

Australia's international obligations and domestic exemptions

- 7.1 To this point, this report has focused on the effect of Australia's domestic policy in relation to the migration Health Requirement under the *Migration Act 1958* (Cth). In particular, it has considered the impact of the Health Requirement on visa applicants along with an assessment of the processes used in the assessment of the Requirement.
- 7.2 However, given the nature of migration policy, this inquiry has also considered Australia's migration policy in an international context. In this regard, many inquiry respondents asked the Committee to consider Australia's migration health requirement having regard to Australia's international obligations.
- 7.3 This Chapter explores Australia's international obligations under relevant treaties before assessing their significance for the migration treatment of disability under the *Migration Act 1958* and its regulations. Finally, calls for the removal section 52 of the *Disability Discrimination Act 1992*, which exempts Migration law and its administration from the force of that Act, are assessed.

International obligations

- 7.4 Australia is signatory to a number of international treaties or instruments. Principal among these is the United Nation's (UN) *Convention on the Rights of Persons with a Disability* (the CRPD or Disability Convention) which was

ratified by Australia on 18 July 2008. It is the main international instrument for the human rights protection of the rights and freedoms of people with a disability.¹

- 7.5 Also raised in evidence was the UN *Convention on the Rights of the Child* (the CRC or Children's Convention) was ratified by Australia in December 1990. It safeguards the rights of children and provides associated protections for family participation and unity.² While the Children's Convention is relevant to the present inquiry, evidence primarily centred around Australia's obligations under the Disability Convention.

United Nations Convention on the Rights of Persons with a Disability

- 7.6 Australia was an active contributor to UN discussions for the Disability Convention and had significant input into its eventual form. Australia was one of the first countries to become signatory to the Convention, and subsequently to ratify it.³

- 7.7 The Disability Convention provides comprehensive protections and directly prohibits discrimination against people with a disability as discrete social group. It is one of the key international agreements helping to strengthen the rights of persons with a disability. Article 1 (1) of the Disability Convention states:

The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.⁴

- 7.8 The Convention establishes 50 Articles and an Optional Protocol.⁵ It provides a comprehensive framework to address societal barriers underpinned by eight guiding principles guaranteeing non-

1 Australian Treaties Series, *Convention on the Rights of Persons with a Disability*, National Interest Analysis Reference: [2008] ATNIA 18, accessed March 2010 at <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/2008/12.html?query=Disabilities>>.

2 United Nations *Convention on the Rights of the Child*, accessed April 2010 at <www.unicef.org/crc/index_30160.html>.

3 Australian Treaties Series, *Convention on the Rights of Persons with a Disability*, National Interest Analysis Reference: [2008] ATNIA 18, accessed March 2010 at <<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/2008/12.html?query=Disabilities>>.

4 United Nations Enable – Rights and Dignity of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, accessed March 2010 at <<http://www.un.org/disabilities/default.asp?id=150>>.

5 The Optional Protocol enables the Convention's elected monitoring mechanism, the United Nations Committee on the Rights of Persons with Disabilities.

discrimination, equality of opportunity, full participation and inclusion in public life. The Convention protects the family and the rights of the child, prohibits degradation and harsh treatment, and articulates rights to access public infrastructure, education, accommodation, standards of living and health care.⁶

- 7.9 As discussed later in this Chapter, the Convention is not enforceable on state parties (individual nations party to the Convention), however, it requires that domestic law and government programs be in harmony with treaty obligations. In particular, Articles 4 and 5 require state parties to ensure laws are not in contravention to obligations for non-discrimination under the treaty.
- 7.10 Additionally, the Convention sets out a framework for the monitoring and review of measures undertaken by states to comply with their obligations. In particular, Disability Convention Article 34 establishes the United Nations Committee on the Rights of Persons with Disabilities (the Disability Committee) as an elected independent monitoring mechanism.
- 7.11 Articles 33 and 35 require State Parties to set up national mechanisms to monitor implementation of the Convention's precepts and to provide a 'full and comprehensive report' of the measures within two years, and at least every four years after that.⁷

Ratification and interpretative declaration of the Disability Convention

- 7.12 Australia's ratification of the Disability Convention was supported by the Australian Government on the conviction that Australia was already in compliance with its 'immediate obligations' under that and the relevant ratified international conventions.⁸
- 7.13 The Department of Immigration and Citizenship (DIAC) submission to this inquiry stated:

6 United Nations Enable – Rights and Dignity of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, accessed March 2010 at <<http://www.un.org/disabilities/default.asp?id=259>> and see Professor Ron McCallum and Professor Mary Crock, *Submission 31*, Attachment 2, Background Operation of the CRPD.

7 From the entry into force of the present Convention for the State Party concerned. United Nations Enable – Rights and Dignity of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, Article 35 – Reports by State Parties, accessed March 2010 at <www.un.org/disabilities/default.asp?id=259>.

8 Australian Government, *Australian Treaty National Interest Analysis – Category 1 Treaty*, [2008], ATNIA 18, from para 8, and see paras. 32; 34 accessed March 2010 at <<http://www.austlii.edu.au/au/other/dfat/nia/2008/18.html>>.

