Inquiry into the migration treatment of disability

Submission to the Joint Standing Committee on Migration

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Introduction

The Law Institute of Victoria (LIV) welcomes the opportunity to make a submission to the Joint Standing Committee on Migration (JS Committee) *Inquiry into the migration treatment of disability* (the Inquiry).

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 13,500 members. The LIV's Administrative Law and Human Rights Section Migration Law Committee is made up of legal practitioners experienced in immigration law. Many Committee members are accredited specialists in immigration law and many have experience representing clients who are affected by the health requirement. The Disability Law Committee is made up of legal practitioners who work in the disability sector.

The LIV has expressed its concerns about the operation of the health requirement in migration law[1] and seeks policy and legislative reforms to better protect visa applicants who have a disability.

Background

The LIV welcomes the Inquiry, which arises largely as a result of Australia's ratification of the United Nations *Convention on the Rights of Persons with Disabilities* (the UN Disabilities Convention) on 17 July 2008. In its report to government, the Joint Standing Committee on Treaties recommended a review of the relevant provisions of the *Migration Act* 1958 (Cth) (Migration Act) and migration policy, to remove any direct or indirect discrimination against persons with disabilities in contravention of the UN Disabilities Convention.[2]

The Inquiry also arose amidst the well publicised case of Dr Bernhard Moeller, who in 2008 was refused permanent residency on the basis that he did not meet the health requirement because a Medical Officer of the Commonwealth (MOC) assessed that his 13-year-old son Lukas would incur significant public health care and community services costs due to his Down Syndrome.[3]

The JS Committee website notes that in 2007-08, "at least 240 people were refused visas on the basis of a health condition, including at least 70 with a disability. An additional 442 applicants were refused a visa on health grounds because they had a family member who was unable to meet the health requirement."

The National Ethnic Disability Alliance (NEDA) has reported that migrants and refugees with disability are routinely refused entry to Australia as a result of an assessment of the potential health costs associated with their illness or disability. They state that "many families supporting people with disability make a difficult decision to leave behind a family member in order to build a life in Australia".[4] This highlights that the health requirement has a significant impact on the lives of many people seeking to travel or migrate to Australia.

On 9 June 2009, the LIV wrote to the JS Committee, urging the Committee, in the interests of equity and transparency, to inquire into the impact of the health requirement generally, without distinguishing between those conditions which might constitute a disability. Our submission was based primarily on the basis that there is no settled definition of "disability" in Australian law. The

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[1] LIV Submission to the Joint Standing Committee on Migration, *RE: Migration and Disability Inquiry* , 9 June 2009, avaiable at www.liv.asn.au/submissions.

[2] Joint Standing Committee on Treaties, Report 95: Review into treaties tabled on 4 June, 17 June, 25 June and 26 August 2008, Ch2.

[3] See Statement by Senator Evans on Dr Bernhard Moeller, 26 November 2008 available at http://www.minister.immi.gov.au/media/media-releases/2008/ce08113.htm

[4] NEDA, Refugees and Migrants with Disability and the United Nations Convention on the Rights of Persons with Disabilities (July 2008), available at http://www.neda.org.au/files/refugees_and_migrants_with_disability_and_un_crpd_july_2008_final_1.pdf

UN Disabilities Convention itself recognises that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".[5] While our request to broaden the Inquiry's terms of reference was not entirely accepted, the LIV commends the JS Committee's initiative to include the following guidance to submitters on its website underneath the terms of reference:

> *Submitters may wish to refer to Schedule 4 of the* Migration Regulations *1994, which specifies the health requirement for visa applicants and outlines the considerations that apply for applicants with a 'disease or condition'.*

The JS Committee has been asked to inquire into the assessment of the health and community costs associated with a disability as part of the health test undertaken for Australian visa processing. Specifically, the terms of reference provide that the JS Committee shall:

(a) 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.

