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Submission No 57

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Committee Secretary
Joint Standing Committee on Migration
House of Representatives
PO Box 6021
Parliament House
CANBERRA ACT 2600

To the Committee Secretary

On behalf of Down Syndrome WA (DSWA), I wish to make a submission to the Joint Standing Committee on Migration inquiry into migration and disability. The attached submission written by me as the spokesperson on migration for DSWA has been endorsed by the Board of Directors and the Executive Officer of the Association. If there is any opportunity to make a submission in person, I would be very willing to do so.

DSWA's Vision is that people with Down syndrome live a life of their choice and make their contribution to the community.

DSWA's Mission is to support people with Down syndrome to achieve their goals.

Yours sincerely

(Dr) Jan Gothard

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Joint Standing Committee on Migration

Inquiry into Migration and Disability

Submission prepared by

Dr Jan Gothard

On behalf of Down Syndrome Western Australia

Endorsed by the Executive Officer and Board of Directors, DSWA

28 October 2009

down syndrome WA

I wish to make a submission to the inquiry into migration and disability.

I am not a migrant so have not personally experienced this process. However for at least ten years I have been involved in the issue of migration through the Down Syndrome Association of Western Australia (DSWA), through Down syndrome (DS) organisations in other states and more recently, Down Syndrome Australia Network (DSAN). Down syndrome is the most commonly occurring form of intellectual disability and one of the easier ones to recognise, and as such, the families of people with DS have been significantly affected by and perhaps overly-represented in the current process of assessing visa applications. As a parent of a daughter with DS, and as an academic, I have long-term interest in this area. I have published scholarly papers on the history of migration and disability, and have commented on the subject widely in the media. At the time of the Moeller case in late 2008, I was interviewed and broadcast by over a dozen national media outlets, and an opinion piece I wrote for online ABC attracted more than one hundred responses in less than 24 hours.[1] At a state and national level I have given information and supported dozens of families with a member with DS attempting to migrate into Australia or obtain permanent residence after arrival on a temporary visa. I have also given information on the migration process for people with a disability (including autism) to families from a number of different countries, have provided information at the request of DS associations in the UK, New Zealand and South Africa. I have given papers on the topic at three international Down Syndrome congresses in the last few years. I have therefore been exposed to a wide range of personal experiences of navigating the current migration channels

I also make this submission as the migration spokesperson for Down Syndrome Western Australia (DSWA) and this submission has been formally endorsed by the Executive Officer and the Board of Management of the organisation.

In this submission I wish to respond to the question of whether or not the current process for assessing a visa application against the health requirement is fair and transparent; to examine aspects of the present cost–based system of assessment; to look at examples of how the system has operated to date in terms both of impact on families and inconsistencies in application; and finally, to suggest points to consider in changing the system. In examining the question of how the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment, I will argue that the system to date has not attempted to balance costs and benefits, although strategies exist for doing so; but will also question whether cost-benefit analysis is an appropriate criteria for determining entry. Finally, I will consider how this present process fits in with the current Australian government focus on Australian values, and the emphasis otherwise placed on commitment to Australian values in the migration process.

I do not intend to analyse the process in similar migrant receiving countries, nor discuss this policy in the light of the United Nations Convention on the Rights of Persons with Disabilities; but I would like to strongly endorse the submission to this Inquiry made by Dr Ben Saul, on behalf of the National Ethnic Disability Alliance, which deals in detail with those issues.

I am an historian of migration and as such take a long term view of migration practices. The Immigration Restriction Act, 1901, as the cornerstone of the new Australian nation's white Australia policy, was designed to keep people of colour out of Australia, but it is not well known that, alongside criminals and other 'undesirables', the 1901 Act excluded from Australia 'any idiot or insane person' and 'any person likely to become a charge upon the public'. The wording changed over the next few decades as terms such as 'idiot' and 'imbecile' became offensive, but the meaning remained consistent. Today anyone deemed likely to 'result in significant cost' to the Australian community will still fail the public-interest criteria of the Migration Act. Like the Act of 1901, which did not mention race but which nonetheless served to exclude people of colour, the present Migration Act does not name disability as a factor which militates against entry, but the implication of the health and public interest criteria are as clear now as they were in 1901. Those with a disability need not apply.