Ratifying the Convention is part of the Government's broader longer term commitment to improving the lives of both people with a disability and their families and comes as part of a significant set of reforms of Australia's disability laws.

Australia's declared understanding is 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, and that it does not 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.

Australia remains at the forefront of upholding the rights of people with disabilities, and this Convention is part of the Government's broader longer term commitment to improving the lives of both people with a disability as well as their families.⁹

- 7.14 This position was based on the Government's impact analysis (NIA) and the assessment of the treaty conducted prior to ratification of the Disability Convention.¹⁰ The assessment was conducted by the Joint Standing Committee on Treaties (JSCOT) which found that that ratification of the Convention provided an opportunity 'to resolve any inconsistencies and effect positive reforms' under the migration health requirements. It recommended that:

...in the light of the ratification of the Convention, it would be timely to carry out a thorough review of the relevant provisions of the Act and the administrative implementation of migration policy to ensure that there is no direct or indirect discrimination against persons with disabilities.¹¹

- 7.15 In ratifying the Disability Convention, Australia also lodged an interpretive declaration outlining Australia's understanding of its obligations under the Convention. Many submissions questioned the status of Australia's interpretive declaration, especially in relation to the

9 Department of Immigration and Citizenship, *Submission 66*, p. 24.

10 Before ratification of a treaty the Australian Government prepares an Australian National Interest Analysis (NIA) which assesses the potential economic, social and other impacts of ratification. See Australian Government, *Australian Treaty National Interest Analysis – Category 1 Treaty*, [2008], ATNIA 18, accessed March 2010 at <<http://www.austlii.edu.au/au/other/dfat/nia/2008/18.html>> .

11 Recommendation 2, JSCOT, 'Convention on the Rights of Persons with Disabilities', *Report 95: Review into Treaties tabled on 4 June, 17 June, 25 June and 26 August 2008*, October 2008, p. 17 and for recommendation see p. 23.

Health Requirement and compliance with Australia's international obligations.

- 7.16 Paragraph 3 of Australia's interpretive declaration stated in regard to migration law:

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 requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.¹²

- 7.17 The United Nations Enable website explains that under treaty law a State Party may lodge a reserve or interpretative declaration to qualify or clarify its compliance with a treaty it has ratified noting:

A reservation is a statement that purports to exclude or modify the legal effect of a treaty provision with regard to the State or regional integration organization concerned. The statement might be entitled "reservation," "declaration," "understanding," "interpretative declaration" or "interpretative statement." However phrased or named, any statement that excludes or modifies the legal effect of a treaty provision is, in fact, a reservation. A reservation may enable a State or regional integration organization that would otherwise be unwilling or unable to participate in the Convention or Optional Protocol to so participate.¹³

- 7.18 The Migration Law Program, Australian National University (ANU) College of Law, argued that an interpretive declaration has limited jurisdiction under international law and, accordingly, that the Government should not seek to avoid obligations under it:

It is our understanding that this is to be considered an interpretive declaration and not a reservation to those articles protecting the

12 United Nations Enable – Rights and Dignity of Persons with Disabilities, *Reserves and Declarations - Australia*, accessed March 2010 at <<http://www.un.org/disabilities/default.asp?id=475>>.

13 United Nations Enable – Rights and Dignity of Persons with Disabilities, *Chapter Four; Becoming a Party to a Protocol or Convention*, accessed April 2010 at <<http://www.un.org/disabilities/default.asp?id=232>>

equal rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, which the declaration otherwise confirms. As such, it is not to be considered a "catch-all" protection for any policy relating to immigration against the full application of the rights recognised by the Convention.¹⁴

- 7.19 Castan Centre for Human Rights and Rethinking Mental Health Laws Federation Fellowship took a similar view, recommending amendments to the current health assessment criteria and migration law to bring Australia into compliance.¹⁵
- 7.20 Professor Ron McCallum AO, 2010 Chairman of the United Nations Disability Committee, saw the lodging of Australia's interpretative declaration as an example of 'overabundant legislative caution'. He observed that the Disability Convention already permits decisions in areas of migration and movement to be 'reasonable and proportional'. He argued, however, that the migration rules are not being applied in a 'reasonable and proportional manner'.¹⁶
- 7.21 In a similar vein, the Australian Federation of Disability Organisations (AFDO) cited the United Kingdom (UK) Parliamentary Joint Committee on Human Rights which disapproved a Government proposal to lodge an immigration reserve to the Convention. It considered the proposal unnecessary given the Convention gave no additional rights to migrants enter the UK, nor had power to compel on migration matters. A reserve, may however, give Government inordinate migration controls while conflating disability and public health risks.¹⁷
- 7.22 Several submissions, such as from Queensland Advocacy Incorporated (QAI), called for the withdrawal of the interpretive declaration. Mr Kevin Cocks from QAI stated:

Withdrawing it would make it a fairer process for people with disabilities, whether they were children, as part of a family, or

14 Migration Law Program, Australian National University College of Law, *Submission 59*, p. 4.

15 Castan Centre for Human Rights Law and Rethinking Mental Health Laws Federation Fellowship, Faculty of Law, Monash University, Melbourne, *Submission 36*, p. 16.

