Submission No 89

Submission to the

Joint Standing Committee on Migration

Inquiry on the Migration Treatment of Disability

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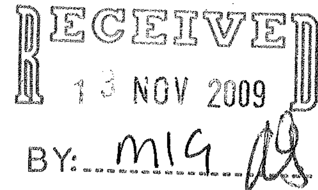

Summary and Recommendations

This submission summarises the migration experiences of people from non-English speaking backgrounds (NESB) with disability. It is based on the work of the Multicultural Disability Advocacy Association of New South Wales (MDAA) over the past 12 years. Our comments are informed by our individual advocacy with people from NESB with disability, their families and carers. Migration has been one of the top five matters requiring advocacy assistance each year since MDAA started in 1997.

MDAA's experience is that although people from NESB with disability enrich our society and add to its diversity, there are major obstacles for us to get a visa to migrate to Australia. Potential migrants, offshore refugees and humanitarian applicants with disability are refused a visa if we are assessed as not meeting the health requirement in the *Migration Act 1958,* because we may cost the Australian community too much, or may prevent the access of Australian residents to health and community services.

In our experience these assessments of costs are based on unwarranted assumptions about the nature of disability and the likelihood of our use of health and community services. They take no account of our particular circumstances or the contributions we and our families can make to the economic and social well-being of the Australian community.

Australia's discriminatory migration policies and practices separate families and put people's lives on hold. In doing this they create inhumane and unnecessary barriers to resettlement. Family separation is extremely detrimental psychologically and financially.

The health requirement is legal only because the *Migration Act* is exempt from the *Disability Discrimination Act 1992.* Relevant reports by the Productivity Commission (2004)[1] and the Australian National Audit Office (2007)[2] confirm this. This discrimination ignores Australia's international treaty obligations under several United Nations conventions, particularly the Convention on the Rights of Persons with Disabilities (CRPD) 2008; the Convention on the Rights of the Child (CRC) 1989; and the Convention Relating to the Status of Refugees 1951 and its Optional Protocol 1967.

Under these Conventions people with disability have the same rights as anyone else to seek Australia's protection or to apply to migrate here. Under the CRPD their applications cannot be treated differently because they have a disability. It

[1] Productivity Commission, 2004. *Inquiry Report, Report No. 30: Review of the Disability Discrimination Act 1992.* Commonwealth of Australia.
[2] Australian National Audit Office, Audit Report No. 37 2006-07. Performance Audit, *Administration of the Health Requirement of the Migration Act 1958.* Commonwealth of Australia 2007.

should be enough that the person meets the criteria for the particular visa they have applied for: skilled; family reunion; business; refugee or humanitarian.

In our view the health requirement in the *Migration Act 1958* should be abolished. Regardless of human rights considerations, it is clear that administering the health requirement is not worth the cost. Fewer than 1% of all visa applicants are rejected because they fail the health requirement. In our opinion the funds used to administer the health requirement would be better spent on providing health and community services.

MDAA believes that a human rights framework which focuses on social inclusion is the best framework for assessing the contributions of potential migrants and offshore refugees with disability. This framework underpins the CRPD which emphasises the rights of people with disability to have the same kind of life as other people in the community. This puts the responsibility squarely on governments (including Australia's) which have ratified the CRPD to remove the barriers standing in the way of people with disability participating fully in society.

Social inclusion requires communities, governments and policy makers to change their attitudes to people with disability. In migration law and policy this means eliminating discriminatory attitudes and legal provisions such as the health requirement which shut out applicants with disability.

Of the 25 countries with refugee resettlement programs Australia appears to be the only one with a requirement which, in practice, bars offshore refugees with a health condition or disability deemed to present a significant cost to the Australian community.

MDAA makes the following recommendations which, if adopted, would remove the current discriminatory practices in migration policy, promote the rights of people with disability and fulfil Australia's international obligations.

Recommendation 1: Remove the exemption of the *Migration Act 1958* from the *Disability Discrimination Act 1992.*

Recommendation 2: Abolish the health requirement in the *Migration Act 1958*.

Recommendation 3: Rescind the Australian Government's reservation to the United Nations Convention on the Rights of Persons with Disability and its Optional Protocol.

Recommendation 4: Make the necessary legislative and administrative changes to reflect Australia's international treaty obligations.

Recommendation 5: Create a subclass for refugees with disability with a target of 10% of offshore refugee places, additional to the current resettlement places, and ensure that refugees with disability have access to information about this.

Recommendation 6: Review the Department of Immigration and Citizenship's (DIAC) administrative procedures to ensure that they do not discriminate against people with disability.

Recommendation 7: Provide clear guidelines and administrative procedures for ministerial intervention.

Recommendation 8: Require DIAC to develop a disability action plan under the *Disability Discrimination Act 1992* including disability awareness training for DIAC staff.

About MDAA

The Multicultural Disability Advocacy Association of NSW (MDAA) is a community based organisation with over 460 members, working for a community where everyone, regardless of background or ability, is welcome, included and supported. MDAA is the peak advocacy body in New South Wales (NSW) and the *only* advocacy service in NSW available specifically for people from non-English speaking backgrounds (NESB) with disability, their families and carers. Our members and consumers come from many countries and cultural backgrounds and have a broad range of disabilities.

Our aim is to promote, protect and secure the rights of people from NESB with disability, their families and carers in NSW and to ensure fair access to services and fair policies in government and non-government services.

We provide a range of advocacy services, including individual advocacy for over 400 people with disability each year. We receive funding from Ageing, Disability and Home Care Department of Human Services NSW (ADHC) and the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).

Introduction

MDAA welcomes the opportunity to make this submission to the Inquiry. It is based on our individual advocacy with people from NESB with disability, their families and carers during the past twelve years. It also draws on previous submissions relevant to the Inquiry which are available from our website.

