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The Committee Secretary
House of Representatives Standing Committee on
Legal and Constitutional Affairs
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Dear Sir/ Madam

**DDLS Submission[1] to the Senate Inquiry into the administration and operation of the *Migration Act 1958***

The Disability Discrimination Legal Service ("**DDLS**") supports any policy, legislation, or initiative that protects the rights of differently abled persons and promotes their participation in every life activity. The DDLS notes with interest the current Senate Inquiry into the administration and operation of the *Migration Act 1958* and in particular Schedule 4 of the *Migration Rules 1994* ("**the Regulations**") .

It appears that the inquiry was precipitated by the much publicised case in October 2008 of Dr Bernhard Moeller who ran a successful practice in Horsham, Victoria, but whose application for permanent residence was initially rejected by the Department of Immigration and Citizenship ("**the Department**") because his 13 year old son Lukas has Down syndrome. Nevertheless, there is a long line of jurisprudence dealing with numerous similar cases of rejection [2]that has solidified the legal validity of this discriminatory policy.

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[1] **This submission was drafted by Placido Belardo, DDLS Principal Solicitor with research support provided by Sharon Williams and Cassandra Lee, DDLS student-volunteers.**

[2] **Including *Ramlu v Minister for Immigration and Anor* [2005] FMCA 1735, Robinson v MIMIA [2005] FCA 1626 (10 November 2005), Seligman v Minister for Immigration and Multicultural Affairs [1998] 346 FCA (9 April 1998)**

## The Inquiry's Terms of Reference

The Committee has been asked to inquire into the assessment of the health and community costs associated with a disability as part of the health test undertaken for the Australian visa processing. The Committee shall:

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.
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.
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.
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.
5) Report on a comparative analysis of similar migrant receiving countries.

This commentary draws upon DDLS's casework experience, as well its aspirations and submissions towards a discrimination free society. Hence, we find it disappointing that the inquiry's terms of terms of reference do not refer to the UN Convention on the Rights of Persons with Disability or the Disability Discrimination Act 1992, and appear to over rely on economic and logistical justifications to retain an essentially oppressive and discriminatory migration policy.

It is our view that notwithstanding the absence of an express reference to its international obligations and domestic anti-discrimination legislation, the UN Convention on the Rights of Persons with Disability (**"UNCRPD"**), the Optional Protocol to the UNCRPD (**"Optional Protocol"**) or the Disability Discrimination Act 1992 **("DDA"**) are included impliedly in every part of the legislative process and functions of the government since Australia ratified the UNCRPD on 18 July 2008, and the Optional Protocol on 21 August 2009.

## Organisational Overview of the DDLS

The DDLS is a state-wide community legal centre that specialises in disability discrimination legal matters. The service is located in Melbourne and provides information, education, training, advice, legal representation and policy/law reform services to people with disabilities and their associates across Victoria. The Service employs three part-time staff: (a Service Manager, an Office Administrator, a Solicitor /Community Legal Educator) and a full time Principal Solicitor, who are supported by volunteers.

The DDLS is managed by a Management Committee, a majority of whom are people with disabilities. The DDLS is an active member of the National Network of Disability Discrimination

Legal Services of the National Association of Community Legal Centres and as such contributes to the development of national action on issues of policy/law reform.

## Summary of Submission

1. The inquiry must recognise the detrimental effects of family breakdowns that happen as a result of current migration legislation and the limitations on anti-discrimination policies.

2. The public interest and health requirements under Schedule 4 of the Migration Regulations 1994 which provides that the applicant's disease or condition must not be likely to result in significant cost to Australia in the areas of health care or community services, reflects a medical and economic model of disability. The human rights model of disability and the UNCRPD ought to inform immigration policy. The Australian migration policy should adopt and apply reasonable accommodation provisions for migration applicants who have disabilities ("**MAWD**").

3. Declining family sponsorship on the grounds of disability or causing family breakdowns is wrong, and is in breach of the UNCRPD. In Victoria, such protection of families is also enumerated in the *Charter of Human Rights & Responsibilities Act 2006* s17(2). Family class immigration should not be subject to the health requirements of Schedule 4 of the Regulations provided the principal applicant has satisfied all the requirements of the application. In the alternative, the DDLS proposes that:

   a) The test of and compliance with the health requirements as determined by the Commonwealth Medical Officer ("**CMO**") and applied to MAWD should be subject to an assessment of their or their family members' potential to contribute to society and share in the costs of providing welfare assistance to all Australians.

   b) That the health assessment be subject to a reasonable accommodation test.

   c) The Migration Act of 1958 and the Regulations should be amended in order to:

      i. Remove the use of the hypothetical person test in the medical officer's examination of a visa applicant in favour of an "actual" person test which considers the personal, medical, employment history of the applicant or their family members.

      ii. Provide instances where a MAWD may apply for a waiver of the health requirement.

      iii. Determine whether a MAWD's disease or condition is likely to result in significant cost to Australia in the areas of health care or community services through someone other than a CMO. Take in to

account the input of the MAWD's family members, and/or their associates, other health or related professionals, disability support groups, and existing ethnic community organisations.

iv. Grant a provisional visa subject to a reasonable (waiting) period from the time of the grant of the visa within which an MAWD may prove that his or her disease or condition has not resulted in significant cost to Australia in the areas of health care or community services.

