


Submission No 38

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## **HIDDEN TOO LONG: MIGRATION AND DISABILITY**

**Submission to Joint Standing Committee on Migration  
Inquiry into immigration treatment of disability**

**October 2009**

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## SUMMARY

*Hidden too long* describes how my family came to see the Department of Immigration relate to people with a disability. Its history has been one of using its 'health' and 'public interest' laws so that the risk of passing on disability's undesirable traits to further generations was avoided, social misfits were weeded out, and economic burdens were excluded.

*Our Story* describes our struggles over an eight year period from 1983 to 1991 to have my step-daughter, Sarah, recognised as a permanent resident, as were her three sisters. During this time she was classified as a PI (Prohibited Immigrant) after having 'mistakenly' been granted permanent residency. It was not till the Federal Executive Council made an order in 1991 for her acceptance that she belatedly was given the same status as her sisters.

*Prejudged and Unfair* examines the constancy of rejection of people with a disability. Health and public interest assessments were 'tools of reasonableness' ensuring the Immigration Restriction Act 1901 and Migration Act 1958 were effective in keeping out people with a disability. This submission describes the learnings of my family and me as we came to understand the Department of Immigration operating from legislation and regulations deliberately inconsistent with the other government vision and policy. I believe that appropriate values and principles for assessing visa applications of people with a disability are to be found through the social model for disability that is now widely accepted in Australia and other countries. People with a disability deserve to be treated with fairness and transparency. Sarah deserved to be treated in the same way as her sisters.

## OUR STORY

Our migration story is focused on my step-daughter, Sarah Guilfoil, who has an intellectual disability. Sarah was born in the United States and applied in 1983 for permanent residency in Australia, together with my wife Barbara (we had been married for 1 year) and Sarah's three younger sisters. Sarah was 19 years old. I was an Australian citizen and was their sponsor.

Initial contacts had been with the Geelong office of the Department of Immigration and Ethnic Affairs in late October and early November 1982 to seek a sponsorship application and information on visa processes. The completed sponsorship application was sent to the Department on 19 November 1982, stating Sarah as principal of the four girls sponsored. Barbara, who had been on a visitors visa in Australia for 14 months, returned with me to the United States where I had work from 15 December 1982.

The Geelong Office contacted the Chicago Consulate on 7 January 1983 to advise of our application and our intention of returning to Australia in May 1983. This

dispatch also suggested arrangements be made for an interview "as the question of custody and whether Sarah can be considered part of the family unit will need to be resolved." The interview took place on 19 April 1983 at the Chicago Consulate. Relevant divorce and custody documentation was provided. In the course of the interview, the interviewer noted against Q40 of the application "Have any of the persons shown ever suffered from a physical or mental disability, or a serious illness?" :

(Moderately) Mentally/intellectually retarded + educable (not Down syndrome).

This reflected information we provided and discussion that followed. Subsequently the interviewer completed the Department's Migrant Selection Assessment in which he commented: Although she is 20 years old, Sarah is totally dependent on her parents. At i/v her mother said that Sarah is moderately mentally and intellectually retarded but 'educable'. I have asked that a report be provided on Sarah's condition for referral to Canberra.

A medical examination on Sarah was carried out at the East Madison Clinic in Wisconsin on 20 April 1983 and the Department of Immigration and Ethnic Affairs Medical Examination form completed. The report called for medical responses to normal/abnormal conditions for 27 areas as well as "Other abnormalities that may affect the applicant's ability to earn a living." The examining medical doctor checked normal against all but three areas. Against both 'Intelligence' and 'Mental state' he commented "Moderately retarded – educable" and against 'Eyes' he made no comment. However an attached report had diagnosed Sarah's vision impairment as ocular albinism.

There were many dispatches between Canberra, Geelong and Chicago over the next three weeks referring to Sarah's disability, including:

Applicant (Barbara) has met all P.R. requirements this office (Geelong). However grant of visa subject to dependent daughters meeting requirements. Presumably "Sarah" considered dependant in view of her disability. Mrs. Donovan indicated 4 daughters would migrate to A/a. Please do not issue migrant visa to Mrs. Donovan until daughters meet all requirements.

Annotations by Migration officers, such as "You betcha!" seem indicative of the zeal with which the case was being pursued.

