The Royal Australasian
College of Physicians

Submission to the Joint Standing Committee on Migration into

The migration treatment of people with a disability

on behalf of

The Royal Australasian College of Physicians

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Executive Summary

Legislation on migration to Australia must take account of all forms of requests but it is widely recognised that most immigration requests relate to family unity – young adults wishing to live and work in Australia with their young families, or older established families wishing to be reunited with parental family members who wish to come to Australia to live with them. Clearly many of these family members, particularly the older people, may have disabilities.

The Royal Australasian College of Physicians trains physicians to provide the highest level of specialist medical care to people with disabilities when they need specialist medical care. Most people with disabilities do not need exceptional amounts of specialist medical care.

Most persons with disabilities have physical disabilities which do not preclude their employment and self sufficiency. The number who have intellectual impairments which lead to dependence on another person, have most of their day-to-day physical and emotional support provided by their families, not government services.

The Health Requirement in current legislation is flawed for four reasons –

- it does not discriminate between acute illness and disability;
- it places a financial criterion alone to the decision about the value of the individual to the Australian community;
- it assesses the individual separately from her/his family situation; and
- it relies on the discretional judgment of only one medical officer who may/not have adequate training.

The College is cognizant of the need for legislation to meet the four ethical principles of autonomy, beneficence, non-maleficence and justice. It believes that current

legislation is not balanced as it appears to be emphasising economic feasibility over social values, and particularly not recognising that the person with a disability should not be seen alone, but should be assessed in the context of her/his family situation. The College urges the government to consider redressing this apparent imbalance in future legislation with respect to migration.

Introduction

The Royal Australasian College of Physicians (RACP) welcomes the opportunity to provide a submission to the inquiry into the migration treatment of people with a disability. We are particularly concerned in this submission with the experience of health promotion and illness support of Australians with disabilities and the balance of social values over economic burden of immigration of people with disabilities.

The Royal Australasian College of Physicians (RACP)

The Royal Australasian College of Physicians is a Fellowship of more than 10,500 specialist and generalist physicians and 4,000 trainees who practise in more than 25 medical specialties including public health medicine, cardiology, respiratory medicine, neurology, oncology, occupational and environmental medicine, rehabilitation medicine, palliative medicine, paediatrics, geriatric medicine, sexual health medicine and addiction medicine.

The College works to establish and achieve the highest standards of contemporary knowledge and skill in the practice of medicine and to promote the health and well being of the community. The College, in collaboration with affiliated specialty societies, is the provider of frameworks and standards of education for specialist physicians and trainees. The College is a key stakeholder in the Australian health system, advocating for improving the health and wellness of individuals and communities and reducing disparities across population groups.

Beyond the drive for medical excellence, the RACP is committed to developing health and social policies which bring vital improvements to the well-being of patients.

People with a disability in Australia

Disabilities are defined as long term impairments under article 1 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD).

The Australian Institute of Health and Welfare reported in June 2008 that recent gains in life expectancy in Australia have been accompanied by an increase in years of life lived with disability. There has been no significant change in the underlying age-standardised rates of severe or profound core activity limitations over the past two decades. Improvements in diagnosis and data collection have increased reporting rates, especially for children. However, the ageing of the population and increased life expectancy are leading to more people with severe or profound core activity limitations, as well as more people with disability generally.

Between 1981 and 2003, the number of people with disability increased from 1.9 million to 3.9 million. This includes an increase in the number of people with severe or profound core activity limitations from 453,000 to 1.2 million. By 2010, the total number of Australians with severe or profound core activity limitations is projected to increase to 1.5 million. A rise in the reported prevalence rates of disabling conditions associated with childhood such as autism-related disorders resulted in a substantial increase in the reported number of children with a disability in the past decade.

Participation of people with disabilities in Australia

From regular Australian (self report) Surveys of Disability, Ageing and Carers conducted between 1998 and 2003, we know that there was an increase of 93,900 people needing help with core activities. Most of these people relied mainly on family or friends for assistance. The number of people needing help with core activities who had no source of assistance remained at around 71,000 people.

The number of students with severe or profound core activity limitations attending school grew from around 40,000 in 1981 to almost 150,000 in 2003. In 2003, children and young people with disability (especially those aged 15–20 years) were more likely to be attending school than at any time over the previous two decades. There has been a trend towards students with severe or profound core activity limitations attending ordinary schools rather than special schools. The increase in the number of students with disability is likely to create future demand for services and assistance to help these young people successfully manage the transition from school to adult

life. This includes entry into employment, post-school education, and other social and economic activities.