- Response to the Department of Immigration and Citizenship (DIAC) discussion paper *'Australia's Humanitarian Program 2009-10 and Beyond'* (January 2009) (www.mdaa.org.au/service/systemic/topics/immigration.html)
- Submission to the Senate Standing Committee on Legal and Constitutional Affairs *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (January 2009) (http://www.mdaa.org.au/service/systemic/topics/legals.html)
- MDAA and NEDA[3] joint submission to the Senate *Inquiry into the Administration and Operation of the Migration Act 1958* (August 2005) (http://www.mdaa.org.au/service/systemic/topics/immigration.html)

In preparing this submission we consulted MDAA members and consumers about the Inquiry's terms of reference, to find out what they wanted to say to the Committee. Their comments and recent case studies[4] are included throughout this submission.

[3] National Ethnic Disability Alliance (NEDA). For more information go to http://www.neda.org.au/
[4] We changed some identifying details in the case studies to preserve individual privacy but the essential circumstances outlined in the case studies are true.

This submission summarises the main relevant points made in our earlier submissions and then comments on each of the Inquiry's terms of reference.

Summary of relevant points made in our earlier submissions

The migration health requirement has been a source of frustration and anxiety to MDAA members and consumers for a long time. We have made the following points about it in our previous submissions:

- Australia maintains discriminatory policies and practices against migrants and refugees with disability by exempting decisions made under the *Migration Act 1958* from coverage of the *Disability Discrimination Act 1992* (DDA). As a country we continue to do this despite the Commonwealth Government's ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) in July 2008. In our view, the exemption contravenes various articles of the CRPD, namely:
  - ***Article 4(a)***: requires parties to '*adopt all appropriate legislative administrative and other measures for the implementation of the rights recognized under the ...Convention*'
  - ***Article 4(b)***: requires parties '*to take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities*'
  - ***Article 5***: addresses equality and non-discrimination for people with disability
  - ***Article 18***: recognises the rights of people with disability to liberty of movement and nationality on an equal basis with others

- The Productivity Commission's 2004 report[5] on the DDA supports our view stating, '*...if the Migration Act were not exempt from the DDA these health requirements might conceivably be found to discriminate against some people with disabilities indirectly (by setting rules that they do not or cannot meet) or discriminate directly (by requiring additional tests or medical evidence not required of people without disabilities).*'

- Discriminatory and inconsistent application of the health requirement in determining visa eligibility makes unwarranted assumptions about the potential economic costs of supporting a migrant, refugee or humanitarian applicant with disability in Australia. In reality, with appropriate support, many people with disability live independently with no greater dependence on public health or community services than anyone else. Many applicants have skills and qualifications that could benefit the Australian

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[5] Productivity Commission, *Inquiry Report*, 2004, *Report No. 30: Review of the Disability Discrimination Act 1992*, Commonwealth of Australia, p. 343.

community but medical assessors and DIAC officers discount the social, cultural and economic contributions people with disability make, which can vastly outweigh any initial support costs.

- Commonwealth governments give contradictory messages to people from NESB with disability about the value of people with disability. Through budget allocations and strategies which emphasise the rights, skills and potential of people with disability to get a mainstream education, work and participate in general community life, governments promote the value of people with disability as individuals who contribute to the community. But at the same time, people with disability are consistently refused entry to Australia because they fail the health requirement. DIAC focuses on the negative aspects of disability, looking for easy reasons to reject migration applications rather than accept them. It is unfair and unreasonable to reject people with disability because of untested assumptions about future costs associated with the disability.

- The health requirement presents a difficult choice for families with a member with disability who apply to migrate to Australia. DIAC often rejects the application in the first instance and tells families that everyone except the person with disability would be accepted. Faced with this dilemma some families decide they should migrate to start a new life in Australia for the benefit of most family members, even though it means leaving behind the person with disability, most often a child. They hope to be reunited as soon as possible in Australia. Some families stay, hoping to persuade local DIAC staff to change their decision and accept the whole family. By separating families, the health requirement contravenes the United Nations Convention on the Rights of the Child 1989 (CRC), which states that children have a right to grow up with their family and that the best interests of the child are the main consideration in any decision about them.[6]

- A devastating consequence of war and civil unrest is the separation and/or loss of family members and support networks. This can leave people with disability highly vulnerable. Physical, social and attitudinal barriers exclude refugees with disability from accessing essential services such as food, water, shelter, health care, education and vocational training. The design of refugee camps often limits their access to these essential services.[7] With limited mobility and family support, refugees with disability face greater isolation and neglect. By applying the health requirement, Australia's Refugee and Humanitarian Program fails to address the needs of this vulnerable group. This contravenes Australia's obligations under

[6] Article 3 and Article 7, United Nations Convention on the Rights of the Child 1989.
[7] Women's Commission for Refugee Women and Children. *'Disabilities among refugees and conflict-affected situations'.* June 2008. Available at: http://www.womensrefugeecommission.org/docs/disab_fulll_report.pdf

the UN Convention Relating to the Status of Refugees (1951) and its Optional Protocol (1967) (Refugee Convention) which obliges parties to cooperate with the Office of the United Nations High Commission for Refugees and support it in protecting people who have '*...a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*'.[8] Refugees with disability, despite demonstrating the need for protection and third country resettlement, are unsuccessful in applying to the Australian Government for protection due to dubious estimates of the potential costs of the disability.

- For MDAA members and consumers, both migrants and refugees, reuniting with the family member left behind is the top priority after arriving in Australia. The resettlement process is hindered by the emotional, financial and psychological effects of separation from a family member. Feelings of guilt and concerns for the safety and welfare of family members with disability increase as the prospects for reunion appear slim, because of the health requirement. The separation of families, particularly members with disability who are left in vulnerable circumstances, continues to have a detrimental effect on the resettlement of refugees. Families carry excessive financial burdens as well, having to send funds overseas regularly to support the family member with disability left behind.

- Social security payments are considered in assessing potential costs under the health requirement, despite the fact that migrants with disability and carers of newly arrived migrants have to wait 10 years before being eligible for a disability support pension (DSP) or carer income support. Eligibility for support services is also tied to eligibility for the DSP, so people have to wait for 10 years when early intervention from support services may have meant that they would not need income support later on. It is wrong anyway to assume that all migrants with disability would get a DSP, because the level of disability may not qualify for DSP and the person may be able and willing to participate in the paid workforce.