On 16 May 1983 the Department of Health recommended that Sarah "Does not meet medical standard. Reason No. 10 in accordance with Attachment 7 to Chapter 6 of Migrant Entry Handbook. Code 03 applies."

A dispatch from the Department of Health in Canberra to Chicago stated "Medically acceptable." The following day the Acting Consul (Visas & Immigration) wrote to Sarah: "I am pleased to inform you that your application to migrate to Australia has been approved." The letter then stated that this covered Sarah and her three sisters. The approval of my wife's application was given in a separate letter on the same day. We flew into Australia on 31 May 1983.

Shortly after our arrival we received correspondence from US Social Security that Sarah's payments would be stopped from June 1983. Although we took the matter up with our US congressional representative, he stated that a person "admitted for permanent residence is eligible for SSI benefits in this country. I am sorry that Australia's laws are much more stringent." We had expected at the time of filling in sponsorship forms that continuation of benefits would apply for Sarah. We therefore made application in Australia for what was then termed an 'invalid pension' in the

hope it would be granted on compassionate grounds. This unleashed a saga that went on for the next 8 years.

A Department of Social Security officer phoned the Geelong Immigration office on 7 September 1983 in relation to Sarah's application for an invalid pension, specifically wanting to know if an assurance of support was signed. The Geelong office confirmed "that assurance of support has been taken out."

The Canberra office of the Department of Immigration and Ethnic Affairs dispatched an enquiry to the Chicago Consulate of the circumstances regarding approval for Sarah, noting "assurance of support held but Sarah is claiming invalid pension." The response from Chicago to Canberra stated:

- 1) Pressure of work and from applicant wishing to depart by end May led to misinterpretation of D.O.H. interim cable following referral of health documentation.
- 2) Sarah was then approved without repeat without 03 code.
- 3) Error was not uncovered as D.O.H. follow-up memo recommending refusal and 03 code was received and filed after visa issue and while I was on vacation.
- 4) Sarah's doctor described her as moderately retarded but educable.
- 5) Mrs. Donovan asserted frequently during dealings with us that Sarah had been capable of working and being productive and would serve as an example in the area of handicapped training in Australia.<sup>1</sup>

This dispatch contains the annotation: "Would appear that Sarah may be a P.I. Section 16(1)c(i) applies."

On 3 November the Officer-in-Charge of the Geelong Area Office wrote a summary of the situation to the Senior Assistant Director of Operations adding the following 'opinions':

The case was referred to Central Office as I was under the mistaken impression that that office had previously been involved.  
I consider that there has been some attempt to conceal "Sarah's" condition. No mention was made of her condition to this office and Chicago reports that Question 40 on "Sarah's" M.47 was unanswered. ... Your comments and advice re action to be taken with regard to Sarah would be appreciated.

The response of the Senior Assistant Director of Operations on 15 November 1983 was:

Chicago made two administrative mistakes:

- 1) Issuing a migrant visa to a person with a prescribed illness which action involved a misinterpretation of advice from the Department of Health;
- 2) Issuing a migrant visa without the appropriate code (blacked out) to cover the situation of a person with a prescribed illness thus rendering them a P.I. under Section 16 of the Migration Act (see also attachment 17 – note 5, Migrant Entry Handbook).

In the circumstances, having issued a migrant visa, the Department cannot in good faith claim that Sarah Guilfoil is a P.I. because of a further administrative mistake.

This did not stop Department officers over the next 8 years insisting Sarah was a prohibited immigrant (P.I.) or illegal immigrant.

The Geelong office requested Barbara and I meet with them on 29 December 1983 to discuss Sarah's application for an assurance of support. An explanation was given there of how Sarah would be ineligible for an invalid pension for a period of 10 years. Officers also requested Sarah's passport "so that the correct coding can be inserted."

Barbara returned to the Geelong office on 13 January 1984 with Sarah's passport. Notes made by the Officer-in-Charge give the following description of the meeting:

I explained to her (Barbara) that because of an error by our Dept in the USA Sarah was given an unconditional entry to Australia. Also the questions arising on the application forms were not fully answered and we inadvertently processed Sarah for P.R. when she obviously had a prescribed condition. Immediately on her arrival in Australia she became a P.I. because she did not have the proper coding. We were not trying to change Sarah's status rather we were correcting an error made previously and Sarah would cease to be a P.I. and would have permanent status in Australia.

