



Submission to the Joint Standing Committee on
Migration Inquiry into Migration Treatment of
People with a Disability

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Submission No 72

"There are concerns that the health requirement only considers the estimated cost to the public health system along with state-related costs such as special educational needs and community care and does not recognise a person's ability or what they can contribute to the community."

Senator Chris Evans, Minister for Immigration and Citizenship, media release, 26 November 2008

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Committee Secretary
Migration Treatment of People with a Disability Review
Joint Standing Committee on Migration
Parliament House
Canberra ACT 2600

Dear Committee Secretary

The Network of Carers Associations acknowledges the Inquiry into Migration Treatment of People with a Disability and appreciates the Joint Standing Committee on Migration for the opportunity to provide a submission to the Inquiry.

About the Network of Carers Associations

Carers Australia is the national peak body representing the diversity of those Australians who provide unpaid care and support to family members and friends with a disability, mental illness, chronic condition, terminal illness or who are frail.

Carers Australia's members are the Carers Associations in each state and territory that deliver specialist information, counselling and other services to carers in the community.

Carers Australia is informed about carer issues through its member Carers Associations (the Network of Carers Associations, the 'Network') and its participation in national and international forums.

The Network of Carers Associations believes that all carers are entitled to the same rights, choices and opportunities as other Australians in order to enjoy optimum health, social and economic wellbeing and to participate in family, social and community life, employment and education.

Key statistic about caring in Australia

There are 2.6 million carers in Australia, and nearly 500,000 of these are primary carers – the people who provide the most care.¹ Carers are the foundation of our aged and community care system, and the annual replacement value of the vital care that they provide is estimated to be over \$30.5 billion.²

The impact of providing care on the carer's own health and wellbeing is well documented with many carers experiencing a significant decline in their own physical and mental health. Unless well supported, caring can also have a negative impact on carers' employment and education prospects, their financial position, and their ability to participate in social and community life.³ When carers are properly supported, it can be a rewarding experience for all involved.

According to statistics on caring from the Australian Bureau of Statistics 2003 Survey of Disability, Ageing and Carers (SDAC):

- Approximately one-third of all carers in Australia live in NSW
- 40 per cent of primary carers cared for a partner, 29 per cent for a child, 32 per cent for other (eg siblings, parent)
- 78 per cent of primary carers lived with the person they supported
- 39 per cent of carers indicated that the main reason for providing care is the belief that they can provide better care, 58 per cent indicated family obligation, 35 per cent emotional obligation.

About this submission

This response addresses the Inquiry's Terms of Reference and comments on the transparency of the health requirement as outlined in Schedule 4 of the *Migration Act 1958*. This submission also focuses on important factors that need to be considered when making a decision about the person with a disability, their families and carers.

This submission is written in the interest of representing people with a disability and their families ensuring that their human rights are protected and that they receive equal treatment before the law. This submission will focus on the economic and social contributions of people with a disability and their families, and Australia's obligations under international treaties which need to be honoured when health screening visa applicants.

The rights of individuals with a disability, as outlined in the United Nations Convention on Rights of Persons with Disabilities, place a positive obligation on the Australian Government to specifically ensure that people with disabilities have access to full and equal participation in the society. It promotes respect for the dignity of persons with disabilities and supports the development of a culture based on acceptance of human diversity.

The primacy of the family as the fundamental unit of society is also protected by the Convention and extends the right of protection and assistance 'to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities'. Family carers and the organisations supporting them have a strong collective interest in any law and policy which impacts on the people they care for, as the wellbeing of the person with a disability is usually their primary concern.

The health requirement

Social vs. medical model of disability

There are several limitations in the current applications of the health requirement in respect to persons with disabilities, their families and carers. The migration screening of an individual with a disability against the health requirement outlined in Schedule 4 of the *Migration Act 1958* focuses strongly on the 'defect' of an individual rather than the person's strengths and abilities. The current provisions also oppose the social model of disability

widely accepted by Australian governments and service providers as the preferred model of disability for legislation, policy and service delivery.⁴

The social model of disability proposes that systemic barriers, negative attitudes and exclusion by society are the ultimate factors defining who has a disability. It argues that disability is not so much an attribute of the individual as much as it is of the social and physical environment in which a person with a disability lives. The social model of disability recognises the inherent equality of a person with a disability and their human worth beyond an economic assessment of the cost of that disability.

