Submission to the Joint Standing Committee on Migration Inquiry into the migration treatment of disability

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This submission concentrates on the Committee's third term of reference which requires it to:

> *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.*

It will be argued that the Health Requirement should be abandoned *in toto* as it is out of line with Australia's national and international obligations and with contemporary understandings of disability. The reasons are summarised under three heads:

- Legal-constitutional
- Socio-political, and
- Ethical.

Legal-constitutional

The Convention on the Rights of Persons with Disabilities

Imputing a "cost" to a person with a disability, and using that as a possible factor to refuse a visa, contravenes Australia's obligations under the Convention on the Rights of Persons with Disabilities. The Convention commits States Parties 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. (Article 18)*

It also states that Parties must ensure that people with disabilities have the right to 'utilise relevant processes such as immigration proceedings that may be needed to facilitate exercise of the right to liberty of movement.'

It has been claimed that the Migration Act does not discriminateagainst people with disabilities in that it does not specifically exclude them. True – but it is a clear instance of "indirect discrimination". This works by allowing a particular characteristic (In this case, use of services) to influence or determine the outcome (granting of a visa), with the result that populations perceived to have that characteristic will receive "less favourable" treatment than those without.

According to a well-established body of equal opportunity law, indirect discrimination is permissible, *if and only if*, it can be shown to be reasonable in the circumstances. For example, using English proficiency as a criterion for an occupation involving rapidnote taking and transcription may well be reasonable (bar adequate translating technologies). But there is no such fit in the case of the Health Requirement. That a person may require extra services has nothing to do

with their suitability or contribution as a citizen. Instead, it has everything to do with our willingness to share our health system and community services.To reiterate, it is our un/willingness to pay a hypothetical cost, not the person's suitability as a citizen that is at issue here.

(In circumstances in which a particular disability is associated with the health or safety of the Australian community, the public interest is already safeguarded through our quarantine and border protection mechanisms.)

The Convention on the Rights of the Child

In many casesrecently receiving media attention – the Robinson, Ford and Moeller families, and the tragic case of Mr Sharaz Kayani – the disability of a *child* has been at stake. Subjectingthat child and their family to the scrutiny of the Health Requirement manifestly contravenes our obligations under the Convention on the Rights of the Child. The most relevant sections are:

1. ***Article 3 (i),*** which requires States Parties to give primary consideration to the "best interests of the child"

   > *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

2. ***Article 6 (ii),*** which requires States Parties to ensure to the "maximum extent possible" the physical wellbeing of the child.

   > *States Parties shall ensure to the maximum extent possible the survival and development of the child.*

Several points are important:

a. It is manifestly *not* in a child's best interests to be treated as a "cost". It is demeaning and objectifying and could do long term harm.
b. Related to this, deliberations over the visa place considerable stress on the family, which, both directly and indirectly, is harmful to the child.
c. At a minimum, Article 6 means that a child's disability cannotbe a reason for refusing a visa. More strongly, it invokes apositive responsibility to admit the family if the needed services are significantly better here than in their country of origin.

The Disability Discrimination Act 1992 (Cth)

The situation whereby ourDisability Discrimination Act (section 52b) specifically exempts the Migration Act from its operations - including 'anything done by a person in relation to the administration of that Act or those regulations'– is worse than absurd. Hannah Arendt, writing in the wake of the international failures to protect human rights in the aftermath of the Second World War, famously said thathuman rights were dead. Without national protection, human rights are paper rights. When we exempt the Migration Act from applying the principles that prevail*within*our nation, weguaranteethat human rights "stop at the nation's door".

Our task is to ensure that the Migration Act is in line with the Disability Act, not the other way round.

Socio-political factors

The Migration Act is out of step with national and international understandings of disability. For some time, the "social model" of disability has informed policy and practice. The UN Convention, the World Health Organization and the Australian Institute of Health and Welfare, for example, all place their focus on the disabling impact of the environment - that is, on those physical, social and/or cultural factors that limit a person's life. This speaks to a rights-based approach and places the onus on policy makers to remove the barriers that prevent a person with disabilities enjoying the same quality of life and freedoms as anyone else. In marked contrast, the Health Requirement constructs a very significant barrier.

The Migration Act also sits uneasily with the current Government's policy of social inclusion. It this is to mean anything, it has to embrace diversity and recognize the multiple contributions of young and old. Instead, migration policy accords with what has come to be called "market" citizenship - that is, a form of citizenship in which a person's worthis progressively linked to economic contribution and all other contributions – social, familial, cultural, emotional and spiritual - are disregarded.

Migration policy plays a vital role in determining the shape of our society, who we welcome and who we don't. In the same way that the infamous dictation test narrowed the range of acceptability on racial grounds, so does the Health Requirement in relation to disability.

Ethics

Finally, and over and above all these factors, for an affluent country such as Australia to deny entry to a person with disabilities on the grounds of cost is simply unconscionable. If all nations take the same position, if they all allow human rights to "stop at the nation's door", then a new class of pariahs is created. At some point in history, we will be judged and judged badly – just as we now judge the White Australia Policy. It is time for the Migration Act to step into the 21st century.

I am glad to have had this opportunity to make a submission and thank the Standing Committee for making it possible.

Patricia Harris 11/09/09