


RECEIVED
29 OCT 2009
BY: MIG 

Submission

Inquiry into Immigration Treatment of Disability

28 October 2009

Left Right Think Tank (NSW)

Charlene Gerrard and Francesca Sidoti

Page 1 of 14

Hard Heads, Soft Hearts & Young Minds...

C/O The Foundation for Young Australians, 21-27 Somerset Place, Melbourne VIC 3000
ABN 9413 584 4030 | info@leftright.org.au | www.leftright.org.au

Introduction

Left Right Think Tank is Australia's first independent and non-partisan think-tank of young minds. Our mission is to involve young people in public policy. Our vision is for a society which seeks and embraces the ideas of young people.

We are glad to be able to make this submission to the Inquiry and thank them for the opportunity. We are concerned with the treatment of disability in immigration processes, and have recommended some alterations to the policy in this report.

Contents of recommendations:

1. **The Health Requirement in Migration** pg 4
 - a. The health requirement be removed from Migration Regulations 1994 (Cth) as it is discriminatory. Disability should be regarded as a positive consideration when an immigration application is being reviewed.

2. **The United Nations Convention on the Rights of Persons With Disabilities** pg 5
 - a. Left Right Think Tank (NSW) recommends that both s 52 of the *Disability Discrimination Act 1992* (Cth) and the health requirements under Schedule 4 of the Migration Regulations be repealed in order to comply with the international obligations Australia has undertaken to follow.

3. **The United Nations Convention on the Rights of the Child and the United Nations Convention Relating to the Status of Refugees** pg 8
 - a. The Convention of the Rights of the Child and the Convention Relating to the Status of Refugees be incorporated into Australian law to enable a framework of fairer legislation around this issue.
 - b. In the case of refugees, it should be acknowledged that disability is often a further impediment in the country of origin. Therefore, disability should come under special consideration and be regarded positively, as opposed to as an additional barrier to asylum.

4. **Support from the Australian Government** pg 9
 - a. The 10-year moratorium on government support be eliminated in favour of the two-year moratorium as is observed for other migrants and refugees.
 - b. Government policy should be reframed around an acknowledgement of the positive contributions people with disabilities make to a society, as opposed to the current emphasis of the potential 'cost'.

The Health Requirement in Migration

The health requirement in Schedule 4 of the Migration Regulations 1994 (Cth) is “designed to protect Australia from public health risks, contain public expenditure on health and community services, and maintain access of Australian residents to those services” (Joint Standing Committee on Migration 2009). The question to be determined by the Inquiry is:

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.

The question posed by the Inquiry is focused on whether or not change to the current immigration decision-making process for those with disabilities should involve a balancing exercise between economic and social benefits, and service costs. Our response to this is that it should not. Human rights, and thus the rights of disabled people, should be recognised as inviolate and cost considerations should not prejudice these rights. Provisions that allow for discrimination on the basis of disability should be abolished.

Under the existing Migration Regulations, disability does not mean that a person or a family will be refused a visa. However, in the 2007-2008, at least 240 people were refused visas on the basis of a health condition, including at least 70 with disabilities. An additional 442 applicants were denied visas because they had a family member unable to meet the health requirement (Joint Standing Committee on Migration 2009).

Though the wording of the health requirement is not explicitly discriminatory against people with disabilities, it is an example of indirect discrimination. Dr Patricia Harris made the point in her submission to this Inquiry that viewing someone entirely in terms of his or her ‘cost’ to society is unethical and discriminatory.

The health requirement also facilitates indirect discrimination against people with disabilities, as it makes no allowance for the capacity for a person with disabilities to contribute meaningfully to society, both economically and socially.

Left Right Think Tank (NSW) recommends that the health requirement be removed from Migration Regulations Act 1994 as it is discriminatory. Disability should be regarded as a positive consideration when an immigration application is being reviewed.

The provisions of the *Disability Discrimination Act 1992* (Cth) which prohibit discrimination on the basis of disability are waived with regard to the *Migration Act 1958* and the health requirement in the Migration Regulations. This waiver enables discrimination on the basis of disability. The right to be protected against discrimination is absolute and should be applicable across legislation.

The processes in gaining a visa are similarly ad hoc. People who have had applications denied can appeal to the Minister for Immigration who reviews the decision and has the power to reverse it.

The lack of transparency throughout these processes, and the discretionary nature of these decisions are highly problematic. By removing the health requirement and encouraging that all legislation is consistent with prohibitions on discrimination, discretionary decisions would not be necessary. Administrative processes, including the length of time applications involve, need to be improved.

The United Nations Convention on the Rights of Persons With Disabilities

The Convention on the Rights of Persons with Disabilities is one of the nine core United Nations international treaties. It codifies existing customary international law, highlighting that the rights of the disabled are human

rights, not special rights that can be applied on a discretionary basis. Article 5, Clause 2 of the Convention on the Rights of Persons with Disabilities (hereafter 'the Convention') states:

'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.'

In addition, Article 18, Clause 1 states:

'States Parties shall recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that persons with disabilities:

- a. Have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability.'*

In ratifying the Convention on 17 July 2008, Australia added the following interpretive declaration (paragraph 3):

'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.'