Mrs. Donovan continued to argue. I pointed out that we would continue to pursue the issue and that if they left Australia for a holiday they would have difficulty returning.

Mrs. Donovan continued to argue and left saying that she would ask her husband to come to the office on Monday morning.

I met with officers on 16 January 1984 and requested copies of the relevant regulations and sections of the Migration Act. The relevant part of the Migration Act 1958 was Section 16(1)c(i):

A person suffering from a prescribed disease or a prescribed physical or mental condition.

The relevant regulation giving meaning to this Section was Regulation 26(a):

Serious mental deficiency, dementia, insanity, epilepsy, drug addiction, alcoholism;

Regulations 26(b) and 26(c) related to other 'health conditions'

Syphilis, tuberculosis, leprosy, trachoma;

Cancer or other malignant condition, extensive paralysis, blindness, deaf mutism, organic disease of the nervous system, leukaemia, primary anaemia.

I advised the Officer-in-Charge that, on Sarah's behalf, Barbara and I would apply under the Freedom of Information Act to the Department of Immigration and Ethnic Affairs for Sarah's personal file. We would then further discuss the matter of coding and Sarah's passport.

Barbara and I were most concerned at how so called 'serious mental deficiency' was used to categorise 'intellectual disability'. Australian, Victorian and other State Governments were working at that time to ensure intellectual disability was not seen as an 'illness' and certainly not confused with 'mental illness'.

Over the next 8 years I sought advice and support from the Human Rights Commission, migrant advocacy agencies, national and state disability organisations, federal and state politicians. I corresponded with successive Ministers for Immigration over

- 1) Sarah being labelled a P.I. or illegal immigrant,
- 2) the Immigration Department's pathological approach to intellectual disability that was inconsistent with the vision, policies and practices of other Departments,
- 3) a needed review of the Migration Act 1958 and regulations, and
- 4) assurance of support.

I also made a submission in January 1988 to the FitzGerald Committee to Advise on Australia's Immigration Policies.

The 'remedy' generally provided by the Minister and Department was "It is therefore in Miss Guilfoil's interests to have this situation remedied through the issue of an entry permit suitably endorsed." This however would not have addressed our

broader concern for persons with a disability. This was most important to us and rarely grasped by 'officialdom'.

By the end of the 1980's both Barbara and I were involved at regional, state and national levels in developing and promoting disability supports. Sarah was supported in work programs in Geelong and continued to live with us.

In late 1990 Barbara was awarded a Churchill Fellowship to investigate preretirement programs for people with intellectual disability in the United States. As President of the National Council on Intellectual Disability she was well placed to work with the Federal Department of Community Services and Health as well as State Departments and agencies throughout Australia to further opportunities for persons with intellectual disability to be fully included in the life of their communities. I had arranged study of adult community education programs that included persons with disabilities. Sarah was to accompany us and employment had been arranged for her in food preparation with a restaurant chain. We were due to fly out on 1 March 1991, but Sarah's status as an 'illegal immigrant' was an impediment.

I wrote to the Minister for Immigration on 10 February 1991, in part stating:

It seems that the time has come, after nearly 8 years, to bring to public notice the issues of your department's withdrawal of Sarah's permanent residency. Sarah is clearly not ill, she is not diseased and she is not deviant. We strongly oppose the attempts of your department, by their language or practices to so label her. 'Regularising' Sarah's passport or processing towards permanent residency are not acceptable. The simple fact is that Sarah was granted permanent residency and came in good faith with her sisters to this country. Her sisters did not undergo the ordeal your department has inflicted on Sarah. If there are problems in this situation, they are of your department's making and within the control of your government to rectify.

The Minister's response on 14 February 1991 gave explanations for migration legislation, in particular to changes made from 19 December 1989 under which Sarah became an illegal immigrant. He noted that we were advised of a concession period to 31 October 1990 from which date there was said to be no avenue available in Australia for Sarah to become a permanent resident. He added that he made further concessions on 10 December 1990 for persons who were illegally in Australia on or before 18 December 1989 to regularise their status. He advised that the Victorian Director of Immigration would be available to explain the necessary processes.