- For most people migrating to Australia, including people from NESB with disability, getting a job is one of the first priorities. People expect to find work in their chosen field within a short time after arriving in Australia but this can be frustrated if qualifications and experience are not recognised here, if English language skills need further development, or if employers focus on what we can't do rather than what we can. Most people therefore accept any job they can get and some have difficulty finding one at all. People with professional qualifications and experience end up driving taxis or working in low paid unskilled jobs. This creates huge

[8] United Nations Convention Relating to the Status of Refugees 1951 (Article 1) http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf

psychological, emotional and financial strain and makes it hard to cope or get ahead.

- Medical Officers of the Commonwealth (MOCs) who assess the potential costs of a person's disability appear not to have any knowledge of the disability rights movement in Australia and the increasing participation of people with disability in all aspects and levels of society. They continue to impose negative and wrong assumptions about disability and fail to take into account government policies such as the 10 year waiting period for income support and services. MOCs appear to assess the level of potential medical costs at the high end of the spectrum, without looking closely at the person's medical history. The DIAC policy threshold for costs regarded as 'significant' is currently $21,000.[9] Our experience is that MOC assessments are found to be exaggerated when the individual's circumstances are finally considered in detail during their appeal.

- Our experience demonstrates that the health requirement separates people with disability from their families; frustrates people with disability and their families by putting their lives on hold or at risk; and compounds the effects of disability, by denying access to support services.

Amal and Kareem

Amal aged 22 and her brother Kareem aged 19 are Iraqis who managed to escape the war in Iraq and now live as refugees in Jordan. They were reunited with one of their cousins recently but do not know where any other family members are, except for a relative of their mother's with whom they once lived, who now lives in Australia.

After escaping from Iraq Amal and Kareem were hoping to join their relative in Australia. She sponsored their applications under the Refugee and Humanitarian Program (visa sub class 202). DIAC rejected their applications in January 2009. They both inherited a degenerative vision impairment and were assessed as not meeting the health requirement. In the rejection letters, the Medical Officer of the Commonwealth was quoted as saying:

'...the applicant satisfies the requirements of paragraphs 4007(1)(a) and 4007(1)(b) i.e. health criteria...the applicant is unlikely, as a result of the disease or condition to prejudice the access to health care or community services of any Australian citizen...'

Despite this, Amal's and Kareem's vision impairments were assessed to cost $630,000 each to the Australian community over their lifetimes because they would be eligible for community services and income support.

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[9] DIAC. *Procedures and Advice Manual 3*, 2008. Para 56.2 The MOC is guided by this figure, a multiple of average annual per capita health, welfare and community services costs for Australians for 5 years. The MOC is expected to include costs that can be identified with 'reasonable certainty' as occurring beyond that 5 year period. The complexity of these calculations is described on pp. 74-75 of Australian National Audit Office Audit Report No. 37 2006-7.

They submitted additional supporting information to the assessing officer, in the hope that a waiver of the health requirement can be applied. They are still waiting for a response.

Comments on the Inquiry's terms of reference

We are disappointed that the terms of reference focus so much on the alleged costs to the Australian community of granting a person with disability a visa. Nothing in the terms of reference encourages us to expect that potential migrants, refugees or humanitarian applicants with disability will get a fairer go after the Inquiry than we do now. The terms of reference appear to have been developed without regard to Australia's obligations under the CRPD[10], the CRC and the Refugee Convention.[11]

Under these conventions people with disability have the same rights as anyone else to seek Australia's protection or to apply to migrate here. Under the CRPD a person's application cannot be treated differently because they have a disability. It should be enough therefore that the person meets the criteria for the particular visa they have applied for: skilled; family reunion; business; refugee or humanitarian.

1. Report on the options to properly assess the economic and social contribution of people with a disability and their families seeking to migrate to Australia.

The UN website provides the following introductory information about the CRPD:

> *"The Convention marks a 'paradigm shift' in attitudes and approaches to persons with disabilities. It takes to a new height the movement from viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.*
>
> *The Convention is intended as a human rights instrument with an explicit, social development dimension. It adopts a broad categorization of persons with disabilities and reaffirms that all persons with all types of*

[10] One of which (Article 8) is to take action to raise awareness throughout society of the rights of people with disability, to combat stereotypes and promote awareness of the contributions of people with disability. Perhaps Australia's awareness raising program should start with DIAC.
[11] For a discussion of those obligations we refer the Committee to the discussion paper released in June 2009 by Australian Lawyers for Human Rights, '*A Human's Worth: Putting a Price on Disability in Migration Matters*', available at http://www.alhr.asn.au/activities/2009/06/01/discussion-paper-a-human-s-worth-putting-a-price-on-disability-in-migration-matters.html

disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced."[12]

In our view a human rights framework which focuses on social inclusion is the best framework available for assessing the contribution of people with disability: this is the basis for the CRPD.[13] The social model of disability focuses on the physical, social and cultural environment in which people with disability live. Many of the difficulties we and our families experience stem from the fact that societies are organised and structured in ways that do not take into account everyone's rights and needs. As a result, people with disability are often shut out of community activities and our right to participate fully in community life is ignored. Inaccessible buildings for people who use wheelchairs or other mobility aids, low expectations, assumptions and stereotypes about people with disability are some of the difficulties we experience because our needs are ignored and our rights are not recognised by the society we live in.

Ketut
'It's emotionally draining for people with disability because we feel we can't contribute to the community or that there is no recognition that we can make a contribution.'

By contrast, the CRPD emphasises the rights of people with disability to have the same kind of life as other people in the community. This puts the responsibility squarely on governments which have ratified the CRPD to remove the barriers standing in the way of people with disability that limit our full participation in society.