16 Professor Ron McCallum AO, *Committee Hansard*, Sydney, 12 November 2010, p. 12.

17 Australian Federation of Disability Organisations, *Submission 6*, pp. 8-9. The United Kingdom later made a reservation asserting the right to apply laws for 'entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, as it may deem necessary from time to time'. See United Nations Enable—Rights and Dignity of Persons with Disabilities, *Reserves and Declarations*, accessed May 2010 at <<http://www.un.org/disabilities/default.asp?id=475>>

adults, as individuals or part of a family. There would be no discrimination, and Article 5 in the CRPD calls for non-discrimination.¹⁸

- 7.23 The Australian Capital Territory (ACT) Human Rights Commission claimed the interpretative declaration contradicted Australia's otherwise progressive domestic policy. The Commissioner submitted:

...given the challenging background of many people who have recently arrived to our country, including those seeking asylum, we suggest it sends the wrong message about Australian society that people with a disability are not valued. To the contrary, health, discrimination and human rights legislative and service regimes that exist around Australia, particularly in the ACT, demonstrate the commitment of our society to inclusiveness. National strategies and action plans on health and disability highlight the importance of liaising with those from a CALD background. To suggest in their very first contact with Australia that people with a disability are not valued contradicts these aims and goals.¹⁹

- 7.24 The Cabramatta Community Centre observed:

We note that Australia sought to exclude the migration health requirement from its obligations under the United Nations Convention on the Rights of Persons with Disabilities, where these requirements are based on legitimate, objective and reasonable criteria, through the declaration that was made upon ratification...²⁰

Scope of Australia's obligations under the Disability Convention

- 7.25 Before considering the significance of the Disability Convention for the current inquiry, it is useful to establish what general obligations are imposed on Australia, and other treaty signatories, under international law.
- 7.26 While treaty obligations vary, and the debate about the relationship between international and domestic law continues, three practical obligations can be considered to apply:

18 Mr Kevin Cocks, Queensland Advocacy Inc. (QAI), *Committee Hansard*, Brisbane, 28 January 2010, p. 18 and see QAI *Submission 90*.

19 Australian Capital Territory (ACT) Human Rights Commission, *Submission 76*, p. 3.

20 Cabramatta Community Centre, *Submission 28*, p. 1.

- the Vienna Conventions on the Law of Treaties provides that treaties are governed by international law not domestic law;
 - State Parties must ensure their domestic law permits them to meet their treaty obligations; and
 - a State Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.²¹
- 7.27 While not domestically enforceable, treaties may impose obligations on a State Party to ensure their domestic laws are consistent with, and do not impose obstacles to, compliance. There is thus potential for international treaties to influence the formation and administration of domestic law and to aid its statutory interpretation.²²
- 7.28 The Federal Court case *Minister for Immigration and Ethnic Affairs v Teoh* (1995) provided an important test case for this in Australian case law.²³
- 7.29 Mr Teoh, a Malaysian national married to an Australian citizen with whom he had children, was refused permanent residency on a drug trafficking charge and was to be deported under the *Migration Act 1958*. In the judgment on the case, the majority determined that there had been a breach of natural justice, as the Immigration Department had failed to invite Teoh to make a submission on whether a deportation order should be made, contrary to its obligations.
- 7.30 The High Court held by a majority that there was a 'legitimate expectation' that the best of interests of children be a primary consideration based on the *Convention on the Rights of the Child*, which had not had legislative implementation. The *Teoh* case thus established a principle that Government and its agencies will act in accordance with the terms of a treaty, even where those terms had not been incorporated into Australian law.²⁴

21 A State 'cannot plead provisions of its own law or deficiencies in that law' in answer to a claim it is in breach of a treaty obligation. Mark Jennings, Senior Adviser International Trade, 'The Relationship Between Treaties and Domestic Law' Treaties in the Global Environment, Attorney-General's Department, accessed April 2010 at <http://www.dfat.gov.au/treaties/workshops/treaties_global/jennings.html>.

22 JSCOT, *United Nations Convention for the Rights of the Child*, 17th Report, August, 1998, p. 4.

23 *Minister for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273, see JSCOT, *United Nations Convention for the Rights of the Child*, 17th Report, August, 1998, p. 144. Other relevant cases include *Mabo v Queensland (No. 2)* [1992] 175 CLR 1, *Dietrich v The Queen* [1992] 177 CLR 292.

24 'The Relationship Between Treaties and Domestic Law' Treaties in the Global Environment accessed April 2010 at <http://www.dfat.gov.au/treaties/workshops/treaties_global/jennings.html> .

