28 October 2009

Committee Secretary
Joint Standing Committee on Migration
House of Representatives
P.O. Box 6021
Parliament House
CANBERRA ACT 26000

By email: jscm@aph.gov.au
original to follow by mail

Dear Sir/Madam,

Re: Submission to the Joint Standing Committee on Migration
Inquiry into Immigration Treatment of Disability

This submission comments on the application of the Schedule 4 health criteria of the *Migration Regulations 1994*. Specifically, it will focus on the application of criterion 4007 of Schedule 4, and how this provision can often lead to manifestly unfair and unreasonable results. Whilst I do not intend to litigate a particular client's matter, I will use (with their permission) one family's recent experiences with an offshore post to exemplify the damage that grossly ill-trained, insensitive decision makers can do to a close family unit. I believe that a great deal of training is necessary to overcome wrong assumptions made about the disabled and their families, assumptions that Immigration decision makers feel they ought to make when "balancing" whether or not to use their discretion in dealing with waiverable health criteria. I also believe, as will be made evident in the submission below, that the health criteria ought not be applied to former residents and their families.

This is not to say that our firm believes that only the specific amendments dealt with below should be made, merely that as working lawyers, our time is limited and we do not have the resources to address every aspect of the Committee's enquiry.

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Rather, we want to focus on the negative/ignorant attitude of some officers of the Department that tends to lead to decisions based on a complete lack of understanding of disability and to use a real world case.

I seek to address each of the following terms of reference with respect to one particular client below:

- The options to properly assess the economic and social contribution of people with a disability and their families seeking to migrate to Australia;

- 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;

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

I direct the Committee's attention to the case of Mrs Nicola Greeves ("Nicola"), Australian permanent resident, having received a resident return visa in 2006 (after the Department's initial refusal and then a successful Migration Review Tribunal review). Nicola sponsored her husband of 28 years, Brian Greeves, for a subclass 309 spouse visa on 7 April 2008. Named as a dependent in their application was their severely intellectually and physically disabled but otherwise healthy then-25 year old son, James Greeves ("Jamie"). Nicola and Brian have another son, Ashley, who is an Australian permanent resident, having been granted a child visa on 10 April 2007.

Brian and Jamie's application for their spouse visa, sponsored by Nicola, was lodged at the Australian Consulate-General in Hong Kong. That application was refused on 10 June 2009. The reason given for refusal of the application was that Jamie failed to satisfy Public Interest Criterion 4007 of the *Migration Regulations 1994*. I note that Nicola has sought review of the decision to refuse her husband and son's visas in the Migration Review Tribunal.

In determining whether an applicant satisfies PIC 4007, decision makers are required by the Regulations to seek the opinion of a Medical Officer of the Commonwealth. According to regulation 2.25A(3), decision makers are required to accept the opinion of the Medical Officer of the Commonwealth as correct.

In this case, there was no question as to the primary applicant's (ie. Brian) ability to satisfy PIC 4007 – the only issue that arose in that respect was whether or not Jamie satisfied the health criteria. In the opinion of the Medical Officer of the Commonwealth, Jamie failed to satisfy paragraph 4007(1)(c) of the *Migration Regulations 1994*. This provision states:

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(c) subject to subclause (2), is not a person who has a disease or condition to which the following subparagraphs apply:

(i) the disease or condition is such that a person who has it would be likely to:

(A) require health care or community services; or

(B) meet the medical criteria for the provision of a community service;

during the period of the applicant's proposed stay in Australia;

(ii) provision of the health care or community services relating to the disease or condition 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;

regardless of whether the health care or community services will actually be used in connection with the applicant; and

In this case, the delegate of the Minister allowed the applicant the opportunity to respond to the health criteria, as per criterion 4007 (2) which states:

(2) The Minister may waive the requirements of paragraph (1)(c) if:

(a) the applicant satisfies all other criteria for the grant of the visa applied for; and

(b) the Minister is satisfied that the granting of 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.

