Submission No 46

THE Human Rights Council of Australia

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Ms S Bryant
Committee Secretary
Joint Standing Committee on Migration
Parliament House
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Dear Ms Bryant

Thank you for your letter dated 14 August 2009 inviting a submission in relation to the inquiry by the Joint Standing Committee on Migration into the migration treatment of people with a disability.

As the Joint Standing Committee is no doubt aware, on 17 July 2008, Australia ratified the *Convention on the Rights of Persons with Disabilities*. It thereby became obliged under international law to ensure compliance with the obligations provided for by the Convention.

More recently, on 21 August 2009, Australia acceded to the Optional Protocol to the Convention. Accordingly, subject to satisfying admissibility criteria, individuals and groups of individuals subject to Australia's jurisdiction became entitled to file communications with the United Nations Committee on the Rights of Persons with Disabilities in relation to alleged failures to comply with the obligations imposed by the Convention.

It has long been recognised that the provisions of the *Migration Regulations 1994* (especially Schedule 4, clause 4005(c)) discriminate against those with disabilities who make applications for visas to enter and remain in Australia. This discrimination is allowed for under section 52 of the *Disability Discrimination Act 1992* (Cth). The discrimination has been justified on public interest grounds, in particular, the need to contain threats to public health and ensure adequate provision of health care and community services to Australian citizens and permanent residents.

The Council understands that the manner in which the *Migration Regulations* have been interpreted has caused particular hardship to some visa applicants with disabilities. In particular, for example, the Council is aware that a lack of provision

for whole-of-family visa application assessments has routinely caused individual family members – very often children or the elderly – to be denied visas while visa applications by remaining members of the family have been granted. Families are thus left with a very difficult choice of declining to take up their visas or leaving the unsuccessful visa applicant behind in the country of origin. Alternatively, a whole family may be refused visas on the basis that one child has a disability, even though the family as a whole would make a substantial contribution to the Australian community and the child, in the context of the whole of family contribution, would not constitute a large net 'burden' on Australian public expenditure.

It seems clear that the manner in which the *Migration Regulations* have been construed and acted upon in cases such as this would now offend against one of the fundamental precepts upon which Disabilities Convention is based, namely, recognition that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State (see Recital (x) of the Convention). Moreover, denying visas to those members of a family unit who are disabled while granting visas to remaining family members breaches Article 23(1) of the Convention which provides for States Parties to take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to family. There can be little, if any, doubt that refusing to issue a visa to a disabled child while granting visas to other members of the child's family would not be in the best interests of the child and thus offend against Article 23(4) of the Convention.

The Human Rights Council of Australia (HRCA) does not deny the importance of public interest considerations such as public health and the need for consideration to be given to the economic impact of making provision for persons with disabilities. Ratification of the Convention, however, means that the international legal obligations imposed by the Convention must now be fully and properly taken into account and proper provision made both in law and practice. Primary and delegated legislation must be amended, as necessary, to ensure compliance with the Convention. In so far as the *Migration Regulations* offend against the prohibition on discrimination against persons with disabilities in Article 5 of the Convention, the regulations may be in breach of the Convention. To the extent that scope should remain to continue to lawfully discriminate against migrants with disabilities on public interest grounds, this discrimination must be reasonable and proportionate to all the relevant circumstances.

Thus, for example, it would not be justifiable to deny a visa application to a disabled person on grounds involving costs associated with the provision of special facilities if, under the Convention, there is already an obligation to provide such facilities to Australian citizens and permanent residents and no significant additional costs would be involved in extending provision of the facilities to the visa applicant.

The HRCA urges the Joint Standing Committee to recommend a thorough review of the *Migration Regulations* as they affect persons with disabilities in light of the obligations imposed by the Convention.

Consideration should also be given to limiting or repealing section 52 of the *Disability Discrimination Act*. Australia is a developed country. Arguments that it can ill-afford costs associated with the provision of appropriate facilities to individual migrants with disabilities are difficult to accept.

Finally, the HRCA submits that the obligations imposed by the Convention be specifically recognised among the criteria to be taken into account when visa applications are being considered. Since the ratification of the Convention, economic and social costs and benefits, and law and policy associated therewith, are not the only relevant decision-making criteria. Included within the decision-making criteria must be Australia's international obligations under the Disabilities Convention.

Yours sincerely

Andrew Naylor
Chairperson
Human Rights Council of Australia Inc.