The health requirement and international obligations

- 7.31 The Committee's inquiry found that there was substantial concern from some submitters regarding the interaction of Australia's domestic legislation is and its international obligations regarding migration policy.
- 7.32 The chief concern was that the *Migration Act 1958* (Cth) is exempt from the provisions of the *Disability Discrimination Act 1992* (Cth) (DDA). Many submitters considered that this puts Australia at odds with its international obligations to ensure domestic legislation is free from discriminatory provisions.²⁵
- 7.33 Many submitters raised perceived inconsistencies between the Health Requirement and the Disability Convention. In particular, it was held that the Health Requirement is at odds with the certain articles of the Disability Convention, namely 4, 5 and 18. Briefly:
- **Article 4** which provides fundamental protections against discrimination in obliging signatories (State Parties) to:
 - ...undertake to ensure and to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
 - ...take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.²⁶
 - **Article 5** which provides fundamental protections for Equality and Non-Discrimination, requiring that State Parties shall:
 - recognise 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; and
 - prohibit all discrimination on the basis of disability and guarantee persons with disabilities equal and effective legal protection against discrimination on all grounds.²⁷
 - **Article 18**, guarantees liberty of movement and nationality, including 'the freedom to choose residency and nationality on an equal basis with others' including by ensuring that persons with disabilities:

25 See citations later in this chapter.

26 United Nations Convention on the Rights of Persons with a Disability (Art. 4. 1(a) & (b)).

27 Information in this section from *United Nations Enable*, 'Convention on the Rights of Persons with Disabilities' accessed March 2010 at <<http://www.un.org/disabilities/default.asp?id=259>> and see Professor Ron McCallum and Professor Mary Crock, *Submission 31*, Attachment 2, Background Operation of the CRPD.

- Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability;
- Are not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement;
- Are free to leave any country, including their own;
- Are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.²⁸

7.34 However, in relation to the Disability Convention, the United Nations Human Rights Committee *General Comment 18: Non-Discrimination* also provides that:

...not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant.²⁹

7.35 This is known as the 'proportionality test'. The Law Institute of Victoria advised that the proportionality test recognises that human rights are not absolute and may be subject to 'reasonable and justifiable limitations'. In the context of the Health Requirement, the proportionality test would require:

...balancing the right to discriminate against people with a disability with requirements to protect Australia against health risks, excessive public expenditure and access to services'.³⁰

Views in relation to obligations under the Disability Convention

7.36 The Australian Federation of Disability Organisations (AFDO) asserted that Australia's migration treatment of people with a disability does not comply with key clauses in the UN Convention including the General Obligation to repeal legislation³¹, requirements for respect, non-discrimination and equality of opportunity³², and for freedom of

28 *United Nations Convention on the Rights of Persons with a Disability* Articles 18(a), (b) (c) & (d) respectively.

29 New South Wales Young Lawyers Human Rights Committee, *Submission 32*, p. [6].

30 Law Institute of Victoria, *Submission 88.1*, p. 4.

31 *United Nations Convention on the Rights of Persons with a Disability* Article 4 (1)(b).

32 *United Nations Convention on the Rights of Persons with a Disability* Article 3.

movement.³³ AFDO also advised that consultations over the National Disability Strategy revealed that the migration treatment of people with disability was a major concern.³⁴

7.37 Many submissions cited the cases of Drs Moeller and Abdi and Mr Kayani as exemplars of the failure to provide equal and fair treatment for people with disability under the current migration health requirement, in contravention of Articles 5 and 18.³⁵ Others spoke from personal experience about discrimination under the current health arrangements.

7.38 Cynthia Sierra Muir wrote about her struggle to keep her sister Carmen, her legal ward, from being sent back to Spain. As discussed earlier, Carmen had no family in Spain but was refused permanent Australian residency because of her intellectual impairment.³⁶

7.39 Mrs Muir maintained that Australia's ratification of the Disability Convention should ensure her sister's access to health services without discrimination (Article 25), and her right to free movement (Article 18). In particular, Article 18 implied that:

As a disabled person, Carmen has the right:

- To decide where she lives and to move about the same as everyone else.
- To belong to a country (be a citizen) and not have that taken away because she is disabled.
- To have papers, like passports, that other people have.
- To leave any country including her own.³⁷

7.40 Some legal experts also supported the view that Article 18 demands equal treatment of people with a disability under migration law.³⁸ However, it was also noted that issues raised over the provision were not resolvable at Convention consultations.³⁹

33 *United Nations Convention on the Rights of Persons with a Disability* Article 18.