Disability is best understood as the process which happens when one group of people create barriers by designing a world only for their way of living, that takes no account of the impairments other people have.⁵

In Australia, the *Disability Discrimination Act 1992* defines disability using the medical model (total or partial loss of the person's bodily or mental functions) but the requirement of employers and service providers to make reasonable adjustments to their policies and practices or physical aspects of their premises usually follows the social model of disability.

The United Nations Convention on Rights of Persons with Disabilities also follows the social model of disability. It recommends specific strategies aimed at removal of barriers for social participation of people with a disability.

This approach needs to be consistently applied in the health screening of migrants with a disability. It is clear from Schedule 4 of the *Migration Act 1958* that the medical model of disability is the only one used. It leaves no provisions for society as a whole to make necessary adjustments to accommodate the needs of people with a disability or to account for their contributions. It unjustly assumes that people with a disability are a burden on the health and community care systems and that they have nothing to contribute.

The Network of Carers Associations recommends that the Australian Government revises the health requirement so it corresponds to the current social model of disability as outlined in the United Nations Convention of Rights of Persons with Disability.

Transparency and fairness

The Network of Carers Associations is also concerned with the lack of procedural transparency and fairness in the application of the health requirement which has given rise to problematic and unfavourable decisions on the eligibility of migrants with a disability and consequently their families. These issues were also addressed in the Australian National Audit Office Report *The Administration of the Health Requirement of the Migration Act 1958* in 2004/2005.⁶ Many recommendations outlined in the report remain of great concern for migrants with a disability and their families:

- robust and consistent guidelines need to be developed in the form of the *Notes of Guidance for Medical Officers of the Commonwealth (MOC)* to enable them to reach rational and accurate opinions in order to satisfy the public policy interests and the interests of migrants with a disability

- the *Notes of Guidance for Medical Officers of the Commonwealth* need to be publicly available on the DIAC website so that prospective visa applicants with a disability and their families can make informed decisions about their migration to Australia
- an additional and concurring opinion of a second Medical Officer of the Commonwealth needs to be provided in order to safeguard fairness and enhance procedural transparency of the health assessment
- the *Notes of Guidance for Medical Officers of the Commonwealth* need to be regularly updated in order to correctly reflect developments in medical science relevant to robust and accurate decisions about the costs of disability.⁷

The most important issue for migrants with a disability and their families in the health requirement assessment is that the rigid criteria does not take into account whether the individual with a disability would *actually* utilise community services. The decision is made, in essence, on a hypothetical assumption of the use of the health and community services that a person in the same circumstances *would* use or *may* be eligible for, regardless of whether the health care or community services will actually be used by the applicant.⁸ The use of services is multifaceted and depends on a range of factors including what support is provided by family carers. It also does not take into account the possibilities of employment and their potential to earn an income.

Paramount to the health requirement is the need to protect Australia from public health risks (such as tuberculosis and other communicable diseases). The public health safety concerns are currently also protected through quarantine and other customs measures, and should be considered separately from the requirements for persons with a disability and their families.

While the Network of Carers Associations agrees that health risks need to be managed to protect and contain public expenditure on health and community services, the current health screening appears to apply a very narrow view in terms of a person with a disability's contributions. This assumption clearly contradicts the reality of many Australians with a disability and it negates positive contributions they make to the community including their economic contributions. Many applicants with a disability and their families bring with them skills and qualifications that can potentially benefit the Australian community yet these are ignored in the health assessments by medical assessors.

