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Submission No 58

Inquiry into the Migration Treatment of Disability

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Australian Human Rights Commission Submission
to the Joint Standing Committee on Migration

28 October 2009

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1 Introduction

1. The Australian Human Rights Commission (“the Commission”) makes this submission to the Joint Standing Committee on Migration in its Inquiry into the Migration Treatment of Disability.

2 Summary

2. The Commission endorses the view of the Australian Government, as expressed in its interpretive declaration lodged with its ratification of the Convention on the Rights of Persons with Disabilities: that disability related distinctions in relation to people who are not Australian citizens and are seeking to enter or remain in Australia, are consistent with Australia’s acceptance of obligations under this Convention, if and to the extent that these requirements are based on legitimate, objective and reasonable criteria.
3. The Commission welcomes this Inquiry as an opportunity to contribute to public discussion, and consideration by Parliament and Government, of measures required to ensure that health requirements under the Migration Act (both in their terms and their application) meet this test for consistency with human rights.

3 Recommendations

4. The Commission recommends that the Committee endorse the test stated by the Australian Government in its interpretive declaration lodged with its ratification of the Convention on the Rights of Persons with Disabilities, that health requirements applied under the Migration Act should be based on legitimate, objective and reasonable criteria.
5. The Commission recommends that the Committee examine health requirements under the Migration Act for consistency with this test, and make recommendations for reform in any areas of inconsistency which are found.
6. The Commission recommends that the Committee review any instances in which decision makers under the Migration Act are not able and required to take into account benefits which may arise from participation in and contribution to Australian society when considering costs or requirements for services which may arise from an applicant or an applicant’s family member having a disability.

4 Inquiry is welcome and necessary

7. The Commission commends the Parliament (through the Committee) for undertaking, and the Government (through the Minister for Immigration and Citizenship and the Parliamentary Secretary for Disabilities and Children’s Services) for requesting, this inquiry relating to health requirements in the Migration Act.

8. The Commission is aware of concerns, which have also been raised in other submissions to this Inquiry, and in other fora by the Commission itself over time, that criteria and procedures under the Migration Act do not adequately provide for decision makers to have power and duties to take into account benefits which may arise from participation in and contribution to Australian society, when considering costs or requirements for services which may arise from an applicant or an applicant's family member having a disability.
9. These concerns have been raised regarding visa applications across the board (for example regarding whether relatively low levels of projected additional costs arising from a person's disability may operate in effect as a bar on being considered favourably for being admitted to or remaining in Australia).
10. Concerns have been raised in particular regarding the impact of criteria and procedures in relation to assessment of health requirements under the Migration Act as they may affect compliance by the Australian Government with its obligations and goals regarding refugee and humanitarian protection.

5 Australia's ratification of Convention on the Rights of Persons with Disabilities provides the appropriate test to apply in this Inquiry

11. The Commission endorses the view of the Australian Government, as expressed in its interpretive declaration lodged with its ratification of the Convention on the Rights of Persons with Disabilities, that disability related distinctions in relation to people who are not Australian citizens and are seeking to enter or remain in Australia, are consistent with Australia's acceptance of obligations under this Convention if and to the extent that these requirements are based on legitimate, objective and reasonable criteria.
12. The Commission regards this interpretive declaration as an important and constructive contribution in clarifying the relationship between the non-discrimination requirements of the Convention on the Rights of Persons with Disabilities and the role and responsibility of national governments regarding immigration.
13. Reference in Australia's interpretive declaration to legitimate, objective and reasonable criteria as the test for avoidance of objectionable discrimination closely follows international jurisprudence on the meaning of discrimination, for example as referred to in advice appended to the submission by the National Ethnic Disability Alliance to this Inquiry.

6 Reasonable decision making requires that all relevant factors be able to be taken into account

The Commission submits that, for reasonable decision making to be assured in relation to an application for an Australian visa, where costs and service impacts arising from the disability of an applicant or an applicant's family member are an issue, decision makers need also in all cases to have the capacity and duty to

consider other relevant and offsetting factors including potential contributions, by the individual or family concerned, to the life of the Australian community.