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 policy, in the arena of migration people with disability are still subject to the same attitudes prevalent in 1901.

This anomaly is both surprising and disturbing and in itself renders the migration process fundamentally 'unfair', in that the law sanctions the application of different and discriminatory procedures to different people. Beyond that however, there are a number of other ways in which the application of the migration process is neither fair nor transparent.

A transparent system for assessing a visa application would require at least some recognised and benchmarked scale of costs for things such as education, education support, health and social security. There is none. In his 2001 unpublished paper 'Barriers to Immigration for Applicants with an Illness or Disability', researcher Terry Wiggins reviewed MOC (Medical Officers of the Commonwealth) estimates of the costs associated with a child with a disability applying to migrate as part of a family, and found that they varied hugely. The cases reviewed, with the exception of one person aged 25 years, were of children aged 2 to 10, with similar disabilities and prognoses of lifetime expectancies. Yet the MOC-estimated costs for those people ranged from $180,000 to $1,950,000. The oldest applicant - with the shortest remaining life expectancy - was estimated as the highest likely 'cost'. Estimated costs for services such as residential care also varied enormously – in one case, from $244,000 to $1,500,000.[2]

As Wiggins argued, whereas a medical officer was an appropriate person to assess the existence of a medical condition, a medical practitioner was not necessarily best qualified to assess the developmental condition or potential of an individual with intellectual or developmental delay. This is the province of different professionals such as specialist developmental paediatricians familiar with the disability in question. Information could also reasonably be drawn from disability peak bodies about the likely social outcomes for individuals with the disability in question. Nor should a medical practitioner be expected to make valid assessments of the cost of supported schooling, employment or accommodation, which is well outside their sphere of competence or expertise. If a cost benefit analysis is to be used, then a database of actual costs incurred by Australian residents is the only objective and fair approach.[3]

Further, if people with disabilities are to be assessed in terms of their potential costs, the migration process should require that all applicants for migration be assessed against the health criteria. However, under the present system it is only where people present with a manifest disability that they are placed in the position of having to 'prove' a position that is philosophically impossible to prove: that they will NOT be a significant cost to the Australian community. What are the likely costs of educating a family with four children in the state system? What are the likely future health costs of a smoker? What are the possible health costs associated with a woman whose mother and sister died of breast cancer, and the possible costs associated with her three daughters? What if a family has a history of Huntington's disease? At present, the Australian government takes in migrants regardless of these sorts of questions. Presumably it is considered that, in taking in these migrants, we take them in warts and all, and that the benefits they or their family members will bring will outweigh the possible costs of dealing with those warts. Why then is a different set of guidelines followed for people with disabilities? If we take 'fair' to mean even-handed, then the process is clearly not fair.

There are similar problems with the present migration health process if we consider 'fair' in the sense of 'fair' to the Australian community. Excluding people from permanent residence in Australia on the grounds that they might possibly become a 'significant' and therefore unacceptable 'cost' to the Australian community is a clear statement to the effect that one's contribution to the common good can only be assessed in the sorts of terms which are susceptible to numerical measurement: a measurement of financial cost. The corollary of this is that any 'contribution' people with disabilities might make to the Australian community is not worthwhile if it is not measurable in this way. Further, it also assumes that people with disabilities – those already living in Australia and those who would seek to do so - do not make a financial contribution to society. Neither of these assumptions has been tested empirically. I do not have the resources to make this case, but there is increasing evidence from, for example, the Productivity Commission, that people with disabilities do make a significant economic contribution to society as workers. Untested assertions to the contrary devalue the lives of those members of the Australian community who have a disability and in that sense the migration process based on those assertions is not 'fair' to those members of our society. If a person's cost is to be measured (and I argue below against this approach), then for the process to be fair, it should be a net cost, arrived at after careful scrutiny of both credit and debit features. This does not occur at present. A person with a disability is automatically assessed as a debit with no note taken of any 'credit' aspects - measured in either quantitative or qualitative terms.