Between 1988 and 2003 the gap in work participation between people with and without disability remained the same. There was no significant improvement in participation rates of people with severe or profound core activity limitations. Between 1993 and 2003, unemployment rates halved among people with disability and more than halved among people without disability. The fall was much smaller among people with disability who had schooling or employment restrictions only. Age cohort analyses show that people with severe or profound core activity limitations tended to exit the labour force earlier than people with disability generally. Between 1998 and 2003 almost all the increase in employees with disability was in the private sector. The number of employees with severe or profound core activity limitations fell in both the private and the government sector.

Between 1981 and 2003 there was a trend towards people with severe or profound core activity limitations living in the community. The trend was strongest in those aged 5 – 29 years. The trend shows clearly the importance of service programs to support carers, and to support the stability of community living arrangements.

Disability and migration law

On the 18 July 2008, Australia ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The treaty was the culmination of more than a decade of work by domestic and international civil society organisations including the RACP, and it represents an historic step forward for the disability rights movement. Australian ratification sends a powerful message for the recognition of the rights of people with disability in Australia. Ratification of CRPD is also an opportunity to address areas of Australian law and policy that were inconsistent with the internationally agreed rights of people with disability, including in relation to migration issues.

The Joint Standing Committee on Treaties recommended in November 2008 that: a review be carried out of the relevant provisions of the Migration Act and the administrative implementation of migration policy, and that any necessary action be taken to ensure that there is no direct or indirect discrimination against persons with disabilities in contravention of the Convention. The terms of reference put to the Joint Standing Committee on Migration seek to re-formulate the balance between the

economic concerns that underpin the Health Requirement, and the need for a more tailored approach based on both the social and economic benefits an individual with a disability may contribute.

The RACP urges the Australian Government to go further and acknowledge those values that cannot be expressed in economic terms, such as the quality of persons' lives, their relationships and their contribution to Australian society. The Health Requirement seeks to apply 'Public Interest Criteria' that focus on the economic worth, alone, of migrants. RACP wishes to see the concept of Australia's 'public interest' reformulated in order to reflect the obligations of non-discrimination and the social model of disability put forth in the CRPD.

Other recent developments indicate that the issue of disability rights is gaining increasing recognition as a significant human rights issue in Australia. In 2007, the Australian National Audit Office released a report on the administration of the Health Requirement, which noted key issues in its facilitation. In 2008, Senator Evans made public statements that the Immigration Department needed greater discretion to assess the particular circumstances of each case and less reliance should be put on Ministerial discretion.

RACP believe that the current laws are discriminatory to people with disability, and disregard the valuable contributions that are made to Australia by all people with disability. It is the view of RACP that Australia's laws, policies and practices are at odds with obligations we have assumed under international law.

Inconsistency with emerging anti-discrimination commitments

The CRPD enables a strong anti-discrimination mandate and creates an opportunity to promote participation, empowerment and independence for people with disability. Australia made a declaration upon ratification that the Convention did not "impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria." There has been strong opposition to this interpretive declaration from both the Australian disability community and international advocates.

In so far as the current migration health requirements can contribute to the separation of migrant families, Australia's migration treatment of people with disability is also at odds with Article 3 and Article 5 of the United Nations Convention on the

Rights of the Child. Leaving children with disability behind to an uncertain future is not in a child's best interest.

The most problematic exemption is the current exemption of the Migration Act (section 52) from the provisions of the Disability Discrimination Act (DDA). However, recent amendments enable complaints to be made under the DDA as to the administrative process concerning visa applications. RACP believe that the current laws are discriminatory to people with disability and disregard the valuable contributions that are made to Australia by all people with disability.

People with a disability are often ineligible to immigrate to Australia because of their disability – visas are often rejected on the basis of a person's disability. Specific sections within the Migration Act give the Australian Minister for Immigration and Multicultural Affairs discretionary power to grant admittance into Australia. The exemption of the Migration Act from the DDA promotes the two-tiered value system afforded to people with disability living in Australia on the one hand, and potential migrants with disability on the other. The rationale is that people with a disability would put a significant and invariable burden or hardship on the Australian community because our society does not have the resources to support additional numbers of disabled people. However, the Federal Government enacted the DDA to remove these very barriers and discrimination on the basis of disability.

Health Requirement legislation

The current Australian migration health test is at odds with the equal protection obligation under Article 5 of UN CRPD, leading to unjustifiable indirect discrimination for some migrants with disability.

The exemption of the health assessment from the Disability Discrimination Act 1992 highlights the potential discrimination that may occur. Indeed the 2004 review of the Disability Discrimination Act 1992 noted in relation to the health test that "some of these criteria may indirectly discriminate against some people with disabilities." RACP does not consider that any area of Australian law should discriminate directly or indirectly against people with disability, even with respect to non citizens, such as migrants.