(b) Report on the impact on funding for, and availability of, community services for people with a disability moving to Australia either temporarily or permanently.

(c) 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.

(d) Report on how the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment.

(e) Report on a comparative analysis of similar migrant receiving countries.

Disability discrimination and the UN Disabilities Convention

Migration law and policy are exempt from the *Disability Discrimination Act* 1992 (Cth) (DDA).[6]

The Productivity Commission considered the exemption in its 2004 report, *Review of the* Disability Discrimination Act *1992*.[7] The Productivity Commission commented that:

> *If the* Migration Act *were not exempt from the* DDA, *these health requirements might conceivably be found to discriminate against some people with disabilities indirectly (by setting rules that they do not or cannot meet), or discriminating directly (by requiring additional tests or medical evidence that are not required of people without disabilities).*

Notwithstanding the potential discriminatory effects of the Migration Act and its regulations, the Productivity Commission found that an exemption for the Migration Act and its regulations in the DDA is appropriate on other public policy grounds. The Commission did conclude that the current scope of the exemption may be wider than necessary and recommended that the exemption be reviewed and amended to ensure it exempts only those provisions which deal with issuing entry and migration visas to Australia and does not exempt administrative processes under the Migration Act and its regulations.

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[5] Preamble, *United Nations Convention on the Rights of Persons with Disabilities*, para (e).
[6] *Disability Discrimination Act* 1992 (Cth), s52.
[7] Productivity Commission, *Review of the* Disability Discrimination Act 1992 (2004), 343.

Since the Productivity Commission report, Australia has ratified the UN Disabilities Convention and its Optional Protocol. We note that the National Ethnic Disability Alliance (NEDA) received legal advice from Dr Ben Saul, Barrister and Director of the Centre for International Law, University of Sydney, on the consistency between Australia's obligation under the UN Disabilities Convention and the Migration Act exemption under the DDA and that this has been provided to the JS Committee.[8] Dr Saul concludes that the current Australian migration arrangements are unable to satisfy the equal protection obligation under article 5 of the UN Disabilities Convention.

Article 5 provides that:

(a) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

(b) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

Dr Saul argues that article 5 "'prohibits discrimination in law or practice in any field regulated and protected by public authorities".[9] He concludes that "even where permission to enter a foreign country is not recognised as a human right (which might be fatal to protection under article 4), 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 Regulations 1994) must comply with the non-discrimination requirements of article 5".

Human rights are not absolute and may be subject to reasonable and justifiable limitations – often referred to as a proportionality test. In this submission, we make recommendations to increase safeguards for people with a disability to ensure that the health requirement is not applied in an indiscriminate or blanket way and so that migration policy objectives are balanced proportionately against the right to equal treatment.

Summary of current migration law and policy

It is widely understood that the current health requirement has three main functions in migration law and policy:

- to protect the Australian community from public health risks;
- to contain public expenditure on health care and community services; and
- to safeguard access for Australians to health services in short supply.[10]

Section 65 of the Migration Act requires the Minister to be satisfied that a valid visa application meets the health criteria in order to grant a visa. Section 60 provides 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".

Regulation 2.25A of the *Migration Regulations* 1994 (Cth) (Migration Regulations) provides that in determining whether a visa applicant satisfies the health requirement relevant to a visa subclass, the Minister must seek the opinion of an MOC on whether the applicant (or where relevant, another person) meets the requirements of the relevant public interest criteria (PIC) 4005, 4006A or 4007 of Schedule 4, where information is known to the effect that the person may not meet any of those requirements. Schedule 4 sets out the health requirement for visa applicants (where this is relevant

[8] Submission from NEDA, available at http://www.aph.gov.au/house/committee/mig/disability/subs/sub001.pdf
[9] *Broeks v The Netherlands, UN Human Rights Committee*, 172/84, para 12.3; see also UNHRC, General Comment 18, para 12.
[10] See e.g. Productivity Commission, *Review of the* Disability Discrimination Act *1992* (2004), 343-4.

to the grant of a visa) and outlines the considerations that apply for applicants with a "disease or condition".