While the Australian migration process is generally selective, based on a points system and on Australia's economic needs, it also includes the notion of family reunion. We take as a *starting point that people who get through the migration system* (those who don't have a disability, that is) will bring benefits to the country – in other words we act on the assumption that their costs in terms of health care, education of their children, likely possible pension requirements etc are offset by the benefits they bring. These may be particular skills the economy needs but, by including family reunion, we are also acknowledging that our system is not tied solely to benefits that can be measured in terms of economic factors. Family reunion may mean, bringing the last remaining family member to Australia, or it may mean bringing in an elderly relative who is dependent for support. The benefits here presumably relate to more ephemeral factors such as psychological well being for Australian residents and citizens. They may also relate to factors embodied in our 'values' – compassion, and a notion of the public good. In some cases, individuals who come to Australia to join permanent residents already living here may represent a possible 'financial cost' to the Australian community in terms of potential use of welfare benefits, and in this case someone already resident here in Australia may be asked to stand surety against such costs. An 'Assurance of Support' (AoS) is a commitment to provide financial support for the person applying to migrate, where there is a belief that the person on whose behalf the AoS is made may become a cost to the Australian community. According to the Department of Immigration and Citizenship,

> a required (mandatory) AoS applies to the following visa categories:
>
> - Parent
> - Aged Parent
> - Contributory Parent
> - Contributory Aged Parent
> - Aged Dependent Relative
> - Remaining Relative.

In addition, a discretionary AoS may be requested by the Department

> if an applicant is assessed as being at risk of becoming a charge on Australia's welfare system. This request is based upon close consideration of the education, skills, employment history, English language capacity and age of the visa applicant and their sponsor.[4]

I cannot state categorically that this AoS has never been made available to families who have a member with a disability. Anecdotally, however, I have come across many families attempting to migrate to Australia with a member with a disability, who have repeatedly advised the Immigration authorities that they would willingly undertake to provide full medical and health insurance, cover all costs associated with education, and provide any required assurance that their family member will not become reliant on social welfare benefits, and I have never heard of a family in these circumstances which has been permitted or has been offered this option. If the intention of the public good criteria (health process) is to protect the community's coffers, an AoS would surely be a possibility worth considering in terms of equitable treatment alone. While I do not necessarily wish to advocate the automatic use of this provision, the fact that it appears to be offered routinely in the situation of aged relatives but is apparently not offered in the case of people with a disability is surely grounds for concern.

Against this general background I wish to refer to a number of cases of which I have personal knowledge, in order to highlight both the lack of fairness and the lack of transparency of present migration practices. As I have undertaken a number of interviews with people who have been through the migration process and have a considerable body of correspondence with many others, I will quote the individual directly where possible.[5] Whereas some families have given me permission to use their names and some are already in the public domain, others are still keen to avoid the possible scrutiny of the Department, having already experienced discrimination against their family member first hand. In my experience, families who have had to negotiate the migration process with a family member with a disability acquire citizenship as soon as possible in the hope that this will give them more protection; but they still remain wary of the Australian government's attitude towards individuals with disability, having learned the hard way that the DDA does not in fact extend protection from discrimination to people with a disability. As one British immigrant said:

> I was really keen the minute we could that [our son] should become an Australian citizen so that he wouldn't ever get his permanent residency taken away. I thought, you know, that he might go out of the country and not be allowed back in again… Until [our son] got his Australian Citizenship there was always a very small anxiety that something was going to go wrong with the Immigration. I didn't trust them, basically. I'd lost trust, yes.[6]

The health process impacts on different categories of applicants in different ways, which contributes to its lack of transparency, but the process is almost always invidious. Consider the case of families who are already permanent residents but who have a child with a disability born outside Australia. Almost twenty years ago, *Margaret and Alan Cuthbert*, both medical practitioners, and their young son *Richard*, applied for and were granted permanent residence to live in Western Australia. *Margaret* was pregnant and remained in the UK with her son *Richard* till her new baby was born, while her husband bought a home and established their medical practice in rural Australia with their Australian partner. The newborn child however had DS and when they tried to have him granted permanent residence so the family could be re-united in Australia, this was denied them and they were actually advised by the Department of Immigration simply to leave the child behind in the UK. It took them some months and a great deal of concerted agitation before their new son was finally granted the right to enter Australia, but eventually they were given permission, though they were never given an explanation as to why this was suddenly permitted. Nor were they required to go through the Migration Review Tribunal process.