The RACP is also concerned that medical officers are asked to participate in the process of health assessment, when it is the outcomes of that legislated process by

which the Government may directly or indirectly discriminate against applicants with disability. This is at odds with the standard promoted by the College amongst it's members, that physicians should 'promote a just, effective and efficient distribution of health care resources'. Physicians must abide by the law, but also recognise their responsibility to seek to alter those laws or regulations which do not work in the best interests of patients.

The Health Requirement is particularly problematic when the applicant is a child, or when a family has a child with a disability. Children often fail the Health Requirement as the cost assessment is meant to be calculated over their lifetime. The current regime follows a 'one fails-all fails policy', whereby a whole family fails the assessment if a secondary applicant (such as the applicant's child) does not satisfy the Health Requirement. Assessing a child's economic worth without considering the contributions of the family as a whole or the child's own potential, can lead to unjust decisions.

The application of the Health Requirement to those seeking refugee or humanitarian visas also requires significant reform. Refugees and asylum seekers are more likely to suffer from particular health problems, often related to physical and psychological trauma, poor nutrition and developmental delay in children. Although refugees do not have to pay for the cost of the Health Requirement, they are still subject to the same criteria as voluntary migrants. Refugee children have the same rights to health care, education and safety as do other children in Australia. This position is laid out in more detail in the College's Policy 'Towards better health for refugee children and young people in Australia and New Zealand', available on the College's website here.

Of particular concern to RACP is the Australian Government's fiscal argument that entry will necessarily have a negative impact on the health system and the Australian community. The implication that having a disability implies ill-health and an excessive burden on the health system is erroneous. The main source of potential concern for migrants with disability is the mandatory health and medical check up, where the estimated potential future health costs of applicants are weighed against the public interest of safeguarding access to scarce resources for the Australian community. Some cost to the Australian community must be expected and tolerated. The RACP recognises that the entry and stay of an individual with a disability may attract cost, but there are economic and social benefits that may also accrue.

The exemption from DDA is justified by Australia by public policy interests in minimising public health and safety risks to Australia, containing public health expenditure, and maintaining access to health and community services for Australian residents (Productivity Commission, Review of the DDA (2004), 343-344). Under almost all migration categories, people are subject to stringent health assessments. This assessment is based on the assumption that if a person has a disability, this person will be a financial burden to the community. This assumption contradicts other government policy and statements that people with disability are valued members of the community and make valuable contributions.

The Migration Regulations 1994 provide for the exclusion of applicants who have a disease or condition for which the "provision of the health care or community services relating to the disease or condition" regardless of whether the health care or community services will actually be used in connection with the applicant. Clause 4005-07 of Schedule 4 would be likely to:
a) Result in a significant cost to the Australian community in the areas of health care and community services; or
b) Prejudice the access of an Australian citizen or permanent resident to health care or community services.

Health Requirement assessment

The assessment must not only establish the future potential health costs associated with a person over their lifetime, but also assess the capacity for the Australian community to afford this care, and for this not to affect access to services by Australian citizens and residents. While the health assessment does not specifically exclude people with disability, arguably some people with disability, particularly those who might require costly treatment, are more likely to be excluded as a result of the assessment.

The RACP believes that people with disability may be rejected because of untested assumptions about future costs associated with their disability. It is difficult to rationally and fairly assess the costs associated with disability or illness over a person's life time, and arguably there is significant room for interpretation in this process. Indirect discrimination against migrants with disability may also occur because the evidentiary requirements are not sufficiently strong, for example in relation to accurately quantifying the future costs to the community of illness or disability.

In Australia, it is the opinion of a single medical officer about the disability condition of a visa applicant that is held sufficient to support adverse differentiation against the person on the basis of disability. Requiring two or more concurring medical opinions may be an important safeguard against arbitrary or unjustifiable differentiation against the disabled, in circumstances where medical opinions can reasonably differ on questions such as the severity of the disability and the care and treatment (and thus the expense) required. While there is ordinarily an avenue of merits review in Australia through the Migration Review Tribunal, which can re-evaluate the factual basis of the decision, the Tribunal is not itself a medically-qualified body and is therefore not in a position to provide expert reconsideration of medical opinions (as opposed to the weighting and legal evaluation of that expert medical opinion).

Further, the health assessment does not take into account whether or not services will actually be used, or the ability of individuals to pay for the costs that may be attributable to a person's illness or disability. The Health Requirement has been interpreted by the courts as not requiring a consideration of the particular applicant's circumstances, but rather a consideration of 'a person' who has that disease or condition, but the medical assessment is to 'ascertain the form or level of condition suffered by the applicant in question and then apply the statutory criteria by reference to a hypothetical person who suffers from that form or level of the condition.'