Social inclusion requires communities, governments and policy makers to change their attitudes to people with disability, to accommodate our needs as fully participating members of the community. In migration law and policy this means getting rid of discriminatory attitudes and legal provisions such as the health requirement which shut out applicants with disability. Using a social inclusion framework would not assess an individual's contribution in financial terms. We know of no tool that allows you to measure or assess social contribution adequately against services and supports, because it is a comparison between apples and oranges. Rather, social inclusion would provide a firm basis for Australia, as a party to the CRPD, to promote opportunities for community participation, inclusion and independence and to remove discriminatory provisions in domestic laws.

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[12] See http://www.un.org/disabilities/default.asp?navid=12&pid=150

[13] See CRPD Article 3 at http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf

Milho

After fleeing the war in Croatia, Milho arrived in Australia in 2002 with his parents and younger sister. The family had applied for refugee status six years earlier at the Australian Embassy in Belgrade.

Initially, Milho's mother was scared about Australia and was very unhappy with the first 'help' she received. Milho was 19 and has Cerebral Palsy which affects his mobility and communication. Milho's mother consulted a doctor who didn't seem to know anything about disability services or where the family might find some support. It took Milho's mother more than a year to find the right services for him as nobody she contacted told her how to go about finding them. Milho and his family were getting very frustrated.

Milho's mother finally found a physiotherapist who showed the family 'how to do things'. When they approached the Spastic Centre on her suggestion they got a lot of information and support.

Milho doesn't need much assistance now as he finished high school successfully and is in his final year at TAFE. All Milho and his family needed were doctors and services who knew where to refer him for assistance.

Australia made a declaration when ratifying the CRPD that the Convention did not impact on Australia's health requirements for non-nationals seeking to enter or remain here, where these requirements are based on legitimate, objective and reasonable criteria. We do not accept that the health requirement is legitimate, objective or reasonable, because it directly and indirectly infringes the rights of people with disability. We are not alone in thinking this. The Joint Standing Committee on Treaties, for example, recommended in November 2008[14] that the *Migration Act 1958* and the administration of migration policy be reviewed and any necessary action be taken to ensure that there is no direct or indirect discrimination against people with disability in contravention of the CRPD.

In MDAA's opinion the health requirement should be abolished. We agree with Professor Patricia Harris in her submission to this Inquiry that the health requirement is '...out of line with Australia's national and international obligations and with contemporary understandings of disability.'[15]

People with disability make the same kinds of contributions to the community as anyone else: many of us work in paid jobs and pay tax; many others do unpaid work as volunteers in a wide range of community organisations; we contribute as much to the well-being of our families, friends and colleagues and to the community at large as anyone else.

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[14] Joint Standing Committee on Treaties, 2008. *Review into treaties tabled on 3 December 2008 and 3 February 2009*. Available at: http://www.aph.gov.au/house/committee/jsct/3december2008/report/front.pdf

[15] Submission No. 2, p. 2. http://www.aph.gov.au/house/committee/mig/disability/subs/sub002.pdf

Ekrem

'I came from Turkey to New Zealand with my family and then migrated to Australia. All my family, except for my son who has Down Syndrome, work and have permanent residence in Australia but Ekrem has a Special Category Visa. Because of his disability he can't get permanent residence in Australia and has lost all the support he had in NZ, such as training at the polytechnic. He can only get 1 year of pre-employment training from ADHC.

I think the waiting period to get social security and support services is wrong. The international agreement on social security between Australia and NZ has a clause that it does not apply to a person with disability born outside NZ. This is wrong. Everyone else in my family is treated like a human being but not Ekrem.'

When asked what contributions people with disability make to the Australian community MDAA's members and consumers responded as follows:

'Working and paying taxes till they retire.'

'Voluntary work: I'm a member of a church choir which raises money for others.'

'Because of my son's disability I did a lot of research into that disability and did a lot of community education about it – I won an award for that.'

'Breaking the stigma about disability. I do a lot of public speaking to raise community awareness about disability and what people with disability can do. Because of my disability my family have worked with other people with disability in different areas – teaching for example.'

'People with disability make a contribution by participating in community life as part of the community. Everybody is different and we are part of that. It would be very boring if we were all the same.'

2. Report on the impact on funding for, and availability of, community services for people with a disability moving to Australia either temporarily or permanently

Under the DDA, discrimination is permitted only where it would create an unreasonable burden on an organisation to make the adjustments needed to accommodate a person's disability. Similarly, the CRPD requires a State Party to provide 'reasonable accommodation'[16] of an individual's requirements and to

[16] See Article 24(2)(c) CRPD, for example, concerning the right to education.

take '...measures to the maximum of its available resources'[17] to promote the rights set out in the Convention.

In our view Australia is obliged to provide the level of funding and availability of community services that would reasonably accommodate the needs of people with disability who live here. Setting our international legal obligations to one side (which we do solely for the sake of argument), it is important to understand that we are talking about very few people who do not meet the health requirement. In our view the impact on funding and services of granting visas to people with disability would be minimal as the following information indicates.

The response to a question on notice at a Budget Estimates hearing on 27 May 2009 provides the following statistics[18]:

In 2007-8 almost 600,000 temporary and permanent visa applicants, including family members, were assessed against the health requirement by a MOC.

A total of 1,532 permanent and temporary visa applicants were refused a visa on 'health grounds'. These included:

- 1,133 permanent visa applicants.
- 116 provisional visa applicants (temporary visas which lead to the grant of permanent visas).
- 283 temporary visa applicants.

Of those 1,532 applicants:

- 2 failed on public safety grounds because they had active TB.
- 244 failed on 'health costs/ prejudice to access grounds' because they 'had a health condition'.
- An additional 442 were refused a visa on 'health grounds' because they had a family member who '...was unable to meet the health requirement ...because under Australian migration law, all members of the family unit included on a permanent visa application must meet the health requirement in order for any applicant to be granted a visa.'
- 844 were refused because they failed to undergo required health assessments.[19]
- Of the 244 temporary and permanent visa applicants who failed to meet the health requirement, 71 failed to meet it on the grounds of 'some form of disability'.

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[17] See Article 4(2) CPRD.