In a similar case as recently as November 2008, I received an email from a couple who, with their daughter, had all been granted and had taken up permanent residence (PR) in Australia in 2007. When she became pregnant with twins, the mother of the family returned temporarily to her country of origin and gave birth there in September 2008. One of the twins had DS. *Mrs Lee* emailed me in disbelief.

> I went to the Australian High Commission… to submit my application for sponsoring our two boys to migrate to Australia. However, I was told that my boy with Down Syndrome would be denied the visa for a PR [permanent residence] as he has Down Syndrome.

> May I ask whether the Migration Act actually discriminates against DS children even though we have already been granted PR?... I have asked a question as to how are we are supposed to migrate to Australia if they do not allow my son to be with us?[7]

The *Lee* family is still awaiting the outcome of their case. In the meantime the mother wished to take the babies and her young daughter back to Australia where her husband is living and establishing their new home. However when she asked the Australian migration office in the country where she was living if she could at least take the baby and its siblings back with her to visit – given it is less than a year old and she cannot leave it behind – she was told it was very unlikely she would even be issued with a tourist visa for the child as they suspected she would keep the child there with her and not return. She is in limbo and the family divided while the mess is sorted out.

A child without a disability born to permanent residents while they are outside Australia is virtually automatically granted the right to permanent residence in Australia, and even to contemplate refusing entry to a child whose family is already resident in Australia seems quite bizarre. In the case of the *Cuthberts*, the child was eventually granted permission to enter Australia, but it seems inhumane to subject a family which already has the right to live in Australia to an extended and totally unnecessary bureaucratic process, if the outcome is that the child is to be granted entry anyway. Worse however, is the possibility that there are cases where children of permanent residents born outside Australia with a disability, have in fact been denied the right to live with them in Australia. This is the prospect presently facing the *Lee* family.

Then there is the situation of families who are living in Australia on temporary residence visas who are given permission to enter the country because they brought invaluable skills which are in demand here. In some cases, those families already have children with disabilities, or they may have a child with a disability born here. The case of German doctor Bernhard Moeller and his family, which attracted sustained media attention late last year, is one example. Dr Moeller was working on a temporary visa in a rural community in Victoria and despite the continuing local demand for his services, he was refused the right to permanent residence because his son, who had DS, failed to meet the health criteria of the Migration Act. Subsequently the press seized on the issue and the resultant media frenzy brought a successful resolution for the family at an unprecedented rate, though not before the family had to go through the MRT, which also rejected their case to stay. At the same time, the case of the Robinson family living in Western Australia was also resolved almost overnight in the climate of interest associated with the Moeller case. But midwife Tracey Robinson, working in Western Australia on a temporary residence visa like the Moellers, had waited more than six years for a resolution because the family was fearful of the outcome of media intervention. Instead they chose to avoid the press and go the legal path. Over that period their application for permanent residence was first rejected by the Australian immigration authorities; they then appealed to the Migration Review Tribunal and lost the case there; then took their case successfully to the Federal Court; the Department of Immigration appealed and that Federal Court decision was overturned; and thereafter their only hope was ministerial intervention. The only reason they were able to stay their six year course was because a Perth law firm acted *pro bono* on their behalf. The outcome which the Moellers achieved in three months took the Robinsons six years. Such commitment is not possible for most families and indeed would have been impossible for the Robinsons without that legal support. As Tracey Robinson wrote after the battle was finally over:

> David is really the person that makes it worthwhile… when I look at him and think that for 15 years David has had to battle for basic rights that people without DS take for granted.[8]

The other issue about pursuing the case through the system is the enormous expense. Migrant and parent Sharon Ford has written about her experience. Her family was sponsored to migrate to Australia in 1998 by the University of Western Australia but because they have a daughter with DS, they knew it was going to be a battle, and prepared themselves accordingly by marshalling informed expert witnesses to counter the predictable allegations made by the CMO that that their daughter would be 'a significant cost' to the Australian public. However, even to get as far as the Migration Review Tribunal cost the family itself at least $3000 (1998 figures). The application for review submitted in February 1999 cost them at an additional $1400, and the family were subsequently required to pay another $330 for a (Review) Medical Officer's (RMO) opinion, then to submit an additional psychologist's report ($840) to help the RMO make the decision. By this time too, the University of Western Australia which was sponsoring the family and had lodged the appeal in Canberra on the family's behalf, was, as Sharon Ford wrote, 'not at all excited about the "significant cost" their research project had incurred in the delay in processing the visa of one of the principal researchers'.[9]