'Significant cost' is currently set at $21,000 and the Commonwealth medical officer is to be guided by the annual per capita health and welfare expenditure for Australians. Potentially, this unfairly disadvantages many skilled migrants, who in some cases have a demonstrated capacity to meet future costs associated with disability. The policies also deprive Australia of valuable skills from individuals who are excluded because they or a family member has disability. Existing migration processes also fail to account for the broad social contribution that might be made by applicants for example, to families and communities.

The Minister for Immigration can use his discretionary powers under Section 417 of the Migration Act to allow migrants with disability to enter, where the Minister is satisfied that granting the visa would be unlikely to result in (i) 'undue cost to the Australian community' or (ii) 'undue prejudice to the access to health care or community services of an Australian citizen or permanent resident' (Migration

Regulations 1994, Sch 4, 4007(2)).4. However, the assessment of "significant" cost to the community appears to be unclearly defined.

Finally, indirect discrimination against migrants with disability may occur by inadequate procedures to take into account an applicant's ability to pay for the costs attributable to their own disability or illness. Where an employer undertakes to cover the medical expenses, an exemption may be given (Migration Regulation 1994, Sch 4, 4006A (2)), but not where the applicant gives such an undertaking (although this is a factor taken into account in the exercise of the Minister's own waiver). The applicant's own means of support (including private health insurance coverage or support by family members or others) is not considered in the medical cost assessment made by the Medical Officer. Again, if the legitimate policy aim is the protection of scarce health resources, it is arguable that it cannot be a necessary and proportionate means of attaining that objective to screen out those who can fund their own treatment and therefore would not burden resources.

Health requirements under migration law are in principle permissible under human rights law in order to safeguard scarce medical resources. Indirect discrimination against migrants with disability may occur because the threshold of the health test is set too low to adequately balance the interests of non-discrimination against people with disability with the preservation of scarce health resources. Thus, in some cases the health assessment may lead to discrimination that is not proportionate to the policy objective of preserving health resources for all Australians.

Recommendations

The Joint Standing Committee on Migration Review into the Migration Treatment of Disability creates an opportunity to remove discrimination against people with disability from current migration laws and processes.

1. The present view of people with disabilities as a burden on the community, a view which permeates current migration legislation, is contrary to the positive obligations of non-discrimination, as outlined in the Convention on the Rights of Persons With Disabilities (the CRPD).
2. Current migration processes do not provide fair outcomes for people with disability and their families, and they devalue the full social and economic contribution that people with disability make to their communities and Australian society as a whole.

3. This view must be abandoned, and the positive contribution made by people with disabilities and their families be given greater consideration.
4. The Federal Government should amend the Migration Act 1958 to allow access to an appeals process for applicants who have been denied a visa for reasons related to a disability associated with the applicant or the applicant's immediate family.
5. Where the Minister decides to intervene following the decision of a tribunal or court, the Minister should be required to act according to standardised assessment criteria within a transparent process.
6. The migration health test is at odds with Australia's international non-discrimination and equal treatment obligations and should be reformulated.
7. RACP proposes that a shift from an objective economic assessment of a disabled person's value without consideration of that individual's personal capabilities or needs, or family situation, to one with a greater focus on their value and contributions to a diverse and progressive society, should be considered.
8. The exemption of the Migration Act 1958 (Cth) to the Disability Discrimination Act 1992 (Cth) should be reformulated, to remove the potential for any direct or indirect discrimination against migrants with disability.
9. Australia should lift its reservation to the Convention on the Rights of Persons with Disabilities regarding the Health Requirement and ratify the Optional Protocol to that Convention.

1. Convention on the Rights of Persons with Disabilities: Opened for signature 30 March 2007, 189 UNTS 137 (entered into force 3 May 2008);
2. Migration Act 1958 (Cth) s60(1); Migration Regulations 1994 (Cth) reg. 2.25A; Department of Immigration and Citizenship, Procedures Advice Manual 3 (14/04/2009) Sch4/4005-4007 – The Health Requirement [4];
3. Department of Immigration and Citizenship, Fact Sheet 22: The Health Requirement (Commonwealth of Australia, 26 May 2009);
4. Department of Immigration and Citizenship, Procedure Advice Manual 3, Schedule 4/4005-4007 – The Health Requirement;
5. Migration Act and Disability - Sector Wide Position Statement: Mon, 28/09/2009 Australian Coalition for the Ratification of the UN Convention on the Rights of Persons with Disabilities;
6. The Senate and Constitutional Affairs Committee report on the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

Disability in Australia: trends in prevalence, education, employment and community living Australian Institute for Health and Welfare bulletin 61 • June 2008:www.aihw.gov.au/publications/aus/bulletin61/bulletin61.pdf - 2008-06-01
7. Royal Australasian College of Physicians. Towards better health for refugee children and young people in Australia and New Zealand. Sydney: RACP2007
8. Royal Australasian College of Physicians. Code of Professional Behaviour. Sydney: RACP2006