[18] http://www.aph.gov.au/Senate/committee/legcon_ctte/estimates/bud_0910/diac/14_qon_27_May_2009.pdf

[19] The response does not say whether these 844 applicants did not undergo the initial health assessments, or subsequent ones requested. If the latter, it may have been too expensive for the applicants to do extra tests (or even the initial tests perhaps).

These figures exclude applicants who did not meet the health requirement but who got a visa anyway because the decision maker waived the requirement.[20]

The Auditor-General's 2007 report[21] on the administration of the health requirement also provides some interesting statistics on visa applications assessed against the health requirement in 2004-5:

- There were 4,485,675 visa applications.
- 404,848 visa applicants were required to undergo a health assessment: medical examination, x-ray, or other medical tests.
- 161,077 visa applicants had medical results assessed by a MOC and a MOC opinion was provided.
- 1,224 visa applicants did not meet the health requirement: these people would not be granted a visa unless a health waiver were approved.
- 156 visa applicants failed the health requirement but had the requirement waived: these people were granted a visa.

These statistics indicate that in 2004-5 and 2007-8 fewer than 1% of visa applicants[22] were refused on health grounds. The Auditor-General's Report also shows how complicated the administrative procedures for administering and waiving the health requirement are and how they are not always followed or applied correctly. The complexity of the process indicates that it is probably very costly: for the panels of MOCs both here and overseas and the administrative costs of processing health assessments and referring documents, x-rays and medical reports to Canberra for checking. Any reasonable taxpayer would have to accept that the 'benefit' gained last year (2 people excluded because of active TB and 686 others rejected because of their or a family member's health condition or disability[23]) is not worth the cost of keeping the requirement.

As the following example illustrates, even if a person is assessed against the health requirement, their disability or health condition may not be identified. This shows again how pointless the whole exercise is.

Fatima

'I came to Australia in the 1990s with my children to escape war in my country. We spent 3 years in India recognised as Afghan refugees by the UN.

I phoned my brother in Australia to find a sponsor. We applied 5 times and were rejected each time. Then I went to someone different at the UN to fill in the forms and

[20] Discretion to waive the health requirement is available in limited circumstances. It is not often exercised, according to Australian National Audit Office. Audit Report No. 37 2006-7 p. 17.
[21] ibid at p. 17.
[22] The number of applicants rejected on health grounds in 2004-5 comprised 0.3% of those assessed and fewer than 0.03% of the total number of visa applicants. In 2007-8 only 0.25% of those assessed under the health requirement were refused a visa on health grounds.
[23] While only 71 people were refused a visa because of 'some form of disability' we do not know how many of their family members (of the 442) were also rejected.

give them to the Australian Embassy. I had one interview at the Embassy but no-one told me about life in Australia, just asked questions about my history, how many kids you have, why you want to go to Australia. I wanted to know about life in Australia – you know, services, cultural issues such as body covering, how the people live.

My daughter was small for her age and she had to wait to have 2 medical checks. My son has a heart condition but it was not discovered until we arrived in Australia. He also had problems learning at school but we didn't know that until we got here.'

In our view the money spent on administering the health requirement would be better spent on increased funding for community services. Currently, not everyone who applies for a visa is required to undergo a health assessment anyway: people are selected only after they have answered questions and signed a declaration about their health. DIAC is therefore relying on applicants being honest, to work out who should be assessed under the health requirement. In these circumstances, we believe customs and quarantine declarations and procedures should be adequate to detect people arriving in Australia with public safety health concerns. Alternatively, we could require everyone who applies for permanent or temporary residence to present a recent x-ray on arrival or have one taken at the airport. Any conditions identified as a public safety concern could then be assessed and treated.

In our experience abolishing the health requirement would not have any short-term impact on the current availability of services for several reasons:

- there are no services for newly arrived migrants with disability because they have to wait 10 years;
- current funding levels are inadequate to provide the level of services needed; and
- people from NESB with disability and their families do not use the services available, for a variety of reasons, e.g. people are unaware that services exist; providing support for a person with disability is seen as a family responsibility; services often do not have the skills to respond to the person's cultural needs.[24]

The Australian Bureau of Statistics 2003 *Survey on Disability, Ageing and Carers* confirms that most people with disability receive support from family members. The main reasons cited were families believing it is their responsibility and also that they provide better support than service providers.[25] This calls into question the current approach to granting a visa that if one family member fails the health requirement, all fail. Rejecting whole families because one member has a health

[24] See our earlier submissions and the Productivity Commission's *Report on Government Services 2009* chapter 14, p.14.42 at http://www.pc.gov.au/__data/assets/pdf_file/0019/85420/59-chapter14-attachment.pdf

[25] Australian Bureau of Statistics, 2003 *Survey on Disability, Ageing and Carers*, available at: http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features12003?OpenDocument

condition or disability fails to recognise the mutual support and contributions family members give to each other.

> ***Aman***
>
> *In 1994 the Nehru family migrated from India to New Zealand with their two sons Aman and Raja, to pursue better career opportunities. The family became NZ citizens and in 2001 decided to move to Australia under the 1973 Trans Tasman Travel Arrangement between Australia and NZ which meant that the family could live in Australia.*
>
> *Because Aman was born with a physical disability the Nehrus contacted the social security department before they made the decision to leave NZ. They were told that the Social Security Agreement between NZ and Australia would deem their son eligible for a disability support pension (DSP) and other support programs.*
>
> *After arriving in Australia, the Nehrus discovered that this was not true. As Aman's disability occurred outside NZ (at his birth in India) he was not covered by the Social Security Agreement. This meant he would have to wait 10 years before he was eligible for the DSP. Because he was not eligible for the DSP he was also not eligible for other support programs and services.*
>
> *Although Aman has been assessed as otherwise eligible for the mobility allowance, because of his visa status he can't get the allowance. This means that a lot of his income is spent on travel costs getting to and from his paid and voluntary jobs.*

We would also recommend abolishing the social security waiting period.[26]

There are other hidden costs to be considered, as well as the costs of administering the health requirement. Money sent to support the family member with disability who was left behind and spent on phone calls and visits to that person, would all have been spent here if the person had been granted a visa along with the other family members.