PIC 4005, 4006A and 4007 require that the applicant:

(a) is free from tuberculosis; and

(b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and

(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; and

(d) if the applicant is a person from whom a MOC has requested a signed undertaking to present himself or herself to a health authority in the State or Territory of intended residence in Australia for a follow-up medical assessment, the applicant has provided such an undertaking.

Health requirements relating to (a) tuberculosis or (b) other threats to public health in Australia or dangers to the Australian community cannot be waived by the Minister in any case.

Under PIC 4006A, the Minister may waive the health requirements under (c) where an employer signs a written undertaking that he or she will meet all costs related to the disease or condition that causes the applicant to fail to meet the health requirement. PIC 4006A applies to visa subclasses 418 (Educational) and 457 (Business – Long Stay).

Under PIC 4007, the Minister may waive the health requirement under (c) if the Minister is satisfied that the granting of 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 Australian citizen or permanent resident. PIC 4007 applies to some family, humanitarian, second stage business skills and permanent sponsored skilled visas. In *Bui v Minister for Immigration & Multicultural Affairs*,[11] the Federal Court held that there is a requirement to show compassionate or compelling circumstances to attract the exercise of the waiver discretion, even though it does not appear explicitly from the language of Item 4007.[12]

[11] [1999] FCA 118.
[12] *Bui*, at [40].

No waiver is available under PIC 4005, which applies to most visa categories including general skilled migration, student and tourist visas. Therefore, visa applications are refused for persons who do not meet the health requirement for any visa where PIC 4005 applies.

Other matters relevant to the health requirement are set out in the Procedures Advice Manual 3 (PAM3), Schedule 4, 4005-4007, including:

- Health examination requirements for temporary visa cases, including by Country and period of stay;
- Health examination requirements for permanent/provisional visa cases;
- Delegations, record-keeping, and clearance processes for assessment of applicants against the health requirements; and
- Guidance for assessing cases against the PIC, including health waiver and health undertaking provisions.[13]

Operation of the health requirement - visa application processing

Visa applicants are required to provide a health declaration as part of their application form and where required, to undertake health checks. Health checks may include radiological (Form 160) and / or medical examination (Form 26). DIAC Fact Sheet 22[14] identifies that for those applicants who require a medical and/or x-ray examination and a significant medical condition is identified, the MOC will provide DIAC with an opinion on whether the health requirement has been met. Visa applicants are generally given an opportunity to comment on the MOC's adverse opinion within a prescribed period (a natural justice obligation). Under the Migration Regulations officers deciding visa applications must accept the opinion of the MOC on whether applicants meet the health requirement.[15]

The MOC will provide health waiver costing advice with any adverse opinion on a disease or condition under PIC 4006A or 4007. Visa applicants are generally given the opportunity to comment on the health waiver costing advice by making a health waiver request. Different criteria and internal DIAC procedures occur for assessing waiver under PIC 4006A and 4007. If a health waiver request is refused, the visa application will be refused.

Key problems with the current health requirement and its application and recommendations for reform

In 2006-07, the Australian National Audit Office (ANAO) assessed the effectiveness of DIAC's administration of the health requirement and examined whether DIAC was setting and implementing the health requirement in accordance with the Migration Act, the Migration Regulations, and DIAC's own guidelines (the 2007 ANAO report).[16]

The ANAO concluded that while DIAC complied with the intent of s60 of the Migration Act, there were several limitations and gaps in DIAC's administrative processes underpinning its implementation of the PIC:

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[13] See Australian National Audit Office, Administration of the Health Requirement of the Migration Act 1958, Audit Report No.37 (2007), available at http://www.anao.gov.au/uploads/documents/2006-07_Audit_Report_37.pdf, 138.
[14] Available at http://www.immi.gov.au/media/fact-sheets/22health.htm
[15] Regulation 2.25A (3).
[16] Ibid.

