Child Safety Commissioner
promoting the safety and wellbeing of children
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16 November 2009
CSCD/09/645

Committee Secretary
Joint Standing Committee on Migration
Department of House of Representatives
P O Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary

SUBMISSION TO THE JOINT STANDING COMMITTEE INQUIRY INTO IMMIGRATION TREATMENT OF DISABILITY

The Victorian Child Safety Commissioner welcomes the opportunity to provide a submission to the inquiry into the migration treatment of those with a disability. One of the specific functions of the Commissioner under the mandate of the *Child Wellbeing and Safety Act 2005 (Victoria)* is to promote child-friendly and child-safe practices within the Victorian community. Therefore I have a strong focus on social inclusion, which means ensuring the needs of the most vulnerable children within our community, including those who reside in out of home care, children with disabilities and children of refugee and newly arrived families are addressed. The work of my office is guided by a human rights approach informed by the United Nations Convention on the Rights of the Child (UNCROC) and the Victorian *Charter of Human Rights and Responsibilities.*

Accordingly, this submission will focus 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 it is inappropriate in contemporary Australia to retain the Health Requirement when considering whether a person with a disability should be granted a visa under the *Migration Act (1958).* The grounds for this argument are that disability is not the same as chronic ill health, discrimination on the basis of a disability is incompatible with other Commonwealth and State human rights based legislation, the need to use a social model of disability rather than an economic rationalist approach, the extra impact upon children with a disability, and especially those who are refugees.

Disability Discrimination Act 1992 Exemption

It is accepted that a person may be refused entry to Australia if they present a serious risk to the health of, or is a danger to, the community, with the provisions designed to deal with contagious diseases which may threaten public health. However in a modern society, it is understood that disability is "not equivalent to ill health", and a conceptual model implying this would be determined to be discriminatory against people with disabilities. However, because the *Migration Act* (1957) has been made exempt from the operation of the *Disability Discrimination Act (1992)* this flawed argument has not been tested.

Furthermore, the assumption underlying this argument implies that people with a disability are burdensome to the community with additional costs in health related needs, and will be capable of providing a worthwhile contribution to the Australian community. Fortunately, the Australian Government's Social Inclusion Agenda (2009) refutes this outdated view, being a reflection of Australian social values which support access and inclusion of all people with disabilities in the community.

Victorian Charter of Human Rights and Responsibilities

The outmoded view of people with disabilities as people who need constant care and represent a negative financial impact upon the community is perpetuated by the acceptance that the Migration Act can be allowed to continue to actively discriminate against people on the grounds of their disability. This current disability discrimination exemption is counter to other Commonwealth and State legislation, such as the Victorian *Charter of Human Rights and Responsibilities (2006)* which states that "Every person has the right to equal recognition and protection before the law" (s8). When the State utilizes an economic rationalist approach to migration, it has far reaching implications for framing the whole debate about our identity and values as a community. The insidious nature of this approach goes unrecognized, for it weighs people up, measuring their productivity value against their financial cost in health care services. Such an approach is particularly repugnant in a society that claims all of its members are valued equally and should not be discriminated against on the basis of age, impairment, political belief or activity, race, religious belief or activity, sex or sexual orientation.

Social Model of Disability and CRPD

It has been suggested by the Australian Lawyers for Human Rights that Australia should consider moving from "an objective economic assessment of a disabled person's value... to one with a greater focus on their value and contributions to a diverse and progressive society". It is to be hoped that Australian society truly believes that a person's value is not simply defined in economic terms, but is more complex and relates to their quality of life, relationships and contribution to their community. This conceptualization fits with the social model of disability adopted in the United Nations Convention on the Rights of Persons with a Disability (CRPD), ratified by Australia in 2008, and the social inclusion agenda promoted through development of a National Disability Strategy. The CPRD requires the State 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). Australia is currently sending out a very contradictory message, that it does not want as new members of the community anyone who will be a drain on the health care budget. This sends an appalling message to those community members who have or acquire a disability, suggesting that they are of lower worth than other community members.

Children with a Disability

The discriminatory nature of the Migration Act when applied to those with a disability undermines all of the positive initiatives implemented by the Australian governments, such as the *Statement of principles for children and young people with a disability and their families* recently released by the Victorian government. This statement affirms the government's "commitment to protect and promote the rights of children and young people with a disability and their families, and to support children's physical, social, intellectual, cultural and spiritual development". Social inclusion reinforces that those with a disability should have every opportunity to participate as fully as possible in the community, which is especially important for children and young people who are yet to explore their potential.

Disproportionate Impact Upon Children

It appears that many of those currently being refused a visa on health grounds are families who have a child with a disability, such as in the case of the Moeller family from Victoria. In such situations, the projected financial cost of the child's health care needs is toted up and in the case of skilled migration, is weighed against what the employer will provide for if a minimum threshold is surpassed. If the cost to the Australian taxpayer is deemed too high, the family's application is refused. Complex arguments then ensue regarding how accurate the figures are, the method of calculation and weighting of the value of the productivity of the parents. Aside from being very complex and open to flaws, such a process is objectifying and demeaning of the family member with a disability and the privacy of the family as a whole. The stress that the visa process places upon the family, can be both directly and indirectly, harmful to the child. The process also ignores the right to protection of families and children to be treated as the fundamental group unit of society and for children to have the right to protection that is in their best interests and which may be required because they are a child (Victorian Charter of Human Rights and Responsibilities, s17).