> ***Morales Family***
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> *Juan and Lucia Morales migrated from Argentina to Australia in 1995 with two of their children. Their youngest child, Ricardo, stayed in Argentina with Lucia's elderly mother because 'Ricardo has an intellectual disability and someone said we would not get a visa if we put him in our application.'*
>
> *After arriving in Australia, concerned for Ricardo's welfare, the Morales family applied for him to join them here. DIAC rejected Ricardo's application because he did not meet the health requirement because of his intellectual disability.*

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[26] For a full discussion of the effects of the 10 year waiting period and reasons for abolishing it see NEDA's May 2009 report, *Migrants with Disability and the 10 Year Qualifying Residence Period for the Disability Support Pension*, available at http://www.neda.org.au/page/migrants_with_disability_and_social_security.html

As Ricardo's grandmother's ability to support him decreased, his family decided he should join them in Australia. He arrived with a tourist visa and before it expired his parents applied to DIAC for permanent residence for him.

After 10 years of 'processing', DIAC finally granted Ricardo a visa.

Similarly, what are the costs of administering the review tribunals which determine appeals from applicants with disability and their families, or the costs associated with requests to the Minister to intervene? What does it cost to provide services later in a person's life that would have been unnecessary if they'd had access to intervention 10 years earlier, shortly after they arrived here?

Lee Family

Mr and Mrs Lee migrated to Australia in 1991 from Malaysia. Their 6 adult children and their families remained in Malaysia with the Lees' youngest daughter Ming who was 14.

The Lees ran their own successful business and both Mr and Mrs Lee travelled to Malaysia frequently. They missed their children, particularly Ming who lived with their eldest daughter and has Down Syndrome.

Over the years the Lees' adult children applied for and were granted permanent residence. Mr and Mrs Lee were very anxious about Ming and wanted her to join the rest of the family, so they applied for a tourist visa for her. After she arrived in Australia, Mr and Mrs Lee consulted a solicitor and applied for a child visa for Ming.

The DIAC officers assessing Ming's application changed several times over the 8 years while her application was being assessed. At one point DIAC lost the contents of Ming's file and the family had to resubmit the information. In addition, DIAC made repeated requests for the same information (mainly medical reports about Ming's Down Syndrome) and the family provided the information at considerable financial cost.

During that time, Ming was not eligible for any support services and was not allowed to attend school or work. She helped around the house instead.

After 8 years, DIAC rejected Ming's application for a child visa. During that long wait both Mr and Mrs Lee had died. DIAC decided that as her parents had died, Ming was not a dependant and they also assessed her as not meeting the health requirement because of the potential costs of her Down Syndrome. Ming's family were devastated: after being held in limbo for so long they were now being told that their sister was not allowed to stay here with them.

After seeking advice from their solicitor, the Lee family appealed to the Migration Review Tribunal, which rejected their appeal in 2008 because the dependent relative visa was no longer available to Ming. The family then asked the Minister to intervene, as this was the only avenue left.

Ming's brother said: 'My parents paid a migration agent to do the residence application for my sister. It was not successful because the sponsor (our father) died before the Department made a decision, then they said because the sponsor was dead they had to reject the application. It took 8 years before they made that decision: were they waiting for the sponsor to die? We applied to the MRT and they rejected it, then we wrote to the Minister a year ago. It's been 9 years since the application and my sister is not eligible for any medical or disability support services because she is not a permanent resident. The Department asks for updated medical assessments but I don't understand why – her Down Syndrome is a permanent condition and doesn't change. My sister's life is on hold – if she gets a visa she can study and get some training and support. We have to renew her bridging visa every 3 months. It's very hard emotionally and we are scared every time that she'll be rejected. It's been 9 years and I hope we get a decision on the visa from the Minister soon.'

In 2009, over 9 years after applying for it, Ming was granted permanent residence by the Minister.

Because the health requirement is so discriminatory and applied so arbitrarily, the only realistic avenue for people from NESB with disability and their families who want to migrate to Australia is to ask the Minister to intervene and grant a visa. We are concerned that the current legislation and administrative procedures do not provide any other avenue for making a decision based on the individual's particular circumstances. This indicates a significant flaw in the current Migration Act. People from NESB with disability and their families are relieved that the Minister can intervene and reunite families but it is demoralising and demeaning for us (and contrary to Australia's international obligations) to have to beg to have our rights recognised in this way.

A 2008 review[27] of the Minister's powers observed that while other Commonwealth departments had moved in the opposite direction over the past 20 years, personal discretions had been invested in the Minister for Immigration rather than a tribunal or courts. The main reason appears to be that governments do not trust the courts or public servants to '...get migration issues right'.[28] The review draws heavily on a 2004 Senate Select Committee review[29] of the Minister's powers which canvassed the issues and made 22 recommendations for improving the administrative procedures and policies relating to the exercise of the Minister's intervention powers.

[27] Elizabeth Proust, *A Report to the Minister for Immigration and Citizenship on the Appropriate Use of Ministerial Powers under the Migration and Citizenship Acts and Migration Regulations*, 31 January 2008. At: http://www.minister.immi.gov.au/media/media-releases/2008/proust-report.pdf
[28] ibid p 5.
[29] Senate Select Committee *Report on Ministerial Discretion in Migration Matters*, March 2004, p. 161.

The 2008 review noted[30] that in 2006-7 there were over 4,000 requests to the Minister to intervene. In our experience people seek the Minister's intervention when they believe that DIAC or the review tribunals did not treat their application fairly. Once an application goes off the rails at DIAC it is extremely hard to get it back on track. In our view, abolishing the health requirement is likely to decrease the Minister's intervention workload significantly.

3. Report on 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

In our view the main considerations in deciding whether to grant a visa are whether the applicant meets the criteria for the visa category they are applying for. The only issues in balance should be discrimination versus unreasonable impact on the Australian community.

When we asked MDAA members and consumers what DIAC should consider when granting a visa their responses included:

'Family circumstances and the family support available to the person with disability in Australia so they don't have to rely on social security.'