These limitations and gaps weakened DIAC's ability to fully assess the appropriateness, consistency, and efficiency of its health screening of visa applicants. This also meant that DIAC could not determine the effectiveness of its implementation of the health requirement in protecting Australia from public health threats, containing health costs and safeguarding access of Australians to health services in short supply—important DIAC objectives under the health requirement.[17]

The ANAO made eight recommendations in its report. At the Senate Legal and Constitutional Affairs Committee Budget Estimates Hearing (the Budget Estimates Hearing) on 28 May 2008 Senator Ellison asked DIAC to provide information on the measures being implemented to strengthen the health requirement administration in the DIAC, following the recommendations of the ANAO. This question was taken on notice and DIAC provided written responses in relation to output 1.1 (Migration and Temporary Entry) (the DIAC response).[18]

Taking into account the ANAO's recommendations, we maintain that improvements need to be made in relation to simplifying the health criteria and increasing transparency, consistency and fairness in the decision-making process.

Simplification: public health risk and economic impact considerations should be addressed separately

As outlined above, visas subject to a health requirement may only be granted where the applicable criteria in PIC 4005, 4006A or 4007 are met. Each of these criteria include requirements relating to tuberculosis and other threats to public health/ dangers to the community and diseases and conditions which have "significant" cost and resources implications. Waiver is not available in relation to "public health risks" and may be available for cost burdens, depending on the visa category.

The LIV considers that the application of three PIC is unnecessarily complex and confusing for visa applicants, without a sound policy basis. To address these concerns, we propose that threats to public health and dangers to the community, including the tuberculosis and public health risk criteria, should be addressed separately in the Migration Regulations from those diseases and conditions which require consideration of economic impact (economic impact criteria).

The public health risk criteria should not be subject to waiver. This recognises the ongoing need to protect the Australian community from infectious and communicable diseases.

Economic impact criteria should in all cases be subject to waiver. The availability of waiver for economic impact criteria, regardless of visa subclass, will increase fairness because it will enable DIAC primary decision-makers to consider the personal circumstances and characteristics of the visa applicant or relevant person. Our proposals in relation to the operation of waiver in cases of potential economic impact are set out further below.

1. The LIV recommends that the health requirement should be simplified by abolishing PIC 4005, 4006A and 4007 and creating two formal health requirements: public health risk criteria and economic impact criteria.

Improved transparency and consistency: scheduling of all diseases and conditions

Health requirement (1)(c) in PIC 4005, 4006A and 4007 establishes an objective test, so the MOC must consider whether "a person" with the disease or condition of the applicant would be likely to

[17] Australian National Audit Office, above n13, [10].

[18] Question taken on notice budget estimates hearing: 28 May 2008 Immigration and Citizenship Portfolio (42) Output 1.1: Migration and Temporary Entry, available at http://www.aph.gov.au/Senate/Committee/legcon_ctte/estimates/bud_0809/diac/42.pdf

require health care or community services or meet the medical criteria for the provision of a community service.

The strict application of the objective test in 1(c) was discussed in the 2005 judgement of *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1626 (*Robinson*). In *Robinson*, Siopis J held that the proper construction of 1(c) "requires the MOC to ascertain the form or level of condition suffered by the applicant in question and then to apply the statutory criteria by reference to a hypothetical person who suffers from that form or level of the condition." Siopis J therefore accepted that the MOC should *not* make cost assessments on the basis of a generic form of the condition.

In the experience of our members, despite the decision in *Robinson*, MOC opinions continue to be computer-generated and make very little reference to or provide any evidence of any meaningful consideration by the MOC of the medical and other evidence that has been submitted in relation to the actual prognosis of the relevant person and the health care and community services costs likely to be incurred by the Commonwealth during the proposed period of stay. Rather, DIAC will consider such personal circumstances only where a health waiver request is available.