More money and more time were expended before the family was finally permitted to take up the job in Australia. How can this loss of time and money be seen as contributing to the public good? Clearly only those families with an extraordinary capacity to access information and with significant financial resources are going to succeed. It is a process of exclusion by attrition.

I could cite many other examples of families, well qualified to enter and with skills that the country needs, who have been denied access to Australia simply because of the health provisions, but I hope they will make their own submissions. They are however less likely to be heard from by the Inquiry because of course they are not living in Australia. Many, understandably, give up at first hurdle, when they are rejected on first application because of their child's disability. Australia thereby loses the skills the family would otherwise have brought to the country, and creates for itself a legacy of bitterness. As one British family wrote to me:

> We were turned down on the grounds of 'not meeting the required health standards'. We've tried and obviously we are not perfect enough. I only hope that the government view is not that of the majority of Australians. We won't be bothering with the Tribunal. I don't think I could live somewhere, where we only got a visa because we had to plead to get it. [10]

There is of course no way of knowing how many others similarly stop trying before the Tribunal stage, nor indeed how many simply don't bother in the first place because they believe it is futile.

Other families are affected in still different ways. Migration policies don't impact solely on those seeking to migrate; in some circumstances they can also serve to prevent people with disability and their families from acquiring citizenship on the basis of their disability. This situation particularly affects New Zealanders in Australia. As close neighbours of Australia, New Zealanders have long been entitled to unrestricted entry into Australia. From 2001, the situation changed and though they are still entitled to live and work in Australia, New Zealanders are no longer automatically classed as 'permanent residents'. New Zealanders too now have to apply for permanent residence before they can apply for citizenship. Permanent residence is the golden key which permits access to social security benefits and health care, should one need it. For most New Zealanders, the process of applying for permanent residence is very straightforward – but if you have a child with a disability, once again, you fail the health test. You may still stay in Australia; you just can't acquire the status of permanent resident and are therefore denied the consequent right to apply for citizenship and full membership of the Australian polity.

Like many New Zealanders, the *Monroes* had chosen Australia as their permanent home, but they now find themselves living in Perth in a limbo for second-class residents, purely because their healthy Australian-born child has Down syndrome and therefore fails the health criteria. The Monroes are fairly philosophical about this because they don't particularly need health care – but nonetheless there is a principle of equity at stake. As they wrote

> We are better off than a lot of others in this situation, in that (because we are NZers) we ARE (including our son) allowed to live in Australia, indefinitely. I guess that's a start. I find it a little rude that we can work, pay taxes, start businesses, employ people BUT we can't participate in Social Security![11]

The fact that the family are required to contribute their full share of taxes seems particularly incongruous because taxes, of course, support the Australian government's social security system and go towards providing health care and social security for others.

I want to outline a final example which makes clear how inconsistently the regulations are applied. Dr Edi Albert,[12] a British general practice clinician and academic, was working in Hobart when he and his family applied for permanent residence. When his application was first submitted in mid 2001, he was initially advised that the application of his infant son born in Hobart earlier that year would likely be rejected. The child had DS and the migration official concerned wrote to Dr Albert advising him that on the basis of the Commonwealth Medical Officer's (CMO) report, the child did not meet the public interest criteria. Consequently, the DIMA official was 'inclined to refuse this visa application'.[13] Unusually, however, before it was formally processed by the department, Dr Albert was also given six weeks' opportunity to review and respond to the CMO's report, which stated that

> Christopher has Down Syndrome and recently had surgery to correct a ventricular septal defect and has progressed well. He is said not to have any other complications often associated with the syndrome. From the reports provided, this applicant is likely to require assistance with schooling and have difficulty performing the full range of activities of daily living which are necessary for independent functioning in the community.[14]