This assumption is also erroneous as families and carers of people with a disability are often resistant to external care, preferring to meet the needs of their family members. For example, in NSW the level and usage of Home and Community Care (HACC) services by people from culturally and linguistically diverse communities is 8.6 per cent which is significantly lower than the national benchmark figure of 19.1 per cent.⁹ This finding indicates that (contrary to popular opinion) migrants with a disability are not an enormous cost and burden on the nation's community care services. In fact, efforts are made by Australian governments to encourage and enable them to access these services.

The Network of Carers Associations recommends that the transparency and fairness of the visa decision-making is enhanced by reformulating and narrowing the exemption of the *Migration Act 1958* from the *Disability Discrimination Act 1992*.

Separation of families and children with disabilities

As outlined above, the importance of family as a fundamental unit of society and for a person with a disability is protected by the United Nations Convention of Rights of Persons with Disabilities. There is stress and hardship for many families who make a difficult decision to leave behind a family member with a disability in order to build a life in Australia. This potentially has a great impact on their settlement outcomes as well as on the family member left behind. In cases involving humanitarian entrants, these family members with a disability are likely to remain in extremely vulnerable situations, such as refugee camps or in situations of war or political unrest.

Separating people with a disability from their families and carers may also hinder the settlement process of their families, especially when the health and wellbeing of a child with a disability is in question. These situations need to be considered on the grounds of social inclusion and safety rather than strictly balancing costs and benefits.

The application of the health requirement poses significant concerns in regards to children with disabilities, who may be refused entry on the grounds of significant costs to the Australian health and community services. Because the costs are assessed over a person's lifetime, such as special education and Carer Payment, they are usually extremely high and less likely to be waived at the discretion of the Minister. This is particularly evident in the case of refugees and humanitarian entrants. The application of the Ministerial waiver of the health requirement, although regularly exercised by DIAC, appears to favour children and partners of Australian citizens, with a significantly lower number of waivers granted to humanitarian entrants and refugees.

The health assessment criteria may discriminate against a child with a disability on the grounds of the significant costs. This is in opposition to the international treaties to which Australia is a signatory. Rights of the child are considered in both the United Nations Convention of Rights of Persons with Disabilities and the United Nations Convention on the Rights of a Child. Both conventions go to great lengths to explicitly protect children with disabilities and preserve the unity of the family. Article 23 (4) of the United Nations Convention on Rights of Persons with Disabilities, for example, requires that "in no case shall a child be separated from parents on the basis of a disability of either the child or both the parents". Similarly, the Article 23 of the United Nations Convention on the Rights of the Child requires that State parties recognise a full and decent life of a child with a disability, in conditions which ensure dignity and promote self-reliance.

The Network of Carers Associations recommends that the Australian Government seriously considers the impact of the health requirement on safety and wellbeing of a child with a disability and to apply this in the best interest of the child, as endorsed in the international treaties ratified by Australia.

Case study: Shahraz

Shahraz was recognized as a refugee in 1996. He attempted to sponsor his family members to Australia several times over a period of four-and-a-half years. The then Department of Immigration and Multicultural Affairs refused to exercise its discretion to waive the health requirement in respect of his child with multiple sclerosis who, together with his wife and two daughters, was seeking to join him.

Shahraz lost all hope of ever being reunited with his wife and children and died as a result of self-inflicted injuries sustained when he set fire to himself outside Parliament House. As a result of an investigation, the Commonwealth Ombudsman stated that 'the history of this case is one of administrative ineptitude and of broken promises' and recommended that the health requirements for immediate family members be no different from those for their proposers.

Case study taken from NGO Report to Human Rights Committee, above n 50, 208. Also see further Commonwealth Ombudsman, Report on the Investigation into a Complaint about the Processing and Refusal of a Subclass 202 (Split Family) Humanitarian Visa Application (2001) 1-2.

