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## Disability, Migration and Human Rights

Submission to the Joint Standing Committee on Migration's  
Inquiry into Immigration Treatment of Disability

October 2009



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#### **About the Human Rights Law Resource Centre**

The Human Rights Law Resource Centre is a non-profit community legal centre that promotes and protects human rights and, in so doing, seeks to alleviate poverty and disadvantage, ensure equality and fair treatment, and enable full participation in society.

The Centre also aims to build the capacity of the legal and community sectors to use human rights in their casework, advocacy and service delivery.

The Centre achieves these aims through human rights litigation, education, training, research, policy analysis and advocacy. The Centre undertakes these activities through partnerships which coordinate and leverage the capacity, expertise and networks of pro bono law firms and barristers, university law schools, community legal centres, and other community and human rights organisations.

The Centre works in four priority areas: first, the effective implementation and operation of state, territory and national human rights instruments, such as the Victorian Charter of Human Rights and Responsibilities; second, socio-economic rights, particularly the rights to health and adequate housing; third, equality rights, particularly the rights of people with disabilities, people with mental illness and Indigenous peoples; and, fourth, the rights of people in all forms of detention, including prisoners, involuntary patients, asylum seekers and persons deprived of liberty by operation of counter-terrorism laws and measures.

The Centre has been endorsed by the Australian Taxation Office as a public benefit institution attracting deductible gift recipient status.

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## 1. Executive Summary

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### 1.1 Summary

1. This submission responds to the Joint Standing Committee on Migration's invitation to comment on the assessment of the costs associated with a disability as part of the health test undertaken for Australian visa processing.
2. The Committee's terms of reference do not include consideration of the extent to which the health requirement in the *Migration Act 1958* complies with the prohibition of disability discrimination in the *Disability Discrimination Act 1992* (Cth) (**DDA**) or Australia's obligations under international human rights law. The Human Rights Law Resource Centre (**HRLRC**) considers that the standards articulated in these instruments should be of primary importance in the Government's treatment of persons with a disability in all areas, including in the migration context.
3. This submission focuses on the third and fourth of the Committee's Terms of Reference:
  - (a) 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; and
  - (b) how the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment.
4. The HRLRC's principal submission is that decisions to grant or refuse a visa must comply with Australia's international human rights obligations and the standards of non-discrimination set out in the DDA.
5. Neither international law nor the DDA prohibit all forms of discrimination. However, for discrimination to be lawful it must be demonstrably justifiable and meet standards of reasonableness and proportionality. The HRLRC considers that the current migration regime focuses on costs associated with disability in a way that is neither reasonable nor proportionate. Importantly, the health requirement does not consider the economic and non-economic contributions that can be made by people with disability and their families.
6. This submission sets out Australia's relevant obligations under the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and*

*Cultural Rights (ICESCR)*, the *Convention on the Rights of Persons with Disabilities (CRPD)* and the *Convention on the Rights of the Child (CRC)* and makes recommendations aimed at ensuring compliance with these instruments.<sup>1</sup>

## 1.2 Recommendations

### **Recommendation 1:**

The health test contained in the *Migration Act* and regulations should be amended to ensure compliance with Australia's international human rights obligations and the standards of non-discrimination set out in the *Disability Discrimination Act*.

### **Recommendation 2:**

The Health Test should be amended to ensure that any discrimination against persons on the basis of their disability is reasonable and proportionate. This requires, at a minimum, that the following factors be taken into consideration:

- (a) the contribution of people with disabilities to social and economic life in Australia;
- (b) the contribution of people with disabilities to Australia's cultural diversity and social cohesion;
- (c) the contribution of individuals towards meeting the costs associated with their disability;
- (d) decreased costs associated with disability as barriers to participation in social and economic life are removed (in accordance with Australia's obligations under the CRPD); and
- (e) possible advancements in medicine and assistive technology which would impact upon costs.

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<sup>1</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 003 UNTS 3 (entered into force January 2, 1976); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1249 UNTS 13 (entered into force on 2 September 1990).

**Recommendation 3:**

Where the application of the health tests impacts upon children, decisions must be made in the best interests of the child concerned.

**Recommendation 4:**

The exemption of the operation of Divisions 1, 2 and 2A of the *Disability Discrimination Act* to the provisions of the *Migration Act* and regulations, and to those things permitted or required to be done under those instruments, should be repealed.

7. In addition, the HRLRC endorses the recommendations made by the **Disability Discrimination Legal Centre (NSW)** to this inquiry.

## 2. The Health Requirement

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8. Section 60 of the *Migration Act 1958* states that:

If the health or physical or mental condition of an applicant for a visa is relevant to the grant of a visa, the Minister may require the applicant to visit, and be examined by, a specified person, being a person qualified to determine the applicant's health, physical condition or mental condition, at a specified reasonable time and specified reasonable place.