With waiverable health criteria, the Medical Officer of the Commonwealth must predict the *"likely"* cost to the Australian community so that the Minister or his delegate can determine whether, when weighing up the circumstances of the individual case, the granting of the visa would be unlikely to result in *undue* cost to the community or undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

In Jamie's case, the refusal was based on his perceived *"severe intellectual impairment and physical disability"* and the delegate's determination that the grant of the visa to Jamie would not result in undue costs or prejudice of access to the Australian community, even though the Medical Officer of the Commonwealth determined that the degree of prejudice to access to health care of community services of an Australian citizen or permanent resident was only moderate.

The Medical Officer of the Commonwealth estimated the lifetime cost of care for Jamie to be approximately $2,100,000.00. In submissions to the Australian

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Consulate-General in Hong Kong, factors that were relevant to the decision maker's consideration were put to the decision maker, including information about the family's links to the Australian community (including the permanent residency of their other son), the benefit of Brian's skills in Australia, Nicola's work with the disabled and the benefit she brings to the community as well as the assets that Brian and Nicola have and their ability to care for their son financially (in the future). I have included these submissions for your reference.

As you can see from the decision, not only were these considerations not taken into account, the decision maker sought to actively dismiss the applicant's submissions based on assumptions without fact. Indeed, the decision maker sought to attack Nicola because of the amount of time she has spent in Australia, disregarding the fact that she is unable to spend protracted periods of time in this country without her severely disabled son, who does not travel well and does not currently have a right to remain in this country for extended periods of time. Moreover, the decision maker sought to personally attack the previous decisions of the Tribunal and the Department in granting Nicola her Resident Return visa, though this was irrelevant to the decision. In this particular case, there is no doubt that this decision maker's prejudices have produced quite hurtful and insulting assumptions about this family that are now the subject of an appeal within the Migration Review Tribunal. I note that this appeal will take ten months to be constituted within the Tribunal before it is actually heard. This protracted situation could have been avoided had the decision maker (I note, the Consul of Immigration at the Australian Consulate-General in Hong Kong), was not only skilled in dealing with disabilities but was also skilled to do the work that she has been delegated to do, namely to weigh up considerations of the family's economic and social contributions when determining whether to waive the health requirement.

The Relevant Considerations in the Greeves Family

Nicola is a Grade III RDA (Riding for the Disabled) Instructor (which is a highly sought after qualification) and a qualified nursery nurse. Nicola's Grade III Instructor Certificate is recognized internationally and this allows her to teach others. She has volunteered for over twenty years and through this work she has had the opportunity to meet Princess Anne, as evidenced by the photos attached.

Nicola's work provides opportunities for the disabled to enjoy healthy, stimulating and therapeutic horse-related activities. Her skills would be invaluable in Australia, as evidenced by the letter of Ms Sue Tuck who is involved in Riding for the Disabled in Australia. The work of volunteers cannot be quantified, though I invite the Committee to recognise that it is of very significant benefit to the any community. Nicola has been an immense benefit to the community in Hong Kong and has the potential to do the same in Australia, should she be given the opportunity. Indeed, Nicola has the right to live in Australia but of course cannot do so until her husband of 28 years and her son are able to migrate to Australia also. These considerations were neglected by the decision maker.

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Brian Greeves is not only highly qualified as a pilot, he is a much sought after expert aviation consultant. Brian advises and trains all around the world on a wide range of aviation matters, including Aviation English Proficiency training, airport operation and design, flight data analysis, expert/technical witness, IFALPA training courses, airline safety and operations. There is absolutely no doubt that Australia would be incredibly fortunate to have such a highly qualified, sought after professional living in Australia.

Brian is a director of his own Aviation Consultancy companies, [redacted] and is employed as a consultant by the International Federation of Air Line Pilots Association (IFALPA). Brian intends to set up his own aviation consultancy company in Australia as he has done in the past in [redacted] and the [redacted]. He intends to continue working as a consultant and the headquarters of his consultancy will simply be moved to Sydney. There is a critical shortage of the highly specialized aviation consultancy that Brian is involved in. In fact, he has had several job offers (for consultancy work and other) in Australia already, including with the [redacted].