Balancing the costs and contributions

Migrants and refugees have always had an important role in the Australian economy as they increase the availability of skilled labour, job-market competition and mobility, and increase consumer demand. Moreover, the overall fiscal impact of migrants on the Australian economy was found to be positive but their indirect contributions to society are often not accounted for.¹⁰

A report by the University of New England for the Department of Immigration and Citizenship found that the social benefits of migration far outweigh the costs, especially if measured in the longer term. The researchers confirm that migrations have been critical in increasing not only the economic, but also enhancing human and social capital of the nation.¹¹

A migrant with a disability, their family and carers also contribute through increasing social capital in the community. These contributions are, however, hard to measure. Adopting a narrow view of costs and benefits, would mean that Australia would lose the gains that people with a disability can bring to Australian society. In balancing costs and contributions of a person with a disability or their family, a broad view and the social model of disability needs to be applied to fairly administer the health requirement without compromising the public interests.

It is not the Network's intention to suggest all the contributions that migrants and refugees with a disability, their families and carers can make to Australian society as this would inevitably lead to adopting a narrow balance sheet of costs and benefits. However, if such a balance sheet is to be developed, the Network suggests that it be inclusive of a person's strengths and contributions, family ties, humanitarian status and preparedness to provide their own systems of support.

It is incorrect to assume that migrants with a disability would be Disability Support Pension recipients given that there is a ten year waiting period, their level of disability may not qualify them and that they may choose to participate in the workforce. Calculations of the fiscal impact on the federal and state budgets undertaken by Access Economic for the then Department of Immigration and Multicultural Affairs in 2003 showed that overseas-born persons have a much lower incidence of use of disability services than their Australian-born counterparts for all age groups, except the very young.¹²

In the case of refugees and humanitarian arrivals, special considerations must be given to their need for a safe and conducive environment as well as the likelihood of acquiring a disability because of war and violence and the often protracted period of living in unstable and unsafe conditions. These factors should take precedence over strict calculations of costs and contributions.

The Network of Carers Associations recommends that:

- i) The Australian Government recognises the economic and social contribution of individuals with a disability and their family carers to Australia beyond the potential costs associated with their illness or disability.
- ii) The Australian Government waives the health requirement of the *Migration Act 1958* for refugees and humanitarian entrants in need of resettlement.

Are there additional factors that should be considered?

There is a multitude of important factors that need to be considered in the decision making process for visa applicants with a disability. Some of these are set out in the United Nations Convention on the Rights of People with Disabilities and Convention on the Rights of the Child, as described above.

For Australia, the United Nations Convention on the Rights of People with Disabilities represents an opportunity to promote a culture of continual improvement in participation, empowerment and independence for people with a disability. Importantly, the ratification of the Convention provides an opportunity to raise the profile of issues affecting people with disabilities in Australia and challenge barriers that currently exist. Provision for the removal of these barriers will greatly facilitate the building of a foundation of social inclusion across all levels of Australian society.

The Australian Government is committed to a number of long-term initiatives for the improvement of the lives of people with a disability, and their families, including (but not limited to) the National Disability Strategy, national carers legislation, National Mental Health and Disability Employment Strategy and AusAID's Disability Strategy: "Development for All". This strong and systemic commitment by the Australian Government needs to apply to individuals with a disability, and their families, seeking a residency in Australia, and especially to refugees and humanitarian entrants with a disability.

The focus on a person's deficits as the centre of the health requirement is often at odds with social inclusion policies and principles promoted by the Australian Government. Social inclusion adopts the approach based on community and individual strengths, including recognition of the varied and positive contributions of people with a disability and those from culturally and linguistically diverse backgrounds.¹³ It also strives to reduce disadvantage by promoting economic, civil and social participation based on person's strengths and capacity building over a period of time. The potential of the health requirement to separate families inadvertently deteriorates social capital and resources of migrant communities, severely impacting their settlement outcomes and social inclusion in the long term.

The Network of Carers Associations believes that for the reasons outlined above the Joint Standing Committee on Migration must ensure that the *Migration Act 1958* corresponds to the United Nations Convention on the Rights of People with Disabilities and the *Disability Discrimination Act 1992* and not be exempted from these laws.