9. Under Section 65 of the *Migration Act 1958* the Minister may grant or refuse visa applications on a number of grounds, including whether the health criteria has been satisfied.

10. Schedule 4 of the *Migration Regulation 1994* sets out the 'Public Interest Criteria' for granting residence visas. Included is the requirement that the applicant:

- (c) is not a person who has a disease or condition to which the following subparagraphs apply:
  - (i) the disease or condition is such that a person who has it would be likely to:
    - (A) require health care or community services; or
    - (B) meet the medical criteria for the provision of a community service; during the period of the applicant's proposed stay in Australia;
  - (ii) provision of the health care or community services relating to the disease or condition would be likely to:
    - (A) result in a significant cost to the Australian community in the areas of health care and community services; or

(B) prejudice the access of an Australian citizen or permanent resident to health care or community services;

regardless of whether the health care or community services will actually be used in connection with the applicant

11. The Department of Immigration and Citizenship's fact sheet on the health requirement states that the requirement is intended to:<sup>2</sup>
- minimise public health and safety risks to the Australian community;
  - contain public expenditure on health and community services, including Australian social security benefits, allowances and pensions; and
  - maintain access of Australian residents to health and other community services.
12. Public health and safety risks are adequately protected by existing migration and quarantine laws. The next two requirements are, however, legitimate factors to be considered in migration assessments. The problem is that they are not assessed against the following factors identified by the Disability Discrimination Legal Centre in their submission to the present inquiry:
- (a) the contribution of people with disabilities to social and economic life in Australia;
  - (b) the contribution of people with disabilities to Australia's cultural diversity and social cohesion;
  - (c) the contribution of individuals towards meeting the costs associated with their disability;
  - (d) decreased costs associated with disability as barriers to participation in social and economic life are removed (in accordance with Australia's obligations under the CRPD); and
  - (e) possible advancements in medicine and assistive technology which would impact upon costs.
13. For any distinction based on disability to comply with human rights standards, these issues must be factored into decision-making.

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<sup>2</sup> Available at <http://www.immi.gov.au/media/fact-sheets/22health.htm>

### **3. Australia's Human Rights Obligations**

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#### **3.1 Convention on the Rights of Persons with Disabilities**

14. Australia ratified the CRPD in July 2008 and the Optional Protocol to the CRPD in August 2009. The CRPD enshrines the civil, political, economic, social and cultural rights that are necessary to ensure that people with disabilities have the capacity and opportunity to fully participate in and contribute to our community. It sets out a detailed code for the implementation of human rights for persons with disabilities.
15. Under the CRPD, Australia has committed to ensure and promote the full realization of human rights, including non-discrimination, for all persons with disabilities.<sup>3</sup> This obligation does not distinguish between citizens and non-citizens, or make exceptions for governments administering a migration scheme. Persons with disabilities are entitled to be protected from discrimination on the basis of disability, particularly discrimination by public authorities, regardless of whether they are a citizen of Australia or not.
16. The UN High Commissioner for Human Rights characterised the CRPD as rejecting the 'view of persons with disabilities as objects of charity, medical treatment and social protection' and affirming persons with disability as 'subjects of rights, able to claim those rights as active members of society'.<sup>4</sup> This paradigm shift is not reflected in the current formulation of the health requirement which fails to recognise the significant contribution made by persons with disabilities.
17. Of direct relevance is article 18(1) of the CRPD which provides that:

States Parties shall recognize 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.
18. When it ratified the CRPD, the Australian Government submitted an 'interpretive declaration' in relation to article 18 which states that:

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

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<sup>3</sup> CRPD, art. 4.

<sup>4</sup> Statement by Louise Arbour UN High Commissioner for Human Rights on the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities, 5 December 2006.



requirements for non-nationals seeking to enter or remain in Australia, **where these requirements are based on legitimate, objective and reasonable criteria.** [Emphasis added]

19. The Government's own interpretation of this article requires that restrictions on liberty of movement of persons with disabilities be based legitimate, reasonable and objective criteria. Read in light of the CRPD as a whole, these criteria must reflect the agency of persons with disabilities and their valuable contribution to society. Moreover, consistent with international and comparative human rights jurisprudence, the Government bears the responsibility to demonstrably justify, to a high degree, the necessity of any restrictions on rights.<sup>5</sup>

### 3.2 The Right to be Free From Discrimination

20. Non-discrimination constitutes a basic and general principle relating to the protection of all human rights.<sup>6</sup> The CRPD, the ICCPR and the ICESCR all contain comprehensive prohibitions on discrimination.<sup>7</sup>
21. There is substantial and settled international jurisprudence in support of the position that for a limitation on the right to non-discrimination to be lawful, it must be reasonable and objective. In other words, the limitation must pursue a legitimate aim and be proportionate to that aim. For example, its recent General Comment No. 20, CESCR explained that:<sup>8</sup>

[d]ifferential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realised and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority.