'It is very difficult for a person with disability to sponsor someone to come to Australia to support them because of the income required for an assurance of support. You can sponsor a carer or spouse for a visa but you need lots of evidence to persuade the Department and the rules are too strict – they need to be more flexible.'

'You need an assurance of support for some visas but not for others. It's a problem if you don't have any family members here, to find someone who will give an assurance of support. The amount depends on how many people are migrating, how old they are. It's an added burden on the assurer who needs to be earning at least $35,000 a year. The Department should have the discretion to waive the assurance requirement.'

'There is no consistency in policy: some people are asked to pay bond money for family visitor visas, some are not.'

'Family reunion doesn't seem to apply for people with disability. The Department needs to exercise some compassion. Where is the policy of community integration for people with disability when it comes to migration of people with disability? Governments are hypocrites and don't practise what they preach.'

'Family reunion policies are too strict now. They don't allow family reunion any more unless the other family members are highly skilled. If they are highly skilled they would apply for a skilled visa. Why does skill apply to family reunion?'

[30] Proust, E. op cit. p 5.

'As a visitor you should have some money to support yourself while you are here but as a refugee it's ok not to have any money because you are seeking protection.'

'Expand the category of eligible people for the carer visa – not just immediate family members. The present rules are particularly hard on people with disability who have no family support here.'

'Migration, health, disability support and social security should have coordinated rules: Medicare cover for medical treatment costs should start as soon as you arrive; shorten the 10 year waiting period.'

'The Department needs to speed up its processing time – and not wait for people to die.'

'Forms are hard for people to fill out, especially people with low education or refugees who are afraid to come out and speak to UN officers from their host countries for fear of being sent back home.'

'The costs assessed for health treatments such as operations and other things are not made known to people so applicants have difficulty responding. How does the Department calculate the costs of disability?'

'They should check the character or police records of people wanting to come to live here permanently or temporarily.'

4. Report on how the balance between costs and benefits might be determined and the appropriate criteria for making a decision based on that assessment

As indicated above, we believe that the only appropriate criterion is the principle of reasonableness. DIAC should grant a visa to a person with disability[31] if they meet the criteria for the particular visa they have applied for, unless it would be unreasonable (that is, place too much of a burden on the Australian community) to make the adjustment required to accommodate the disability. This is the only basis for discriminating against a person with disability permitted by the CPRD and the DDA.

In our view what is regarded as unreasonable or too much of a burden on the community should be assessed against the financial capacity of the country concerned (Australia), not against possible individual costs associated with disability. It is unreasonable to put a financial cost on the value of a human life and human rights. Given the small number of people with disability applying to migrate to Australia, the costs we would incur are minimal compared to the Commonwealth budget for health, welfare and community services.

[31] And their family if the person is included in a family application.

In addition, it is clear that Australia benefits economically from migration and that this economic benefit can easily accommodate the financial costs required to meet the needs of the few migrant and refugee applicants with disability. In 2001 the Commonwealth Government asked Access Economics to assess the impact of migrants on the Commonwealth budget. The report indicates[32] that over a period of 10 years, migrants and refugees deliver a net surplus in revenue to the Government of approximately $31.9 million for every 1,000 migrants. There is no reason to believe that this has changed significantly in the 8 years since the report was written.

The current health requirement is discriminatory because it makes dubious assumptions about hypothetical costs. As outlined above, disability arises from social, attitudinal and structural barriers in society. As Australia progresses in eliminating these barriers and discrimination towards people with disability, economic opportunities will increase for people with disability and therefore the costs associated with disability will decrease.

We believe that government departments, including DIAC, should conduct a costs assessment of the administration of any program criteria they develop. The savings made by abolishing the health requirement, for example, would reduce the administrative cost burden to taxpayers and could be used to offset any costs associated with disability.

Diana

"I was born in China with congenital scoliosis. At the age of ten I became paraplegic as a result of surgery to correct my spinal condition. In 1988 when I was twelve I came to Australia with my family, under a visitor's visa to undergo surgical treatment. At the time I couldn't speak a word of English and was bed-bound, requiring full-time care. After appropriate medical treatment and a period of rehabilitation the impact of my condition reduced significantly and I was able to live independently.

When our visitors' visas ran out we obtained temporary protection visas under a special category granted to many Chinese as a result of the Tiananmen Square massacre. In 1994 visa holders under this category were given the opportunity to become permanent residents. My family was granted permanent residence status but my application was rejected because I failed the health requirement.

In the same year I also lodged a Spouse application as I was married to an Australian citizen. When we went to a DIAC office in Rockdale to lodge the application I was told by an official over the counter that I shouldn't bother lodging it. She leaned over the counter and told me: 'I'm the one who will assess your application and I can tell you now that your application will be rejected for sure.' She went on to say: 'You are a burden on society. I'm trying to save you the application fee. You should go back to China and if your husband really loves you he will go with you.' These words were said to me in

[32] Access Economics, 2001. *Impact of Migrants on the Commonwealth Budget: Summary Report, 2000-2001, Update,* Department of Immigration and Multicultural Affairs. 2001. Table 1

public. I felt humiliated and worthless. We insisted on lodging the application and some time later it was rejected.

At various times I was asked by DIAC to undergo health examinations at the cost of $300 each time although my impairment was a permanent condition. Each examination involved chest x-rays and some basic blood tests. At no time was I asked about what I do, my knowledge and skills, my involvement in the community and whether I have any support needs.

Just when I was in complete despair I received a call from a DIAC officer based in Canberra offering to support me by requesting the Minister to intervene. She advised me to prepare documentation demonstrating my capacity in being a contributing member of society and the detrimental effects I would experience if I had to return to China. My request was successful and I was granted permanent residence at the end of 1995.