34 Australian Federation of Disability Organisations (AFDO), *Submission 6*, pp. 3 and 4.

35 Federation of Disability Organisations (AFDO) *Submission 6*; Multicultural Development Association, *Submission 20*, pp. 7–8; Mary Ann Gourlay, *Submission 25*, pp. 20–21; Ethnic Disability Advocacy Centre Inc, *Submission 42*, pp. 4–5; LIV *Submission 88:1*, p. 3; Queensland Centre for Intellectual and Development Disability, *Submission 85*, p. [2]; Mr Graeme Innes, AHRC, *Committee Hansard* 12 November 2010, p. 4

36 Mrs Cynthia Muir, *Submission 3*, p. 1.

37 Mrs Cynthia Muir, *Submission 3*, p. 3.

38 NSW Disability Discrimination Legal Centre (DDLCL), *Submission 55*, p. 4.

39 Professor Jan Gothard, Down Syndrome WA, *Committee Hansard*, Melbourne, 18 February 2010, p. 46.

- 7.41 The Committee sought clarification from the Law Institute of Victoria in relation to Article 18:

The LIV notes that international law does not confer on non-citizens a general right to enter a foreign country and Article 18 of the UN Disabilities Convention does not confer any such right. A country is therefore entitled to refuse entry to non-citizens on the basis of legitimate, objective and reasonable criteria.⁴⁰

- 7.42 In applying the proportionality test, however, LIV did not think the migration criteria compatible with Article 5 in that the health criteria are applied in a blanket way, and not balanced proportionately against the right to equal treatment.⁴¹

- 7.43 On this basis, the Migration Law Program ANU College of Law submission maintained that 'legitimate, objective and reasonable' criteria must comply with all 'principles of inclusion and equality', including freedom of movement:

To the extent that government uses health criteria to 'pick and choose' those who should be allowed to enter Australia on the basis of the perceived severity of their disability and the perceived health costs flowing from it, such a course of action would be clearly discriminatory and in breach of the freedom of movement guaranteed in article 18 of the Convention.⁴²

- 7.44 In its submission, the National Ethnic Disability Alliance (NEDA) cited comprehensive legal advice prepared by Dr Ben Saul of the University of Sydney. Dr Saul believes that the current migration arrangements fail to meet equal protection obligations under the Disability Convention.⁴³

- 7.45 In his evaluation Dr Saul applied various tests to determine consistency between obligations under the Disability Convention and the Migration Act exemption under s 52 of the *Disability Discrimination Act 1992*. The focus of this assessment was primarily, but not exclusively, the migration Health Requirement.⁴⁴

- 7.46 Consideration in particular was given to obligations under Disability Convention Articles 4, 5 and 18. It was the opinion of Dr Saul that Article

40 Law Institute of Victoria, *Supplementary Submission 88.1*, p. 3.

41 Law Institute of Victoria, *Submission 88.1*, p. 5.

42 Migration Law Program, Australian National University College of Law, *Submission 36*, p. 4.

43 National Ethnic Disability Alliance, *Submission 1*, p. [2].

44 National Ethnic Disability Alliance, *Submission 1: 1*, Legal advice from Dr Ben Saul, Director, Sydney Centre for International Law, Sydney University, 15 May 2008.

18 in itself does not guarantee freedom of movement given Government priorities to safeguard public health.⁴⁵ However, as Article 5 compels a state party to 'prohibit discrimination in law or practice in any field regulated and protected by public authorities':

...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 5.⁴⁶

7.47 Dr Saul's assessment also identified potential for both direct and indirect discrimination under Australia's health requirement under Article 5, so that:

- *Direct* discrimination may arise where additional medical tests or evidentiary requirements are specifically imposed on disabled persons once they have been identified as disabled through the health screening process. There may thus be differential treatment compared with other visa applicants...
- *Indirect* discrimination may potentially arise where [Migration] Act sets standards of health requirements which the disabled do not or cannot meet.⁴⁷

7.48 Finally, the 'proportionality test' was applied to both the Australian and Canadian migration health requirements. The conclusion was that Canada had a far stronger *prima facie* case for 'justified differentiation' under Article 5. In particular :

Failure to take into account the benefits as well as the costs of admitting people with a disability may cast doubt on whether protection of the health system alone is a sufficiently reasonable and objective policy to justify differential treatment on the basis of disability.⁴⁸

7.49 A number of submissions suggested that Australia's position was discriminatory under the Disability Convention. Castan Centre for Human Rights Law and Rethinking Mental Health Laws Federation Fellowship stated:

45 Dr Saul also notes that a draft containing requirements for equal rights to 'enter and migrate to a country other than state of origin' was not accepted during Disability Convention consultations. National Ethnic Disability Alliance *Submission 1:1*, p. 3 and see ref. in Ms Mary Ann Gourlay, *Submission 25*, p. 36.

46 National Ethnic Disability Alliance, *Submission 1.1*, Legal advice from Dr Ben Saul, [p. 3].

47 National Ethnic Disability Alliance, *Submission 1:1*, Legal advice from Dr Ben Saul, pp. [3; 4].

48 National Ethnic Disability Alliance, *Submission 1:1*, pp. 6-8.

A provision that differentiates applicants based on whether they have a disease or condition is a distinction on the basis of disability. It impairs those visa applicants who have disabilities from obtaining immigration status on an equal basis with others, as they have to meet additional criteria that are inherently hard to meet for a majority of people with long-term impairments. According to the *CRPD* this constitutes discrimination.⁴⁹

- 7.50 Ethnic Disability Advocacy Centre identified indirect discrimination as the consequence of the costing measures:

Indirect discrimination against refugees and migrants with disability occurs because the threshold of the health test is set too low to adequately balance the interests of non discrimination against people with disability with the preservation of scarce health resources. Thus, in some cases the health assessment may lead to discrimination that is not proportionate to the policy objective of preserving health resources for all Australians.⁵⁰

- 7.51 Mr Graeme Innes, Disability Discrimination and Race Discrimination Commissioner, argued that 'legitimate reasonable and objective' migration criteria must include a more sophisticated costs benefits analysis.⁵¹ He stated at hearings:

Obviously, the cost of a disability is not an irrelevant consideration when it comes to migration and to many other matters. The real issue is the balancing process between the costs and the benefits.⁵²

- 7.52 Professor Mary Crock accepted that migration laws must in some respects be discriminatory to ensure Australia's best interests. However she considered that the failure to distinguish between disease and disability discriminates between people in an 'unequal way', and thus fails the 'reasonable and proportionate' test.⁵³
- 7.53 Given Australia has a developed framework which prohibits discrimination under Australian law in the *Disability Discrimination Act 1992 (DDA)*, the Committee next evaluates the effect of the migration

49 Castan Centre for Human Rights Law and Rethinking Mental Health Laws Federation Fellowship, Faculty of Law, Monash University, Melbourne, *Submission 36*, p. 23.

50 Ethnic Disability Advocacy Centre Inc., *Submission 42*, p. 5.

51 Mr Graeme Innes, Australian Human Rights Commission, *Committee Hansard*, Sydney, 12 November 2010, p. 3.

52 Mr Graeme Innes, Australian Human Rights Commission, *Committee Hansard*, Sydney, 12 November 2010, p. 22.

53 Professor Mary Crock, *Committee Hansard*, Sydney, 12 November 2010, p. 13.

exemption for the treatment of people with a disability under the Health Requirement.

The Migration Exemption

7.54 As outlined in Chapter 2, the DDA makes disability discrimination unlawful and aims to promote equal opportunity and access for all people with disabilities within Australia.⁵⁴

7.55 Part 2, Division 5 of the DDA currently provides for a number of exemptions to the Act including for defence peace keeping purposes, superannuation and insurance and, at s 48, on the basis of infectious diseases to protect public health.⁵⁵

7.56 However, s 52 also exempts the application of the DDA to Migration law and regulations so that:

Divisions 1, 2 and 2A do not:

(a) affect discriminatory provisions in:

(i) the *Migration Act 1958*; or

(ii) a legislative instrument made under that Act; or

(b) render unlawful anything that is permitted or required to be done by that Act or instrument.

7.57 Professor Jan Gothard of Down Syndrome Western Australia was among the many⁵⁶ who argued that it is time for change:

Race-based discrimination was removed from Australian legislative and migration practice in 1975 with the passage of the Racial Discrimination Act, but the passage of the Disability Discrimination Act (DDA) in 1992 did not have the same impact for people with disability: clause 52 of the DDA explicitly acknowledges the 'discriminatory provisions' of the Migration Act of 1958 but states that no section of the DDA shall apply to the Migration Act or to those who administer it. While Australia has rejected discrimination on the basis of race in all areas of law and

54 Australian Human Rights Commission, Disability Rights, accessed May 2010 at <http://www.hreoc.gov.au/disability_rights/>

55 *Disability Discrimination Act 1992* (Cth).

56 Professor Patricia Harris, *Submission 2*, p. 4, Mary Ann Gourlay *Submission 25*, pp. 9–10; Blind Citizens Australia, *Submission 44*, p. 11; Robert Duncan McCrae, *Submission 94*, p. 1.

policy, in the arena of migration people with disability are still subject to the same attitudes prevalent in 1901.⁵⁷

7.58 In addition, Mr Frank Hall-Bentick of the AFDO commented:

...we are concerned that the terms of reference do not examine the exemption of the Migration Act from the Disability Discrimination Act. We are concerned these terms of reference only seek to tweak these discriminatory, unjust migration procedures by adding further complex assessment procedures rather than challenging and removing these discriminatory rules and regulations.⁵⁸

7.59 Similarly, the United Nations High Commissioner for Refugees (UNHCR) described the effect of the migration exemption as follows:

The health requirement is inherently discriminatory in its effect and is only legalized, to that extent, by section 52 of the Disability Discrimination Act 1992.⁵⁹

7.60 The Ethnic Disability Advocacy Centre noted:

As a consequence of the Migration Act (1958) being exempted from the Disability Discrimination Act (1992), refugees and migrants with disability and their families are not offered the same protection from discrimination that apply to other areas of Australian law.⁶⁰

7.61 The Federation of Ethnic Communities' Councils of Australia (FECCA) considered that application of the *Disability Discrimination Act 1992* to the *Migration Act 1958* would remove this potential for discrimination:

It is an anomaly that immigration law is not currently subject to the DDA. Historically disabilities have been considered with health requirements to protect the community from transmittable diseases. It is time to break this nexus. Health regulations should not single out people with disability and refuse them visas or place different requirements on them. Clearly it is time to ensure that immigration law conforms to Australia's obligations under international conventions including the Disability Convention. We need to look at the way society treats a person with disability

57 Down Syndrome WA, *Submission 57*, p. 3.

58 Mr Frank Hall-Bentick, Australian Federation of Disability Organisations, *Committee Hansard*, Melbourne, 18 February 2010, p. 42.