[redacted]. The decision maker also determined that since he was aged 59, the potential tax benefit to Australia was negligible to non-existent. Not only has the decision maker sought to negate the evidence presented to her with respect to the benefit Brian's skills are likely to bring this country, this is an extraordinary example of *ageism*, without any consideration of the increased benefit of the knowledge and expertise that comes with age and experience, the very reason why Brian is now a consultant to several international aviation organisations, advising on international aviation safety and frequently advising international airports on their safety standards.

It is with this in mind that I strongly urge the Joint Standing Committee on Migration to recommend a change of the Migration Regulations to allow significant weight to be given to a family's capacity (through trust and other arrangements) to pay for the care of disabled family members in Australia. As it currently reads, criterion 4007 leads to the ridiculous scenario whereby decision-makers are bound to take into consideration costs to the community *even if* such costs will not be borne by the community. The wording of criterion 4007(1)(c) states that decision-makers should consider the likelihood of *"significant cost to the Australian community...whether the health care or community services will actually be used in connection with the applicant"*.

The skewed logic of this provision is particularly apparent in the case of Nicola and Brian Greeves. They are Jamie's primary care givers, along with a full-time carer they employ at their home in Hong Kong. Despite the (at times) onerous demands placed on the couple in caring for their son, they have nonetheless been able to amass

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substantial assets and savings. As noted, Brian runs successful aviation consultancy businesses part-time, he also receives dividends [redacted] and the couple have properties in [redacted] In her decision, the delegate was satisfied that Brian and Nicola's assets were in excess of [redacted] In short, the Greeves' live, by any financial measure, a comfortable lifestyle.

And yet, according to the application of PIC 4007, the ability of Brian and Nicola to provide for their son's care themselves (as they have done all his life) counts for nothing. Despite numerous undertakings on behalf of Brian and Nicola, the perception for applicants is that the Australian Government refuses to accept their pleas that people like James can be cared for in ways that do not place a strain on the public purse.

Not only did the delegate not take into consideration the capacity and history of the family's ability to take care of their own child, the delegate sought to place significant weight on the fact that the family receive a very small monetary benefit from the Hong Kong Government ([redacted]). I am instructed that this amount equates to very little in reality, not even enough to cover Jamie's adult nappies. If the decision maker had chosen to take into consideration how very little the family are supported by their present community by the money that they receive, instead of using the fact that they receive a small amount from the Hong Kong Government to find they would be a burden on Australia, the decision may have been more balanced. Instead, the decision maker's assumptions based on prejudice have resulted in an improper assessment of the economic and social contribution of this family. In other words, the decision maker failed to take into consideration that for approximately 18 years, Brian has worked as a commercial pilot of large passenger jets and contributed tax to the Hong Kong government [redacted]. Whilst this was not specifically spelt out to the decision maker in submissions, she could have easily deduced this fact, rather than simply focussing on the negative, based on her own prejudices.

Despite the outright derision of the delegate, the Greeves family have done everything in their power to provide the best possible care for Jamie, at one stage sending him to a Rudolf Steiner school in the UK (at great expense) to give him the best possible education. This left both Nicola and Jamie incredibly distressed and the situation was not sustainable because they missed each other, so he rejoined the family after a period of time. Whilst this occurred over eleven years ago, the decision maker used this as evidence to demonstrate that they would not care for their son in the future and were willing to, in effect, dump him on the British School system. This appalling assumption is yet another example of the damage that an unqualified decision maker can do, when assessing these sorts of decisions.

I submit that the balance between the economic and social benefits of the entry and stay of an individual with a disability *and his/her family*, and the costs and use of

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services by that individual is a relevant factor in the visa decision and should be given great weight. This should be clearly set out in policy so that there is no doubt in the minds of decision makers that they must make their decisions fairly and without bias.