Furthermore, decision-making is confounded and difficult to understand where there is no legislated definition of "significant cost". PAM3 states:

> *The MOC decides whether the health condition [of a visa applicant] would attract a level of public funding regarded as 'significant'. There is no absolute definition of the level of costs regarded as significant, but the MOC may be guided by a multiple of average annual per capita health and welfare expenditure for Australians.*

In light of the complex nature of the mixed objective/subjective assessment of the health status of an individual, the LIV proposes that the assessment process be clarified and made more transparent by listing all diseases or conditions of concern to the MOC in a schedule to the Migration Regulations and by making that schedule publicly available, including on DIAC's website. This will significantly improve transparency and certainty for visa applicants, who should be able to determine prior to making a visa application whether their health status (or the health status of a relevant person) may adversely affect their visa application. Flexibility may be maintained by the ability to add or remove diseases or conditions of concern by way of Gazette Notice. The LIV submits that public health risk criteria and economic impact criteria diseases and conditions should be published in separate schedules to the Migration Regulations.

A benchmark "expected cost" of economic impact diseases and conditions should be set out in the economic impact schedule. The "expected cost" should not be based on a generic form of the condition. Rather, a variety of cost levels should be specified in relation to the varying forms or levels of the diseases or condition of concern.

The Migration Regulations should clearly indicate a prescribed level of cost that will be deemed to be "significant" and therefore prima facie, applicants will fail the health requirement where likely health care and community services costs exceed that level.

Fairness should be ensured through reform of the waiver eligibility criteria, such that every effort is made to ensure that full consideration is given to the personal characteristics and circumstances of each relevant person affected by the visa decision. Where a visa applicant (or other relevant person) is found to have a disease or condition of concern as listed in the economic impact schedule, the applicant should be invited to provide evidence about whether or not they will generate the expected cost as prescribed by the MOC and, especially where costs are likely to amount or exceed that expected, present arguments why the health requirement should be waived in their case.

Visa applicants will benefit from increased transparency and certainty, with full knowledge prior to visa application about the application process and information they will be required to provide in order to seek waiver of the economic impact criteria. We set out further information below about proposed reforms to the application of the health waiver, which we recommend should be available in all visa subclasses to allow proper consideration of personal circumstances and characteristics in every case.

2. The LIV recommends that an additional Schedule to the Migration Regulations or another legislative instrument (e.g. Gazette Notice) be introduced, specifying:

   (a) Diseases or conditions which are deemed to be a public health risk or a danger to the Australian community (the Public Health Risk Schedule); and

   (b) Diseases or conditions of concern which are deemed to have a specified economic impact (the Economic Impact Schedule).

3. The LIV recommends that the Economic Impact Schedule include the "expected cost" of each listed "disease and condition" for each form or level in which that disease or condition manifests.

4. The LIV recommends that the Migration Regulations should be amended to clearly indicate a prescribed amount which will be deemed to be "significant" and therefore *prima facie* give rise to a failure of the health requirement if no waiver can be secured.

5. The LIV recommends that the Public Health Risk Schedule and the Economic Impact Schedule be regularly reviewed and amended to reflect recent developments in disease treatment and control and the impact of such developments upon public health risks and the provision and costs of health care and community services.

Improved transparency: Notes for Guidance should be made generally available to the public at no cost

MOCs use *Notes for Guidance* when determining whether a person has a disease or condition within health requirement (1)(c) of PIC 4005, 4006A and 4007.

The *Notes for Guidance* were introduced following a recommendation of the Joint Standing Committee on Migration Regulations, in their report *Conditional Migrant Entry: the health rules* in 1992, which noted that there were no official guidelines for assessing health conditions.