Barbara and I met with the Victorian Director of Immigration on 18 February 1991 who with Department legal advisors present outlined an 'onshore' and 'offshore' proposal to resolve the impasse. The onshore proposal entailed:

- 1) A fresh application for permanent residency;
- 2) Payment of fee which could be expected to be refunded;
- 3) Meeting health standards (If Sarah did not meet these, since there was no Departmental power to waive, the matter would be presented at the Executive Council meeting on 27 February);
- 4) Visa would be issued in time for Sarah's departure on Qantas flight 101 departing Melbourne at 1pm on 1 March 1991; and
- 5) Visa would include endorsement.

The offshore proposition was:

- 1) Sarah would apply for migrant entry before leaving;
- 2) Expected to be granted;
- 3) Payment of fee which could be expected to be refunded;
- 4) Visa would be forwarded to our United States address;
- 5) Sarah would return as permanent resident;
- 6) Visa would include endorsement.

We also discussed the broader issues of concern and were advised that:

The practice of endorsements on visas is expected to be discontinued within approximately 12 months.

The Minister will advise the Joint Standing Committee on Migration Regulations that he wished as a matter of urgency that issues relating to people with disabilities be considered and recommendations made to him.

The Minister confirmed in writing the following day the options and broad issues as had been put by the Victorian Director of Immigration.

With Sarah, we chose the 'onshore option' and trusted that the Minister would see through the two actions on broader issues. The Executive Council waived the health standards at its meeting on 27 February 1991 and Sarah's passport with endorsement was delivered to her at Melbourne Airport on 1 March. We had a productive time in the United States and returned without incident.

The Joint Standing Committee on Migration Regulations conducted hearings during 1992 throughout Australia relating to Conditional Migrant Entry: Health Rules and published its report in December 1992.

## **PREJUDGED AND UNFAIR**

This inquiry is focused on questions of fairness in relation to costs to the Australian community and health system of supporting visa applicants with a disability. Approaches to this will of course be viewed within the purpose of the Migration Act which is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens (Section 4(1)). Just how national interest is defined in this context is therefore critical.

Minister Evans recently described the national interest relating to regulating migration as

- 1) having strong border security and a lawful managed migration program that ensures confidence in our immigration system and
- 2) giving fair and humane treatment to those seeking asylum in Australia and a consideration of their claims in accordance with our international law commitments. (ALP Conference 2009, [www.chrisevans.alp.org.au/news/0809/immispeeches01-01.php](http://www.chrisevans.alp.org.au/news/0809/immispeeches01-01.php))

Those seeking asylum have justifiably been of significant public attention but "fair and humane treatment" has not been part of Australia's treatment of people with a disability seeking to come in. Their experience is highly likely to have been one of being seen as unacceptable risk and burden without benefit.

"Making social inclusion a reality" and making Australia "a stronger, fairer nation" must permeate how we deal both with people with a disability who are citizens as well as those seeking to come into Australia. This means dealing with people first,

and not as less than real people, as disabled and burdensome people, diseased people, or deviant people. Being true to making social inclusion a reality requires a commitment to embed authentic equality in all of our laws, policies and relationships. The contrast between our embrace of the United Nations Convention on the Rights of Persons with Disabilities, becoming one of the first Western countries to do so, and how we institutionalise their inequality through exempting migration from disability discrimination is stark.

The Australian approach from 1901 to perceived 'people of difference' has been one of prejudice and fear. The Immigration Restriction Act 1901 was highly effective in achieving its intended outcome of prohibiting various classes of people from coming into Australia. Its blatant prejudice was on show through application of a dictation test of fifty words read in any European language, or later any language at all, at the discretion of an immigration officer. This enabled exclusion of individuals on the basis of race without having to explicitly state it.

Excluded outright were people with an intellectual disability, prohibited as "idiots" and included in the deviant class with "the insane", prostitutes, criminals and people with infectious diseases (Section 3). The 'public interest' was to be further safeguarded by excluding "any person likely in the opinion of the Minister or of an officer to become a charge upon the public or upon any public or charitable institution." (Section 3b)

In the view of Professor Alison Bashford, author of *Imperial Hygiene*, eugenic ideas were embedded in all aspects of the Immigration restriction Act, including maintenance of the 'public charge' to exclude people on the basis of their mental health (RN Rear Vision, *Australia's eugenic heritage*, 22 April 2007, [www.abc.net.au](http://www.abc.net.au)).