4. Section 52 (b) of the DDA should be amended in order to qualify the blanket exemption and allow the DDA to apply where the subject matter of the claim is not about a visa application, but the health and safety of a person who is in the custody or subject to the authority of the Minister.

5. The DDLS is not in a position at this stage to provide specific and substantial comments in relation to a disability where the person's medical condition is considered a public threat disease. For the purposes of this submission, the DDLS wishes to make it clear that it acknowledges that public safety is paramount in the administration of any government laws or programs, however, the DDLS is of the view that instead of putting MAWD into categories such as public threat diseases or potential dangerous behaviour, the ban on their migration should not disregard the UNCRPD (and the Optional Protocol), and the viability of the provisions of reasonable adjustments to the persons concerned, particularly where that person is already within the migration zone or with established attachments in Australia.

## Australia's Legal Obligations

It is important to reiterate the obligations of both the legislation and International Covenants and Treaties which are evidently breached by current migration policies and regulations.

Disability has always been a negative factor in visa or migration applications because a health check requirement is a universal condition adopted by most countries[3] that allow a migration intake. Historically, this criterion was intended as a public safety and community response against the spread of epidemic or communicable diseases at a time when prevention and cure of some of these diseases were unknown, uncertain or unavailable. However, it is quite clear that the Regulations[4] are motivated by the view that MAWDs are a burden and an unnecessary strain on resources that are meant for

[3] **Australia's test of whether the disease or condition must not likely to result in significant cost to Australia in the areas of health care or community services is mirrored in overseas jurisdictions as "whether an alien is likely to become a public charge " in the United Sates or the migrant " would cause or might reasonably be expected to cause excessive demands on health or social services; " in Canada or the "reliance on the health system " in New Zealand.**

[4] **4005/4006/4007(c) of the Regulations**

Australian citizens or residents. This economic rationale defeats the visa application of a person who would otherwise be successful, if not for a family member who has a disability. Contrary to the UNCRPD and the Optional Protocol, the Regulations use the diagnosed medical condition or disability to define the worth of a person and their families, and exclude entry permanently based on the arbitrary conclusion that they don't deserve to be members of Australian society. This perspective is clearly at odds with approaches currently encouraged by the Australian government and the community at large.

Article 18 of the UNCRPD requires Australia "*to recognize the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others...*". The imposition of the health requirement to the MAWD is anathema to the commitment that Australia made to provide a home and share its resources with them, when it adopted the UNCRPD. The reliance on economic justifications has undermined the moral fibre and decency of Australia as a member of the United Nations.

The Commonwealth is bound to comply with these obligations, which it has formally agreed to observe and implement. As a general rule a country may not rely on its internal laws to breach its international obligations. The High Court's interpretation of the Constitutional External Affairs power has extended that power to include passing laws for the implementation of treaty obligations.[5]

**Migration and the DDA**

The prohibition of disability discrimination and the enforcement of the rights of a person with a disability against direct or indirect discrimination are provided under the DDA and in the counterpart legislations of each state and territory. The DDA is however subservient to any matters involving the application of the Migration Act of 1958 because section 52 of the DDA provides that:

> Divisions 1, 2 and 2A do not:
>
> (a) affect discriminatory provisions in:
>
> (i) the *Migration Act 1958* ; or
>
> (ii) a legislative instrument made under that Act; or
>
> (b) render unlawful anything that is permitted or required to be done by that Act or instrument

Subsection 52(b) removes all doubt that any claim of discrimination that a visa applicant or a person under the jurisdiction of the Minister has, is exempted and without legal

[5] **Koowarta v Bjelke-Peterson (1982) 153 CLR 168; Commonwealth v Tasmania (1983) 158 CLR 1.**

remedy. Apart from the typical case of a denial of visa applications that deals with non compliance to the health requirement, DDLS has noted the unfairness and unreasonableness of this blanket exemption in relation to a client who was detained in an immigration centre.

The client was referred to the DDLS by the Refugee and Immigration Legal Centre of Victoria with instructions to issue proceedings of indirect discrimination[6] and seek an order transferring the detainee to a suitable health facility. This was based on the fact that a detention centre is essentially a prison, and therefore not suitable for a person who as a result of isolation and extended detention, has developed physical and mental illnesses. The same argument may apply in the case of a child and form a basis of liability under the Convention on the Rights of a Child[7]

This case was not about whether a visa application was to be granted or not, but quite simply about medical intervention for an ill person, whose life and safety was at a real and serious risk. Nevertheless, the undersigned had deemed the proposed action was bound to fail because of the blanket exemption under Section 52.

