is likely to become a public charge. This ground of inadmissibility arises most frequently when a person applies for permanent residence. The term is not defined in the legislation, but is the subject of guidance from the US Citizenship and Immigration Service (**USCIS**). The USCIS guidance defines 'public charge' as:
- an alien who has become (for deportation purposes) or is likely to become (for admission or adjustment of status purposes) "primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense."
- 15.5 The guidance states certain benefits, including Medicaid, a form of non-cash healthcare and disability benefit, is exempt from the consideration of government assistance to be received by the applicant.
- 15.6 In contrast to the Australian provisions, the statute specifically states that age, health, family status, assets, resources and financial status, education and skills must be taken into account when deciding if an applicant may become a public charge. In addition, the case law on the subject dictates that the 'totality of the circumstances' are taken into consideration.³⁸
- 15.7 Applicants can also be sponsored by a family member who is a citizen or permanent resident if they submit a binding, contractual affidavit of support.³⁹ The person petitioning for the family member must demonstrate that, based on the size their family and the applicant's family, they can demonstrate income and assets of at least 125% of the federal poverty guidelines.⁴⁰

Part F – Submissions

- 16. Call for migration policies affecting the health requirements to protect human rights**
- 16.1 ADEC recognises that people immigrate for many different reasons. They may be migrants seeking work or asylum seekers fleeing persecution.
- 16.2 In any event, ADEC considers a shift is required from a pure objective economic assessment of a person with a disability to a more balanced assessment involving assessing the individual's needs, capabilities and circumstances. ADEC considers this Committee should recognise that people with certain disabilities and health problems may still make a positive contribution to Australia.
- 16.3 In ADEC's opinion, this Inquiry raises an underlying tension between the human rights of migrants and the largely economic reasons that prompt countries to select it migrants.
- 16.4 ADEC submits that international human rights standards provide a tool to manage this tension in a principled and transparent manner.
- 16.5 It is relevant that the health requirements set out in Australia's Migration Act do not incorporate human rights guarantees.
- 16.6 ADEC urges this Committee to consider applying a human rights framework as the principle basis for the development and implementation of policies relating to the health requirements as they affect disabled people and children.
- 16.7 This is because it establishes universal minimum standards applying to every person with a disability together with a coherent framework for action. It also provides the framework to reconcile and balance the competing interests of Australia and the individuals caught up in the process of migration.

³⁸ See also in relation to the factors considered: *Matter of A 19* Board of Immigration Appeals interim decision number 3097; *Matter of Vindman* Board of Immigration Appeals interim decision number 2563; and *Matter of Kohama* Board of Immigration Appeals interim decision number 2761.

³⁹ Section 1182(a)(4)(C), Title 8 of the United States Code.

⁴⁰ Section 1183(a), Title 8 of the United States Code.

- 16.8 ADEC considers a foundation for comprehensive national migration policies and practices based on standards of human rights will enhance both social legitimacy and accountability.
- 16.9 Adopting a human rights approach in the immigration context will ensure that:
- compliance is achieved with the relevant international human rights standards;
 - all persons can enjoy fundamental human rights and freedoms on the basis of equality and without discrimination on the basis of disability;
 - all applicants for permanent or temporary residency, including disabled people and children will be treated with dignity and respect at every stage of the migration process; and
 - the principles of natural justice are observed ensuring transparent and fair admission procedures and procedural safeguards such as the rights of appeal and access to effective legal remedies.
- 16.10 ADEC submits the current Australia migration health requirement is contrary to and inconsistent with Australia's obligations under international law, particularly:
- Article 4(1)(b) of the CRPD in that Australia has failed 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities';
 - Article 5 of the CRPD resulting in an unjustified and disproportionate indirect discrimination against certain persons with certain disabilities; and
 - Article 2 of the CRC in that Australia has failed to take appropriate measures to ensure that a child is protected against all forms of discrimination;
 - Article 23 of the CRC in that Australia has failed to ensure that physically disabled children enjoy a full and descent life.
- 16.11 Furthermore, assessing a child's economic worth without considering the contribution of the family or the child's development leads to unjust decision making.
- 16.12 Finally, ADEC submits that whilst the use of ministerial discretion can, and has in the past, acted as a safeguard to ensure that Australia meets its human rights obligations, the presence of ministerial discretion is not sufficient, in itself, since its nature is non-compellable and non-reviewable.

Part G – Recommendations

17. Having regard to ADEC's submissions above, ADEC urges the Committee to make the following recommendations:
- that Australia lift its reservation to the Convention on the Rights of Persons with Disabilities;
 - that the Migration Act, the Migration Regulations, migration policies and practices are audited to ensure compliance with international human rights obligations;
 - that the health requirement is specifically reformulated to bring it into line with the Australia's international human rights obligations; and
 - that measures are introduced to ensure the principles of natural justice are observed such as transparent and fair admission procedures and procedural safeguards such as the rights of appeal and access to effective legal remedies.