In the 2007 ANAO report, the Auditor-General concluded that "the development, updating and review of the *Notes for Guidance* has continued to be problematic, characterized by a lack of priority setting and uncertain mechanisms for their endorsement." The Auditor-General recommended that DIAC "provide a sound basis for consistent medical assessments by ensuring complete and up to date guidelines (*Notes for Guidance*) are available for medical officers and that these are regularly reviewed."

DIAC indicated to the Budget Estimates Hearing that in March 2007 DIAC signed a contract for the completion of thirteen *Notes for Guidance* papers with the company Adhealth. They suggested that these papers will be reviewed annually to ensure they remain current. The completion date for this project is June 2011.

The LIV is concerned about the lack of transparency relating to *Notes for Guidance*, which are not publically available, and the protracted period over which they are being reviewed and revised, which increases the likelihood that the current guidance material is out of date.

We propose that the *Notes for Guidance* be made publicly available and that these be reviewed annually, particularly if our recommendation to schedule all diseases and conditions of concern is not implemented. The *Notes for Guidance* should relate to the Public Health Risk and Economic Impact Schedules recommended above.

6. The LIV recommends that *Notes for Guidance* are made publicly available and should be reviewed annually and as soon as there has been any significant development in treatment that will impact upon the cost of or access to health care and community services.

Improved fairness and equity: reform of health waiver eligibility and proper assessment of personal circumstances and characteristics of a visa applicant (or relevant person)

Under DIAC's policy, DIAC must consider waiving the health requirement for all cases where the health waiver option is available "even though the power to exercise the health waiver is not compellable".[19] All health waiver decisions must be reported to, and monitored by, DIAC's Health Policy Section.[20] Cases with expected costs over $200,000 require consultation with the Health Policy Section prior to the final decision.[21] Dr Ben Saul highlights that the availably of health waiver is an important safeguard against blanket differentiation against disabled persons.[22]

The LIV is concerned about the deficiencies identified by the 2007 ANAO report in health waiver data held by DIAC, which showed that DIAC was "unable to demonstrate that the health waiver had been considered for all waiver eligible visa applicants, or substantiate that health waivers were applied consistently and in line with its policies and procedures". We note DIAC response in 2008 that a central designated coordination point and health waiver management system is being developed, due to be completed in 2009.[23]

In addition, concern has been expressed that the focus of health waiver decisions on whether a person's disease or condition poses an "undue" significant cost burden is not balanced by consideration of the positive (financial and other) contributions which a person with a disease or condition may make to Australia if admitted.[24]

At present health waiver is unavailable for most visa applicants, because PIC 4005 applies to most visa subclasses and does not contain provision for waiver. As discussed above, under the current law, when forming an opinion under health requirement 1(c) of PIC 4005, 4006A and 4007, the MOC is required to consider only limited subjective information about the personal circumstances and characteristics of a visa applicant (or relevant person). The actual prognosis of a person and other factors such as their age and past employment history will therefore be most relevant in relation to the exercise of the health waiver discretion. The impact of the health requirement (1)(c) is therefore most acute where no waiver is available, so that for most visa applicants, the likely cost to the Australian community arising from a person's manifestation of a disease or condition will not be fully considered along with the benefits that such a person, and other applicants included in their application, could bring to Australia.

The LIV considers this to be a harsh application of the law, where an applicant's personal circumstances and characteristics might be very relevant to whether or not they are likely to make a contribution to the Australian community. We also consider this blanket rule to be in breach of Australia's obligations under the UN Disabilities Convention, in particular art 5, as discussed above.

We therefore submit that a health waiver should be available for all visa subclasses in relation to those diseases and conditions listed in the Economic Impact Schedule (proposed above).

We propose that the Migration Regulations be amended to set out an inclusive list of factors which the primary DIAC decision maker should be take into account when assessing a health waiver request, including the applicant's:

(a) age;

(b) eligibility for a Disability Support Pension or other income support;

(c) past employment history and future work prospects;

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[19] DIAC PAM3, July 2006, sections 67.1 and 89.1.
[20] PAM3, s67.
[21] See 2007 ANAO report, above n13.
[22] Attachment to submission form NEDA, above n8, At [47].
[23] See above n18.
[24] See e.g. NAPWA, in Productivity Commission Review (2004), 345.