In response, the Deputy Chancellor of the University of Tasmania, the institution sponsoring Dr Albert, wrote appealing the medical finding, arguing that it was based on 'a narrowly perceived and outdated view' of the child's disability.[15] Further ammunition on the Albert family's behalf came in the form of a letter from the Hon. Doug Lowe, former state premier and health minister and at that stage executive officer of the Tasmanian branch of the Australian Medical Association, arguing that, given the value Dr Albert brought to the practice of general medicine in Tasmania, the best decision that could be made in terms of 'public interest' would be that the family be given permanent residence.[16]

The Department of Immigration had already specifically stated that there was no possibility of waiving the health criteria in Dr Albert's case because of the type of visa for which he was applying.[17] It is therefore unclear how it happened but, within weeks, the family was advised that all their visas had been granted. They were not required to go through the Migration Review Tribunal and with no further examination their assessment was rewritten to show that infant son was no longer deemed to pose a possible future cost to the community. There is no doubt that playing the right hand at the right time (and having a strong hand to play) can turn the game round, despite the rules.

This case raises interesting questions about the practice of decision making within the migration arena in the past few years, particularly in terms of consistency and transparency. How does one assess the likely capacity to contribute – or likely costs - of a three month or six month old baby? And if one six month baby with DS is deemed not likely to be a cost in the future, then how can another be refused? Clearly other factors were taken into account here: presumably the capacity of the family as a whole to contribute, which may have been seen as countering any likely 'cost' incurred in supporting the child with DS. But the case also raises questions of the extent to which the Department follows its own rules and the laws governing migration.

In November 2008, in response to public concern about the migration health process, Minister Evans said to the Senate of the Moeller case:

> The family's application for permanent residency was refused by the department last month in accordance with the law after a Commonwealth medical officer assessed that Dr Moeller's 13-year-old son Lukas would incur significant public health and community care costs due to his Down Syndrome.
>
> Where a Medical Officer of the Commonwealth has assessed a visa applicant as having a health condition that is likely to result in a significant cost to the Australian community or prejudice the access of Australians to health care or community services, the law requires that this decision must be accepted by the department.[18] [my emphasis]

How this ministerial view of the law fits in with the Albert case, where the decision made by the Dept of Migration officer clearly overrode the CMO's report on the Alberts' son, is not clear, and again, points the lack of consistency in application of the law. More important however is that it is apparent that the Dept decided autonomously that the evident benefits brought by the Albert family outweighed the potential 'cost' to the community of their infant son with DS. A similar argument led to the ultimate success of the Moeller family in October 2008, with Minister Evans stating publicly, 'Their continued presence and contribution in Australia will be beneficial',[19] though in this case Senator Evans was more punctilious than his predecessors in waiting for the findings of the MRT before he intervened. But if this is an acceptable argument, why is it not applied universally? If a family brings to Australia skills which are in short supply, then that in itself should be enough evidence of benefit to the Australian community.

Minister Evans also stated 'I do wish to express my regret at the stress that this has caused Dr Moeller and his family', but this stress is experience by the countless families in this situation, all of whom have been accepted for migration so all of whom – presumably – have been assessed as 'beneficial' to Australian society and its economy. Minister Evans also stated that in his capacity as minister he was 'able to assess all the evidence' on the Moeller case. It should not be necessary however for families to have to endure a lengthy and costly MRT process, in order to reach a point where proper consideration can be given to their application at Ministerial level. Surely if the guidelines for applicants pointed to the need for supporting documentation relating to disability and gave clear direction as to what documentation is needed, particularly relating to the extent of possible community support and the commitment of family support to the person with a disability, the process could be short circuited. In the Moeller case too, it is also worth noting that the MRT process was not able to reach the decision that Evans reached, that the family's net contribution was positive. The MRT was also bound to accept the view of the CMO of the 'costs' of the person with disability and is not empowered to take into consideration the factors which led Evans to reverse the MRT's decision, namely the benefit to the community of the family as a whole.