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<sup>5</sup> *Kracke v Mental Health Review Board* [2009] VCAT 646, 108; See Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009), [147] citing *Bater v Bater* [1950] 2 All ER 458, 459 (Lord Denning); *Oakes* [1986] 1 SCR 103, 42.

<sup>6</sup> Human Rights Committee, *General Comment 18, Non-discrimination*, Thirty-seventh session, 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

<sup>7</sup> CRPD, art. 5; ICESCR, art 2(2); ICCPR, art 2(1).

<sup>8</sup> CESCR, *General Comment No. 20*, above n 2, at para 13.

22. In General Comment No 31, the HRC states that, where limitations or restrictions are made on rights and freedoms protected under the ICCPR:<sup>9</sup>

States must demonstrate their necessity and *only take such measures as are proportionate to the pursuance of legitimate aims* in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right (emphasis added).

### 3.3 Convention on the Rights of the Child

23. Australia is subject to additional obligations in cases where children are impacted by discriminatory health requirements tests. Of particular significance is article 3 which requires States to make decisions 'in the best interests of the child'.
24. In light of the above, the HRLRC makes the following recommendations:

**Recommendation 1:**

The health test contained in the *Migration Act* and Regulations should be amended to ensure compliance with Australia's international human rights obligations and the standards of non-discrimination set out in the *Disability Discrimination Act*.

**Recommendation 2:**

The Health Test should be amended to ensure that any discrimination against persons on the basis of their disability is reasonable and proportionate. This requires, at a minimum, that the following factors be taken into consideration:

- (a) the contribution of people with disabilities to social and economic life in Australia;
- (b) the contribution of people with disabilities to Australia's cultural diversity and social cohesion;
- (c) the contribution of individuals towards meeting the costs associated with their disability;
- (d) decreased costs associated with disability as barriers to participation in social and economic life are removed (in accordance with Australia's

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<sup>9</sup> Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para 6.

- obligations under the CRPD); and
- (e) possible advancements in medicine and assistive technology which would impact upon costs.

***Recommendation 3:***

Where the application of the health tests impacts upon children, decisions must be made in the best interests of the child concerned.

#### **4. The Disability Discrimination Act**

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25. Section 29 of the DDA prohibits direct and indirect disability discrimination in the administration of Commonwealth laws and programs. However, discrimination is not unlawful if it would impose an unjustifiable hardship on the discriminator.<sup>10</sup>
26. In determining whether hardship is unjustifiable, all relevant circumstances should be taken into account, including (among others):
- (a) the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
  - (b) the effect of the disability of any person concerned;
  - (c) the financial circumstances, and the estimated amount of expenditure required to be made, by the first person; and
  - (d) the availability of financial and other assistance to the first person.
27. The burden of proving that something would impose unjustifiable hardship lies on the person claiming unjustifiable hardship.<sup>11</sup>
28. Section 52 of the DDA provides an exemption from the requirements of the DDA to the provisions of the Migration Act and regulations, and to those things permitted or required to be done under those instruments.
29. Earlier this year the Committee on Economic, Social and Cultural rights reviewed Australia's compliance with ICESCR and commented on the issue of disability and migration, stating:<sup>12</sup>

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<sup>10</sup> DDA, s. 21(B).

<sup>11</sup> DDA, s. 11(2).

The Committee regrets that insufficient measures have been taken by the State party to ensure an adequate standard of living for persons with disabilities. In particular, it notes with concern that section 52 of the Disability Discrimination Act 1992 exempts migration laws, regulations, policies and practices, from the effects of the Act, leading to negative immigration decisions based on disability or health conditions. The Committee expresses concern at the fact that this situation has had a particularly negative impact on the families of asylum seekers. (art.2.2 and 10 and 11)

**The Committee encourages the State party to strengthen its efforts towards the adoption of concrete measures to enable persons with disabilities to fully enjoy the rights guaranteed by the Covenant. It recommends that the Migration Act 1958 and the Disability Discrimination Act 1992 be amended to ensure that the rights to equality and non-discrimination apply to all aspects of migration law, policy and practice.**

30. Clearly, the DDA would not prohibit consideration of the costs associated with the grant of a visa to a person with a disability or a member of their family. However, this issue cannot be determinative and other considerations, including those listed in recommendation 1, should be considered.

**Recommendation 4:**

The exemption of the operation of Divisions 1, 2 and 2A of the *Disability Discrimination Act* to the provisions of the *Migration Act* and regulations, and to those things permitted or required to be done under those instruments, should be repealed.

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<sup>12</sup> Committee on Economic, Social and Cultural Rights, 42<sup>nd</sup> Session, Geneva, 4 to 22 May 2009 *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights – Australia* (E/C.12/AUS/CO/4).