During the twenty-one years I've been in Australia I've obtained a Bachelor degree in Social Ecology and an Honours degree in Social Science. I'm currently undertaking a Masters in Public Administration. I've been a taxpayer for more than eleven years. I have developed a creditable professional career in advocating for the rights of people with disability at state and national levels. I'm currently managing one of the leading organisations in Australia on disability rights and cultural competence. I have served voluntarily on many boards of community organisations and government committees. I'm an active contributor to my local Chinese community as well as the broader Australian community. Can all this be deduced from a diagnosis of a physical impairment and a couple of x-rays?"

5. Report on a comparative analysis of similar receiving countries

Our comments on this term of reference relate to offshore refugees and asylum seekers who arrive in Australia and seek protection. It is important to keep these two categories separate in discussion because they are subject to different considerations. Offshore resettlement and onshore asylum are different systems which arise from different obligations.

We researched these issues in 2007 because MDAA's Individual Advocates reported that refugees and asylum seekers with disability were experiencing many barriers to getting the settlement and support services fundamental to the well-being of refugees and asylum seekers with disability. We concluded that:

- more research needs to be done about the specific needs and multiple layers of disadvantage experienced by refugees and asylum seekers with disability, to inform and improve essential settlement programs, and other social support services;
- Australia's Refugee and Humanitarian Program should not operate on an undeclared basis of 'skilled migration' and cost considerations but rather

the program should be non-discriminatory, humane and compassionate, to encourage and support refugee and asylum seeker resettlement;

- much of the estimated 'cost' attributed to disability is based on unwarranted assumptions and would be significantly reduced if adequate services, assistance and equipment were provided quickly after the person's arrival in Australia.

> ***Jenny***
>
> *Jenny arrived in Australia with a student visa and after a couple of years began a relationship which resulted in the birth of a baby girl.*
>
> *Jenny subsequently applied for refugee status for herself and her daughter. She feared persecution in her home country because of her child's intellectual disability and their ethnic minority status.*
>
> *Because of her status as an asylum seeker Jenny and her baby received no financial or material support from settlement services and had to depend on charity to survive while DIAC processed her application.*

There are currently 147 States Parties to the 1951 Refugee Convention and/or the 1967 Protocol. All of these countries are obliged by the Refugee Convention to assess the claims for asylum of people who arrive at their borders and request it. Where such a person is found to be a refugee, signatories are obliged to offer protection without discrimination on the basis of any unrelated factors, such as the person's medical or health status. That principle is reflected in Australia in the fact that onshore applicants for protection visas are not subject to the health requirement. They are required to undergo a health examination and any conditions identified are treated, but asylum seekers who arrive in Australia and claim protection are not excluded on the basis of health or disability. MDAA is not aware of any countries with properly functioning asylum systems established under the Convention which refuse asylum seekers on that basis.

The procedures for responding to asylum seekers are different from procedures for refugees who apply overseas for resettlement. Because there are over 15 million displaced refugees worldwide and because about 80% of these people are supported by developing countries, a number of developed countries, including Australia, offer protection to numbers of refugees through resettlement. This is entirely separate from, and additional to, their core obligations under the Refugee Convention to give protection to people who arrive in the country and seek protection.

We understand that there are about 25 countries with resettlement programs[33]. Australia appears to be the only resettlement country with a requirement which, in practice, bars people with a health condition or disability deemed to present a significant cost to the Australian community.

Most resettlement countries require medical assessment before resettlement, so that the relevant authorities are aware of the person's needs when they arrive. Some countries, including New Zealand (NZ) and Denmark, have a quota for people with a particular condition, such as HIV. Up to 10% of NZ's resettlement program may be allocated to people with significant medical conditions. The USA, which has the largest intake of any resettlement program, allows a health waiver for most resettlement applicants and has recently stopped mandatory HIV testing. Canada usually waives the relevant health requirements because of the circumstances and needs of resettling refugees.

Jai

Jai arrived in Australia as a resettlement refugee sponsored by his uncle. Jai receives a disability support pension because employer attitudes to his intellectual disability have hampered his search for work. He married a woman from his country and applied to sponsor her to live in Australia. Jai's uncle could not sponsor her as he is now elderly and also receives income support.

DIAC asked Jai for an assurance of support for his wife. As Jai and his uncle are very isolated and have no social support networks, they were unable to find anyone else who could give an assurance of support. DIAC then rejected his application to sponsor her.

Jai is in despair as he feels he will never have his wife join him here in Australia.

Conclusions

Migration is a contentious issue in Australia. People with disability and their families are routinely refused residence visas and protection (in the case of offshore refugees), due to unwarranted assumptions about the future costs of their health care and disability support.

The health requirement in the *Migration Act 1958* unfairly discriminates against individuals and families on the basis of disability. It separates families and causes unnecessary emotional and financial distress. It also fails to consider the potential social and economic contributions of migrants and refugees with disability and their families. Further, it is of doubtful benefit to the Australian community as fewer than one percent of all visa applicants fail to meet the health requirement.

[33] For more information about resettlement countries and their procedures go to http://www.unhcr.org/refworld/docid/3ae6b35e0.html

In our opinion the health requirement should be abolished. Abolishing it would appear to make sound economic sense as well as fulfilling Australia's domestic and international obligations to respect and promote the rights of people with disability.

Recommendations

MDAA makes the following recommendations.

Recommendation 1: Remove the exemption of the *Migration Act 1958* from the *Disability Discrimination Act 1992.*

Recommendation 2: Abolish the health requirement in the *Migration Act 1958.*

Recommendation 3: Rescind the Australian Government's reservation to the United Nations Convention on the Rights of Persons with Disability and its Optional Protocol.

Recommendation 4: Make the necessary legislative and administrative changes to reflect Australia's international treaty obligations.

Recommendation 5: Create a subclass for refugees with disability with a target of 10% of offshore refugee places, additional to the current resettlement places, and ensure that refugees with disability have access to information about this.

Recommendation 6: Review DIAC's administrative procedures to ensure that they do not discriminate against people with disability.

Recommendation 7: Provide clear guidelines and administrative procedures for ministerial intervention.

Recommendation 8: Require DIAC to develop a disability action plan under the *Disability Discrimination Act 1992* including disability awareness training for DIAC staff.