(d) ability to participate in the community, with family and community support; and

(e) prospects for receiving care and / or support from their family, community or other organisation such that reliance upon Australian health care and community services would be lessened.

This set of factors is by no means exhaustive. An expanded set of factors prescribed in regulations will provide guidance to visa applicants regarding the type of information to provide in health waiver requests and DIAC decision-makers in relation to what information to take into account. This information should be used to make a more realistic cost and / or prejudice assessment, to be compared with the cost assessment published in the Economic Impact Schedule, in order to determine whether in fact is the person is likely to pose an undue cost to the Australian community or prejudice access to health care and community services. Compassionate and humanitarian circumstances should continue to be considered in relation to whether a significant cost is undue and guidelines should be made to assist decision-makers to assess waiver requests.

Ministerial intervention should also continue to be available as an additional safeguard for people with disabilities.

7. The LIV recommends that the health waiver be available for all visa subclasses.

8. The LIV recommends that in determining whether to exercise a waiver, the primary DIAC decision maker should as a minimum be required to take into account including the applicant's:

- age;
- eligibility for a Disability Support Pension or other income support;
- past employment history and future work prospects;
- ability to participate in the community, with family and community support; and
- prospects for receiving care and / or support from their family, community or other organisation such that reliance upon Australian health care and community services would be lessened.

This information should be used to make an actual cost assessment of the person's health status. The actual cost estimate should be compared to the published "expected cost" and the prescribed "significant cost" and a decision made about whether the person poses an undue burden continue to be based on a consideration against various factors including economic and social contribution, compassionate and humanitarian grounds.

9. The LIV recommends that ministerial intervention should continue to be available as an additional safeguard for people with disabilities.

Quality: role for specialists and health economists

The LIV is concerned about the lack of transparency relating to the current assessment of expected cost of a disease or condition and specifically, that the assessment is made by a medical practitioner. We consider that an MOC is not an appropriate decision-maker in relation to determination of economic impact and we suggest that cost-benefit analysis is not an area of medical expertise. This concern is also valid in relation to the MOC's role in preparing a health waiver costing advice.

The LIV also queries whether MOCs will always be most appropriately qualified to make medical assessments in relation to disabilities, such as HIV/AIDS, when they are not specialists in that area. We note that general health requirements under Canadian immigration law require two or

more concurring medical opinions as an additional safeguard.[25] We would support a requirement for a second specialist medical opinion where a person is found not to meet the health requirement, however, we emphasise that the cost of this medical assessment should not be imposed on the relevant person.

10. The LIV recommends that the cost-estimate calculation should be completed by someone who is qualified to make this assessment, such as a health economist or actuary, and not a medical officer. Discounted cost modeling should be applied in costs estimate calculations, particularly where estimates are being made in relation to persons seeking visas authorizing them to remain in Australia for periods greater than 12 months.

11. The LIV recommends that a second specialist medical opinion should be obtained only in cases where a person is found not to meet the health requirement.

Protection visa applicants

The LIV does not support any economic impact health requirement for refugee and humanitarian entrants, including those seeking family reunion. We note the work of NEDA in this area, including the July 2008 report *Refugees and Migrants with Disability and the United Nations Convention on the Rights of Persons with Disabilities.*

Conclusion

The health requirement under the Migration Act has a significant impact on the lives of many people seeking to travel or migrate to Australia. The LIV urges the government to undertake reform of the health requirement, to simplify the law in this area, to increase transparency and improve fairness, equity and quality of decisions. The LIV would be pleased to elaborate on our submission at a public hearing.

25 *Immigration and Refugee Protection Act* 2001 (Canada), s 38(1).