


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MIGRATION REVIEW TREATMENT OF DISABILITY

Submission to the Joint Standing Committee on Migration

October 2009

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SUBMISSION ON THE MIGRATION REVIEW TREATMENT OF DISABILITY

1. Introduction

The **Ethnic Disability Advocacy (EDAC)** is a community based non-profit organization which seeks to promote, protect and safeguard the rights and interests of culturally and linguistically diverse (CaLD) people with disabilities, their families and carers in order for them to achieve their full potential as Australian citizens.

We thank the Joint Standing Committee on Migration for the opportunity to provide a submission on the Treatment of Disability and Migration. Reforms to the health requirements of the Migration Act in relation to disability is welcoming given the progress that Australia has made in addressing the issues of discrimination of people with disability within the development of a National Disability Strategy and the recent ratification of the UN Convention on the Rights of Persons with a Disability.

We like to acknowledge and support the National Ethnic Disability Alliance's comprehensive and well researched submission on the Migration Review. The stories from migrants of Culturally and Linguistically Diverse backgrounds who have experienced disabilities is testimony of their struggles, achievements and valuable contributions to the Australian society.

2. How the Australian migration policy fails migrants and refugees with disability in terms of fairness and non discrimination.

Under current procedure all applicants for migration have to undergo stringent health assessment before the application is approved.

A list of general medical practitioners is provided by the Department of Immigration and Citizenship to the applicant in Australia or offshore. The health assessment involves a series of medical tests, such as a chest x-ray to detect tuberculosis, a blood test to detect any contagious diseases and others. The medical report is then submitted to the Commonwealth Medical Officer to determine whether a potential applicant has satisfied the health requirement.

If the Commonwealth Medical Officer is of the opinion, based on the medical report, the applicant with disability requires further medical examination to determine whether he falls within the ambit of *Schedule 4* of the Migration Regulation, the applicant will be required to see a specialist in the field of disability to determine whether the disease or condition is likely to result in a significant cost to the Australian community in the area of health care and community services. The estimated potential future health costs of applicants over their lifetime are weighed against the "public interest" of safeguarding

access to scarce resources for the Australian community, regardless of whether the person actually uses the health care or community services or perhaps be able to pay for the care themselves.

The mandatory health assessment and its costs factor treat people with disability as a burden to the Australian society and ignore the economic and social contributions they can provide to the country. Many Australians with disability are employed and have and will continue to make significant contributions to Australia in both economic and social terms. It is almost impossible to estimate the lifetime potential health and community support costs incurred by a person with disability as their potential economic contribution is not measured. We also believe the current cost threshold used for the health requirement and assessment of potential migrants is unrealistic and unfair to many migrants with disability.

In most cases (including for humanitarian entrants), the assumed future health costs associated with disability will affect their visa application. The person with disability is most likely rejected even up to the Review Tribunal and the cost inhibits many applicants. In some cases, through the Ministers discretion, the health requirement can be waived but we believe this is only a minority.

This means 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 disability. It also means that many families may have to leave behind a family member with disability under the care of relatives or decide not to migrate at all. This can be a devastating dilemma for the family and even worse consequence for the disabled person who is left behind.

Similar situations occur when a Business Migrant's and/or a 457 visa holder's application for permanent residency is routinely rejected because a family member with a disability fails the health requirements. This also extends to disabled students who have successfully completed their studies in Australia and having their applications rejected because of health reasons (disability), even though they may have a greater potential of making significant social and economic contributions. They are also denied the opportunity of remaining permanently in Australia.

2.1 Health Requirement under Migration Regulations (1994)

The anachronistic character of *Schedule 4 of the Migration Regulations 1994* excludes an applicant who has a "*disease or condition*" which would during the applicants proposed stay in Australia, be likely to

- a) *require health care or community services; or*
- b) *meet the medical criteria for the provision of a community service;*

and the provision of such health care or community services relating to the disease or condition would be likely to:

- c) result in a significant cost to the Australian community in the areas of health care and community services; or
- (d) prejudice the access of an Australian citizen or permanent resident to health care or community services;

There is a serious inconsistency between Australia's obligation under the United Nations Convention on the Rights of Persons with Disability (UNCRPD) and the Migration Act 1958.

2.2. Exemption of DDA (1992) from Migration Act (1958)

Clause 52 of the Disability Discrimination Act (DDA) 1992 explicitly acknowledges the "Discriminatory provisions" of the *Migration Act 1958* and states that no section of the DDA shall apply to the Migration Act or those who administer it. However, recent amendments have enabled complaints to be made under the DDA as to the administrative process concerning visa applications.

Our propensity to see the DDA as all encompassing of the human rights of people with disability is leading to disappointment, in migration cases when it fails to deliver against these expectations.

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.

2.3 United Nations Conventions on the Rights of Persons with Disability

Australia has an official commitment to the *United Nations Convention on the Rights of Persons with Disability (UNCRPD)* through its ratification in July 2008 and as such has committed to non discrimination practices against people with disability in all areas of the Australian law.