The current arrangements create social discord and impose hardship upon many individuals and families, and fail to acknowledge the social and economic contributions that generations of migrants have made to Australia. Aside from the inherent discrimination against those with disabilities, the current system does not provide for access to an appeals process for those without the support of a sponsor, leaving some unsuccessful applicants with no course for redress.

Further Inequality for Refugee Children

Inequalities in the process are not limited to appeals, Australian Lawyers for Human Rights have highlighted the differences in treatment of the Moeller and Kiyani families where the perceived value of a family with highly educated and resourced parents were eventually successful in gaining a visa, in contrast to a refugee family where the father publicly killed himself in protest at the delays and rejection of his family's visa on the basis that one of his daughters had cerebral palsy. As far as is known, the mother has been accepted for migration, but not the child with a disability. Thus, it is argued that children with a disability are particularly disadvantaged by the current policy because the health requirement demands that costs including education and carer pensions are calculated over a person's lifetime, increasing the likelihood that children will cross the $200,000 threshold.

Furthermore, because children are not usually the primary applicant, their particular situation and prospects are not taken into consideration in the process. As the health requirement dictates that if one family member fails, the whole family unit fails, the policy has led to children with a disability being left behind whilst other family members migrate, especially in the situation of refugees. The Convention on the Rights of Persons with Disabilities (CPRD) recognizes that children with a disability should be granted the same rights as any other children to family life, and that children should be protected against being concealed, abandoned, neglected and segregated. As a result of civil wars and other conflicts, the incidence of physical disability such as amputations and shrapnel wounds amongst refugee families is necessarily increased. Questions can therefore be asked as to why Australia appears to only be receiving refugees who are physically whole and intact and whether "cherry picking" of suitable refugees is occurring, rather than those humanitarian refugees being in direst need being granted visas.

For Australia to discriminate against such vulnerable individuals and disadvantage those with disabilities even further is appalling. In legal terms, such policies do not accord with Australia's obligations under the United Nations Convention on the Rights of the Child, which requires that the "best interests of the child are considered' (Article 3) and that to "ensure to the maximum extent possible the survival and development of the child" (Article 6), or the 1951 Refugee Convention. In economic terms, refugees who are separated from family members are not able to devote their energies to the considerable settlement challenges confronting them until family connections are restored. This allows the whole family unit to work on rebuilding their lives, benefitting their host countries with the considerable economic, social and cultural contributions they can provide.

Health Care Costs versus Contribution

The argument that is raised in support of maintaining the health requirement in the *Migration Act 1957* is that potential migrants with a 'disease or condition' will represent a financial impost and negative impact upon Australian health and community services provision. This is reflected in the nature of the remaining four terms of reference of this inquiry. However, it is very important that the Australian community is not left to imagine an amorphous number of potential immigrants from all over the globe who might immediately seek to enter Australia if the health requirement was removed. The reality is that in 2007-08, Departmental figures indicate that at least 240 people were refused visas on the basis of a health condition, including at least 70 with a disability and an additional 442 applicants were refused a visa on health grounds because they had a family member who was unable to meet the health requirement (Parliament of Australia, media release, 9 October 2009). These are not huge numbers of people relative to the millions of people applying for visas to visit or migrate to Australia, and would not seem to represent a significant burden to Australian health care system. In any event, the vast majority of those wishing to migrate to Australia are part of a family group and for very many family members will address the majority of their care needs rather than the formal health care system.

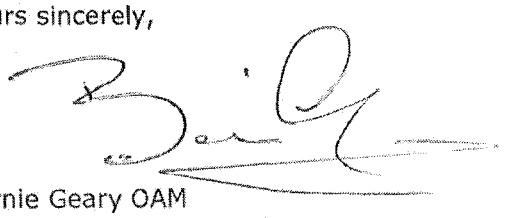
The current archaic system not only perpetuates discrimination against Australians with disabilities in the name of preventing a financial burden, such a simplistic approach is very costly for the Australian economy. Potential candidates for migration are excluded on the basis of their own or a family member's disability, leading to a loss of potential, productivity and possibility for the nation's future as it is unable to attract, maintain and support people with disabilities with highly specialized skills, competencies and knowledge, who are leaders within their fields, denying Australia the substantial contribution they are able to make (Dr Rhonda Galbally, 7 October 2009).

Conclusion

Australia needs to remove this relic that is the health requirement, as it casts people with disabilities as a hypothetical cost to the community and fails to consider their suitability as a potential citizen, a particularly unethical practice when that person is a child, in a refugee camp.

If you wish to discuss further any of the issues raised, please contact Dr Virginia Dods on 8601 5285 or Virginia.dods@ocsc.vic.gov.au, at this office.

Yours sincerely,



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