59 United Nations High Commissioner for Refugees (UNHCR), Regional Office for Australia, New Zealand, Papua New Guinea and the Pacific, *Submission 82*, p. 6.

60 Ethnic Disability Advocacy Centre Inc. *Submission 42*, p. [3].

including under its visa requirements to maintain their legitimate human rights.⁶¹

- 7.62 Mrs Maria Gillman, whose well qualified and blind sister was rejected on the basis of her 'health' condition, stated:

I wish to make it clear that we did not consider for one moment that Una might not meet the health requirements, as she was a healthy person with no known medical condition. Naively, we did not think that her blindness could be an obstacle to her application, as Australia had enacted the Disability Discrimination Act in 1992.⁶²

- 7.63 The Royal Australasian College of Physicians (RACP) remarked on the contradiction between Australia's international commitments and domestic policy in the following terms:

The exemption of the Migration Act from the DDA promotes the two-tiered value system afforded to people with disability living in Australia on the one hand, and potential migrants with disability on the other.⁶³

- 7.64 The RACP saw there was room for the Migration Exemption to be 'reformulated, to remove the potential for any direct or indirect discrimination against migrants with disability'.⁶⁴

Views on possible reform of the migration exemption

- 7.65 The Committee sought views on the impact of removing the migration exemption from the *Disability Discrimination Act 1958* (Cth). The Committee was particularly interested in how this may increase application numbers, possible litigation and Australia's sovereign capacity to determine who enters Australia. Views were also sought on appropriate ways to manage Australia's health resources if changes were made.

- 7.66 Mr Brandon Ah Tong Pereira, Vision Australia, commented that:

Let us be absolutely clear: to discriminate in immigration solely on the basis of disability contravenes the moral standards of fairness that underpin international human rights norms and, by admission, is at odds with international law. This assertion remains, regardless of the perceived justification under the

61 Federation of Ethnic Communities' Councils of Australia, *Submission 24*, pp. 8, 9.

62 Mrs Maria Gillman, *Committee Hansard*, Melbourne, 18 February 2010, p. 27.

63 Royal Australasian College of Physicians, *Submission 80*, p. 7.

64 Royal Australasian College of Physicians, *Submission 80*, pp. 7; 12.

vanguard of 'public interest' – that is, the idea of needing to minimise public health and safety risks, contain public health expenditure and maintain access to health and community services for Australian residents⁶⁵

- 7.67 Dr Rhonda Galbally of the National People with Disabilities and Carer Council responded to questions as to whether the removal of the exemption would distort demand for places in Australia. She noted that a more liberal approach in the past had not produced that result:

We have gradually seen a change over time where the interpretations of the law have become different over the last two decades. We have never seen a flood to Australia. We have seen genuine families applying to come here or people in refugee situations where they happen to have a family member with a disability or who declare, and there will be families who do not declare them as things have become harsher and harsher...⁶⁶

- 7.68 Mrs Catherine McAlpine of Down Syndrome Victoria suggested that the removal of the DDA would simplify migration processes:

The Disability Discrimination Act just means that people cannot be discriminated against because of their disability, so all the other criteria apply. You asked the question: what if it was a family reunion? It is the same thing. We are not just talking about skilled migrants. We are saying that if it is a family reunion and you meet every other requirement, then there should be no discrimination on disability. If it is a refugee and you meet the refugee requirements, you should not be discriminated against. So to a certain extent it is just very simple: if the disability act applies, you cannot discriminate on those grounds.⁶⁷

- 7.69 Professor Jan Gothard agreed, observing that the DDA makes clear the distinction between discriminating against people with a disability, irrespective of their skills or assets, and population policy.⁶⁸ She stated:

65 Mr Brandon Ah Tong Pereira, Vision Australia, *Committee Hansard*, Melbourne, 18 February 2010, pp. 49–50.

66 Dr Rhonda Galbally, National People with Disabilities and Carer Council, *Committee Hansard*, Melbourne, 18 February 2010, p. 6.

67 Mrs Catherine McAlpine, Down Syndrome Victoria, *Committee Hansard*, Melbourne, 18 February 2010, pp. 60–61; see also Mr Frank Hall-Bentick, Australian Federation of Disability Organisations, *Committee Hansard*, Melbourne, 18 February 2010, p. 58.

68 Professor Jan Gothard, Down Syndrome WA (Western Australia), *Committee Hansard*, Melbourne, 18 February 2010, pp. 53–54.

If a person is a professional person, if they are well qualified and if, as an individual, they have the skills Australia needs, then I do not see why their disability should be a bar.⁶⁹

7.70 However, a key issue for the Committee is clarity in the application of legislation and its regulation. This provides transparency and certainty for applicants and also avoids potentially time consuming and costly litigation as a means of determining outcomes.