With DDA exemption under the Migration Act, Australia will have contravened (*Article 4*) which requires state parties "*to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the convention*" and *to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities*".

The *UNCRPD* also prohibits discrimination on the basis of disability and obliges them to guarantee people with disability equal and effective legal protection against all forms of discrimination (*Article 5*).

Article 18 of UNCRPD 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. However, the current migration health assessment has given rise to indirect discrimination against refugees and migrants with disability who have applied for migration to Australia.

Article 34 of the Convention establishes a new international monitoring mechanism, the Committee on the Rights of Persons with Disabilities. Under the Convention, countries are required to report regularly to the Committee on the measures they have taken to give effect to the obligations in the Convention (Article 35). The Committee will consider those reports and make general recommendations to the reporting countries (Article 36).

Discriminatory and inconsistent application of the Health Assessment requirements in determining eligibility under the Migration Act focuses on unwarranted assumptions about the potential economic costs of supporting a migrant or refugee with disability in the Australian community thus eroding the UNCRPD's intentions and commitments.

Migration policies and regulations that are founded on respect for human rights, democracy and the rule of law should contribute to respect, tolerance and appreciation of any society. It is crucial to have an understanding that disability issues belong in a social and not a medical category. Exclusion and segregation of people with disabilities tend to result from community and political options based on false assumptions about disability and in many western countries this policy is no longer accepted and practised.

2.4 Definition of Discrimination under DDA (1992)

It may be argued that the Migration Act does not expressly discriminate people with disability by specifically referring to it but it can be construed as clear instance of "indirect discrimination". *Section 5 of the Disability Discrimination Act 1992* makes it unlawful to discriminate against people because of their disability which states;

(1) For the purposes of this Act, a person (*discriminator*) discriminates against another person (*aggrieved person*) on the ground of a disability of the aggrieved person if, because of the aggrieved person's disability, the discriminator treats or proposes to treat the aggrieved person less favorably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person without the disability. The word *discrimination* in the above section can be construed as *direct* or *indirect*

- **Direct Discrimination** is where someone receives less favorable treatment than a person without a disability in similar circumstances.
- **Indirect Discrimination** occurs when a rule or condition that applies to everyone particularly disadvantages people with disabilities.

It is apparent that *Schedule 4 of the Migration Regulations 1998* indirectly discriminates an applicant with disability being a regulation that applies to everyone that disadvantages people with disability.

The recent landmark cases of Dr Bernard Moeller and Dr Siyat are among others that unveil the unjust nature of the Migration Act that discriminates people with disability and their families by outweighing the *health requirement against* a person's contributions to the Australian community at large.

In Dr Moeller's case Minister Evans intervened to repeal the decision made by the Migration Review Tribunal. Whilst we are pleased with the positive outcome for Dr. Moeller, ministerial intervention is not a substitute for legislative and regulation change.

People with disability or their families should not be put in the position of having to fight their way through the Migration Review Tribunal before being accorded the right to bring their skills and qualifications into Australia.

There are two main approaches to disability. The first approach positions people with a disability as welfare recipients in need of care as adopted and construed by the Migration Regulations 1998.

In contrast the social theory approach views people with disability as individuals with civil rights of access and equity as per the United Nations Conventions on the Rights of People with Disability and other legislations such as the. *Disability Services Act, (1986); Disability Discrimination Act (1992)*;

An analogy can be drawn between the first approach that emphasis on dependency in line with the contents of *Schedule 4 of the Migration Regulations* in contrast to the second approach which stresses on independence, rights, inclusion and valued contributions of the person with disability.

The exemption from the *Disability Discrimination Act 1992* has highlighted the potential discrimination that could occur.

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.

3. Recommendations

- The current health requirement only treats individuals with disability as a cost to the country. Potential social and economic contributions must be taken into account within a much broader framework of benefits to the individual, family, society and its human rights obligations.
- Processes must be fair to ensure transparent, consistent and fair visa processing for migrants and refugees with disability.
- Full application of the Disability Discrimination Act 1992 to the Migration Act 1958 health assessment to remove the potential for any direct or indirect discrimination against refugees and migrants with disability;
- Withdrawal of the Australian interpretive declaration made upon ratification of the United Nations Convention on the Rights of Persons with Disabilities pertaining to the health requirements for non nationals.

4. Conclusion

No nation in the world will achieve its full potential for economic development while it leaves out people with disabilities. No society will be a complete democracy unless people with disabilities can participate in public life. Failure to respond to the concerns of people with disabilities ignores one of the greatest humanitarian and human rights challenges of the world today.

“We all have a disability of some kind; all are lacking in one way or another. Saul has an injury to his leg. What if his personality was deformed? How much worse if his soul was lame? Preachers or teachers look for the good in all of us. (Bless them for doing so.) I don't see a cripple. I haven't met anyone yet who isn't handicapped in some way. So what's the big deal?” Wear it like a Purple Heart”. ~ - Georgiann Baldino