There are no moral or economic reasons to justify the extent of the exemption under Subsection 52(b). There is no nexus between the wide exemption and the rationale in requiring MAWD to comply with Schedule 4 of the Rules.

## The Hypothetical person test under the Regulations

The CMO is tasked by the Regulations not only to undertake a medical assessment but also an economic impact assessment of the MAWD. This scheme begs scrutiny on whether doctors are competent in making a fair and accurate determination of economic questions. It is safe to say that the relationship between disability and social services, or disability and labor market integration are outside the competence of a medical health practitioner or medical? expert. In addition, the assessment is also couched in the context of a hypothetical person who may have the MAWD's attribute rather than an

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**[6] Under section 6 of the DDA, indirect discrimination happens when a person is required to comply with a condition or requirement which the person is unable comply with because or the person's disability, or (b) because of the disability, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so. It maybe arge3ud that in this case, it is not reasonable to require a person with a mental illness to live in a detenti0on centre without adequate medical and other health facilities required by the detainee's illness and that the detainee is unable to comply with that condition because the lack of timely and appropriate medical treatment is detrimental to the person's health and safety.**

**[7] Article 3 and 6 of the Convention require Australia to give primary consideration to the best interest of the child and to ensure to the maximum extent possible the physical well being of the child.**

informed examination of all relevant circumstances and factors (such as personal, medical, employment history of the persons listed in the visa application) that attend the present applicant???.

If the driving reason for the assessment under the health requirement is to ascertain whether the disease or condition is likely to result in significant cost to Australia in the areas of health care or community services, it is imperative that the process must focus on the applicant and must be done in a wholistic manner in order to achieve consistency, and prevent the CMO second guessing the worth of a person and making an assessment *"by reference to a hypothetical person with a generalized notion of the condition*[8] or *confusing long-term income support as an aspect of health care or reliance on community service"*[9].

**Relaxation of the Health Requirement**

DDLS notes that in a number of ways, (i.e. requiring copies of statement of support, proof of income, statement of assets and liabilities, identities of extended families) the Department essentially expects that migrant families would, as a matter of tradition and ethnic values, look after their family members. This expectation however is not currently a relevant consideration when denying the visa application of a MAWD, which only supports the case that the current health requirement is, by being narrow and oppressive, an affront to Australian's international moral and legal obligations.

DDLS is of the view that the family breakdown that results from migrants torn apart wittingly or unwittingly by a discriminatory migration policy, is by itself an economic setback, as there are financial costs borne by migrant families in maintaining their relationships with those that are left behind. These are monies that could have been spent in Australia or infused to the local collective effort to provide care and support to many Australians with disabilities.

DDLS supports the view that the health requirement should not be applied to family class visa, but notes that the terms of reference themselves foreshadow a conservative departure, if any is made, from current policy or regulations. Hence DDLS recommends that if the exemption form the health requirement is not provided or waived, the Regulations should be made compatible with international obligations by providing further/alternative avenues of assessment, rather than confining the applicant with a disability or their family member with a disability to meet the strict requirement of the health or public interest criteria.

DDLS rejects the idea that an applicant be offered a chance to "buy" their way out of the health requirement for a family member with a disability, because it tends to reduce the problem into simply creating an equally oppressive distinction between those have

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[8] **Robinson v MIMIA [2005] FCA 1626 (10 November 2005)**

[9] **Seligman v Minister for Immigration and Multicultural Affairs [1998] 346 FCA (9 April 1998**

and those who have not. DDLS supports a health requirement regime where a waiver or non application thereof is based not only on the financial status of the applicant but on broader grounds. These grounds should include the notion of accepting that in fact an applicant's disability may actually result in significant cost to Australia in the areas of health care or community services, but is one that could be reasonably accommodated.

The test of reasonable accommodation under the DDA for instance is a fairer barometer, and may strike an acceptable compromise, between the perceived economic rationale and of removing the immorality posed by the discriminatory conduct against migrants that are legalised in Australia. In considering the question of reasonable accommodation, the parties must give due regard to all relevant factors which may include the extent or level of support that an MAWD may receive from his or her family and the community, the impact on a family who may be pushed into the dilemma of living in Australia away permanently from a son, daughter or close family member with a disability, and the commitment that the family is willing to undertake for a relative with a disability. The potential of the applicant to contribute to the community is a vital factor but shouldn't be confined to traditional material contribution or revenue earning capacity, given that many Australians contribute to the community effectively and significantly through a variety of means other than the movement of cash.

**Conclusion**,

DDLS urges the Committee to adhere to Australia's legal and moral international obligations, reject financial arguments as the ultimate basis in continuing to exclude a person with a disability in the administration of commonwealth laws and program, including migration, and to usher in fresh and inclusive policies that would illustrate Australia's position and leadership in eliminating the misconceived fear of and prejudice against a person with a disability. We believe that such an approach fits well with the current Attorney General's Department – that being the positive support of equal human rights for all – regardless of disadvantage.

If the DDLS can be of further assistance please do not hesitate to contact us.

Yours sincerely

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