If a positive decision based on a family's net contribution to the public good can be made by the Department in the Albert case, why cannot the decision based on family skills be made by the Department in all cases? The Albert decision, and the reasons given for Minister Evans for the outcome in the Moeller case, indicate that the skills which a family as a whole brings into Australia, the skills which otherwise render them acceptable as migrants, can outweigh the possible cost of a person with a disability. For the law to be consistent, this principle should be applied to all families seeking to migrate. Further, it should be applied at the first stage of the process, not after recourse to the MRT and final appeal to the minister.

Finally, I want to comment on the questions of migration and values. Australia is a country which has ostensibly welcomed and celebrated difference and diversity for at least the last forty years. While multiculturalism has its critics and is certainly much less valued by government than was the case a decade ago, difference – defined in terms of race – is still generally celebrated in Australia today, and the Racial Discrimination Act of 1975 continues to prohibit discrimination on the grounds of race in the migration field. Why then does Australian migration law continue to discriminate so flagrantly against those with another form of difference?

What is even more ironic today, as the policy focus in the migration sphere shifts away from multiculturalism to an emphasis on embracing and sharing so-called Australian values, is that in excluding families with a disability, migration policies are acting in direct opposition to the value of equality for people with a disability embodied in our Disability Discrimination Act.

Applicants for permanent residence and citizenship are now required to sign a statement about Australian values as part of this process. The statement includes the passage:

> Australian society values respect for the freedom and dignity of the individual, freedom of religion, commitment to the rule of law, Parliamentary democracy, equality of men and women and a spirit of egalitarianism that embraces mutual respect, tolerance, fair play and compassion for those in need and pursuit of the public good.

The exemption of the Migration Act from the DDA, which is designed to extend freedom and dignity of the individual to people with disabilities, is at odds with the Australian 'values' encapsulated in this statement. Further, it contradicts the notion of 'mutual respect, tolerance, fair play and compassion for those in need and pursuit of the public good'. The 'public good', in terms of the migration health process, is currently measured by economic 'cost' and in monetary terms, but our values statement is seemingly based on a higher currency than money. I would argue that the health process is unambiguously in conflict with the word and the spirit of this statement of Australian values. In face of this contradiction, asking migrants to endorse this values statement is laughable.

Over the years, more than one potential migrant affected by the disability migration process has asked me in some amazement,

> what kind of a country are we coming to that has these sorts of laws and practices?[20]

Excluding people with disabilities from Australia makes a mockery of our focus on values and devalues the lives and rights of every person with a disability who is an Australian citizen or resident. It says, people like you are really not fit to live here. Such an attitude is an anachronism and a disgrace, of which Australia and Australians should be truly ashamed.

CONCLUSION

Minister Evans' recent decision to investigate waiving the health requirement for onshore migration cases promises imminent relief to some families, but there are others equally deserving, who can contribute just as much to Australia, whose lives remain on hold.

According to shadow minister for immigration Dr Sharman Stone, Minister Evans is currently overturning decisions made by both the Migration and Refugee Review Tribunals at a rate of 25 per cent (I believe he had overturned more than one thousand decisions by June 2009)[21] which means that Minister Evans has exercised his discretion and offered closure to at least some of families in waiting, which I certainly think is a positive step in this area. But the extent to which this intervention is necessary says volumes about the process, which I believe the evidence suggests is flawed in its conception and lacking in consistency in application. Ministerial discretion is no substitute for legislative change and I would make the following points about the directions for change.

- Clause 52 within the Disability Discrimination Act, which exempts migration practices and regulations, should be scrapped and the policies and practices of the Department of Immigration reviewed to end discrimination against people with disabilities and their families.
- The present view of people with disabilities as a burden on the community, a view which permeates current migration practice, should be abandoned, and the positive contribution made by people with disabilities and their families given full consideration.
- Assessment procedures need to be transparent, consistent and equitable.
- Families with a member with a disability 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 recognised skills and qualifications into Australia
- And finally, disability alone should not be grounds for rejection.

It is important to remember that an immigration policy is, by definition, intended to be selective and therefore to exclude some and include others. My point here is that the current practice of blanket exclusion for people with a disability goes beyond selectivity to discrimination. In an ideal world one could argue for a world without borders. We do not live in such a world and I can see no point in advocating that position before the Australian government. Rather I would argue that if a family is otherwise qualified to migrate, then disability *per se* should not be a bar preventing that family migrating. This is simply in line with the United Nations Declaration of the Rights of Disabled Persons.