I also believe an appropriate exception to the health criterion ought to be considered for former residents of Australia (and their families). In this case, Nicola was a former resident and is currently the holder of a Resident Return visa. This Resident Return visa and the extensive process that led to the granting of this visa acknowledged her links to the country and her right to live here as a permanent resident.

Nicola lived in Australia from the age of 3 to 16, thus spending her psychological "formative" years in this country. She identifies as an Australian and has always done so. Due to her father's work, she had leave Australia and to travel to Belgium but since 1976 has continually sought out ways to live in Australia by asking Embassies and lawyers around the world of ways to immigrate back to Australia. She inquired at London House in 1976 for a method to migrate permanently to Australia but had to limit her travel to Australia to a holiday visa after the death of her mother. Brian applied for a job in Sydney in 1981 at the time of their marriage, yet the company had to employ an Australian over foreigners. In 1988 Brian was employed by [redacted] and the family moved to Hong Kong. In the early 1990's she made further requests to Australian consulate in Hong Kong, but was given grossly negligent advice by that post. They told her that there was no visa she could apply for, to migrate to Australia despite knowing that she was a former resident and under 45 years of age! Of course, such a visa did exist (the Former Resident visa - subclass 151) and she met the basic criteria by having spent the majority of her life in Australia before turning 18 years of age. She did not finally discover that she met the criteria in the subclass 151 visa, until she had already turned 45 years of age and was thereby precluded.

The birth of their two sons limited efforts to travel here permanently, however they continued to seek advice and were in the process of lodging a business visa through a migration agent in Darwin in 2000 but their hopes were dashed when they were told they would not be able to migrate with Jamie, due to his disability.

Nicola then sought advice from this firm and by an exhausting process, involving appeals to the Migration Review Tribunal, she finally managed to obtained a Resident Return visa (subclass 155) and is now (again) a permanent resident, though after three years, her dream of living in the only country she has believed her home remains elusive. Whilst Nicola and her younger son Ashley, have a right to reside in this country, her husband and disabled son do not and, if the Consul of Immigration in Hong Kong had her way, she would effectively never have a real right to reside in this country at all, unless she divorced her husband and left her disabled son in Hong Kong. Refusing Jamie a visa based on his disability essentially means refusing Nicola the chance to reside in the country she regards psychologically as her home. This

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decision, and the Consul's handling of it was grossly improper, as it failed to take into consideration the psychological impact that this decision would have on Nicola.

Decisions like those in the Greeves matter encourage the separation of families, contravening Australia's obligations under the International Covenant on Civil and Political Rights, specifically Article 23.1 which states:

> *"The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State."*

In this particular situation, the repeated acknowledgment that Nicola had not spent significant amounts of time in Australia omitted the fact that for Nicola to do so would mean time away from Jamie. There was no acknowledgement of the post's own incompetence in wrongly advising Nicola about the criteria for a subclass 151 visa, nor any acknowledgement that Nicola spent her formative years in Australia and has regarded herself as *Australian* all her life. Indeed, this decision means that they are continually separated from their youngest son, Ashley, also a permanent resident who permanently resides in Australia, even though the decision maker acknowledged that Ashley is still dependent on his parents financially.

Other matters

I note that "Notes for Guidance for Medical Officers of the Commonwealth of Australia – Financial Implications and Consideration of Prejudice of Access to Services Associated with Intellectual Disabilities" is only one of many "Notes for Guidance" papers that are used by the Medical Officer of the Commonwealth and is the paper relevant in this matter. This particular paper is severely outdated. Figures prepared for Jamie's estimates are based on a "Notes for Guidance" paper that is nearly 20 years old.

It is submitted that cases such as these elucidate the urgent need for reform of the public interest criteria, as the disconnect between the application of the law and the expectations of the community grows ever wider. I enclose several letters of support for the Greeves family that demonstrate the Australian public's opinion of this family and the way they have been treated by the Immigration Department.

The Reforms

It is respectfully suggested to the Committee that public interest criterion 4007 and its counterparts in criteria 4005 and 4006A of Schedule 4 be amended. The Greeves' situation, as outlined above, is a far too common occurrence in the experience of this firm. Several possible reforms would go some way to improving the public interest health criteria by making it more reflective of a compassionate attitude towards migrants.