It is recognised that in Australia, the doctrine of transformation applies to treaties and to customary international law (which the Convention merely codifies). However, with respect, the reasoning of the above declaration is flawed. While it is true that the Convention does not impose the right for any person to remain in Australia as a non-national, it does in fact 'impact on Australia's health requirements for non-nationals'.

As evidenced in Article 5, the paramount aim of the Convention is to erase all legislative and policy measures that provide a means of discriminating against persons with disabilities. Where disability forms a negative consideration due to the imposition of health requirements, it would appear any legislative provision which allows discrimination against future immigrants or asylum seekers on the basis of disability breaches the terms of the Convention, particularly Articles 5 and 18.

It is not sufficient that the apparent rights of disabled people are stated only for the purposes of rhetoric and in order to mask blatant discrimination. Section 52 of the *Disability Discrimination Act 1992* (Cth) and the subsequent Schedule 4 of the Migration Regulations 1994 (Cth) negate the stated recognised freedom of disabled people 'to choose their residence and to a nationality, on an equal basis with others' and Articles 5 and 18 of the Convention.

It should be noted that in employing the use of an interpretative declaration, rather than a reservation, Australia has signified that it does not mean to deviate from the substantive rights set out in the Convention; but the effect of the declaration appears to do exactly that.

If Australia was truly dedicated to recognising these rights, the potential for discrimination against future immigrants and refugees, and consequently section 52 of the *Disability Discrimination Act* and Schedule 4 of the Migration Regulations, would not exist.

Left Right Think Tank (NSW) recommends that both s52 of the Disability Discrimination Act and the health requirements under Schedule 4 of the Migration Regulations be repealed in order to comply with the international obligations Australia has purported to follow.

United Nations Convention on the Rights of the Child and the United Nations Convention Relating to the Status of Refugees

There are several implications of the health requirement in existing migration legislation that contravene human rights or negatively affect human welfare.

One of the most significant is the effect this has on the rights of the child. Article 6(ii) of the Convention on the Rights of the Child requires,

State parties shall ensure to the maximum possible extent the survival and development of the child.

The health requirement contravenes this right. The “maximum possible extent” would suggest that children should be protected as much as possible, yet the health requirement can create situations where families are split or the child must be left behind due to disability. As suggested by Dr Patricia Harris, at the very least, a child’s disability cannot be the reason for refusing a visa.

The spirit of the United Nations Convention Relating to the Status of Refugees is also not reflected by the health requirement. It is possible for someone to be granted refugee status and the protection as such, only to have that retracted should they fail the health test. Additionally, disability may be a result of a situation in the country the person has originated from. It is illogical and unethical to refuse a visa on these grounds.

Ultimately, the protection of a human being who is fleeing persecution should be of more importance than their potential cost to Australia’s economy. Valuing a person purely in terms of their cost is discriminatory and inhumane.

Left Right Think Tank (NSW) recommends the Conventions of the Rights of the Child and the Convention Relating to the Status of Refugees be incorporated into Australian law to enable a framework of fairer legislation around this issue.

It is also recommended that, in the case of refugees, it should be acknowledged that disability is often a further impediment in the country of origin. Therefore disability should come under special consideration and be regarded positively, as opposed to as an additional barrier to asylum.

Support from the Australian Government

Even if a person is granted a visa, despite a disability, there is a ten-year moratorium on support from the government. This has a significant effect on the quality of life for the individual, and may even aggravate the disability.

Left Right Think Tank (NSW) recommends, at the very least, the 10-year moratorium on government support be eliminated in favour of the two-year moratorium as is observed for other migrants and refugees.

While it is important to discuss this issue with the legislative context, it must be noted that this is also an issue of common humanity and social inclusion. The terms of reference of this inquiry appear to be mostly focused on cost, and miss the important issues of the inclusion of people with disabilities in Australian society and the government's obligation to support them.

Human rights are about including, supporting and protecting the most vulnerable of our society. The health requirement contravenes this basic right and should be removed from legislation.

It is recommended that government policy should be reframed around an acknowledgement of the positive contributions people with disabilities make to a society, as opposed to the current emphasis of the potential 'cost'

Left Right Think Tank (NSW) would like to thank the Joint Standing Committee for allowing them to contribute on this issue. They would also like to acknowledge the influence of the work of the National Ethnic Disability Alliance, Dr Patricia Harris and the Multicultural Disability Advocacy Association, especially the assistance of Ms. Adama Kamara, in the preparation of this submission.

Appendix A:

The position statement from the National Ethnic Disability Alliance (2009) stated the following:

- 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;
- The potential economic and social contributions of migrants and refugees with disability are not adequately taken into account;
- There is stress and hardship for many families supporting people with disability who make a difficult decision to leave behind a family member in order to build a life in Australia. In cases involving humanitarian entrants, these family members with disability will remain in extremely vulnerable situations, such as refugee camps or in situations of war or political unrest.
- While some refugees and migrants are granted exemptions under the current arrangements, these waivers are determined through a decision making process which is inconsistent, can be arbitrary in nature and therefore potentially unfair.
- The *Migration Act 1958* is exempt from the majority discrimination provisions under s. 52 of the *Disability Discrimination Act 1992*. However, recent amendments enable complaints to be made under the DDA as to the administrative process concerning visa applications.