7.71 Professors Mary Crock and Ron McCallum AO, respectively experts in migration and law, did not see that a more generous approach would not cause an appreciable increase in litigation. Professor Crock stated:

There will be litigation. Whenever there is a rule change, people litigate to see what the boundaries of the rules are. It is inevitable. There is litigation at the moment that goes on in this area. It is not entirely settled. So I do not think that it is going to open the floodgates to litigation. It is, on the other hand, going to take a lot of pressure off the minister. That is what it is going to do and it is better to have litigation where you can actually see how the rules are operating and it is transparent than to have everything happening behind a closed door.⁷⁰

7.72 Professor Ron McCallum concluded:

I think the main group that would benefit are families that have a disabled member. We are not going to see a flood of disabled people from around the world applying as independent migrants without any job prospects or family members here.⁷¹

7.73 At hearings in Sydney, Mr Graeme Innes, Disability Discrimination and Race Discrimination Commissioner, commented on a further impact of removing the exemption:

I think that if the exemption were completely removed it would mean that the government was, if you like, giving away its capacity to make decisions as to who is granted visas to come to Australia because, if the act were to apply without any restriction, such grants would need to be on a non-discriminatory basis unless

69 Professor Jan Gothard, Down Syndrome WA, *Committee Hansard*, Melbourne, 18 February 2010, p. 57.

70 Professor Mary Crock, *Committee Hansard*, Sydney, 12 November 2009, p. 21.

71 Professor Ron McCallum AO, *Committee Hansard*, Sydney, 12 November 2009, p. 21.

the government was able to demonstrate unjustifiable hardship in making such a decision.⁷²

Committee Comment

7.74 In this report the Committee has set out a template for reform of the current migration arrangements which will provide a more appropriate and just approach for the migration assessment for people with a disability across the visa streams. The Committee believes this model for reform will also better reflect our international obligations and domestic policy on disability.

7.75 However, a body of submitters argued that a more fundamental review was required and that Australia's overarching anti-discrimination framework, the DDA, should apply to migration law.

7.76 The Committee notes that removal of the exemption would not deactivate provisions in the DDA which allow for discretion to protect against infectious disease:

This Part does not render it unlawful for a person to discriminate against another person on the ground of the other person's disability if:

- the person's disability is an infectious disease; and
- the discrimination is reasonably necessary to protect public health.⁷³

7.77 As discussed earlier, Dr Saul's legal advice confirms that international law also allows for provisions that prohibit migration to contain health risks. This would suggest that even if the migration exemption was removed, Australia retains the right to continue to exercise discretion in considering health conditions that might pose a threat to the community. Regardless of the DDA exemption, Australia's obligations under the Disability Convention are subject to application of the interpretive declaration.

7.78 The Committee considers that improved domestic administration of migration assessment procedure is a more appropriate and just means to proceed. The Committee considers that the removal of the migration exemption from the DDA may result in increased litigation.

72 Mr Graeme Innes, Australian Human Rights Commission, *Committee Hansard*, Sydney, 12 November 2009, p. 7.

73 *Disability Discrimination Act 1992* (Cth) s 48.

- 7.79 Therefore the Committee concludes that the recommendations presented here will enable a more compassionate assessment of mitigating factors and a more progressive accounting of both possible costs and contributions of an individual visa applicant and their families, particularly in relation to a person with a disability.
- 7.80 The Committee also welcomes the Government's progression of the National Disability Strategy and the recent announcement that it will amalgamate all anti-discrimination law into one piece of legislation, with a view to promoting social inclusion.⁷⁴ Given this, the Committee considers that a review of the DDA and its impact on people with a disability is timely.
- 7.81 The Committee also recommends that, as part of a recommended review of the DDA, the Australian Government review the legal implications of removing the exemption of the *Migration Act 1958* (Cth). This review should take into account the Committee's recommended changes to the migration treatment of people with a disability, and consult with relevant government and non government bodies over any proposed amendments to the DDA exemption.

Recommendation 18

The Committee recommends that as part of its proposal to amalgamate Australian discrimination law, the Australian Government review the *Disability Discrimination Act 1992* (Cth) with particular reference to the section 52 migration exemption, to determine its legal implications for migration administration and conduct expert consultations on its impact on people with a disability.

Michael Danby MP

Chair

June 2010

74 On 21 April 2010 the Attorney-General the Hon. Robert McClelland MP and the Minister for Finance and Deregulation the Hon. Lindsay Tanner MP announced that the current Commonwealth *Racial Discrimination Act 1975*, *Disability Discrimination Act 1992*, *Age Discrimination Act 2004* and *Sex Discrimination Act 1984* would be consolidated into one Act. See: 'Reform of Anti-Discrimination Legislation', *Joint Media Release*, Attorney-General's Department, accessed May 2010 at <http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_21April2010-ReformofAntiDiscriminationLegislation>.