Our first suggestion for reform would be to remove medical criteria altogether for any applicant who can show that she/he has spent their *formative years* in Australia.

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When such people are effectively Australian, it is cruel in the extreme to limit their ability to live with their fellow Australian, just because of medical issues to do with themselves or their close family. This reform would not open a "floodgate" as people like Nicola Greeves are quite rare in our experience.

Secondly, the *Commonwealth Disability Discrimination Act 1992* applies to the Administration of Commonwealth Government laws and programs but not Immigration decisions. This must change, so that Immigration decision makers are put on notice that if they exhibit 19th Century attitudes towards the disabled under the guise of "medical" issues, they will be called to account.

Another suggested reform would be to place less emphasis on the *"likely costs"* to the Australian community, and more focus on the benefits that would be provided by the applicant and family's presence in Australia. Admittedly policy will always be crafted with a view to maximising the return to the Australian population – but this should not be at the expense of those Australian citizens (or permanent residents, as in the Greeves' case) who wish for nothing else but to be able to remain together as a family. It is submitted that current public interest health criteria fails to strike the balance between the perceived needs of the *"Australian community"* and those of Australian permanent residents like Nicola and her son Ashley.

Another suggested reform would involve the removal of the requirement for decision-makers to consider likely costs to the Australian community if it is likely that those costs may never materialise. The Greeves' case illustrates perfectly the bizarre application of this provision – that a family with substantial wealth and the clear means to cover the costs of caring for their son would be refused a visa on the basis of illusory *"costs"* to the community, which will likely never eventuate.

The final recommended reform of the Schedule 4 health criteria would be to make the entire process more transparent and accountable. At present, applicants have no ability to effectively challenge the finding of a Medical Officer of the Commonwealth since their calculations in determining an applicant's likely cost to the community are not made available to applicants as a matter of course. Decision-makers within the Department of Immigration & Citizenship itself are required by law to accept the findings of a Medical Officer of the Commonwealth and "take it to be correct". It is contended that this procedure is unduly harsh to applicants, particularly given the often sensitive nature of these cases. Decisions on such matters often appear arbitrary and capricious – with little or no concern for the reality of those applicants.

Conclusion

Ultimately, the application of the public interest health criteria in Schedule 4 as it currently exists has led to many cases where the appearance of inhuman and overly bureaucratic decision-making has undermined confidence in Australia's immigration processes. In this particular case, the delegate, (disturbingly) the Consul of

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Immigration herself at the Consulate-General in Hong Kong, worked on assumptions that had not been tested, had no basis in fact and which evidenced prejudice and bias against the applicants, without a consideration of the wider implications of her decision and without the sensitivity and open-mindedness required when dealing with people with disabilities. The delegate ultimately determined that the Greeves did not and could not look after their son, that they had nothing to contribute to the Australian society and, if they had the chance to come to Australia, would discard their son to the mercy of the Australian healthcare system and also fail to pay their taxes.

The decision was made without any consideration of the value of Brian and Nicola's skills (which are both monetary and non-monetary), the fact that they have a son living in Australia permanently in a property owned by the family, the fact that without Brian and Jamie, Nicola cannot live in Australia though she is entitled to as a permanent resident and the fact that before Ashley was a permanent resident the family have spent over [redacted] in International student fees and living expenses for Ashley. In other words, the Australian Community would be getting three highly effective citizens, with the youngest receiving an Australian tertiary education at family expense.

Cases such as the Greeves' highlight the gulf between what the regulations were intended to do – minimise cost to the Australian people – and their practical effect, which has been to cause hurt and distress to families in desperate need of compassion. Recent high profile cases in this area, such as that of Dr Moeller, evidence the high degree of community dissatisfaction with the provisions, and the desire for the Australian government to grant all people who struggle with disabilities, such as Jamie Greeves, a "fair go".

Should you have any queries or require further information please do not hesitate to contact us.