The Migration Act 1958 removed some of the more blatant prejudice towards racial difference. However, it maintained more hidden discrimination towards people with disability and continued to class them in deviant and undesirable groups. 'Health' and 'public interest' criteria remained and continued to be effective in their original exclusionary intention.

There were hopes of change in the 1980s through more socially progressive attitudes and legislation to recognise people with a disability as valued and able rather than burdensome. Disappointingly, Australia baulked at applying these widely held attitudes to migration. Clause 52 of the Disability Discrimination Act allowed for the "discriminatory provisions" of the Migration Act 1958 to be continued. People with a disability continued to be classed as 'undesirable' and labelled as such with a specific code.

In the early 1990s the Department of Immigration, Local Government and Ethnic Affairs reviewed health standards for immigration purposes. The review included an assessment of any additional costs to the Australian community of accepting migrants with intellectual disabilities. There was a shift from assessment of 'the fact' of having a disability to the 'potential cost' a person with a disability might be to the Australian community for services they might receive. The emphasis appeared to move from perceived public health risk to containment of public expenditure on



health and welfare and the safeguarding of access by Australians to public health facilities. It remained based on “an opinion” of a Commonwealth Medical Officer.

This ‘opinion’ was to be informed by whether :

- 1) ‘Significant’ care or treatment was required, or
- 2) Care or treatment involving the use of community resources in short supply was required (The word ‘significant’ is not used.); or
- 3) The applicant might become a significant charge on public funds.

The approach recommended by the Australian Government Health Service for assessing costs linked a person’s IQ to level of self sufficiency in activities in daily living. Per annum costs were assigned to individuals for accommodation, employment, education, social security benefits and then a range of additional items such as mobility allowance and respite care. Cost differentiation assumed for example that a person with a mild intellectual disability would need low support accommodation while a person with a severe level of disability is assumed to require 24 hour shared supported accommodation.

There are clearly administrative difficulties in trying to project the types and extent of government funded services any person might ever use during their lives. Applying “potential” services overcomes challenges. Yet it is well known (cf. Victorian Auditor-General, *Accommodation for people with a disability*, March 2008) that the great majority of people with disabilities live out their lives outside of government funded accommodation. For Victoria, the Auditor-General reported that of an estimated 992,300 people with a disability, 323,300 were considered to have a severe or profound limitation. Of these, 4600 people reside in government funded shared supported accommodation and a further 8260 are supported through individualised packages (mostly under \$10,000) to live in the community.

My step-daughter who is now 46 years of age continues to live with my wife and me. Based on the Australian Government Health Service assessment data with 1992 figures, her “potential cost” just for accommodation would have been \$34,671 per annum (AGHS figure for moderate and high level intellectual disability). On this basis Sarah’s charge to the public would have been assessed as \$901,446 since she came to Australia. In fact the accommodation charge has been NIL.

The seeming objectivity of costing is supported by migration legislation and regulation that allows almost complete subjectivity. Building the case for rejection of a person with disability on “the opinion” of a Commonwealth Medical Officer linked to “potential costs” guarantees the outcome. Once “potential costs” are deemed relevant, then even ‘significant’ has no moderating effect at all.

The apportioning of “potential costs” to persons with a disability and not the general population of applicants seems to be based on a view that while all migrants have the potential to become a charge on public funds due to injury or old age, the cost of supporting persons with intellectual disability in particular are longer term and more inevitable (Australian Government Health Service, 1992). If this is the sum total of the argument, then prejudice dressed as public interest is unassailable.

A focus on fairness in administering the migration application of a person with disability cannot wash away the essentially unfair treatment of people with a

disability. Outside of migration, Australia's vision, legislation and practices have moved to a social model. It is unacceptable therefore that we allow a patently prejudiced model to be continued. It would be absurd to view anyone's contribution to Australia solely in economic terms. My own step-daughter's contribution would never be valued if she is seen as a burdensome, severely disabled immigrant. The hundreds of people who have come to know and admire her as an artist, football fan, church goer, swimmer as well as through a myriad of other relationships, would attest to how she has enriched their lives.