The Network of Carers Associations recommends that the Joint Standing Committee on Migration ensure that the *Migration Act 1958* adheres to the United Nations Convention on Rights of Persons with Disabilities and the *Disability Discrimination Act 1992* in its entirety.

Conclusion

This submission has sought to create awareness of the issues relating to migrants with a disability, their families and carers in relation to the strict health requirements of the Schedule 4 of the *Migration Act 1958*.

The Network of Carers Associations hopes that the Committee will consider people with disabilities and their family carers who are seeking to migrate to Australia, the *Disability Discrimination Act 1992* and the UN Covenant on Rights of Persons with Disabilities in any further amendment to the *Migration Act 1958*. Overall, the Network would like to see migration legislation in Australia acknowledge the rights of people with disabilities, their families and carers seeking to migrate to Australia and ensure their social inclusion and the recognition of their contribution to Australian society on an equal basis with others.

Endnotes:

¹ Australian Bureau of Statistics (2004). 2003 Survey of Disability, Ageing and Carers: Summary of Findings, Canberra

² Access Economics (2005). The Economic Value of Informal Care. Report for Carers Australia, Canberra

³ Cummins R A et al (2007). *The Wellbeing of Australians – Carer Health and Wellbeing*. Melbourne, Australian Centre on Quality of Life, Deakin University; Briggs H and Fisher D (2000). *Warning – caring is a health hazard: results of the 1999 national survey of carer health and wellbeing*. Carers Association of Australia, Canberra

⁴ See for example the Department of families, Housing, Community Services and Indigenous Affairs (2008) *Developing a National Disability Strategy for Australia*, Commonwealth of Australia, accessed on 30/10/2009 at:

http://www.fahcsia.gov.au/sa/disability/pubs/policy/Documents/nds_discussion_paper/foreword.htm

Also: Implications for the Development of the National Disability Strategy in the *Shut Out: The Experiences of People with Disabilities and their families in Australia*, National Disability Strategy Consultation Report, Department of Families, Housing, Community Services and Indigenous Affairs Commonwealth of Australia, Canberra 2009

⁵ Department of Families, Housing, Community Services and Indigenous Affairs (2006), Evaluation of the Commonwealth Disability Strategy, available at:

http://www.fahcsia.gov.au/sa/disability/pubs/policy/cds_evaluation/Documents/CDS_Evaluation2006.pdf

⁶ Australian National Audit Office (2008). Administration of the Health Requirement of the *Migration Act 1958* ANAO Audit Report No.37 2006/2007, accessed on 27/10/2009 at:

http://www.anao.gov.au/uploads/documents/2006-07_Audit_Report_37.pdf

⁷ Ibid

⁸ The Migrations Regulations 1994 (Cth) reg. 2.25A; Department of Immigration and Citizenship, procedures Advice Manual 3 Schedule 4/4005-4007 – The Health Requirement

⁹ Sedger R and Boyde D (2008). The Report on Project Report on the Study into the Needs of Carers from Culturally and Linguistically Diverse Communities in the Nepean Area, NSW Department of Ageing, Disability and Home Care and the NSW Department of Community Services, Sydney

¹⁰ Access Economics for the Department of Immigration and Multicultural and Indigenous Affairs (2003). The Importance of Age in Migrants' Fiscal Impact, Commonwealth of Australia, accessed on 27/10/2009 at:

http://www.immi.gov.au/media/publications/pdf/migrant_age_on_arrival.pdf

¹¹ The University of New England, Centre for Applied Research in Social Sciences for the Department of Immigration and Citizenship (2007). The Social Costs and Benefits of Migration into Australia, Commonwealth of Australia, accessed on 27/10/2009 at:

http://www.immi.gov.au/media/publications/research/social-costs-benefits/contents_exec_summary_and_intro.pdf

¹² Ibid

¹³ Principle 4 of the Social Inclusion Principles for Australia, accessed on 27/10/20069 at:

<http://www.socialinclusion.gov.au/Principles/Documents/SIPrinciples.pdf>