At the very least, if cost analysis is going to continue to be employed in deciding a person's right to migrate, then it needs to be applied consistently to all individuals, with due regard given to both costs and benefits, and with benefits measured in broader ways then simply financial. And in the case of people with a disability, the process needs to be fine tuned and flexible enough to avoid judgments about individuals based on erroneous and outdated general assumptions.

But better than falling back on the cost-benefit analysis, I would argue that the Australian government should practice what it purports to preach in the area of values. If all other measures indicate the family would be eligible for migration, then in line with our DDA (clause 52 aside) and in line with the United Naations Declaration on the Rights of Disabled Persons, then that family and all its members should be welcomed.

(Dr) Jan Gothard

Down Syndrome Western Australia

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[1] Jan Gothard, 'A burden on the State? the "unfit" immigrant', in Eric Richards and Jacqueline Templeton (eds), *The Australian Immigrant in the 20th Century. Visible Immigrants: Five.* Research School of Social Sciences, Canberra, 1998; Jan Gothard, 'Migrants with disabilities deserve a better deal', ABC Online, 3 December 2008, http://www.abc.net.au/news/stories/2008/12/03/2436344.htm; Jan Gothard and Charlie Fox, 'Consign disability discrimination to the bin', *The Australian*, 17 November 2008.

[2] Terry Wiggins, 'Barriers to Immigration for Applicants with an Illness or Disability', unpublished paper, November 2001, p. 14.

[3] Wiggins, p. 17.

[4] Department of Immigration and Citizenship, Fact Sheet no. 34, http://www.immi.gov.au/media/fact-sheets/34aos.htm

[5] In most cases I cannot name names in this public document but can provide them privately if necessary, as all this correspondence and all interviews are held by me. Pseudonyms are italicised.

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[6] *Cuthbert* interview, 1999, in possession of Jan Gothard, Perth

[7] *Lee* email to Jan Gothard, 19 Nov. 2008

[8] Robinson mail to Jan Gothard, Dec. 2008

[9] Sharon Ford and Jan Gothard, 'Discrimination and Immigration: An Australian (Bad) Example', unpublished paper presented at the 8th World Down Syndrome Congress, Singapore, April 2004.

[10] Email to Jan Gothard, 9 Sept 2004

[11] Email, *Monroe* to Jan Gothard, 12 June 2006

[12] Dr Albert has given me permission to use his name and has given me copies of the correspondence relating to his family's case for migration.

[13] Vicki Daniels, Dept of Immigration and Multicultural Affairs, to Edmund Albert, 10 Sept 2001, in possession of Jan Gothard.

[14] 'Opinion of a Medical Officer of the Commonwealth', Albert, Christopher Carl, 30 August 2001, in Vicki Daniels, Dept of Immigration and Multicultural Affairs, to Edmund Albert, 10 Sept 2001, copy in possession of Jan Gothard.

[15] Cited in Vicki Daniels, DIMA, to Kim Boyer, Deputy Chancellor, Uni of Tas., and CEO, Tasmanian General Practice Division Ltd, 10 October 2001, copy in my possession.

[16] Hon Doug Lowe, AMA, to Dept of Immigration and Multicultural Affairs, 16 October 2001, copy in possession of Jan Gothard.

[17] DIMA to Kim Bower, Deputy Chancellor, University of Tas, 10 Oct 2001, copy in possession of Jan Gothard.

[18] Senator Chris Evans, Statement on Dr Bernhard Moeller, media release, 26 November 2008, <http://www.chrisevans.alp.org.au/news/1108/immimediarelease26-01.php>, accessed 23 June 2009.

[19] Senator Chris Evans, Statement on Dr Bernhard Moeller, media release, 26 November 2008, <http://www.chrisevans.alp.org.au/news/1108/immimediarelease26-01.php>, accessed 23 June 2009.

[20] Email to Jan Gothard.

[21] The Hon Dr Sharman Stone MP, Shadow Minister for Immigration and Citizenship, 'Record tribunal overturn rate needs explanation', Wed, 17 June 2009, <http://www.liberal.org.au/news.php?Id=3323> accessed 23 June 2009.